

The *Other* in International Law: “Community” and International Legal Order

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“Every ten years or so, the United States needs to pick up some crappy little country and throw it against the wall, just to show the world we mean business.”¹

“If I were explaining it to China's leaders, here's what I would say: Friends, with every great world war has come a new security system. . . . The new world system is also bipolar, but instead of being divided between East and West, it is divided between the World of Order and the World of Disorder. The World of Order is built on four pillars: the U.S., E.U., Russia, India and China, along with all the smaller powers around them. The World of Disorder comprises failed states (such as Liberia), rogue states (Iraq and North Korea), and messy states — states that are too big to fail but too messy to work (Pakistan, Colombia, Indonesia, many Arab and African states).”²

On the face of it, there is a built-in paradox in the emergence of international law over the last decade as a core concern of academics and policy-makers. On the one hand, it is difficult to imagine any other period in history that has witnessed such a profusion of attempts to tame the anarchical society by hedging it in a straight-jacket of legalities. Throughout the 1990s,

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¹ Michael Ledeen, Resident Scholar, American Enterprise Institute, *quoted by* Lewis H. Lapham, *The Demonstration Effect*, HARPER'S MAGAZINE, June, 2003, at 11. For a lively recounting of the tales of some of these “crappy wars,” see MAX BOOT, *THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER* (2002). Mr. Ledeen was generous in his specification of time. An examination of post-World War II history indicates that the longest period during which no United States soldiers were involved in a shooting conflict in a “crappy country” would be the five years between the “Mayaguez Affair” (1975), and the Iranian “hostage rescue” debacle (1980); and it is surely no coincidence that the two presidents who presided over the U.S. during this period (Messrs. Ford and Carter) are generally viewed as the two weakest presidents of the post-World War II era, if not of the twentieth century. For one of the rare efforts at a sustained exploration of these assertions of power from the perspective of “the other,” see CHALMERS JOHNSON, *BLOWBACK: COSTS AND CONSEQUENCES OF AMERICAN EMPIRE* (2001). Cf. ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* (2003) (positing and discussing the existence of a purported divergence of ethos between the United States and Europe in the application of military force to issues of international law and international relations).

² Thomas L. Friedman, “*Peking Duct Tape*,” THE NEW YORK TIMES, Feb. 16, 2003. Cf. President George W. Bush, Address to the 58th Session of the United Nations General Assembly (Sept. 23, 2003): “Events during the past two years have set before us the clearest of divides: between those who seek order, and those who spread chaos; between those who work for peaceful change, and those who adopt the methods of gangsters; between those who honor the rights of man, and those who deliberately take the lives of men and women and children without mercy or shame. Between these alternatives there is no neutral ground.”

The simplicity of the imagery of “order” and “disorder” as the dividing line between the civilized “us” and the untrustworthy “other” peppers the history of Western intellectual thought. As a student note writer has ably demonstrated, it provided a powerful dichotomy that was at the core of the development of modern international law. See Note, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, 106 HARV. L. REV. 723 (1993).

international conferences generated reams of treaties, codes, and agendas for action.³ International adjudicatory tribunals proliferated, and endeavored to give teeth to ideas and obligations hitherto thought to be essentially aspirational.⁴ The individual – after all, the only moral and sentient entity for whom laws actually have meaning – became as much the concern of the international system as are nation states. And, as for the nation state, that primordial privilege of “sovereignty” came under sustained assault, and from the United Nations’ Security Council and government-sponsored judicial tribunals, no less than from human rights groups and so-called “civil society.” Through the creation of international adjudicatory tribunals, the issuance of specific orders to specific governments, the imposition of economic and other sanctions on recalcitrant parties, and authorizations to use force, the Security Council has seemingly become the embodiment of an international marshal: ready, willing, and able to enforce international law. The result is that all across the globe, or at least that segment of it with ready access to new information technologies (linked networks of computers, satellites, audio and television feeds) people routinely speak of an international community.

And yet, the ability of international law to regulate state behavior has rarely been more suspect than it is today. The mono-optic lens through which the United States views the relevance of international law to the regulation of her global conduct – relevant when it confers on her a benefit, and irrelevant when it purports to constrain her – far from being exceptional, is actually illustrative of the approach taken by many members of the international society to international law. The impact of international law (or lack of it) on Israel’s policies in the West

³ Thus, numerous multilateral conferences over the last decade have generated more or less binding legal instruments in such diverse areas as the Convention on the Rights of the Child, G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess., Supp. No. 49, Art. 37(a), U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990); the prohibition of “Child-Soldiers”; See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, General Assembly Res No 54/263, UN Doc No A/Res/54/263 (2000); the regulation of the production and use of chemical weapons and of land-mines; See Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507; Treaty on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. Treaty Doc. No. 21 (1993), 1974 U.N.T.S. 3.; the creation of, and trading of, rights to pollute the environment; See Kyoto Protocol to the Framework Convention on Climate Change, U.N. FCCC, 3d Sess., UN Doc. FCCC/CP 1997/y/Add.2 (1997), reprinted in 37 I.L.M. (1998).; a permanent court for punishing international criminals; See Rome Statute of the International Criminal Court, UN Doc No A/CONF.183/9, reprinted in 37 ILM 999 (1998).; and treaties for regulating international trade, See Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Final Act, Marakesh Agreement Establishing the World Trade Organization, Annex 1, available at http://www.wto.org/english/docs_e/legal_e/20-val.pdf (last visited July 25, 2003).; bribery and corruption, See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, available at <http://www.oecd.org> (last visited July 25, 2003). And, of course, there have been numerous conferences that have sought to make the world aware of concerns over and urging additional mandatory rules on such matters as sex, racial and religious discrimination, global population, poverty, urbanization, the AIDS/HIV “pandemic,” the need for clean drinking water, and Africa’s pathetic economic plight, among other issues. See World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, August 31 – September 7, 2001, Durban South Africa; Fourth World Conference on Women, September 4-15, 1995, Beijing China; World Summit for Social Development, March 6-12, 1995, Copenhagen, Denmark; International Conference on Population and Development, September 5-13, 1994, Cairo, Egypt; United Nations Conference on Environment and Development, June 3-14, 1992, Rio de Janeiro, Brazil; Habitat II, February 5-16, 1996, Istanbul, Turkey.

⁴ See generally Benedict Kingsbury, *Forward: Is the Proliferation of International Courts and Tribunal a Systematic Problem?*, 31 N.Y.U. J. INTL. L. & POLICY 679 (1999).

Bank and Gaza is often decried, but international law does not appear to have been particularly relevant to West Europeans as they fought the good fight of guaranteeing that the phrase “never again” applies just as readily to ethnic-cleansing in the Balkans as it did to genocide in the middle of Europe a generation earlier.⁵ Similarly, Russia appears ready and willing to throw off the yoke of international legal constraints – or at least to unilaterally reinterpret to its benefit those constraints – as it seeks to hold Georgia responsible for the limited success of the Chechnyan war. And even in the domain of economic relations where one might ordinarily expect the rule of law to be the norm, the ability of the powerful states to choose and pick which rules to obey has been illustrated by the United States with regard to its willingness to consider – if not adopt – the enforced licensing of the production and sale of the antibiotic, Cipro, while at the same time vigorously contesting the rights of others such as India, Brazil, and South Africa to do likewise with regard to the cocktail of HIV/AIDS antiviral medications.⁶ Similarly, the unilateral conduct of the U.S. in placing limitations on steel imports,⁷ or the European Union in regulating Banana imports,⁸ like the open and undisguised discussion in the United States of the use of force in the occupation and management of Iraqi oil-fields,⁹ call into question the continuing utility of focusing on law as the organizing principle in international relations. And, of course, every privileged country unilaterally asserts its unalienable right to decide for itself what rules, if any, it ought to abide by in regulating the in-flow of immigrants, whether such immigration is governed by such international conventions as the 1951 Refugee Convention,¹⁰ the 1977 protocol, their regional analogs, or indeed other human rights laws. Thus from Australia to Denmark, or Spain to Malaysia, and as a response to domestic political forces, unilateralism reigns supreme in the visitation of disabilities on immigrants.¹¹ And so, international society continues to distinguish substantively and substantially between nationals and “aliens,” citizens and non-citizens, insiders and outsiders, members of the community and the “other.”¹²

⁵ See, e.g., MICHAEL GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO* (2001).

⁶ See, e.g., Mike Godwin, *Prescription Panic: How the Anthrax Scare Challenged Drug Patents*, REASON MAGAZINE (Feb. 2002). The readiness of the American Government to undercut such a sacrosanct principle of intellectual property protection in the interest of the health of its domestic population should be contrasted with the indifference it repeatedly showed in matters relating to protecting the health of Iraqi civilians. Frequently, under the cover of the United Nations sanctions regime, basic health products were denied Iraqis on the ground that such products had “dual use.” See, e.g., Joy Gordon, *Cool War: Economic Sanctions as a Weapon of Mass Destruction*, HARPER’S MAGAZINE (Nov. 2002).

⁷ See World Trade Organization, “United States – Definitive Safeguard Measures on Import of Certain Steel Products: Report of the Appellate Body,” Nov. 10, 2003.

⁸ Eliza Patterson, *US-EU Banana Dispute*, ASIL Insight (February 2001) available at: <http://www.asil.org/insights/insigh63.htm> (last visited Feb. 11, 2004).

⁹ Susan Warren and Chip Cummins, *For Iraqi Oil, A US Corporate Mold*, WALL STREET JOURNAL (April 25, 2003).

¹⁰ United Nations Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

¹¹ See, e.g., Alexander J. Wood, *The “Pacific Solution”: Refugees Unwelcome in Australia*, HUMAN RIGHTS BRIEF, 22 (Spring 2002); *The Welcome Mat has Gone – Why Fewer Asylum-Seekers Go to Denmark*, THE ECONOMIST (July 6, 2002); Bill Donahue, *Life in Limbostan: Stranded in a Spanish Outpost in Africa, Illegal Immigrants from Around the Globe Await the Blessing of Expulsion*, MOTHER JONES 42 (Sept. 1, 2003); Joseph Liow, *Malaysia’s Illegal Indonesian Migrant Problem: In Search of Solutions*, CONTEMPORARY SOUTH EAST ASIA (Apr., 2003).

¹² As will become evident, who constitutes “the other” has varied across time and space. Nonetheless, because international law unequivocally has been the creation of Western Europe and its settler offspring, the term has

My purpose in this panoramic essay is to discuss the role of the idea of the “other” in the construction of international law.¹³ I shall argue that it is only through such understanding that one can make sense of the paradox (or paradoxes) that I have just described. Far from existing in antithetical opposition to each other, I shall show that the frameworks of international legalisms popularized in the 1990s were built upon, and in fact would not be viable without, the explicit understanding that legalities are framed by reference to a constructed “other.” Rather than being aberrational, the tendency and capacity of powerful states to seek to use rules to bind others while exempting the application of such rules to themselves, are integral to international legal order, and notwithstanding the 1990s, this is no less true today than it was previously. Indeed, extralegal unilateralism may be a good deal more prevalent and pronounced precisely because of the facade of legalities constructed in the 1990s.

As I shall explain, the push for universal international human rights springs out of the same well as the emerging doctrines of outsider imposed “regime change” in disfavored societies, and the imperial use of “preemptive defense” as a valid means of subjugating these “pariah” or “rogue” states. Both approaches to the ordering of international society are bottomed on a conception of community that is defined as much by the willingness to exclude and ostracize the demonized other as by any desire to share with or include the outsider in a more prosperous world. Purveyors of the emergence of an international civil society that is subject to the rule of law, I shall argue, aim for and further much of the same goals with which diehard proponents of realism in international relations have come to imbue international law. The Western international human rights advocate, I shall contend (and no doubt heretically), is today as much an ambassador of big power chauvinism in the service of a unilaterally determined and fostered righteous cause as is the imperial legal realist of yester years. And more soberingly, I shall make and defend the claim that international law, as a product of the Western enlightenment, demonstrably offers no alternative possibility.

At the outset, then, I should state that this essay challenges the current dominant tendency among those who see themselves as international lawyers to present international law as a unified neutralist project whose object is to promote the welfare of all – or, at least, of the largest number possible. I shall do so by exploring the relationship of the idea of law to that of community, and more particularly by showing that because all laws are intelligible only when understood within the setting of specific communities, and because the existence of a community necessarily requires conscious acknowledgement of the outsider, the current articulation of “universal normative principles” as “international law” – however arguably well intentioned – serves primarily as a ruse to avoid confronting injustices that proponents of a dominant way of life impose on those who are not quite lucky enough to be acceptable members of the dominant

always been defined in relation to exclusion from participation in West European (and North American) institutions and interests. At the moment, Mr. Friedman’s assertion reproduced at the opening of this essay is a fair statement of who today is viewed as “the other.” Not too long ago, that group most likely would have included the Chinese and the Indians, and may yet again.

¹³ The essay adopts a panoramic lens for two reasons. First, the essay seeks to demonstrate that the idea of the “other” cuts across the traditional but artificial subject boundaries within which modern international law discourse all too frequently takes place. Specifically, it seeks to show that those attitudes that shape human rights policies are also at work in the context of decisions about the use of force and in issues related to economic rights. Secondly, that the idea can be traced just as readily across time as across subject areas or space.

community.

Part I of the essay sketches in broad strokes the lineage of the treatment of the other in international law between its enunciation and the demise of the post-World War II order at the turn of the decade of the 1990s. A central claim of the essay is that many of the themes that infect the ways that international law structures relationships between core members of the “international community” and outsiders were present at its creation. Part II discusses the transition from the post-World War II legal order to the “new world order” of the 1990s. This review is undertaken primarily to illustrate affinities between international legal order (and its subdisciplines) with international politics. Law is not an autonomous discipline. International law is no less a social institution that operates within the constraints of socio-political and economic environments than is domestic law. It is thus the embodiment and the projection of power. Part III focuses on the relationship between international law and economic development. Part IV is a meditation on the relationships between and among ideas of “law” and of “community.” The idea of community, however ethereal it may sound, is the forceful product of shared experiences among insiders. The outsider’s perception is not entirely irrelevant, but it is secondary to the formation of a community. Similarly, however complex might be the relationship of law to community, law, I argue, is shaped by the community, rather than the other way around. Part V seeks to apply the ideas fleshed out in Part IV to our contemporary “international community.” Here, I argue for less rhetoric about the extent to which contemporary international relations reflects a regime that is governed by “the rule of law.”

I. THE MAKING OF INTERNATIONAL SOCIETY

An account of the other in contemporary international law can conveniently commence in 1492.¹⁴ Dates, of course, are arbitrary demarcations, and are particularly so in the history of a phenomenon that transcends generations of human experience. But just as an otherwise fleeting moment of light striking an object, when brilliantly rendered by an artist or a photographer may capture and encapsulate an entire zeitgeist, so also may an otherwise seemingly arbitrary date effectively symbolize a historical movement. 1492 is one such date. It represents, as most readers of this essay will readily recognize, the commencement of the European domination of the Americas. But it was also a symbolic year for two other related reasons. It marked, as the history books say, the final expulsion of the Moors from Spain, making the Continent of Europe (if one excludes much of the Balkans and Turkey from this expression) “Christian.” Further, with the successful navigation half-a-dozen years later through the Cape of Good Hope by Portuguese sailors, Christian Europe discovered a route that permitted it to engage in intercourse with the Asiatic civilizations of India and China without having to traverse the landmass of Eurasia – much of which was under the effective control of the Moslem World.

¹⁴ There is nothing original about this demarcation date. Karl Marx also saw 1492 as the beginning of European imperialism, commenting in *CAPITAL*: “The discovery of gold and silver in America, the extirpation, enslavement and entombment in mines of the aboriginal population, the beginning of the conquest and the looting of the East Indies, the turning of Africa into a warren for the commercial hunting of black skins, signaled the rosy dawn of the era of capitalist production. These idyllic proceedings are the chief moments of primitive accumulation.” See KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* 793 (1992). Others have drawn different dates; e.g. 1650 or 1750, representing the end of European feudalism (the end of the Thirty Years War and the 1648 Treaty of Westphalia) or the beginning of the “industrial revolution,” respectively.

It may be comfortably asserted, then, that 1492 marked the launch of the “Christian” civilization of Europe into the dominant role that we now take for granted as its birthright in global affairs. Moreover, that domination was transmitted through and perpetuated by Europe’s mastery of the leapfrogging technologies of transcontinental communication, sea power being only the earliest illustration of a model that was later to include steam power, the telegraph and telephone, wireless communication, the jet engine and, of course, the Internet. What was crucial about sea power (and indeed these other technologies) is that it permitted the European venturer to visit and explore distant lands, partake of the experiences of those lands while untethered from his own, and ultimately to return to his homeland and be reabsorbed by it.¹⁵

Since 1492 European civilization has created, dominated, and shaped international society in a variety of ways, not the least of which has been legal. For analytical purposes, one may divide these 500 plus years into five distinguishable periods. While the starting and breaking points in each of these periods are, like 1492, artificial, each period, I shall argue, embraced a distinctive mindset among Europeans (by which term I include the European expatriates of the Americas and Australasia). Those mindsets were and continue to be shaped by events on the ground, but they were given concrete form and were themselves sculpted in no small measure by the articulation of normative legal doctrines.

There was the period of 1492-1648 which might be referred to as the Period of Discovery. These were the years when, led primarily by Portugal, Spain, the Netherlands, and England, Europeans discovered, mapped, traded with and colonized areas of the world that hitherto had been unknown to each other. But this was a period of discovery not simply in the physical sense, but just as crucially in the mental and intellectual senses. In a pattern that was to recur constantly, the physical activities of European traders and explorers raised and sharpened intellectual ferment within Europe. The result was that in seeking to understand its relationship to the other, Europe was forced to examine its own internal relations, and to formulate those internal relations as a means of dealing with the outsider.¹⁶

In the physical sense, the Catholic-dominated societies of the Iberian Peninsula divided by papal edict and began the internal conquest and pacification of what is today commonly referred to as Latin America. Portugal, whose sailors were – to say the least – persistent in their search for an eastern sea route to Asia, also engaged in substantial commercial activities with the peoples of Africa, whose coastal territories they traversed. Meanwhile, the predominantly Protestant societies of Great Britain and of the United Provinces of Holland settled colonists on the islands of the Caribbean Sea and on the continent of North America. They also engaged in substantial trade and built occasional settlements in South-East Asia; more particularly in the so-called Spice Islands and Ceylon. All four societies preyed on each other’s commerce, but such piracy was particularly virulent between subjects of the Catholic empire of Spain and the Protestant kingdom of England.

¹⁵ See generally HUGH TINKER, *MEN WHO OVERTURNED EMPIRES* (1987).

¹⁶ Anthony Anghie, *Francisco de Vitoria and the Colonial Origin of International Law*, 5 SOC. & LEGAL STUD. 321 (1996).

This was the setting for the emergence of those thoughts that today we acknowledge to have been the genesis of contemporary international law. It was in this climate that the two acknowledged progenitors of the discipline, Francisco Vitoria, a Spaniard, and Hugo Grotius, a Dutchman, developed the concepts and norms that still shape current discussions of international law.¹⁷ Three issues: the waging of war, the conduct of commerce, and the right to transit through international waters (which is essential to both), have been primary concerns of international lawyers. It is in the contributions of Vitoria and Grotius, particularly in their bifurcation of these issues in terms of “us” and “them,” that the foundations of international law assert its relevance for the contentions of this essay.¹⁸

For the purposes of this essay, Vitoria’s contribution to international law lies in his effort to articulate the proper relationship between the conquering and colonizing Spaniards – a group with which he shared cultural affinities – and the conquered indigenous peoples of Latin America. Vitoria was concerned, among other things, with the circumstances under which the Spanish colonists could justifiably engage in aggressive warfare against the native inhabitants of the Americas. Determining the propriety of wars by reference to legal (as opposed to simply expedient political) terms was not a new development in Vitoria’s times. The so-called “just war tradition” which distinguished between right and wrong wars had influenced legal thinkers for about a millennium prior to Vitoria, and its contours had been reasonably well understood for three hundred years. Vitoria’s unique contribution to the debate was in his effort to suggest that the laws which determined the propriety of war-making should not be confined to war among the community of European or “Christian” societies, but that the doctrines embedded in such laws were applicable to wars waged outside of the European community. In this sense, then, the laws of war (or, more accurately, the laws that determined when wars could be fought) were *jus inter gentes* rather than *jus gentium*. This did not mean that the same rules applied both within and without the European communities, but it did mean that laws developed in Europe and applicable to conflict among Europeans, could be extended to embrace interactions between Europeans and non-Europeans. Notably, Vitoria framed the justice of making war in terms of the treatment that the insider accorded the outsider within the insider’s community. Insiders, he seemed to say, owed a duty of hospitality to outsiders. This worked of course, since the Spanish conquistadors were the ones intruding into the societies of the native populations of the Americas; and while Vitoria may have framed his duty of hospitality in reciprocal terms, he could do so with the certainty that neither Catholic Spain, nor European society generally, was going to be invaded by a horde of Native Americans.

Grotius built on Vitoria’s seminal insight which, at one and the same time, sought to impose international legal duties on non-European peoples, while showing little concern about the reciprocal obligations of Europeans to those peoples.¹⁹ In the process, Grotius made

¹⁷ To these two may be added Alberico Gentili, an Italian who lived in England during his productive years, and while there, represented the interests of Spain. See Theodor Meron, *Common Rights of Mankind in Gentili, Grotius, and Suarez*, 85 AM. J. INT’L L. 110 (1991).

¹⁸ To these might be added a fourth: the regulation of political relations among sovereigns themselves. This aspect of international law, however, for reasons that will become evident as this essay proceeds, is not central in dissecting the place of the “other” in international law. Rather, it is bound up entirely in intra-communal engagements.

¹⁹ But see Christopher Weeramantry & Nathaniel Berman, Conference, The Grotius Lecture Series, in 14 AM. U.

pronounced and explicit the multipartite structures of the emerging international legal order. He did this both with regard to war-making and commercial transactions.²⁰ In the first place, there were those laws of war and of commerce which were concerned primarily with the relationships, *inter se*, of European communities. Thus, among this group, there was to be the freedom to navigate the seas, proper diplomatic exchanges, and the like. Second, there were those laws that regulated the relationship of one European community to a non-European community. Thus, while free navigation and free trade were to be encouraged in inter-European intercourse, Grotius found it perfectly consistent with international law for European societies to enter into exclusive contractual arrangements with non-European princes. Thirdly, there was the question of how one European society should deal with the relationship between a European society and a non-European one. Here, Grotius advocated that European societies respect the terms of such arrangements, without regard to whether they would have been acceptable if entered solely among Europeans. Fourth, there were those situations where Europeans engaged in interactions with each other outside of Europe. Grotius suggested that such relationships were to be regulated by the same rules and norms that would operate had such interactions occurred within Europe. Fifth, one might ask what international law rules regulated relationships among non-European peoples in their interactions with each other. Here, as might be expected, neither Grotius nor Vitoria offered any answers; for, international law was essentially about the law of European societies and their dealings with non-Europeans. *Finally*, one might also ask how non-European societies were to relate to European societies. Here, we find that to the extent European scholars sought to articulate rules, they were of a non-reciprocal character. Thus, both Vitoria and Grotius clearly asserted the right of Europeans to trade peaceably with non-Europeans, and the right of the free movement of Europeans within non-European lands. Less obvious were the duties which Europeans owed non-Europeans, or what rights non-Europeans could assert against Europeans.

The second period in the development of what we now refer to as international law may be said to have run approximately from 1650-1790. This was the moment of the consolidation and triumph of the absolutist secular monarch not simply as a ruler, but as the embodiment of an entire nation state. The French, Austrian, Russian and Prussian monarchies were exemplars of this institution. These were all predominantly land-based powers, and the primary focus of their legal relationships tended to be inwards. International relations was the relationship among fraternal princes, rather than issues of trade and colonial settlements. Wars were important, but with the exception of those against the Ottoman Empire, such wars were just as easily viewed as sporting games to be resolved in conferences terminated by the signing of *ad hoc* treaties, as by appeal to any overarching normative principle. Not surprisingly, then, the international legal thought of this period was intricately interwoven with internal philosophical inquiries about the source and scope of the right to rule. The preeminent international legal scholars of the period focused less on interstate relations than on the internal construction of governance. Hobbes,

INT'L L. REV. 1515 (1999) (assigning to Grotius an inclusive universalist ideology).

²⁰ It is notable that the corpus of Grotius' contributions to international law grew out of his service to the Dutch East India Company, and this is true both as to his seminal work, *De Jure Belli ac Pacis*, and his other two notable writings, *De Jure Prædæ* and *Mare Liberum*. See generally HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRIS TRES* (The Rights of War and Peace) (F.W. Kelley, et al. trans., 1964) (1625); HUGO GROTIUS, *MARE LIBERUM* (Freedom of the Seas) 53 (R.V.D. Magoffin, trans., 1916) (1609); HUGO GROTIUS, *DE IURE PRAEDAE COMMENTARIUS* 217 (James Brown Scott ed., Gladys L. Williams trans., 1964).

Bowdin, and Pufendorf articulated one vision of those relationships, while Locke, Montesquieu, and Kant provided counterpoints. Contacts with the non-European worlds continued, but these contacts did not generate the sort of serious inquiry that the fifteenth and sixteenth centuries' voyages of discovery had inspired. When difficulties arose, these were resolved pragmatically and usually within national frameworks, administrative or judicial.

The third period extended roughly from 1815-1914. This is a period to which at least one writer has referred to as the "golden age" of international law.²¹ This was the age of the so-called "balance of power," and fixed notions of national identity were essential to the maintenance of the balance of power. But national identity was not simply limited to the opposition or juxtaposition of say the English to the French, or the German to the Slavic, but indeed of Europe (or persons of European ancestry) to Asia and Asiatics. With the industrialization of Europe, and its colonization and projection of power throughout much of the world, the superiority of Europe was manifest, and a seemingly self-evident dichotomy was Europe as "civilized" and much of the rest of the world inhabited by "uncivilized peoples."

It is hardly surprising then that these realities and attitudes were reflected in the international law jurisprudence of the nineteenth and early twentieth centuries. The overriding feature of that jurisprudence was the emergence of positivism as the legitimating principle of legal rules. The secular state with effective control over a population was legitimately entitled, by virtue of that control, to prescribe governing rules for the society. Like virtually all principles, this doctrine was deployed in the service of the good as well as of the bad, of the beautiful as well as the ugly. Positivism lay behind the successful abolition of the transatlantic slave trade; a success that generated one of the lasting principles of international law, that of "*jus cogens*." But the same principle also underpinned the hands-off approach that European states took to the internal colonial policies of France, the United Kingdom, Germany, and Belgium (among others). Thus, international law was indifferent to the inhumanities of King Leopold in the Belgian Congo,²² and it explicitly endorsed the capitulations system under which European powers secured for their nationals in such non-European societies as Egypt and China uniquely special access to the administration of the laws.²³ Similarly, the role of power as the legitimating force in the relations of European to non-European societies was evident in the frequent use of force by the former to compel acceptance of dictates by the latter. "Gun-boat" diplomacy, as these practices came to be known, were accepted, and legal, features of the international law of that period.

A dominant component of Western intellectual thought in the Twentieth Century was the questioning of the underlying dichotomy of "civilized" and "non-civilized" peoples which had underpinned and rationalized the subjugation and ravages of non-Western populations since 1492. The increasing savageries of European wars during the century between 1850-1945, and

²¹ See Nicholas Onuf, *Henry Wheaton and "The Golden Age of International Law,"* 6 INT'L LEGAL THEORY 2 (2000).

²² See, e.g., ADAM HOCHSHILD, *KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA* (1998).

²³ See, e.g., David Fidler, *A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization,* 35 TEX. INT'L L. J. 387 (2000).

the barbarisms of many European colonial policies undercut claims of a distinctively humane European civilization. These doubts gave rise to two of the most prominent contributions to international law in the twentieth century: the prohibition of the use of force in interstate relations, and the enshrining of the principle of self-determination of peoples. These principles were to become the cornerstones of the fourth period of international law, 1919-1992, and they flourished in an atmosphere in which positivism was the driving force of intellectual legal discourse.

But just as important to the doctrinal development of these two principles was the fourth period's other structural contribution to the development of international law: namely, the creation of permanent international judicial tribunals to interpret and enforce international law doctrines. Indeed, the emergence of such tribunals was necessarily the culmination of positivism, on the one hand, and the prohibition of the use of force on the other. Adjudicatory tribunals with authority to make binding their interpretation of international laws symbolized the emergence of an international community with authority and competence to override the *ad hoc* preferences of individual member states. "Consent" was the hallmark of this regime, but the consent once given became effective and could not be revoked at the mere whim or caprice of the giver. In other words, consent itself was regulated by enforceable law. Positivism thus channeled and constrained the exercise of international authority while making it legitimate.

It is against this backdrop that one must explore what I shall contend constitutes a new (fifth) period in the articulation of an international legal order. Like the other periods, this new period is not a complete break with the earlier periods. Its features, which I shall describe below, are sufficiently different, and sufficiently animated by a different set of philosophical understandings from those that had operated in the fourth period, that they can be fairly seen as constituting a distinctive phase in the development of international law. Moreover, as with the other periods, the use of the date of 1992 is as much for convenience as it is to suggest a precise historical demarcation. But the choice of the date is far from being arbitrary.

II. A NEW WORLD ORDER

In 1992 very few observers doubted that the international relations system was in the throes of a new political order. The bipolar system around which international relations had been organized since at least 1947 was brought to an emblematic end when, at the end of 1991, the Union of Socialist Soviet Republics was declared defunct, and Boris Yeltsin took over from Mikhail Gorbachov as the ruler of Russia. Only a few months earlier, the United States had demonstrated its unparalleled military and political prowess when it organized, and then with unheard of precision, destroyed the Iraqi army in a predominantly air-borne campaign.

The ability of the United States in 1992 to obtain from the United Nations security Council the issuance, under Chapter VII, of a *demarche* to Libya requiring the latter, without regard to established international legal principles, to surrender Libyan citizens to either the United States or the United Kingdom for their alleged involvement in the planting of an explosive device in a U.S. commercial aircraft that exploded over Lockerbie, Scotland, simply confirmed the emergence of what the United States President termed "a new world order." Some observers snickered at the use of this phrase, and in time the phrase went out of vogue, but there is no denying that there were fundamental paradigmatic shifts in the way that people (academics,

government officials, diplomats, jurists, and journalists, among others) thought and talked about the international order (or disorder) in the 1990s, and the way in which they did so previously. And even more critically, there is no denying the interactive relationship between these new ways of thinking and talking about the international system, on the one hand, and the behavior of actors (governments, soldiers/diplomats, international institutions, and non-governmental organizations) in the system on the other. Below, I shall explore four of those fundamental paradigmatic shifts, but as will be evident, these shifts cannot be understood without the reference point of the quintessential primacy – actually supremacy – of the “West”²⁴ (spearheaded of course by the United States) over “others” in the international system. This doctrine, which in other contexts has been termed “essentialism,” I shall demonstrate, has been the hallmark of the post-1992 international legal order. It differs from its predecessor in the magnitude, comprehensiveness, and boldness of its assertion and deployment. In this sense, it is as much alike to its predecessors as the adult is to the embryo.

A. Legitimate Neoliberal States Versus Illegitimate Pariah States

It is common place to date the beginning of our contemporary international system to the 1648 Treaty of Westphalia. Through a legal instrument, the (Christian) princes of Europe ordained and enshrined the modern secular interstate system. Big and small princes, Protestant and Catholic, alike, agreed to establish peace among themselves and to deal with each other on the basis of their juristic equality. All also agreed to extend protection to those present in their territory without regard to religious affirmations; and in-so-doing, to be free from the interference of those princes who had constituted themselves as the protectors of persons or particular religious beliefs. Thus, we’re often told, was born the secular interstate system characterized by the twin principles of internal independence from external interference, and juristic equality. These twin pillars are often referred to in shorthand as “state sovereignty”.

Although contrary to common place wisdom state sovereignty rarely has been thought of in absolutist terms,²⁵ it is fair to say that respect for the idea was the dominant controlling principle of international law during the Fourth Period. It is embedded in what is acknowledged to be the cornerstone of the United Nations Charter, namely, article 2(4), which prohibits the use *or threat of the use* of force against the political independence or territorial integrity of a member state of the Organization. But if the principle was one that was suited to regulating the interstate warfare that characterized European political developments in the post-1648 world (particularly following the completion of the formation of the last great European state, Germany, in 1870), it was one that proved to be ill-suited to the post-1945 order which the United Nations charter sought to regulate. Increasingly and assertively, this order became less and less predominantly European and less and less prominently Christian. More significantly, the causes of war resembled less those of the post-1870 European order (interstate conflicts usually over the distribution of territorial boundaries, economic resources, and political power), and were more

²⁴ The term “West,” which will be used frequently in this article of course is less a geographical than it is a political expression. “Affluent industrialized/post-industrialized societies” is as appropriate a description.

²⁵ See, e.g., FRANCIS HINSLEY, *SOVEREIGNTY* (1966); STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999). See also DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* (1920) (tracing the history of the idea of sovereignty, and arguing for a distinction between the equality of states as a legal norm and their equality as a political concept).

akin to those which prevailed prior to 1870.

The primary sources of military conflict in the post-1945 order related to matters of internal state formation. To what extent was a minority group within an established state entitled to secede and set up its own state – peaceably, if possible, or by force otherwise? What rights did a majority population have to forcibly overthrow a government run by the minority segment of the population? Was a perennially disempowered group entitled to use force to compel power-sharing within a polity? The international legal order provided no authoritative responses to these questions, and in an order in which all issues revolved around the possession of preponderant military power by two alliances, most such internal conflicts, however genuinely internal their origins, were soon translated into proxy conflicts among these polar alliances.

Moreover, in many instances, the nature of warfare in the post-1945 world was radically different from that which had characterized conflict among European societies, and which had therefore shaped international thinking about war. In particular, war as involving the confrontation of massed armies wearing national insignia along defined battlefields was, in the post-1945 world, the exception rather than the rule. Rather, war more likely to consist of “hit-and-run” exchanges between asymmetrically equipped forces operating within underdetermined boundaries. Such a climate readily facilitated the covert proxy wars in which the Soviet Union and the United States readily converted internal wars into international conflicts, the resolution of which the international system was entirely ill-equipped to address.

But the success of the United States in its “Gulf” war, and the failure of the Soviet Union in holding together as a state, rendered intolerable the continuing fissions in the international order which the system, out of necessity, hitherto had accepted. Those who viewed their ideologies, interests, and institutions as reflected in the triumph of the United States promptly asserted the superiority of those ideas, interests, and institutions over all else. No state which did not embody and give prominence to these ideas, institutions, and interests was entitled to recognition as a state. Moreover, the international legal system was obliged to de-legitimize any competing views other than those espoused by these triumphalists.

Francis Fukuyama’s *End of History*²⁶ was the seminal exposition of the zeitgeist. Although many Western intellectuals now distance themselves from Fukuyama’s claims, there is no denying its representativeness as the statement of the conventional viewpoint in the West among politicians, opinion-shapers, and the general public. The failure of the Soviet Union validated and vindicated the correctness of Western Liberal Capitalism as the organizing idea for humanity. In Fukuyama’s lingo, liberalism was the ideal for which humanity had been striving, and in the political, economic, and military triumph of the United States and Western Europe, mankind had finally arrived at the complete realization of that ideal.

International Law scholars wasted little time in translating Fukuyama’s strident polemics into the sedate crypto-conservative creed of reasoned analysis and dispassionate elaboration of “norms.” Essentially, these writers distilled three principles as regulating the “new world order.” There was, they said, an “entitlement to democratic rule” under international law. Governments

²⁶ FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

that could not establish their mandate to *vvox populi* were therefore illegitimate, and not entitled to the traditional rights, prerogatives, or courtesies they or their nations typically expect under international law. These governments, and the societies they ruled, were thus not members of the international community. They are pariah states. Second, International legitimation also requires that a society be governed by “the rule of law.” This mandates that the institutions and practices of the society be “transparent”; i.e., comprehensible to Westerners. Substantive norms such as those that define “corruption,” women’s rights, freedom of press and of property take on legal meaning only when framed in terms that are fully consonant with “Western values.”²⁷ Thirdly, success in the international system, it was often intimated, hinged on the willingness of a society to accept and build on those free economic institutions which had made the West the dominant force in the international order that it had become; that is, the market system for organizing the production, accumulation, and distribution of resources.

A universal regime that embraced these concepts was the driving force of international relations and international law in the 1990s. The boldness and straightforward assertion of the universal applicability of these ideas, and the claim of unity of the ideas, thus distinguish the fifth period from those that had preceded. Meanwhile, the new technologies of the “digital” and “information” “revolutions,” which permitted near-instantaneous communication at relatively little cost (at least in the West), had transformed the planet Earth into a “global village.” Nation states were no longer the ultimate (or perhaps even primary) arbiters of the destinies of mankind. Human beings were free to form their own associations and identities, and to have them fostered and respected under international law. The “state” was shrinking, and international “civil society” expanding. Simply put, the international law apostles of the “end of history” posited a universal society in which all individuals were members of a single international community. In this vision, there was no “other”. International law equitably subsumed the interests of all, and dispensed justice without regard to nationality or the other traditional cleavages of international law.

To understand the post-1992 international legal order, it is important to consider these claims. Further, it is only after one appreciates the thrusts of these claims that one can make sense of the events of the heady 1990s, and more particularly, those which now dominate the current international order – legal, political, and economic.

B. *The Democratic Entitlement and the International Legal and Political Order*

The claim that the post-Cold War world order could accept as legitimate members only “democratic” societies was advanced on deontological and consequentialist grounds. Democratic governance, the argument ran at one level, is an entitlement for which the human spirit consistently yawns. It is inherent in the ideas of liberty and of happiness. And it is at the core of the great Western civilizations of Greece, Rome and the United States. It was the animating spirit of the European Enlightenment and the two Great Revolutions of 1776 and

²⁷ As I’ve argued elsewhere, this is a rather cramped view of the idea of the “rule of law.” See Maxwell O. Chibundu, *Law in Development: On Tapping, Gourding and Serving Palm-Wine*, 29 CASE W. RES. J. INT’L L. 167 (1997); Maxwell O. Chibundu, *Symposium on Globalization at the Margins: Perspectives on Globalization from Developing States: Globalizing the Rule of Law: Some Thoughts at and on the Periphery*, 7 IND. J. GLOBAL LEGAL STUD. 79 (1999).

1789, and it is man's continuing obligation to nourish it, and to make sure it continues to flourish.²⁸ But beyond this appeal to faith, proponents of democracy as a necessary key to admission through the gate of the new world order submitted several practical reasons for their insistence. Among those claims were that, as an empirical matter, democratic states did not go to war with each other.²⁹ Moreover, and of particular resonance for international lawyers, democratic states followed the rule of law both in the regulation of their domestic governance and in their transnational relationships.³⁰ As such, they respected the dignity of the person, honored the human rights of all persons, were less subject to corruption and to other forms of misfeasance, and kept the compacts they made with their citizens and with outsiders. Similarly, democratic states necessarily embraced the market system of organizing economic interactions, grounded, as the latter is, on respect for the sovereignty of individual choices. It is thus hardly surprising, then, that societies whose economies were based on the market system were also the richest and those who provided best for the welfare of their citizens.

But proponents of the democratic entitlement did not rest on these intellectual arguments. Many were also keen to demonstrate the determinism of their beliefs. They contended not simply that democracy was a good thing, but that it was so inherently good that it was sweeping through all of "humankind," without regard to geography or culture. It was an entitlement not only because reasonable persons would opt for it, but because it was what societies, whether their rulers liked it or not, were opting for.³¹

It was but a small step to move from this claim of an internally generated locomotion of a theory of democratic pull, to the advocacy of a robust push in international relations and international law to the universal adoption of democracy as an end in itself. Liberal market societies, henceforth, were to condition their relationships vis-à-vis the rest of the world on the acceptance by the latter of democratic rule. Economic assistance would be given only to those "less developed" states that undertook without question to follow the trinity of "democracy," "rule of law," and "free market" (sometimes collectively dubbed as "good governance.")³² And having taken this step, one could hardly expect the application of coercion in support of a

²⁸ Compare Francis Fukuyama, *supra* note ____.

²⁹ See, e.g., BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD (1993). Compare John Norton Moore, *Solving the War Puzzle*, 97 AM. J. INT'L L. 282 (2003) (arguing that "incentives theory" may provide a better explanatory fit for the proclivity of societies to go to war).

³⁰ See, e.g., Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992); Jose E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EUR. J. INT'L L. 183, 194 (2001) (noting that "we do not know for sure [whether liberal States behave better] but there is plenty of reason to be skeptical"). See generally Fareed Zakaria, *The Rise of Illiberal Democracy*, FOREIGN AFF. (Nov. – Dec. 1997); SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY 59 (2000).

³¹ See, e.g., Thomas Franck, *The Emerging Right to Democratic Governance*, 86 A.J.I.L. 46 (1992); Thomas Franck, *Community Based on Autonomy*, 36 COLUM. J. TRANSNAT'L L. 41 (1997).

³² It may be worth clarifying that here, I'm merely describing what Western thinkers and politicians preached. Whether Western governments actually followed what they preached is a separate question that is not under consideration at this point in the essay.

fervently believed-in ideology to be limited. The imposition of economic sanctions on recalcitrant states and, ultimately, the use of military force for “humanitarian purposes” soon followed. Arguments that these naked assertions of force violated the rules of the post-1945 international legal order were readily dismissed by pointing to the greater good at stake. The new international law is to protect individuals, not states. There is a single universal community, and Western governments and peoples cannot stand by while Third World dictators and “ethnic cleansers” perpetrate untold evils on their kin. If the old law was inadequate to address these problems, then the international community should create new laws.

In time, this expansive view of the “democratic entitlement” generated its own antithesis and backlash. Many of those whose scholarly work had formed the basis for the polemics of the newly fanged world order began to protest that their disciplined and carefully segmented analysis of the disintegration of the old order and the birth of the new had been misconstrued and misapplied by zealots. That a “third wave” of democratic governance had sprang up in the 1980s, argued one influential theorist, should not be mistaken for the universality of a single democratic culture.³³ To the contrary, there remain fundamental differences among the various “civilizations” of the world, and one should not see in democracy or in the particular triumphs of the West the convergence of a single world order.³⁴ Others pointed out that despite the tendency to invest in “globalization” and the homogeneity of societies, there remain fundamental cultural, social, and economic differences between the impoverished worlds of Africa and Asia, and the opulence of Western Europe and North America.³⁵ In the legal context, some writers made explicit that their idea of an international community was limited to “liberal democratic” societies. The convergence of interests and rules which they preached did not thus apply to all members of the international society, but only to a limited subset of the countries of Western Europe and North America.³⁶ In fact, some writers questioned whether the same legitimating effect accorded the democratic process in the West should be extended automatically to some non-Western societies.³⁷ As these writers recognized, legal and political institutions are culturally derived and fostered. And, contrary to the attitudes and assertions of the “end of history” theorists, there is no universal culture. As such, legal rules and political institutions are framed by and respond as much to expedient facts and considerations as to any normative beliefs. In the 1990s, no less than in earlier times, the international system continued (and must continue) to distinguish among cultures.

In practice, Western policy-makers, even as they rhetorically embraced the concept of a democratic entitlement, frequently discriminated quite significantly in its application to societies. It was overridden in such societies as Algeria, Pakistan, and Turkey, but enforced with varying

³³ See Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFFAIRS (Summer, 1993).

³⁴ See, e.g., RONALD STEELE, TEMPTATIONS OF A SUPERPOWER (1995).

³⁵ Robert D. Kaplan’s essays are illustrative of this genre. See, e.g., Robert D. Kaplan, *The Coming Anarchy*, THE ATLANTIC MONTHLY, Feb. 1994.

³⁶ See Burley, *supra* note ____.

³⁷ See, e.g., Gregory Fox, *Intolerant Democracies*, 36 HARV. INT’L L.J. 1 (1995).

degrees of rigor against Nigeria, Kenya, and Zimbabwe.³⁸

Ultimately, of course, just as one cannot make sense of facts without theory, it is equally true that the validity of any theory must be gauged against the facts on the ground. Here, the claim of a “democratic entitlement” as an international legal principle fails abysmally. There is no denying the normative preference for democratic governance over despotic or dictatorial rule.³⁹ Democratic rule is more likely to assure governmental accountability than other contemporary forms of government.⁴⁰ But it is absurd to claim that democratic rule will necessarily lead to international justice. As Prof. John Norton Moore has pointed out, all governments, whether democratic or not, seek to externalize costs⁴¹ while, of course, appropriating the benefits. The extent to which a society can, in fact, impose its costs on others has relatively little to do with its form of governance, and more to do with its power. And there is no evidence whatever that democratic government makes its individuals or rulers more willing to bear the cost of failure than is the case in non-democratic societies. Indeed, if we accept that democratic rule forces individuals to account for their errors, then it may very well act as a disincentive to individuals owning up to those errors or, which is the same thing, it promotes the tendency of individuals to seek to shift blame to others.

In any event the “democratic entitlement” has been framed (and indeed under the contemporary geopolitical order can only be framed) in national terms. Even in its most idealized form, then, the resulting government will be accountable and responsive only to the members and interests of the national polity. If those members are shortsighted or those interests

³⁸ Indeed, in one of those surreal instances in which “truth” appears to be stranger than fiction, United States policy-makers, even in the twenty-first century and while continuously chanting the platitudes of “democracy,” have not only condoned the military overthrow of a democratically elected government in Venezuela, but appear to have actively encouraged it. Christopher Marquis, *Bush Officials Met Venezuelan Who Ousted the Leader*, N.Y. TIMES, Apr. 16, 2002, at A1. But of course, this is “strange” only because of the myopic glasses that the “democratic entitlement” crowd chose to put on in the 1990s. The experiences of Iranians, Guatemalans, Chileans, and Granadians in the not-too-distant past belie any claim that U.S. Venezuelan policies are aberrant; and for reasons that will be developed in Part V below, those policies are perfectly consistent with our contemporary world order.

³⁹ There is, of course, no such thing as “democracy” (or “democratic rule”) simpliciter. For exploration of the inherent complexities of both ideas, see, DEMOCRACY AND THE RULE OF LAW (Jose Maria Maravall and Adam Przeworski, eds., 2003). Invariably, these ideas (or institutions) are qualified by such prefixes as “liberal,” “constitutional,” “deliberative,” “plebiscitary,” “modern” or even “managed.” For the purposes of these comments, however, I shall overlook these modifiers and assume the possibility of an idealized version of the American variant of democratic rule: one that is generated by the voluntary and enthusiastic participation of all members of the society, recognizes and accepts the constraints of “law,” and is wisely responsive to the needs of the society. In short, I shall take seriously the simple but ringing assertion of “democracy” (or, more accurately, of “constitutional democracy”) as “a government of the people by the people for the people.” This ideal, of course, is not matched by reality. For example, contemporary democratic politics is driven as much by the job security needs of the politician as it is by any concern for protecting the interests of the common weal.

⁴⁰ Democracy is by no means the only mechanism for assuring governmental accountability. In closely knit societies, varying forms of oligarchies may be just as effective. Indeed, even in the modern West, where belief in the efficacy of constitutional democracy is now sacrosanct, the judiciary, a quintessential oligarchy, probably plays as significant a role in making governments accountable as does democracy. That is certainly the case in the United States.

⁴¹ See John Norton Moore, *supra* note __ at 284.

xenophobic, the democratic process will reinforce rather than constrain their expression.⁴² Indeed, the democratic system may have built into it a reinforcing perverse incentive to be unjust to nonmembers of the community; that is, to “outsiders” or “others.” Leaders of a national community, in order to obtain the requisite approbation of the national citizenry will present their stewardship in comparative terms *vis-à-vis* outside communities. Naturally enough, where the national welfare is visibly superior, the leaders will claim that it is the result of their superior skills and national spirit. Conversely, an inferior national welfare will be blamed on the evil machinations and unfair practices of the outsider. The more obvious is the cleavage between the national society and the outsider, the easier it is to attribute success to national spirit and failure to unfairness of the outsider. And, since the leaders are the product of the general population, the citizenry is unlikely to disagree; for to do so is to confess its own errors. There is, in short, a conspiracy of silence within a democratic community in which questioning the explanations of the rulers is to question the decision of the entire society.⁴³ Thus, it is easier for “democratic” societies to contrast themselves with “authoritarian” ones; a contrast that is made even easier when such contrasts are paralleled by and paired with (usually discretely and only inferentially) economic, linguistic, scientific know-how, racial, or religious dichotomies.

Consider one of the classic claims in support of the proselytization of democratic entitlement. As I have already observed, many Western scholars routinely affirm the superiority of the Western way of life over others on, among other grounds, the idea that democracies do not go to war with each other. While positing this assertion as an empirically verifiable proposition, these scholars rarely pause to explain why this purportedly observed relationship exists. Since these scholars do not assert that democracies never engage in warfare, that the causal relationship, if any, does not flow from the mere existence of a democratic society, why then do democracies engage in war with non-democratic societies but not with each other? One explanation might be that all wars are started by non-democratic societies, and that democracies engage in war only as a defense. But history is littered with instances in which the likes of The United States, The United Kingdom, France and Israel – to name indisputably democratic societies – have commenced wars.⁴⁴ Moreover, there is no evidence that democratic societies

⁴² As will become evident in the discussion of the other substantive elements of the New World Order that follow, this is by no means a theoretical concern.

⁴³ None of this denies that the views of leaders in democratic societies can be and are frequently challenged, or that leaders frequently are changed. But the contention is that rarely do those questionings and changes flow from concern over the place of the outsider within the national community; and in the few occasions where political relationships with the outsider has forced domestic change, it has been because in a conflict with the outsider, the outsider emerged victorious. The Vietnam War fiasco in the United States, far from being atypical, is illustrative.

⁴⁴ Again, focusing solely on the conduct of indisputably democratic societies, cases such as the Suez “crisis” of 1956, the Granada and Panama invasions of 1983 and 1989, respectively, illustrate the point. Moreover, it is worth noting that in the classic display of the power that jingoism has over pacifism, English and French nationals were no less committed to warfare than were Germans and Russians following the outbreak of World War I. *But see* John Norton Moore, *supra* note __ asserting that the Suez war of 1956 was the sole instance in which “democratic societies” initiated war. Conveniently, he seeks to avoid the untidy challenge to this claim posed by the examples of Granada and Panama by defining war in terms of 1000 deaths or more (inadvertently confirming that what “democracies” shrink from is not war *per se*, but war in which they are called upon to make real sacrifices). And, unsurprisingly, the colonial wars in which ostensible democracies sought to maintain their domination of other peoples (Algeria, Malaya, and Vietnam, to cite the most obvious) do not count.

find the waging of war any more or less palatable than non-democratic ones. The incineration of civilian populations in Dresden, and the explosion of atom bombs in Hiroshima and Nagasaki, not to speak of the use of napalm, fuel air, depleted uranium, and cluster bombs have, after all, been the chosen instruments of war by a democratic society, the United States.⁴⁵ Nor have these uses of weaponry, targeted as they have been just as much at civilian populations and infrastructure as at military targets, elicited any especially resonant condemnation from the members of that democratic society. The simple truth – however unhappy it may be – is that members of a democracy are no less likely than those of a non-democratic one to avail themselves of any weapons at their possession as long as that weaponry is not directed at themselves. Indeed, the one apparent difference between democratic and non-democratic societies in the waging of war is that leaders in the former are all too well aware of the consequences to their personal career of failure,⁴⁶ and as such, employ the means most calculated to lead to victory in the shortest time possible.

On the other hand, if one focuses on democratic rule not as the cause, but as an effect of structured relationships within a society, the inconsistencies described in the previous paragraph can be quite easily explained. Suppose, for example, democracy is understood (as it properly should be) not as the creator, but as the product of an economic environment in which overriding concerns are no longer merely about those of daily subsistence, then one can begin to see that there is in fact a correlation between democracy and wealth, and the question can be reframed not as to why democracies do not go to war with each other, but why wealthy societies do not go to war with each other. Recasting the question permits a reasonably dispassionate observer to focus less on the smugness of being a democratic society, and more on what can be done to relieve poverty and perhaps enable a democratic environment in which redistribution through force becomes less likely. But such an approach would require international legal scholars in the West to spend sometime understanding the “other”; to reflect on the relationships that exist among members of societies other than their own; to focus on the interaction of economic welfare with such social and political institutions as education, health, the organization of a praetorian military, and the structures of kinship or religious-based political systems other than those commonly found in the West. But these are precisely the sort of inquiries that Western international legal scholars, dating all the way back to Grotius, have never been willing to undertake. The unfortunate truth is that international legal scholars have always found it more appealing – because it is easier – to foist unto the rest of the world the system within which they believe themselves to function, than to try to understand alternative possibilities. The claim of a “democratic entitlement” as an international legal norm fits well into that bludgeoning tradition.

⁴⁵ Notably, it was the “liberal democratic” United States – not the “communistic, atheistic” Soviet Union – that has consistently refused to foreclose the use of nuclear weapons as a first strike instrument of war. Indeed, the United States has apparently threatened adversaries with its use. See R. Jeffrey Smith, *U.N. Says Iraqis Prepared Germ Weapons Gulf War; Baghdad Balked, Fearing U.S. Nuclear Retaliation*, WASH. POST, Aug. 26, 1995, at A1. Similarly, the United States has explored the use of “neutron weapons,” whose explicitly intended purpose is to annihilate living organisms even as it leaves inanimate objects unharmed. Democracy, then, whether of the elective or deliberative model, is no assurance that the destruction of the lives of the other will be minimized in a condition of war.

⁴⁶ Thus, the United States’ most influential newspaper, in discussing whether the United States should invade Iraq, wryly observed that the decision had to be made early in the new year before “the presidential election cycle intrudes.” (Emphasis added.) See Patrick E. Tyler, *Urgent Task for Rumsfeld*, N.Y. TIMES, July 31, 2002, at A1.

None of this is to suggest that democratic rule should not be preferred over non-democratic forms of governance. The straightforward argument that I'm advancing here is that as a means for organizing an international society that gives due regard to the interests of the other in formulating national policies, the "democratic entitlement," far from being a helpful ideology, is antagonistic to the promotion of a universalist zeitgeist. Wedded as it is to the promotion of the narrow and immediate self-interest of the participants within a community, the democratic ideal should be acceptable only in an international environment that is devoid of fundamentally ascriptive cleavages and stratifications. Contemporary international society is nowhere near such a nonhierarchical regime. As such, the argument for the recognition of an international legal doctrine that legitimates only those societies that embrace "democratic rule" is no more than a rehash of the age-old concept that the West can rightfully rule non-Westerners because the latter are uncivilized; a principle that dates as far back as the Spanish conquistadors, if not as early as Rome and the Punic wars.

C. We Are Each Other's Keeper?

A well-publicized technique (at least in American movies) of investigative law enforcement is the so-called "good cop/bad cop" act. If the declamation of the "democratic entitlement" frames the bad cop threatening the errant "failed state" that it had better behave or else, the promotion of the "human rights agenda" of the 1990s may be seen as the "good cop" seeking to obtain the cooperation of the victimized citizens of the failed state in the formation of an international community. On the face of it, these two claims might seem to share little in common. Human rights, unlike the claim of a "democratic entitlement," are a well-established claim under international law. Although there are important arguments about the outer boundaries of the scope of human rights, few people disagree about many of its core elements. And yet the promotion of "international human rights" in the 1990s was influenced dramatically by the same underlying force that fostered the articulation of a "democratic entitlement," the overwhelming and overweening power of the West.

There are, one might postulate, three stages in the effectuation of a legal rule. First, all legal rules need specific and authoritative articulation. This is what Aristotle and his disciples – notably Thomas Aquinas – called promulgation.⁴⁷ Legal rules, then, are not left to the imagination of the individual actor, but receive their force from the trans-subjective sanction they receive from the community. Second, because most legal rules flow from the community and therefore embody the values, interests, and power distributions within the community, they are obeyed or complied with by the members of the community.⁴⁸ Third, coercion is sometimes

⁴⁷ See, e.g., THOMAS AQUINAS, *SUMMA THEOLOGIAE, Part 1 of the Second Part, Q90, the Fourth Article* ("In order that the law obtain the binding force which is proper to a law it must needs be applied to the men who have to be ruled by it. Such application is made by it being notified to them by promulgation. Wherefore promulgation is necessary for the law to obtain its force.").

⁴⁸ In fact, there is nothing distinctive about Professor Henkin's statement on compliance by nations with international law. It is the nature of all laws that most people (within the community) obey most of them most of the time. A law that is routinely flouted no longer embodies the values, interests, or power distributions within the community, and such a law, ordinarily, will be removed from the law books of the community. And there are, of course, several other reasons why members of a community may comply with its laws. See LOUIS HENKIN, *HOW*

necessary to compel compliance.⁴⁹ This is what we term enforcement,⁵⁰ and its potential availability is no doubt one of the contributing factors to compliance.⁵¹

Perhaps no other aspect of international law received as much publicization in the 1990s as did “International Human Rights.” Despite the proximity of writings on the subject, however, the decade witnessed relatively little substantive development of the text of the law. About the only authoritative promulgation of new law in the area related to the welfare of children.⁵² There were, to be sure, vociferous debates among international publicists about the definition and scope of international human rights laws, but virtually none of these debates led to any significant authoritative changes in human rights law during the decade.⁵³

While it is difficult, if not impossible, to quantify the level of voluntary compliance in the 1990s, there is little reason to believe that it was any less than it had been in prior decades, and extrinsic evidence affords substantial grounds for suspecting that it was greater.⁵⁴ Among other

NATIONS BEHAVE: LAW AND FOREIGN POLICY, 146-53 (2d ed. 1979).

⁴⁹ It is remarkable how this element of law has come to dominate much contemporary thinking about law. Thus, the lucid writings of a well-known American scholar, Robert Cover, who coined the phrase “law as violence,” has been influential among American academics. See generally ROBERT M. COVER, NARRATIVE, VIOLENCE, AND THE LAW (Martha Minow et al. eds., 1997). And of course, much of legal positivism rests on Austin’s well-worn phrase that “law is the command of the sovereign.” H.L.A. HART, CONCEPTS OF LAW (1997).

⁵⁰ In practice, enforcement may be subdivided into two phases: the authoritative pronouncement by a tribunal as to whether conduct by a particular person constitutes a violation of law (the declaratory), and the exertion of the compulsion necessary to effectuate the pronouncement (the implementation.) It is with the declaratory aspect of enforcement that this essay focuses. It is also worth noting that this aspect of enforcement may also satisfy the “promulgation” element of law, such as in those jurisdictions that follow the English common law practice. This has certainly been the approach of some United States judges in developing customary international law. See, e.g., *Doe v. Unocal Corp.*, 2002 U.S. App. LEXIS 19263 (9th Cir. 2002).

⁵¹ Coercion, of course, is by no means the sole (or even primary) determinant of why actors comply with the law. For a succinct enumeration of other considerations, see Jack L. Goldsmith & Eric A. Posner, *Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999). The purpose of this essay, however, is not to explain why (or even if) international law is obeyed. Rather, my interest is in elaborating why, within the international system, certain conduct by certain actors at certain times may be considered lawful, while the same conduct by others at the same, or other times, would be viewed as unlawful.

⁵² See *U.N. Convention on the Rights of Child* G.A. res. 44/25, annex. 44 U.N.GAOR, 44th Sess., Supp. No.49, at 167, U.N. Doc. A/44/49 (1989). The assertion in the text is subject, however, to three caveats. First, it does not deny that the reach of preexisting human rights law may have been expanded such as by the voluntary adoption and ratification of treaties and protocols by states, or through authoritative judicial explications of preexisting laws. This latter point will be discussed below in the context of enforcement. Second, contrary to the position of some scholars, this writer does not view “international environmental law” – which did receive substantial development in the 1990s – as a component of “human rights laws.” Finally, the writer does not subscribe to the view that academic writings or the rhetorical assertions of policy-makers constitute authoritative promulgations of law.

⁵³ Strikingly, some of the innovations in thinking about human rights law were distinctly antithetical to the “individual rights” orientation of the standard human rights norms. The protection of the “group,” especially women and “indigenous peoples,” became the areas of primary interest. But even these areas did not result in any substantive promulgations of new law.

⁵⁴ See Hans Otto-Sano and Lone Lindholt, *Human Rights Indicators Country Data and Methodology 2000*, DANISH CENTRE FOR HUMAN RIGHTS (2000), available at <http://www.humanrights.dk/upload/application/bd50e713/indicator-full.pdf> (last visited August 18, 2003).

factors, the number of governments that openly invited participation by the citizenry increased – notably in Eastern Europe, Latin America, and Africa. One might expect that this broadening of civil and political participation rendered it more difficult for governments to arbitrarily deprive their citizens of the usual freedoms one associates with the exercise of human rights. On the other hand, the decade also witnessed remarkable instances of civil strife and wars which resulted both in the weakening of state authority and significant population displacements. In the Balkans, Middle-East, Central Asia, and Africa, these undoubtedly resulted in significant atrocities and deprivations of human rights. And even in North America and Europe, the influx of refugees (political and economic) led to the adoption of draconian and discriminatory legislation with drastic consequences for the human rights of the immigrant.⁵⁵ Whatever may have been the level of compliance, however, it is clear that it was the product of political and economic realities on the ground – much of it internal and particularistic – rather than the result of any felt sense of obligation to abide by the norms of an international community.

It is in the area of enforcement that the international law of human rights came into its own in the 1990s. Prior to that decade, international human rights laws were enforced through the conventional approach. Although the benefits of the laws may have redounded to the individual, the obligations were seen as undertaken by the national government, and any alleged violations were remedied through assertions made against national governments, and typically by other sovereigns.⁵⁶ Moreover, the resolution of such claims was, in the first instance, assigned to diplomatic and intergovernmental administrative bodies, and binding adjudication was deemed, at most, as a last resort, and only in exceptional circumstances.⁵⁷

Three fundamental shifts in focus in the 1990s dramatically realigned the enforcement mechanism. First, individuals, as alleged victims of human rights violations, increasingly came to be given direct roles in the enforcement process. Secondly, judicial tribunals, both national and international, became enforcers of first instance. And, perhaps most dramatically, individuals (either as agents of the state, or even as private actors), rather than the state itself, were made directly answerable for claimed violations of international human rights law. Thus, for example, United States courts asserted jurisdiction over civil actions brought by non-United States persons against former officials of foreign governments for alleged violations of international human rights laws that occurred exclusively within foreign territories.⁵⁸ Similarly, the United Kingdom House of Lords held that the former Chilean President, Augusto Pinochet, could be arrested under British law and extradited to Spain for alleged crimes of torture in

⁵⁵ In the United States, for example, a 1996 legislation appeared to authorize the indefinite detention of an unwanted immigrant if no other state would accept him. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678 (2001).

⁵⁶ *See* Article 28 of the International Convention on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 21, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

⁵⁷ The complicated structure of human rights enforcement under the European Convention on Human Rights is illustrative. *See*, European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953), Protocol 11 (1994). *See generally* Nicolas Bratza and Michael O’Boyle, *The Legacy of the Commission to the New Court Under the Protocol No. 11*, 3 EUR. H.R. L.REV. 212 (1997).

⁵⁸ *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876 (1980); *In re Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994); *see also Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (wrestling with the problem of whether international human rights law requires that the individual being sued have acted on behalf of a state).

Chile.⁵⁹ Likewise, Belgian and Swiss trial courts have asserted authority to punish Rwandans found within Belgium and Switzerland for conduct they undertook in Rwanda and which is said to have violated international human rights law.⁶⁰ The most significant change in international human rights law, however, was the adoption in 1998 of the “Rome Treaty” which created a permanent “international criminal Court” to try individuals accused of violating specified international human rights laws, notably those relating to war crimes, crimes against humanity, genocide, and aggression.⁶¹ The Permanent International Criminal Court followed on the heels of *ad hoc* tribunals that had been set up by the United Nations Security Council in response to the massive perpetrations of atrocities in civil conflicts in Rwanda and the former Federal Republic of Yugoslavia.⁶² These tribunals, together with those under contemplation for Sierra Leone and Cambodia, make it evident that there is now an internationally accepted doctrine that sanctions holding individuals directly responsible under international human rights law for conduct deemed to be violative of that law.⁶³

These developments have been lauded on several grounds. They are said to confer “justice” because they remove “impunity” from the violations of international human rights law. As such, they do not only provide recompense or vengeance for victims, but they may also deter future violations.⁶⁴ Moreover, these enforcement mechanisms permit judicial tribunals to pronounce authoritatively on the scope and elements of human rights law, giving this aspect of international law the more familiar obligatory characteristic of Leviathan’s legal rules. At the same time, because individuals are made directly subject to international law, an “international community” is fostered, and the power of the sovereign state as a necessary intermediary between the individual and the international system is diminished correspondingly. The law of rules, enforced by international jurists, one might say, thus replaces the rule of might enforced by diplomats and generals. But the facts on the ground do not bear out these claims.

⁵⁹ See *Regina v. Bow St. Metro. Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No. 3), 1 A.C. 147 (H.L. 2000).

⁶⁰ See, e.g., *Niyonteze v. Public Prosecutor*, Tribunal Militaire De Cassation (Switzerland, 2001), available at <<http://www.vbs.admin.ch/internet/OA/d/urteile.htm>>, and summarized in Oxman and Reydams, *International Decision*, 96 AM. J. INT’L L. 231 (2002). A Belgian statute (“Act of June 16, 1993 regarding the punishment of breaches of the 1949 Geneva Convention,” (translated in 38 I.L.M. 918), as amended in 1999), has been the source of much academic scholarship, not least because Belgian prosecutors had employed the statute to go after persons and events having no connection with Belgium. See generally Eva Brems, *Universal Criminal Jurisdiction for Grave Breaches of International Humanitarian Law: The Belgian Legislation*, 6 SINGAPORE INT’L & COMP. L. REV. 909 (2002). As long as the Defendants were the inhabitants of the Third World side of the track, this assertion of “universal jurisdiction” went not only essentially unchallenged, but was in fact lauded. However, as might be expected, when it was sought to be applied to the likes of prime-Minister Sharon and President Bush, it was promptly revised, and its reach curtailed. See, “Belgian premier denies genocide law changes due to US pressure,” BBC Monitoring Service (June 23, 2003) 2003 WL 58742392.

⁶¹ Rome Statute of the International Criminal Court, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on July 17, 1998. U.N. Doc. A/CONF. 183/9 at art.11 (1998), available at <http://www.un.org/law/icc/statute/rome.htm> (last visited Feb. 11, 2004).

⁶² S.C. Res. 955, U.N. SCOR. 49th Sess., 3453d mtg., U.N. Doc. S/Res/955 (1994); S.C. Res. 808, U.N. SCOR. 48th Sess., 3175th mtg., U.N. Doc. S/Res/808 (1993).

⁶³ But see Arrest Warrant of 11 April 2000, *Congo v. Belgium*, (I.C.J. Feb. 14, 2002), reprinted in 41 I.L.M. 536 (2002), available at <http://www.icj-cij.org/icjwww/idecisions.htm> (last visited Feb. 11, 2004) (holding that Belgium is without authority, under customary international law, to prosecute the former foreign minister of the Democratic Republic of the Congo for conduct engaged in his official capacity, but declining to rule whether such a limitation would apply to actions brought under conventional law such as the Rome Treaty).

⁶⁴ Kenneth Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AJIL 361 (1999).

Preliminarily, it is worth observing that what constitutes “justice” is one of those open-ended debates that, while sometimes helpful in the clarification of specific points in the context of an argument, is almost always utterly futile as a means for resolving issues of broad application. It is conceivable that, for the narrow-minded Aristotelian for whom justice simply means “one’s just desert,” holding individual actors directly responsible for violations of international human rights is all that the term demands. For those who see international law as a tool of system-wide regulation of conduct, then the idea of justice embodies more than the immediate gratification of seeing wrongdoers receive their comeuppance.⁶⁵ For this latter group, the efficacy of the enforcement mechanism must be measured in terms of its consequences both for the immediate victims of the violation and for the governance of the international system as a whole. Here, even as one decries the egregiousness of international human rights violations, note must be taken of the efficacy of an enforcement regime that seeks to “do justice” in fora that are distant from where the wrongful acts occurred, and from which the victims and victimizers alike are far removed.⁶⁶ But, for the purposes of this essay, it is the injustice to the international system, and more particularly to the operation of “law” within the system that the reader’s attention needs to be drawn.

The focus in current international human rights law on the individual wrongdoer, rather than on the state as actor, is generally portrayed as a progressive development of that law. That it should be so viewed is remarkable; for, built into this view are two defeatist assumptions which proponents of individualizing responsibility for the conduct of a state have not bothered to explore. In the first place, this “progressive development” is not simply a confession of the intractability of making states account directly for their behavior,⁶⁷ but it reflects a willingness of the system to throw up its hands on continuing to try to do so. It seeks to “declare victory” by imposing liability on the weakest party to whom culpability can rationally be assigned. Consider the following.

Invariably, the individual sought to be held responsible is a *former* official; a member of the faction or cabal whose party is now not only out of power, but also discredited. In this light, it is instructive that the International Court of Justice has held that a former minister, whose government remains ready to go to bat on his behalf, is insulated from prosecution for alleged violations of international human rights law, at least while he remains in office.⁶⁸ Current government officials thus are immunized from being made to account for violations of human rights regardless of how egregious that conduct may be.⁶⁹

⁶⁵ This debate is, of course, not unique to international law. Within the United States domestic policy arena, for example, there has been in the last decade a similar philosophical disagreement between those who would “lock ‘em up and throw away the keys,” on the one hand (the “three strikes you’re out” crowd), and those who see criminal law as serving broader constituencies. See *Ewing v. California*, 123 S. Ct. 1179 (2003). It need hardly be said that the former group sees criminal policy entirely in terms of “them versus us.”

⁶⁶ See, e.g., Jose Alvarez, *Accounting for Accountability*, 37 COLUM. J. TRANSNAT’L L. 1003 (1999); Maxwell O. Chibundu, *Making Customary International Law through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT’L L. 1069 (1999).

⁶⁷ Compare. NINA H.B. JORGENSEN, *THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES* (2003).

⁶⁸ *Supra*, *Congo v. Belgium*, note ____.

⁶⁹ On its face, it might be assumed that this assertion is contradicted by the indictment of Mr. Robert Taylor -- then President of the Republic of Liberia -- as a “war criminal” by the special court for Sierra Leone. See *Liberia Leader Wants Charge Lifted*, BBC NEWS, June 12, 2003. In reality, however, Mr. Taylor, although duly elected as

In a similar vein, the former official who is to be made accountable typically hails from or represents a weak member state of the international system. This officially sanctioned inequality in the purported application of justice was glaringly in display in the debate over United States ratification of the Rome Convention. What is striking is the extent to which all participants in that debate not only recognized the political partiality of the criminal system there created, but acquiesced and even gloried in that bias. Thus, the United States contended that as the universal policeman, its citizens were entitled to total dispensation from prosecutions under the Rome Convention.⁷⁰ On the other hand, proponents of the Rome Convention argued against a complete dispensation for United States citizens primarily on the ground that such a facially obvious double-standard was not necessary because it was already embodied – albeit less transparently – within the interstices of the treaty. In support of this proposition they advanced two illuminating arguments. In the first place, the prosecutorial decision-making process assured the discriminating application of the terms of the Treaty. The decision to prosecute was to be made either by a politically-appointed Chief Prosecutor, or by the Security Council, whose vote in the matter was nonprocedural, thereby empowering any of the five permanent members to block an undesired prosecution.⁷¹ As experience over the disposition of the charge of war crimes in the Kosovo crisis showed, it would be a remarkable Chief Prosecutor who would be daring enough to lay charges against citizens of a victorious army.⁷² In the second place, the doctrine of “complementarity”⁷³ provided the United States – and, indeed, any other powerful society willing and shameless enough to employ it – an effectively unreviewable mechanism for insulating its nationals from the reach of international criminal prosecutions under the Rome treaty.⁷⁴

President in an election generally acknowledged to have been “free and fair,” had been, for sometime prior to his indictment, treated as a “pariah.” Specifically, his government had been laboring under a remarkable, if not unique, regime of economic and military sanctions imposed by the Security Council of the United Nations. He was thus already a *persona non grata*, comparable only perhaps to Mr. Saddam Hussein, the U.S.-deposed President of Iraq. See Press Release, Special Court for Sierra Leone Office of the Prosecutor: *Deputy Director Expresses Anger at Taylor’s “Pariah Regime”* (Freetown, May 22, 2003).

⁷⁰ See Office of International Information Programs, U.S. Department of State. U.S. Will Not Join International Criminal Court Accord (Grossman addresses CSIS on U.S. decision) (May 6, 2002), available at <http://usinfo.org/wf-archive/2002/020506/epf107.htm> (last visited Feb. 11, 2004).

⁷¹ See Rome Statute, *supra* note __, at Arts. 16, 42.

⁷² See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia (June 2000) (prosecutor’s report, declining to bring charges of war crimes for the NATO bombing of civilians and civilian infrastructures in Serbia during the Kosovo war), available at <http://www.un.org/itcy/pressreal/nato061300.htm>.

⁷³ See Rome Statute, Art. 1, providing that assertion of jurisdiction by the ICC shall be “complementary” to prosecutions under national criminal prosecutions. Presumably, this does not exempt from international prosecution persons who have sought to create domestic peace and tranquility by owning up to past wrongs and seeking (or indeed obtaining immunity within national jurisdictions) for those wrongs.

⁷⁴ One aspect of the argument over whether Ariel Sharon, the current Prime Minister of Israel, should be prosecuted for war crimes allegedly committed while he was Defense Minister during the Israeli invasion of Lebanon in 1982 sheds an interesting light on the doctrine of complementarity. As is well known, there was the killing of substantial numbers of Palestinians in the Beirut refugee camps of Sabra and Shatila. Although these camps were surrounded by Israeli soldiers, it is generally accepted that the killings were perpetrated by Lebanese Christians. The precise role and responsibility of Israeli soldiers either in facilitating the entry into the camps by the Lebanese Christians, or in not putting an end to the killings, are subjects that are heavily disputed. What is not disputed is that an Israeli Government Inquiry Commission investigated these issues and, while not holding Mr. Sharon criminally responsible for the massacres, questioned his leadership of the Israeli army during the course of events in Beirut. Does the work

Conclusively demonstrating that the concern of many proponents of the Rome Treaty was not about the double-standard built into the treaty, many signatory states have, since the refusal of the United States to sign unto the treaty, nonetheless agreed not to hand over to the International Criminal Court United States nationals charged with human rights violations, even if they are found within the signatory state.⁷⁵ Nor, apparently, is the invocation of a double standard limited to the United States. NATO members, many of them ratifiers of the Rome Treaty, appear perfectly willing to invoke the same immunity for their military personnel serving in Afghanistan.⁷⁶

But beyond abstractions about rules of justice, “the taste of the pudding,” as the adage goes, “is in the eating.” International Human Rights Law, in the 1990s, became a favorite of International Law scholars in the West and, by extension, their students. For reasons that I have already provided, this new-found favor cannot be attributed to any fundamental change in the jurisprudence or text of the law, nor to increased incidents of compliance or derogations from it. Rather, it was the willingness of domestic court judges in the West to interpret and apply this law to individual conduct that generated the new interest and enthusiasm.⁷⁷ Judicial enforcement of international human rights law “empowered” Western academic scholars and activists in two distinctive ways. First, a body of doctrine was being generated. This is familiar fare for scholarship. Scholars could now write seemingly disinterested articles and invoke “case law” in support of apparently “neutral” and/or “universal” propositions. Because it was “the law,” there was no longer any need to try to legitimize the propositions through jurisprudential investigation of first principles. Secondly, this “law” could be deployed in pressuring the political branches of government to adopt particular policies favored by the scholars and activists and, indeed, to promulgate new laws and policies that were seen to be consonant with the “law.”⁷⁸

Ordinarily, there is nothing wrong in the development of the law through judicial enforcement. Indeed, this sort of “progressive development” of the law is often a normative good. Similarly, there is nothing necessarily illegitimate in deploying judicial decisions for the two purposes described above. These understandings make sense, however, only if one sees the judicial enforcement of law as the evenhanded and principled application of doctrine within its appropriate sphere, the “community” of the regulated. That has not been the history of the

of this Commission meet the requirement of complementarity? Some have asserted that it does. Todd M. Sailer, *The International Criminal Court: An Argument to Extend Its Jurisdiction to Terrorism and a Dismissal of US Objections*, 13 TEMP. INT’L & COMP LJ 311, Fall 1999.

⁷⁵ Elizabeth Becker, *On World Court, US Focus Shift to Shielding Officials*, N.Y. TIMES, Sept. 7, 2002, at A4.

⁷⁶ See, e.g., Military Technical Agreement between the International Security Assistance force and the Interim Administration of Afghanistan, Annex A Paragraph 4, available at <http://www.operations.mod.uk/isafmta.pdf> (last visited Nov. 19, 2003). Indeed, the Security Council has endorsed the granting of immunity from prosecutions under the Rome Convention to soldiers purportedly serving as “peace keepers.” See Security Council Resolution 1422 (July 12, 2002) and Security Council Resolution 1487 (June 22, 2003).

⁷⁷ I have explored, elsewhere, the role of the domestic courts of the United States in shaping the development of international human rights law. See Chibundu, “*Making Customary International Law*,” *supra* note ____.

⁷⁸ Thus in the United States, for example, judicial rulings construing violations of international human rights law as giving rise to legal claims under the “Alien Tort Claims Act” (see 28 U.S.C. 1350) were invoked by the United States Congress in adopting the “Torture Victims’ Protection Act,” 28 U.S.C. 1350N.

judicial enforcement of international human rights law in the West, nor of its use by Western politicians.

As I have already indicated, one of the disenchanting experiences with the demands for and use of judicial enforcement of international human rights law is that its application has been limited to *former* government officials of *disfavored* societies. If, in fact, this selective application of law were justifiable on legal grounds, this shortcoming would not necessarily be disabling. But the selectivity, unequivocally and demonstrably, is shaped by power politics. The judicial enforcement of international human rights law, in other words, plainly subverts the view that the “rule of law” speaks truth to power. To the contrary, it is used to reinforce the disparate treatment accorded claimed violations by Western societies *vis-à-vis* those of non-Western societies. Here are a few examples:

In Afghanistan, there have been several reports of indiscriminate bombings leading to the deaths of several civilians.⁷⁹ There have also been stories in which United States personnel, if not actively complicitous with local Afghans, have at least stood by while elements of the victorious “Northern coalition Army” in Afghanistan herded defeated Taliban soldiers and supporters into sealed trucks only to have those persons suffocate to death and be buried in mass graves.⁸⁰ Yet, there has been scarcely a murmur that such conduct should be subject to criminal investigation. Rather, as in the former Yugoslavia, their veracity is either challenged, or grudgingly admitted and then dismissed as “collateral damage.” Nor is it surprising that the one instance in which criminal charges have been brought against United States soldiers for their conduct in Afghanistan involved a so-called “friendly fire” incident in which Canadian soldiers were accidentally killed by errant bombing.⁸¹

Nor is U.S. unwillingness to subject its soldiers to prosecutions for war crimes unique. Neither the Belgians in Rwanda, nor the Italians in Somalia, despite stories of human rights violations by their “peacekeepers,” subjected any of their citizens to criminal prosecution.⁸² And, it is apparently the case that U.N. peacekeepers, when they are accused of wrongful acts whether in Bosnia, Kosovo, Sierra Leone or East Timor, are simply “shipped back home.”⁸³ By

⁷⁹ Pamela Constable and Bradley Graham, *Afghan Officials Decry U.S. Airstrike Steps Urged to Prevent More Civilian Casualties*, WASHINGTON POST FOREIGN SERVICE, July 3, 2002, at A01.

⁸⁰ See Pamela Constable, *Report of Mass Afghan Graves Won't Be Probed, Envoy Says* U.N. Official Cites Danger and Weakness of Government, WASHINGTON POST FOREIGN SERVICE, August 28, 2002, at A20.

⁸¹ David M. Halbfinger, *Dismissal of Charges Recommended in 'Friendly Fire' Case*, N.Y. TIMES, March 21, 2003, at A17.

⁸² And while for a moment Belgium gloried in the purported dispassion of its ballyhooed 1993 law authorizing its courts to exercise prosecutorial jurisdiction over any person charged with “crimes of genocide,” the “little David” apparently crumbled in the face of objections by the United States. See N.Y. TIMES, Aug. 2, 2003.

⁸³ See, e.g., Scott A. Levin, *Sexual Exploitation of Refugee Children by U.N. Peacekeepers*, 19 N.Y. L. SCH. J. HUM. RGTS. 833 (2003); Jennifer Murray, *Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Participation of United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina*, 34 COLUM. HUM. RGTS L. REV. 475 (2003). Compare Elizabeth Abraham, *The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standard for Executive Order Detentions in*

contrast, when the Russians put on trial one of their soldiers for the violation of the human rights of a Chechnyan, the argument revolves not around the message being sent, but the shortcomings of the prosecution.⁸⁴

As in other aspects of International Law, the conflict between Palestinians and Israelis over control of territories west of the Jordan river has generated substantial challenges to international human rights law. As has been the case elsewhere in international law, human rights law has failed the challenge – at least if an essential element of that challenge is fairness and evenhandedness of application. The place of terror in waging war is one of the significant sources of controversy that the Israeli-Palestinian conflict has brought to the forefront of discussion. The United States Congress and courts have been unequivocal in the positions that they have adopted. In a series of legislation spurred substantially by the death of U.S. nationals in terrorist attacks related to the conflict, the Congress has required the Executive Branch to designate “state sponsors of terrorism,”⁸⁵ and “terrorist organizations”⁸⁶ and it has authorized civil suits against such states, and the prosecution of members of such organizations, or any persons who furnish assistance to such organizations. United States courts and the United States Department of Justice have moved vigorously to enforce these laws.⁸⁷ Unsurprisingly, those who have been caught up in the net of these prosecutions invariably have been opposed to Israel. But here again, the United States is by no means alone in its condemnation of anti-Israeli terror. It can fairly be said that insistence on the condemnation and punishment of such bombings by the Palestinian Authority, and more particularly by its leader, Yasir Arafat, has become an obligatory component of international politics.

But the indifferent killing of civilians and other noncombatants in the Palestinian-Israeli conflict is not the preserve of Palestinians and their supporters. By any calculation, for each Israeli civilian that has been killed in a terror attack, three to four Palestinian civilians have been killed by Israeli government action.⁸⁸ It is not fashionable to call such action “terrorism,”⁸⁹ but

its Mission in Kosovo, 52 AM. U. L. REV. 1291 (2003). The issue posed in the text is not whether these peacekeepers are guilty, but rather that the structure for determining their guilt or innocence is far from transparent and is, in fact, skewed to avoid accountability by the powerful.

⁸⁴ See Human Rights Watch, WORLD REPORT, 2003, Russian Federation, available at <http://www.hrw.org/wr2k3/europe11.html> (last visited Feb. 11, 2004).

⁸⁵ See, e.g., 28 U.S.C. 1605(a)(7) (the “Flatow Amendment,” named after a U.S. citizen killed in a terrorist bombing in Israel).

⁸⁶ See, e.g., The USA PATRIOT Act of 2001, Public Law 56, 107th Congress, 1st Session, October 26, 2001.

⁸⁷ See, e.g., *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998). See also Eric Lichtblau and Judith Miller, *Threats and Responses: The Professor; Officials Say Case Against Professor Had Been Hindered*, N.Y. TIMES, February 22, 2003, at A10.

⁸⁸ According to the Ministry of Foreign Affairs of Israel, between Sept. 29, 2000, and Sept. 1, 2003, Palestinian attacks have resulted in the death of 743 victims, as well as 504 “severely,” 710 “moderately,” and 3837 “lightly” injured. See “Victims of Palestinian Violence and Terrorism since September 2000,” Israel Ministry of Foreign Affairs Report, available at <http://www.israel.org/mfa/go.asp?MFAH0ia50> (visited Sept. 9, 2003). According to the Palestinian Red Crescent, between Sept. 29, 2000, and Aug. 30, 2003, Israeli Government military actions in the West Bank and Gaza resulted in the death of 2446 Palestinians and injuries to another 23,419. See Palestine Red Crescent Society, “Intifada Summary,” available at <http://www.palestinercs.org/intifadasummary.htm> (visited Sept. 9, 2003). And, as pointed out by an Israeli correspondent writing in Ha’Aretz, “According to calculations of the

the wantonness and abandon with which Israel has conducted its reprisals and “preventive” raids in crowded urban centers and refugee camps⁹⁰ render the semantic distinctions transparently hypocritical. But significantly, unlike the broad and near-universal condemnation which Palestinian suicide bombings rightfully have generated, the response of the “international community” to Israeli government callousness has been, to put it charitably, timid.⁹¹ Thus, when in April 2002, there was no doubt that a large number of civilian noncombatants had been killed during the Israeli occupation of the Janine Refugee camp, the “international community” not only backed down on investigating the circumstances under which those persons were killed,⁹² but remarkably, the seminal issue became the thoroughly vapid one of whether the killing of at least 27 persons should be termed a “massacre.”⁹³ In the one instance in which the killing of a British national was sufficiently weighty to draw the attention of the Security Council, a resolution of condemnation was promptly vetoed by the United States.⁹⁴

That Iraqi civilians (and particularly children) were the primary victims of the twelve-year imposition of sanctions on Iraq is beyond dispute.⁹⁵ While the West and the “international community” wipe their hands of these consequences on the ground that the Iraqi leadership must take responsibility for its obduracy in defying the “international community,” it is striking that powerful members of this “community” not only threatened the potential prosecution of members of the Iraqi government for human rights violations, but they were willing to forego

Shin Bet and by its own definitions, of the 2,341 Palestinians who were killed up to the beginning of August this year, 551 were terrorists, ‘that is, bearing arms and explosives’... . Until the end of August this year, IDF soldiers killed 391 minors, according to B’Tselem. According to the Red Crescent, the IDF killed 141 women. B’Tselem determined that 291 Palestinian security personnel were killed, some of whom were participating in the fighting, whether during an IDF incursion or during attacks they initiated in the settlements or against soldiers... . In addition to some 120 Palestinians who were targets of assassination, 82 Palestinian civilians were killed ‘by mistake.’... They, it is to be assumed, are not included in the 551 terrorists as defined above.” Ze’ev Schiff, HAARETZ, August 8, 2003. “80 percent of the Palestinians killed were not connected to armed actions.” See Amira Hass, *What the Fatality Statistics Tell Us*, HA’ARETZ, September 2, 2003.

⁸⁹ These civilian killings, on those rare occasions when Israel bothers to acknowledge them, are defended as accidents or (borrowing from American terminology) “collateral damage.”

⁹⁰ For a description of the tactics employed in such concentrated urban environments inhabited predominantly by innocent civilians, See Molly Moore, *Deep in Gaza, a Lopsided Battle Raid Illustrates Disparities in Firepower, Casualties*, WASHINGTON POST FOREIGN SERVICE, February 10, 2003, at A1.

⁹¹ To the credit of Israeli society, there’s been a good deal more self-examination there, especially among those who are being asked to enforce the Government’s “Operation Iron Fist” than within the so-called “international community.” See, e.g., Molly Moore, *Israeli Army Engaged in a Fight Over its Soul: Doubts, Criticism Of Tactics Increasingly Coming From Within*, WASHINGTON POST, Nov. 18, 2003, at A1.

⁹² See Plea for Access to Devastated Jenin, BBC NEWS, April 4, 2002.

⁹³ Charles A. Radin and Dan Ephron, *Claims of Massacre Go Unsupported by Palestinian Fighters*, BOSTON GLOBE, April 29, 2002. See also Peter Beaumont, *Brutal, Yes, Massacre, No*, THE OBSERVER, April 21, 2002.

⁹⁴ See, e.g., Michael Wines, *Killing of U.N. Aide by Israel Bares Rift With Relief Agency*, N.Y. TIMES, Jan. 4, 2003; James Bennett, *Split Deepens on Israeli Killing of U.N. Aide*, N.Y. TIMES, Nov. 25, 2002.

⁹⁵ For a reasonably dispassionate appraisal for the general reader of this highly emotional subject, see, e.g., David Rieff, *Were Sanctions Right?* N.Y. TIMES, July 27, 2003.

such prosecutions if forbearance would secure “regime change.”⁹⁶

Few events have offered a better opportunity for observing the correlation of principle and politics in the application of international human rights law than the capture of Mr. Saddam Hussein and the debate over the forum in which he should be prosecuted. And just as the waging of war against his government has laid bare the flimsiness of a principled application of the doctrinal prohibition of the use of force in international relations,⁹⁷ the lineup in the debate over his trial has shredded whatever remaining belief one might have in the promotion of human rights as a principled undertaking. The basic question has been who ought to try Mr. Hussein for his alleged sins. Four fora have been suggested: The United States as the controlling power in Iraq, the interim “Iraqi Governing Council” (presumably representing Iraqi society), a full-fledged international tribunal, and “a mixed tribunal” of Iraqis and the “international community.” The first, with virtual unanimity, has been rejected out of hand for approximating reality too closely.⁹⁸ The first option, that the US try Mr. Hussein, would all-too-blatantly acknowledge what is otherwise obvious: that much of what passes for “international justice” is little more than the act of victors getting to try the vanquished. And so the debate, at least within the circle of the so-called international human rights groups, has focused around the other three options.⁹⁹ That the last two fora should have the support of the human rights groups is to be expected. What is surprising is not simply that trial by an Iraqi national court has not only been contemplated, but the language in which it has been couched and defended by some of its proponents. And so, an academic who advocated as a “badge of honor” the trial in U.S. courts of foreigners for human rights violations occurring entirely outside of the United States,¹⁰⁰ now argues that it would be “paternalistic” for Mr. Hussein to be tried in a judicial forum composed by other than Iraqis.¹⁰¹ And, another academic, who had contended that Augusto Pinochet should be extradited to Spain because Chileans could not be trusted to try him,¹⁰² now even more fiercely defends the propriety of Mr. Hussein being tried by Iraqis.¹⁰³ If these positions indeed represent a change of heart to embrace the view that the enforcement of human rights, however universal the idea, if it is to transcend a transient manifestation of Western power, must be embedded in the particularized practices and institutions of the local non-Western community,

⁹⁶ See, e.g., Broadcast, Voice of America, *On The Line – Will Saddam Go?* Jan. 14, 2003, transcript available at 2003 WL 2064627 (stating that U.S. officials have voiced support for the effort of regional and Arab officials to induce Saddam Hussein to step down in exchange for immunity from prosecution for “war crimes and crimes against humanity,” and quoting Donald Rumsfeld, the U.S. Secretary of Defense, as stating: “[t]o avoid war, I would personally recommend that some provision be made so that the senior leadership in Iraq and their families could be provided haven in some other country.”).

⁹⁷ See *infra* notes __ and accompanying text.

⁹⁸ But see the statement of Kenneth Randall in an interview with National Public Radio, *All Things Considered*, Dec. 15, 2003, available at 2003 WL 65514265. The President of the United States appears to have disavowed this alternative. See Presidential Press Conference, December 15, 2003, available at www.whitehouse.gov/ (“We will work with the Iraqis to develop a way to try him that will withstand international scrutiny . . . [L]ook, the Iraqis need to be very much involved.”)

⁹⁹ For a teasing out of the elements of this debate, see *Saddam Hussein’s Trial: Bringing Justice for the Human Rights Crimes in Iraq’s Past*, HUMAN RIGHTS WATCH, December 24, 2003, available at <www.hrw.org>.

¹⁰⁰ See Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461 (1989).

¹⁰¹ See Anne-Marie Slaughter, *Not the Court of First Resort*, WASHINGTON POST, December 21, 2003, at B07.

¹⁰² See Diane Orentlicher, *Putting Limits on Lawlessness: From Nuremberg to Pinochet*, WASHINGTON POST, Oct. 25, 1998, at C01.

¹⁰³ See Diane Orentlicher, *International Justice Can Indeed be Local*, WASHINGTON POST, Dec. 21, 2003, at B05.

then this writer welcomes such change.¹⁰⁴ But that such a change of philosophy is afoot is highly doubtful. It is difficult to see how this endorsement of the Iraqi national tribunal, at least as currently constituted, can be squared with the fundamentalist belief in principles of “liberal democracy” or impartial justice that Western academics routinely chant as the determinants of the legitimacy of a tribunal that is asked to sit in judgment over alleged war criminals.¹⁰⁵ It may be that some will view as overly skeptical the suggestion that the only rationale for the acceptability of the Iraqi judicial system is that it is simply a thinly veiled stand-in for the reality of U.S. military control. As such, the first two options are different only to the extent that the second is a better mask of the reality of power than the first.¹⁰⁶ But if so, As Susan Sontag has observed: “[t]he writer in me distrusts the good citizen, the “intellectual ambassador,” the human rights activist . . . much as I am committed to them.”¹⁰⁷

One last example illustrates the likely future (and certainly the past) shape of the judicial enforcement of international human rights law. Recently, members of a rebel movement in the Democratic Republic of the Congo were alleged to have engaged in human rights violations, including torture, rape, and cannibalism. The leadership of the rebel movement put some of its soldiers on trial for torture and rape. This action, however, was decried by the leadership of the Democratic Republic of the Congo, which stated that it would be instituting an action against the rebel movement in the International Criminal Court.¹⁰⁸ And so, we may expect that the ICC will become another institution that will preside exclusively over purely third-world conflicts, while being essentially irrelevant in affording protection or succor to Third World victims of inhumane treatment in the West.¹⁰⁹

¹⁰⁴ See M.O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT’L L. 1069 (1999).

¹⁰⁵ See HUMAN RIGHTS WATCH, *supra* note ____.

¹⁰⁶ See Michael Byers, *The Ultimate Justice Show*, LONDON REVIEW OF BOOKS, Jan. 8, 2004 (“[o]stensibly, a proper trial will take place in an Iraqi court established specifically for senior members of Saddam’s regime; the creation of the court was announced by the Iraqi Governing Council just three days before Saddam’s capture. But the Council is itself a creation of the US and heavily beholden to it: its members were handpicked by President Bush’s special envoy, Paul Bremer, and they remain entirely dependent on the occupying authority for resources, security and what little power they hold.”)

¹⁰⁷ From a speech given at her receipt of the 2003 *Friedenspreis de Deutschen Buchhandels* award by German publishers and book sellers at the Frankfurt Book Fair, *reproduced and available at* www.tomdispatch.com (last visited Feb. 11, 2004).

¹⁰⁸ See Stephanie Walters, *Congo Abuses ‘Common’*, BBC NEWS, October 3, 2000. See also *DR Congo Rebels Go on Trial*, BBC NEWS, February 18, 2003.

¹⁰⁹ Indeed, it is notable that in his first official pronouncement regarding the work of his office, Mr. Luis Occampo, the Chief Prosecutor of the International Criminal Court, identified as his priority the investigation for prosecution of claims resulting from these events in the Ituri province of the Democratic Republic of the Congo. See Marlise Simons, *Court Likely to Take Up Congo First*, N.Y. TIMES, July 17, 2003. He did so at the very time that the various belligerents in the DRC had agreed to form a single Government, and when representatives of the various factions were being sworn into that Government. Whether in fact the new Government could and would prosecute alleged offenders was apparently not one of Mr. Occampo’s concerns; nor apparently did the potential effect of his assertions on the viability of a delicately balanced end to a five-year civil war which reportedly had already cost three million lives matter to him. Similarly, David Crane, a former United States Army officer appointed as Chief prosecutor of the Sierra Leone Special Court chose to unseal his indictment of Mr. Taylor, then President of Liberia, while the latter was in the midst of negotiating the conclusion to a civil war ravaging Liberia. Whether such decisions reflect insensitivity, ignorance, or indifference to their political consequences, it is doubtful that the same show or lack of judgment would have been displayed in matters involving Western politics.

In summary, the new human rights law, framed as the enforcement through judicial means of “universal norms,” amounts to little more than an insistence that the West – ably aided, of course, by a cadre of non-Western jurists – apply its new found supremacy to impose judicial sanctions on violators of human rights law. Significantly, this judicial enforcement of law has turned the law of international human rights on its head. Rather than enforcing claims against states, judicial enforcement has become a tool by which state responsibility is buried in the sophistry of going against former government officials or rebellious persons. And this subversion of the idea of human rights has been perpetrated and defended in the name of calling sovereignty to account to the individual. The result is that the doctrine of “sovereignty” remains entirely available to Western societies as they exclude immigrants from entry and participation, but thoroughly undermined in the relationships that rulers have to the ruled in non-Western societies. George Orwell could not have been half as prescient on the uses of double-speak.

III. INTERNATIONAL LAW AND ECONOMIC DEVELOPMENT

A. The rise, Fall, and Re-orchestration of a Liberal International Order

Along with the prohibition of the use of force and the protection of human rights, the internationalization of programs for the promotion of economic progress was a third fundamental innovation of the world order that emerged following World War II. Initially the institutions and regimes that were created in furtherance of this objective responded primarily to the needs of the West.¹¹⁰ The international monetary system, coordinated and managed under the auspices of the International Monetary Fund, thus focused primarily on the maintenance of stable – indeed fixed – exchange rates among Western currencies. The International Bank for Reconstruction and Development (the “World Bank”) was intended to finance the reconstruction of war-damaged Europe, but much of this work – at least with regard to Western Europe – in the initial years following World War II was undertaken through the parallel institution of the “Marshall Plan.” The result was that the World Bank, until the revolutionary changes of the International Economic Order in the late 1960s and 1970s, remained a peripheral actor. The third player in the post-World War II international economic order was the “General Agreements on Tariffs and Trade.” The Orphan of a stillborn parent – the International Trade Organization – GATT had as its primary objective the promotion of trade among Western societies through tariff reductions on manufactures. Conspicuously left out was the reduction of tariffs on agricultural products.

The booming success of the reconstruction of Western Europe and Japan, the comparative impoverishment of Latin America and much of Asia, and the decolonization of Africa and a good part of Asia resulted in challenges, at least by the second-half of the 1960s, in the fit between the objectives of these institutions and their constituencies. The activism in the international arena of the Latin American and newly independent Afro-Asian states, herded under the umbrella of the “nonaligned movement,” forced a restructuring of the international economic order. Ruthlessly exploiting the geopolitics of the Cold War these “nonaligned” states collaborated in the 1960s and 1970s to extract significant concessions from the industrialized

¹¹⁰ The term “West” is used throughout this essay in its generally understood geopolitical and sociological senses. It applies to the cultural habits whose roots are to be found in the rich industrial societies of Western Europe and North America.

West. Skillfully wielding doctrines of state sovereignty and juristic equality, as well as nascent economic power flowing from raw material shortages, they wrangled from the West grudging acceptance of changes in international norms relating to such fundamental concepts as consistency in the application of GATT's most favored nation principle,¹¹¹ the ability of states to rewrite concession agreements, and the right of the state to nationalize foreign-owned property. And, ruthlessly exploiting the West's own rhetoric of "democracy" and "egalitarianism" which had come to be embedded as norms of the international legal order,¹¹² developing societies pushed for an entirely "New International Economic Order."¹¹³ They insisted on "national sovereignty" over their natural resources, complete control over foreign investments within their economies, and the right to determine for themselves the terms under which they would engage in economic relations with others.¹¹⁴ In exchange for these rights, they merely agreed to abide by "general principles of international law"; principles that they would themselves develop through United Nations General Assembly Resolutions and Declarations.

The West, of course, did not sit idly by.¹¹⁵ While it responded in part through such institutions as the G7,¹¹⁶ the more significant and ultimately lasting response was ideological. It took sometime coming, but by 1981, with the election of Margaret Thatcher as Prime Minister of the United Kingdom in 1979, and Ronald Reagan as President of the United States a year later, the neoconservative response was in place.

Neo-conservatism, succinctly put, is a reaction to the perception that the "liberalism" of the West in the post-World War II era was "soft." The West's mettle needed to be hardened. While in the foreign policy and foreign relations arenas the ideology is more commonly

¹¹¹ See Article I of the General Agreement on Tariffs and Trade.

¹¹² See, e.g., ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE* (1972). Both "democratic" and "egalitarian" principles were applied here, not to relations within national politics, but to interstate relations. The resulting doctrine which emphasized the "interdependence" of states was to give way to "realism." Compare STEVEN SPIEGEL & KENNETH WALTZ *CONFLICT IN WORLD POLITICS*, (1971). See generally KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979); John J. Mearsheimer, *The False Promise of International Institutions*, INT'L SECURITY, Winter 1994-95.

¹¹³ For an elaboration of their claims and positions, see, e.g., Gillian White, *The New International Economic Order: Principles and Terms*, in *INTERNATIONAL ECONOMIC LAW AND DEVELOPING STATES* (Hazel Fox, ed. 1992).

¹¹⁴ See, Charter of the Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974), reprinted in 14 Int'l Leg. Mat. 251 (1975); Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, at 3, U.N. Doc. A/9559 (1974), reprinted in 13 Int'l Leg. Mat. 715 (1974); Program of Action on the Establishment of a New Economic Order, G.A. Res. 3202, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, at 5, U.N. Doc. A/9559 (1974); Charter of Economic Rights and Duties of States, G.A. Res. 3181, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1975).

¹¹⁵ For an extensive study of this response, see STEPHEN D. KRASNER, *A STRUCTURAL CONFLICT: THE THIRD WORLD AGAINST GLOBAL LIBERALISM* (1985).

¹¹⁶ The "Group of 7" (now Group of 8 with the inclusion of Russia) began in the late 1970s as an annual gathering of the heads of states of the seven wealthiest countries: The United States, Japan, Germany, France, the United Kingdom, Italy, and Canada for the purpose of coordinating economic policies among them and, therefore, within the international system. Right from its inception, however, it has also provided a forum for attempting to coordinate political policies.

associated with the Cold War conflict,¹¹⁷ it was no less influential in dictating the international economic policies of the West in the 1980s, especially those of the United States and the United Kingdom. In the first place, neo-conservatism required domestic economic policies that tamed the demands of left-of-center groups, such as labor unions and supporters of the welfare state. Instinctively, neoconservatives viewed developing societies much the same way in which they viewed these domestic constituencies. They were leeches on hard-working societies. Secondly, the arguments against “big government” and “big spending” (exempting, of course, law enforcement and “national defense”) framed in response to the claims of the domestic constituencies translated all-too-well in the international arena. Here, for neoconservatives, foreign aid policies whether undertaken by national governments, the World Bank, or the IMF, were to be discouraged. International trade was to be conducted, as much as practicable, on a *laissez-faire* basis; and governmental policies should avoid, as much as possible, impeding the trans-border flow of private capital. The privatization of economies thus became a rallying cry of neoconservatives. Thirdly, the realization of the objectives of the preceding two sets of policies depended on the government acting forcefully and vigorously in the economic arena to maintain a strong national currency. Not surprisingly, then, both the United States and British governments went out of their way to maintain a “strong” dollar and a “strong” pound.¹¹⁸

These were the ideological prescriptions of neo-conservatism and, for the most part, they were also practical policies. Reality occasionally dictated deviations from these orthodoxies. Thus, President Reagan, in order to soften the sledge-hammer effects of his anti-Communist policies in Central America, embarked on the Caribbean Basin Initiative, which extended United States trade to Caribbean and Central American countries on highly preferential terms.¹¹⁹ But these were rare exceptions and, in fact, highlighted the core attribute of the neoconservative approach to international economic relations; namely, that international economics and international politics are completely intertwined and serve the same interest, the “national” interest. Economic relations among states, like politics, in the view of neo-conservatism, is essentially conflictual. The allocation of interests among participants is dictated by the possession of and capacity to apply power resolutely. In this scheme, international institutions play secondary and marginal roles.

The free fall of the price of crude oil in the second-half of the 1980s, and the concurrent appreciation of the U.S. Dollar, seemed to validate the neoconservative approach. By the end of the decade the United States in particular, and the West, generally, was in a much better economic position, both relatively and absolutely than it had been at its beginning. Moreover, in the most profound economic crisis of the decade – the “debt crisis” – it was the actions of the United States government, not those of the various international institutions that were central to its management and resolution. And, as for international trade, the one area where international

¹¹⁷ See, e.g., JOHN EHRLMAN, *THE RISE OF NEOCONSERVATISM: INTELLECTUALS IN FOREIGN AFFAIRS 1945-1994* (1995).

¹¹⁸ These last policies were enshrined in the so-called “Plaza Accord” of 1985, under which finance ministers representing the G7 states agreed not to interfere with the realignment of national currencies, thereby giving their approval to the revaluation of the U.S. Dollar vis-à-vis the other international currencies, particularly the Japanese yen.

¹¹⁹ See, *The Caribbean Basin Economic recovery Act of 1983*, Pub.L. No. 98B67 ' 211, 97 Stat. 384 (1983), codified at 19 U.S.C. 2701 et seq.

cooperation was still ballyhooed, the dominant principles of the “Uruguay round” were those put forward by the Neoconservative United States Administrations of Ronald Reagan and George Bush. In particular, the tentacles of the international trading regime began reaching out to substantively regulate intellectual property rights.¹²⁰

This then was the setting for the international economic order that emerged in the 1990s. Like the political order, it was shaped and nurtured not by abstract concepts of “right principles,” but by the realities of power. This new economic order was thus subject to the same forces that dictated the “new world order” of the 1990s. The United States did not merely possess dominant power, but that power was viewed as the natural consequence of a virtuous and “indispensable” society. The United States did not act for itself, but for all of humanity. Above all, the success of the United States, and of the West, demonstrated beyond cavil the supreme correctness of the underlying belief systems and institutions.

B. The Neoliberal Order of the 1990s

By one of those quirks of history, at just about the time that the successes of neo-conservatism seemed indisputable, its primary proponents (the Reagan-Bush and Thatcher governments in the United States and United Kingdom, respectively) lost political power. They were succeeded by disciples of what came to be known as “the third way.”¹²¹ These epigones of neo-conservatism, while implementing policies that, in practical terms, were indistinguishable from those of neoconservatives, effectively co-opted international institutions into the process, and generated what came to be known as “neoliberal” economics. Two pillars of this new order illustrate its correlation with the “new world order” of the political arena of the 1990s, and its departure from the post-World War II “Liberal Order.” These pillars preached the gospels of “structural adjustment” and of “privatization.” Both had their genesis in the ideologies of neo-conservatism, but their prostyltization and ultimate domination of the globe would not have been possible without neoliberalism’s efficacious deployment of the triarchy of post-World War II “Bretton-Woods” institutions.

Structural Adjustment Programs were pioneered by the IMF and the World Bank in the 1980s. These financial institutions, having essentially been relegated to the backwaters of international economic relations by neoconservative governments, sought to make themselves of continuing relevance by insisting that their developing country wards ape the ideas and practices

¹²⁰ See, Agreement on Trade-Related Aspects of Intellectual property Rights, Annexed to the Final Act establishing the World Trade Organization. See also SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS (2003); CARLOS MARIA CORREA, INTELLECTUAL PROPERTY RIGHTS: THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS (2000); Michael H. Davis and Dana Neacsu, *Legitimacy, Globally: The Incoherence of Free Trade Practice, Global Economics and their Governing Principles of Political Economy*, 69 U.M.K.C. L. REV. 733 (2001).

¹²¹ The belief system supposedly embodied by the term is at best amorphous, and is frequently conveyed by the oxymoron “radical center.” See, e.g., <<http://www.thirdway.org>> (last visited on Nov. 22, 2003). It represents an effort to systematize the expedient pragmatism adopted by such “neo-liberal” politicians in the West as former President Bill Clinton and Prime-Minister Tony Blair, who sought to differentiate themselves from their neoconservative predecessors without fully embracing the liberal policies of the pre-neo-conservative Democratic and Labor parties of the United States and United Kingdom, respectively.

of neo-conservatism. Thus, as a condition for lending to these countries, the IMF and the World Bank insisted not simply on the standard covenants, guarantees, and pledges of repayment or a showing of the capacity to repay, but on wholesale restructuring of national economic policies with their attendant social and political consequences.¹²² Developing country governments seeking financial support from these institutions were frequently obligated to undertake far-reaching reforms in such disparate areas as limitations on governmental expenditures, the size of the civil service, subsidization of imports, tax and tariff-collection mechanisms, the use of price controls, interest rate policies, and inflationary measures. These undertakings were then subjected to periodic reviews with the draw-downs on tranches of existing loans and access to future potential borrowings being dependent on prior performance.

These policies and practices were carried through into the 1990s. There were, to be sure, changes at the margins to take account of the strong criticisms to which structural adjustment programs were subjected, and which reflected the increased ascendancy of the World Bank over the IMF as the preferred tool in dealings between the West and the “developing world.” Nonetheless, in its essence, the neoliberal international economic order of the 1990s was based as much on a notion of subordinating the national economic policies of developing societies to the strictures of a standardized Western-determined set of economic objectives as had the neo-conservatism of the 1980s. Indeed, in some ways, neoliberal economic prescriptions, if anything, tended to be more intrusive. Driven by much of the same zeitgeist that undergirded the international human rights movement, Western proponents of the need to protect the environment and of the rights of women, ruthlessly employed their governments’ control of the World Bank as a tool to force changes in the policies of the developing world on these issues. Similarly, economic interests in the West readily exploited the negotiations of the World Trade Organization – as successor to the GATT – to impose substantive changes in the policies of developing countries in such areas as the protection of intellectual property and so-called “trade related investment measures.”¹²³

The emergence of “privatization” as the dominant economic prescription of the West to the rest of the world in the 1990s aptly ties up the interrelatedness of the dominance of Western military and political power in the 1990s and its use in the economic arena. Neo-conservatism had preached the reduction of government involvement in the economic life of societies. By and large, however, the ideology was only minimally translated into action. Even in the United Kingdom, where Margaret Thatcher vigorously sought to undo decades of Labor Party nationalizations, there remained in government hands at the time that she left office substantial chunks of the British economy that might otherwise have been expected to be privately controlled. The 1990s, by contrast, witnessed not only massive privatizations within domestic economies in the West, but the espousal of privatization as an international dogma.

Whatever else may be said for or against neo-conservatism, its philosophical embrace of privatization was normative.¹²⁴ Deregulation and privatization were seen as social goods.

¹²²I have described Structural Adjustment Policies elsewhere. *See supra* note ____.

¹²³ *See, e.g.,* WALDEN BELLO, *DARK VICTORY* (1998).

¹²⁴ As Ehrman contends, *see supra* note __, American neoconservatives, by and large, were disciples of Reinhold Niebuhr, and while they believed in the supremacy of the American system, they did not automatically insist on

Whether or how those policies got implemented were essentially the concerns of individual societies. By contrast, neo-liberals, much like their international human rights cohorts, came to see in privatization a panacea for the ills of the developing world. Whether Western societies implemented or shrank from privatization – nor the reasons why they did so – was not the point. The successful free market capitalism of the West, grounded as it is on the private ownership, control, and management of capital, when contrasted with the failure of the Communist experimentation – a failure no longer in doubt by 1989 – is all the proof required. It became standard international economic doctrine that societies seeking access to international finance must privatize their economies or forego such assistance, and thus emerged the so-called “Washington consensus” which was pushed actively by the international financial institutions, notably the World Bank and the IMF.¹²⁵

As was the case with the doctrines relating to the “use of force” and “international human rights,” the Washington Consensus was presented in humanistic grounds, but such velvety gloss could not quite mask the potential rusts at the core, and the necessities of an iron fist to maintain its outward serenity. Economic Crises in Mexico in 1994-95, South-East Asia in 1997, Russia in 1998, Argentina in 2001, and Brazil in 2002, have challenged the stability of the underlying wisdom of the Consensus.¹²⁶ How effectively the international economic edifice can continue to withstand these challenges, of course, is subject to divergent speculative inquiries, but what seems obvious is that the outcome cannot be dissociated from the continuing exercise of military and political power by the West, generally, and the United States in particular.¹²⁷ The unfortunate reality is that, in the economic arena, no less than in the human rights area, proponents of universalism have relied not on the spontaneous convergence of beliefs derived from the internal demands and dynamics of societies, but on the compelled imposition of Western ideas deemed to be of universal human benefit. These ideas, once framed as “legal” are then presented as essentially unimpeachable.¹²⁸ In the next part of this essay, I shall challenge this methodology by exploring in normative terms the relationship of the ideas of power, law, community, and the outsider.

IV. THE IDEOLOGIES OF INT’L LAW AND INT’L COMMUNITY

Thus far this essay has presented a description of the interaction of law, politics, and economics in the international system in jurisprudentially unproblematic terms. Law, it has assumed, is constituted of rules and standards. To be sure, the parties may disagree about the

coercing others to adopt it. Of course, this did not rule out the use of incentives and disincentives in getting other countries to follow suit.

¹²⁵See generally JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002).

¹²⁶See, e.g., WALDEN BELLO, *DEGLOBALIZATION: IDEAS FOR A NEW WORLD ECONOMY* (2002); STEPHAN HAGGARD, *THE POLITICAL ECONOMY OF THE ASIAN FINANCIAL CRISIS* (2000).

¹²⁷Although ordinarily this footnote should not be necessary, it may be that to forestall uncalled-for misapprehension of the claims that I’ve made in this, I should explicitly state the obvious. Not every Western politician – let alone individual – has subscribed at all times to the views that I’ve described above. Nonetheless, at different times, those views have been dominant, and have in large measure shaped Western ideologies and institutions.

¹²⁸Judge Richard Posner has observed: “Although American lawyers have made significant contributions to the theory of free speech, their attitude toward law itself is pious and reverential rather than inquiring and challenging.” See R. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 467 (1990).

specifics of particular rules or standards, but they do not doubt the possibility of generating such rules, and that once generated, rules and standards become authoritative and binding on the parties. Similarly, the essay thus far has taken as a given that there is indeed an international order or system; that is, an autonomously functioning regime of predictable rules and principles recognized and accepted as such. For most of international legal scholarship, the acceptance of these conditions is not only axiomatic, but conclusive. So, to the extent what has been written thus far merits debate within international legal scholarship, that debate would almost always be framed simply in terms of the accuracy of the description thus provided, or perhaps the error of the interpretation assigned a particular description. This part of the essay seeks to go beyond factual and comparative descriptions in order to lay bare the foundations that shape the approaches to and conceptions of international law as a distinctively recognizable regime of rules, norms, and practices. This excavation of foundations that are not usually inquired into, but are almost always taken as given, is guided by the belief that in order to understand the legal treatment of the “other” within the international order, it is helpful to understand the role law plays in the construction and definition of a community. Hence, the need to take a break from description to adumbrate underpinning normative notions of law and the community. This articulation will also be helpful in explaining the evaluations of the future of the international legal order with which this essay shall conclude.

A. *Concepts of Law in the International Legal Order*

Many brilliant minds have given attention to the problems posed in defining the concept of law,¹²⁹ and it is not the object of this essay to rehearse the varied answers that have been given, let alone to try to improve on them. Two concepts of particular relevance to the undertakings of this essay, however, seem inescapable from the multiplicity of jurisprudential writings on law. First, law is a distinctive social institution inasmuch as it binds all who fall within its sway. To assert that something is “law,” is therefore to demand compliance. Individual preferences are irrelevant.¹³⁰ The regulated cannot choose whether to be bound. Second, and a point that reinforces the first, the efficacy of law derives from the fact that it is backed up by the community. The nature of the community differs, ranging for example from

¹²⁹ The great minds in the Western intellectual tradition who have shaped the way that we think about law include: Aristotle, Thomas Aquinas, Immanuel Kant, John Austin, Hans Kelsen, H.L.A. Hart, and Ronald Dworkin. See, e.g., ARISTOTLE NICKOMACHIAN, ETHICS, BOOK V (law consists of just rules); THOMAS AQUINAS, SUMMA THEOLOGIAE, *Prima Secundum* QQ 90-97 (laws flow from varied sources including the eternal, the natural, the human and the divine); IMMANUEL KANT, INTRODUCTION TO THE METAPHYSICS OF MORALS (laws are statements of rights and of obligations, and the categorical imperative requires that you make universal the rule that you would have applied to you); JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (law is the command of the sovereign); HANS Kelsen, PURE THEORY OF LAW (law is a system of norms derived through a process of logical reasoning); H. L. A. HART, CONCEPTS OF LAW (law is both the customs of a people and the authoritative pronouncements of institutions to which a people have delegated the function of determining valid rules); RONALD DWORKIN, LAW’S EMPIRE (law is the result of the social process of the collaborative construction and interpretation of the rules and principles of a society).

¹³⁰ This idea is best captured by John Austin’s definition of law as “the *command* of the sovereign.” This is, of course, the heart of positivism, but even proponents of natural law do not meaningfully disagree with the proposition that to assert that something constitutes law is tantamount to demanding obedience by all to whom the statement applies. Rather, the debate revolves around when that something should be considered as law; in other words, what is the source of the law?

Aristotle's Greek "city-state" which explicitly excluded slaves from membership and therefore the burdens of legal obligation, to Kant's "community of liberal states for perpetual peace" which aimed for the inclusiveness and toleration of religiously diverse societies. As Thomas Aquinas rightly recognized when he classified law in terms of the sources of the authority that mandated obedience, a person belongs to several communities, and each community is entitled to demand obedience. And, this recognition is at the core of contemporary theories on how to reconcile the "individual" with the "citizen" in a heterodox multicultural liberal state.¹³¹

Similarly, the means by which enforcement is backed up depends on the nature of the community within which law operates. Thus, in the quintessential modern community, the state, police power ultimately lies at the heart of enforcement, expressed as often as not through the use (or threat of use) of force by the state on behalf of its members against a wrongdoer.¹³² Other societies, however, have sought enforcement through other mechanisms. For example, in the Greek city-state, "Atimia," the withdrawal of communal protection from the wrongdoer by declining to prevent or prosecute the private use of violence against him was an accepted form of punishment;¹³³ while in the Catholic church excommunication from the community of those entitled to partake in the Eucharist was the ultimate sanction. And, of course, enforcement can be implemented through less punitive measures, whether physical or moral. Hence, in an environment in which "money" is the measure of one's value, it is hardly surprising that imposition of financial costs may be just as effective in compelling compliance as moral damnation may have been in a religious environment. Finally, ostracism through imprisonment continues to be a dominant mode of enforcing laws in our time.

Speaking about law without reference to the community in which it functions is, therefore, not a particularly useful undertaking.¹³⁴ And, the transcendence of community in an understanding of law applies regardless of whether one subscribes to a positivist or a natural law conception of the proper basis for determining the source of law. In what follows, then, I shall first elaborate on the implications of these two conceptions of the idea of law for the "rule of law" within international society, and then develop the relevance of the conception of law for an understanding of international society as constituting a "community."

1. The Binding Force of International Law

¹³¹ See, e.g., THE RIGHTS OF MINORITY CULTURES, (W. Kymlicka, ed. 1995); A. MASON, COMMUNITY, SOLIDARITY AND BELONGING: LEVELS OF COMMUNITY AND THEIR NORMATIVE SIGNIFICANCE (2000); Compare C. TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY (1989). The problem of reconciliation within the international system is, if anything, less susceptible to the managerial resolutions proposed by these theorists than one encounters within the state. See *infra* at _____. But cf. Mason at 173 (noting difficulties but maintaining the existence of a "global community").

¹³² A well-worn adage in the United States is that behind all judicial decisions lies the "82nd" (or "101st") air-borne command of the United States Army.

¹³³ See, e.g., R. SEALEY, THE JUSTICE OF THE GREEKS 123 (1994).

¹³⁴ Early proponents of the "rule of law," such as **Albert** Venne-Dicey, recognized this reality. For Venne-Dicey, for example, the "rule of law" was not simply about the existence of law in general, but related to the mechanisms by which each society generated, interpreted, and enforced those laws. Thus, the "rule of law" in England was a distinctly different phenomenon from the operation of law in France.

Until quite recently, it was not unfashionable – even among very well informed and thoughtful persons – to doubt whether there is, in fact, such a thing as “international law.”¹³⁵ At the core of that doubt was the perceived deficiency of the system to enforce its own rules. And without enforcement (or at least the capacity) by the lawgiver, there could be no law.

Proponents of the existence of international law responded to this challenge in three ways. First, the least surefooted of the group argued that international law was a different kind of a legal regime. Like national law, it possessed “hard law” which can and are enforced through such recognizably judicial institutions as arbitral tribunals and the International Court of Justice. But, unlike national law, international law was also to be found in “soft law.” This latter “law” was to be found in hortatory statements, guidelines, codes of conduct or behavior, and like norms. These were law despite the absence of any enforcement mechanism because they are expressive of important international values that cut across cultures and political divides.¹³⁶ A second group forthrightly challenged the notion that actual enforcement is a necessary element of the definition of law. For this group, what matters is whether those persons whom a law purports to regulate view their conduct as constrained by the law. This sense of “compliance” is what distinguishes the legal from the merely moral. As long as nation states in the international system accept that their conduct is constrained by legal rules, it is not essential that there actually be automatic enforcement of rules when they’re occasionally violated.¹³⁷ The third school of thought is represented primarily by the proponents of international human rights who dominated the intellectual articulation of international law norms in the 1990s.¹³⁸ Essentially, this group sought to make international law more like domestic law by co-opting domestic enforcement institutions into the international law arena. But, as I have explained, this co-optation has been at the cost of shifting the focus of international law away from state compliance to the punishment of individuals.¹³⁹

One of the consequences of the shift in international power indisputably to the West in the 1980s and 1990s is that it has permitted the West to institutionalize its chosen norms and enforcement mechanisms so that today no one seriously questions whether international law is indeed law, nor even its source or legitimation.¹⁴⁰ Rather, the focus has turned to mundane questions of interpretation. That shift has been accomplished primarily because the unrivaled accumulation and use of global economic military and cultural power in the United States, in particular, and the West, generally, has been conflated into and confused with the idea of a global or “international” community. The operative assumption appears to be that because particular norms and rules can be transmitted and effectively enforced without regard to

¹³⁵ Compare, for example, HART, *THE CONCEPT OF LAW*, at 208.

¹³⁶ See generally Damrosch, *Enforcing International Law Through Non-Forcible Measures*, 269 REC. DES COURS 19 (1997); COMMITMENT AND COMPLIANCE: THE ROLE OF NONBINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Diana Shelton, ed. 2000); Ulrich Fastenrath, *Relative Normativity in International Law*, 4 EUR. J. INT’L L. 305 (1993).

¹³⁷ Compare LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW & FOREIGN POLICY* (1979).

¹³⁸ For my discussion of this group, see *supra* at ____.

¹³⁹ See *supra* at ____ and accompanying notes.

¹⁴⁰ The evolving transformation did not go unnoticed by scholars. Compare DAVID KENNEDY, *INTERNATIONAL LAW* (1987) and MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA* (1989).

territorial boundaries, all who are made subject to such norms must constitute a “community.” What is striking is that while proponents of this construction of the relationship of international law to an international community speak in terms of a “Grotian moment,” the underlying ethos is essentially Austinian.¹⁴¹ It is apparently the effective enforcement of law that creates the community, not the community that creates law. And here lies one of the paradoxes of the relationship of law to community whose understanding deserves some attention.

It is possible to view law as produced by a community, or a community as the product of law. In the first, law derives its effectiveness from the voluntary compliance of the members of the community. Compliance flows from the fact that the law is the articulation of shared norms and values. In such a setting, the smaller or more insular the community is, the more likely it is that laws, habits, and morals will approximate each other, and may become indistinguishable.¹⁴² This is particularly so in affective communities.¹⁴³ In larger communities, however, where the primary thrust of community formation is functional, the voluntary acceptance of law has to be shaped by factors other than affective ties. Socially ingrained norms and habits, whether imparted through indoctrination or rooted in the inertia of the subject, go some way in explaining acceptance under these circumstances. But no less crucial are those processes and institutions by which law, in all but the most primordial of communities, gets generated, adopted, interpreted, and enforced. These processes or institutions, which H.L.A. Hart has termed “secondary rules of recognition,”¹⁴⁴ themselves constructively reflect and embody the shared norms and values of the community. To be sure, the larger or more complex the community, the more difficult it is to trace the law to its voluntary acceptance by the community, and the processes and institutions now seem to take on a life of their own, independent of the community or its social norms. The idea that law, in this setting, is based on the voluntary compliance of the members of the community becomes notional. Law, as the construction of the community can thus get turned around into the community being the construct of law.

There is of course another way in which law can be made binding. Compliance can be coerced. The quintessential illustration is where an edict of the master is enforced against the slave. But it would be a perversion of the term “community” to think of the master and the slave as living in a single “community.” It is the master that makes the law and enforces it against the slave. The law is that of the master, not of the community. And what is true about the master-slave relationship applies just as readily in all situations in which law is imposed on the basis of the mastery of the one and the subjugation of the other.

2. International Law and International Community

Clearly, there is an aspect in which the operation of international law fits within the notion of law as the product of the community. Much of international law, especially but by no means exclusively treaty-based international law, can be and is legitimated as the product of the community of states. Customary international law, traditionally understood as those practices of

¹⁴¹ See, e.g., Samuel K. Murumba, *Grappling With The Grotian Moment: Sovereignty and the Quest for a Normative World Order*, 19 BROOK. J. INT’L L. 829 (1993); Compare Boutros Boutros-Ghali, *The Role of International Law in the Twenty-First Century: A Grotian Moment*, 18 FORD. INT’L L. J. 1609 (1995).

¹⁴² See generally HART, THE CONCEPT OF LAW, at 77.

¹⁴³ For my discussion of the distinctions among communities, see *infra*, __ and accompanying notes.

¹⁴⁴ See HART, THE CONCEPT OF LAW, at 89.

states backed by “*opinio juris*” can also be readily rationalized as being derived from or effectuated within communal norms, institutions and processes. The relevant community, of course, being that of states.

It is increasingly fashionable, however, to posit international law as operating not simply within a community of states, but among peoples. All of humanity, it is said, form a single community. As such, they may create international law directly, and international law may operate directly on them. In this setting, state consent and practice are not themselves the sources of law, but merely the proof or affirmation of such law. And such consent or practice can be dispensed with when they stand as inconvenient obstacles to the realization of higher norms. International Human Rights Law, and the idea of “*jus cogens*” typically are platforms employed to present this vision of the operation of law in a transcendent community of peoples rather than of states.

If indeed the peoples of the world are responsible for generating international law norms, then the direct application of international legal norms to them would be consistent with the principle that the binding force of law derives from its legitimation through consent, whether constructively implied or directly given. Under classical international law, this fiction worked itself through the presumed representative capacity of the nation state. When the state entered into a treaty, it was conveying the consent of those who constituted it and whose interests it represented. The obligations that it therefore undertook, and the rights and licenses it thereby conveyed, could legitimately be enforced against and on behalf of those for whom it purported to act. Similarly, the legitimation of the enforcement of customary international law was derived in classical theory from the fact that such law represented the “practice of states” accepted by them as based on law.

But, as described in Part II, above, post-Cold War Western international legal scholarship has mounted a sustained attack on this state-based justification of international law.¹⁴⁵ Whether presented as an attack on the vacuousness of the idea of “state sovereignty,”¹⁴⁶ or the claim of universal jurisdiction to enforce human rights,¹⁴⁷ this scholarship has sought to present the interests of the individual and the state as being in opposition rather than reinforcing. The state, this scholarship has suggested, is a predator, against whose rapaciousness international law should intervene. Rather than the state mediating between the interests of the individual and those of international society, this new scholarship posits “international community” and international law as mediating between the individual and the state. “International community” is portrayed as being more representative of the better interests of the individual than is the nation state, and international law, arrived at with or without the consent of the state, a truer protector of those interests than is state-based consent. And the legitimating basis for this law, we are told, is “natural justice.”¹⁴⁸ These claims are worth closer examination.

¹⁴⁵See *supra* at ____.

¹⁴⁶See generally MICHAEL R. FOWLER AND JULIE MARIE BUNCK, LAW, POWER AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY (1995).

¹⁴⁷I have addressed this issue elsewhere. See M. O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT’L L. 1069 (Summer 1999).

¹⁴⁸See, e.g., Dencho Georgiev, *Politics or Rule of Law: Legitimacy in International Law*, EURO. J OF INT’L LAW, Vol.4, No.1, Art.1, 6.

The intellectual denigration of the role of the state by Western legal scholars in the post-Cold War international order, of course, has not been without foundations in factual realities. If the new order symbolized anything, it was the triumph of Western practices and institutions, and their supporting ideologies, over the competing practices of communism and other statist and authoritarian ideologies. International developments in the late '80s and early '90s did not simply underline the collapse of political and economic institutions in hitherto communist societies, but also similar failures in Latin and Central America, South Asia, and Africa. It can hardly be disputed that, by the close of the '80s, the political and economic structures of the West – governance through elected legislatures, politically circumscribed bureaucracies, and more or less privately organized markets – had proved more resilient and adaptable to societal demands and pressures than had state-driven economies and governance by centralized political regimes. Moreover, the institutional failures of non-Western societies extended well beyond the political and economic spheres to embrace a sociological trend in such societies to reject the local in preference for things Western. Demonstrably, citizens of these non-Western societies seemed to prefer Western culture, including dress styles, music, movies, and even food over those customarily available to them. And, for them, travel to the West – for employment, education, or pleasure – were prized as expressions of progress. “Globalization” as the idea of an all-embracing world system of politics, economics and culture, framed by and within the West’s working institutions and structures became the banner of the new order.

This triumph of the West was frequently – and sometimes facilely – translated as the supremacy of Western liberalism’s core concept of the individual over the state. An unsurprising prescription by Western conservatives and libertarians was to unleash the individual from the harness of state control. The level of the unrestricted autonomy of the individual became yardsticks for evaluating the goodness of socio-economic and even political arrangements. The maximization of privately ordered relationships became ends in and of themselves.

Somewhat more surprisingly, this challenge to the position of the state as a legitimate interlocutor between and among individuals and groups also was mounted vigorously by those who ordinarily consider themselves as progressive liberals or as “communitarians.” To this latter group, the political despotism of “Third World governments,” their tolerance and perpetuation of the social patriarchy in the face of the accelerating emancipation of women from such strictures in the less statist West, and the incapacity of state-controlled economies to provide anywhere near the level of well-being and comfort available in the market-centered societies of the West undercut the value of the state as an organizing institution. This undermining of the state was completed by its inability to provide internal security or external defense; an inability repeatedly demonstrated by the collapse of the USSR (and its satellites), and the proliferation of civil and guerrilla warfare in Latin America, Asia, and Africa. What was the use of the state if its function was to repress individual initiative while failing to provide security? The functions of the state might as well be reassigned. Unlike conservatives and libertarians, however, liberals and communitarians could not simply dethrone the state and leave the individual to fend for herself. In place of the state, these progressives gravitated towards two amorphous and ill-defined institutions.

The first of these was “civil society.” The meaning of the term is as vacuous as its invocation is pervasive. It apparently applies to any collective body that is not sponsored by, or which does not purport to act on behalf of the state or its sub-units. Thus, the term just as readily

encompasses a giant transnational profit-motivated corporation such as Exxon-Mobil, as it does the local neighborhood school's Parents and Teachers Association. But it is this elasticity that renders the concept of "civil society" an entirely inadequate substitute for the idea and place of the state in international legal theory. The emergence and nurturing of "civil society" may well provide desirable (and even necessary) checks on a state's exercise of power, but this attribute cannot substitute for the affirmative exercise of authority that is inherent in the regulatory role of the state.¹⁴⁹ Nor can "civil society" meaningfully ever be expected to take on those affirmative roles. Its clients and interests will always be too functionally diffuse for it to generate any sort of coherent and plenary exercise of authority – or even guidance. And just as important, there will be no yardsticks against which to measure its performance and thereby hold it accountable to a diffuse community. Notwithstanding the polyphonous criticisms of the state, its finite physical boundaries and centuries of living experience have endowed it with reasonably stable and predictable obligations. Customers of the state – citizens and residents – can therefore define their expectations and make the state account for any shortcomings in the discharge of its duties. With regard to civil society, such accountability is, at best, rare.

Most progressives implicitly recognize these shortcomings of civil society. At core, civil societies rarely operate as anything other than as interest groups devoted to maximizing the welfare of their narrow memberships. This makes them sectarian, rather than communitarian institutions. Hence, many progressives who find the state a rather poor protector of the interests of its clients are nonetheless unwilling simply to assign such functions as the guarantee of security and liberty to "civil society." Such persons contend, rather, for the existence of an "international community."

But what is "international community?" Does the term symbolize anything more than a rhetorical flourish? In one sense, the aggregation of states that interact with each other and whose behaviors are guided and constrained by rules clearly constitute a "community," and one that is international. But in standard parlance today it is not usually this relationship among states that the term is intended to signify. Phrases such as "the community of states" or "international society" are more likely to be used in such contexts. The usage of the term "international community," today, is often employed either for the purpose of identifying – at the individual level – with other transnational members of the purported community or to dissociate a miscreant – usually a government or government official – from membership in the "community." In other words, at a subjective level, the term in its popular usage seems intended to embrace the transnational solidarity of the good and just, and the exclusion of evildoers. Westerners, automatically, are in. Others are admitted on a case by case basis. More neutrally framed, it can be said that the idea invokes an ethos of interactions among private parties that is underpinned by the regulatory intervention of a select group of governments; namely, those which are deemed to be accountable to their citizenry through popular participation. Membership is conferred and legitimated by the claim of the existence at a personal level of relationships among individuals who have equal capacity to determine the destiny of the globe regardless of their nationality or citizenship. Individuals are direct members of a global community, not derivatively so. This may well be a worthy aspiration, but is it descriptively accurate? And in what sense can one meaningfully speak of international law as the product of

¹⁴⁹See, e.g., L. Henkin, Lecture, That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera, in 68 FORDHAM. L. REV. 1 (1999).

this community? Or, is it that this community is the product of international law?

(a) *Defining a Community*

It is common place to speak of the protean character of the concept of community.¹⁵⁰ At one level, any aggregation of persons may be referred to as a “community.” Thus, a family; faculty, students, and staff associated with a university; members of a labor union; members of the Anglican Church; and, of course, the citizens of a country, unproblematically may be said to constitute communities. But even persons whose attachments are a good deal more reified, such as, for example, the general body of international lawyers, or even an entire group of legal scholars, judges, and legislators engaged in a joint enterprise such as the making, construction and enforcement of legislation, may be called a community.¹⁵¹

What is clear about the idea of a community is that it expresses a shared sense of belonging; that sense may arise in one of two ways or, perhaps more accurately, the combination of both. First, the sense may reflect the existence of affective ties. For example, members of a family share a sense of kinship that binds them together while separating them from others. The sense is not necessarily derived from any shared characteristics, whether physical, psychological, or, increasingly, even genetic. It embodies passion rather than logic, trust and belief over knowledge. At best, the shared sense of community in this setting is explained away in terms of vestigial mysticisms and primordial connections. It may have served some functional purpose in the past, but that is hardly a sufficient explanation for continuation – and indeed vibrancy – in the modern world. What is true of the family also probably explains such consanguineously based communal affiliations as tribal, ethnic, and in some cases, national communities.

The second type of a community is one that is built around functional needs. A university constitutes such a community. Similarly, corporate bodies, armies, and labor unions presumptively constitute communities. But it is not the case that any group that exists to discharge a function thereby becomes a community. Like an affective community, the members of a functional group must view themselves as having a special relationship towards each other, and which they do not share with outsiders. Again, that sense of solidarity and difference, even though generated and underwritten by the imperatives of reciprocal functional relationships, may be solidified by the demands of past necessities. For example, many religious communities may have come together for functional reasons, but the need to protect each other from external hostilities may have resulted in generating the sort of unquestioning bond of shared loyalty and exclusivity characteristic of affective affiliations. What is clear is that the strength of the bonds created in functional communities vary widely. Among other factors, one may expect that those bonds are shaped by the nature of the functions performed by the community, the intensity of the interactions among its members necessary to carry out those functions, the spread or exclusivity of the skills required of members, the barriers to acquisition of those skills, and the levels of

¹⁵⁰See, e.g., Mason, *supra* note __ at 26 (positing that “‘community’ in the ordinary sense involves four different elements, viz., sharing values, a way of life, identifying with the group and its practices, and recognizing each other as members of the group”). See also Alemante G. Selassie, *Ethnic Federalism: Its Promise and Pitfalls for Africa*, 28 YALE J. INT’L L. 51, 58 (2003) (distinguishing between two types of community: affective and political).

¹⁵¹See, e.g., Oscar Schachter, *Invisible College of International Lawyers*, 72 N.W. U.L. REV. 217 (1977); Detlev Vagts, *International Legal Profession: A Need for More Governance*, 90 AM. J. INT’L L. 250 (1996); STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980).

external pressures to which members of the group believe themselves subject to.

It is evident, then, that this most significant attribute of a community – solidarity of membership is shaped both by the internal dynamics of the group as well as by perceptions of threat from outside. Indeed, the two factors do not necessarily operate independently of each other. In particular, the internal dynamics of a community – especially, but by no means exclusively, of one constituted by affective ties – is often influenced greatly by the members' perceptions of threats from the outsider.

An international community of state members readily fits within the idea of a community defined in functional terms. As explained in Part I of this essay, although the functional purposes that have sustained that community have varied over time, the membership of Christian European societies has been a consistent feature of the community. The bonds of solidarity were forged in part in the crusades against Islam. But it was the post-1492 commercial ventures and the accompanying wars and necessities for dispute resolution principles that effectively demonstrated the shared commonalities of European civilization and their differences from non-European ones. The community, of course, expanded ultimately to include many of the latter, but as demonstrated in Part II, the rapid expansion of the community which took place shortly after World War II occurred at the cost of maintaining elements of the affective ties that are to be found, however weakly, even in functionally derived communities. The fraying of those bonds could be and were surmounted temporarily by the imperatives of winning allies in the intramural conflict of the Cold War. With the collapse of the Soviet Union, however, this necessity was dispensed with. The scrutiny of the bonds that held together the purported international community of states now could be and, as demonstrated earlier, was pursued vigorously. Shared values having been found wanting, the scrutinizers now faced the task of how to redefine the international community and, even more crucially, how to implement that redefinition. And it is in this context that international law has come to take on a central role.

As described in Parts I and II of this essay, the nature and politics of an international community of states have shaped international law. Scholars like Grotius, Vattel and Wheaton presented their views of international law within this context. But one of the seminal arguments of international law scholarship in the post-Cold War environment has been to articulate a new vision of international community; one that is virtually and exclusively created and shaped by international law.

B. Our International Community

The new international community is an academic construct. In its idealized form, it is the aggregation of humanity, interacting and relating to each other as individuals and groups with minimal intrusion from the state. On its face, the idea has plausibility because it is the product of a confluence of four significant events and trends. The first two are themselves direct products of the end of the Cold War, the later two would not have exerted the influence on our academic imagination that they have, but for the end of the Cold War.

In the first place, whatever else may be debated about the end of the Cold War (e.g. its cause(s)), there is no doubting that one of its profound consequences was to leave the West as the clear winner. NATO and the United States military had of course triumphed over the Warsaw

Pact and the Soviet Union; but even more profound than military success were the seemingly inevitable conclusions to be drawn about the superiority of Western socio-economic and political thoughts and institutions. There were a few cautionary voices,¹⁵² but the dominant perspective was triumphalist, and conveyed in such highly acclaimed works as Francis Fukuyama's "The End of History."¹⁵³ The linchpin of contemporary Western intellectual thought and the foundation of its institutions is, of course, the primacy of the individual. As one commentator amply demonstrates after an extended survey of relevant literature, it is a tenet of liberal thought that the community exists for the individual, not the individual for the community.¹⁵⁴ The sacred reverence in which concepts like "democracy" and "the market" are treated merely manifest this core principle of Western legal thought. And, as demonstrated earlier in this piece, influential international legal scholarship in the 1990s heavily deployed these animating concepts both to explain and to recommend emerging trends in international law such as the idea of the "democratic entitlement" and privatization.¹⁵⁵ The state was to be decentered.

Secondly, the collapse of the Soviet Union and of Communism had, as an important radiation, the termination of the use of the "Third World" as the theater for proxy fights between the East and the West. Of course, the underlying local causes of conflict within the Third World remained. Wars within and among these Third World groups and countries continued to be fought as brutishly as they had been in the past. The withdrawal of the Soviet Union from the field, however, made it possible for Western critics to be less reticent in their condemnations of these wars and the human sufferings that they brought about. Confident that the Third World belligerents would be no match for Western military might, many of these critics advocated Western intervention "on humanitarian grounds" to terminate these conflicts. Faced with well established principles of international law that explicitly forbade such intervention,¹⁵⁶ these proponents of neointerventionism advanced the doctrine of a single "international community," embracing the welfare of all as justification for such intervention. But for this argument to succeed, the Third World states had to be shown as being unfit to be clothed in that most quintessential of state attributes, sovereignty.

One approach was to show that Third World countries did not constitute "states" as properly understood.¹⁵⁷ This approach was helped along by the prevalence of Third World countries, which, denied of the external financial and military assistance with which their support had been bought by both the East and the West during the Cold War, rapidly disintegrated into feuding local fiefdoms. These so-called "failed states" – overwhelmingly found in Africa – seemed to bear out the claim that these were at best dysfunctional administrative units, but certainly not states as classically understood.¹⁵⁸ As failed states that were incapable of being entrusted with the prerogatives of sovereignty, these territories were best administered as wards

¹⁵²See, e.g., RONALD STEELE, *TEMPTATIONS OF A SUPERPOWER* (1995).

¹⁵³See Fukuyama, *supra* note __ and accompanying text.

¹⁵⁴See Jeanne Woods, *Justiciable Social Rights as a Critique of the Liberal*, 38 TEX. INT'L L.J. 763 (2003).

¹⁵⁵See *supra* __.

¹⁵⁶See Charter of the United Nations, Article 2(4).

¹⁵⁷See, e.g., ROBERT H. JACKSON, *QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD* (1996).

¹⁵⁸See, e.g., S.N. SANGNPAM, *PSEUDOCAPITALISM AND THE OVER-POLITICIZED STATE: RECONCILING POLITICS AND ANTHROPOLOGY IN ZAIRE* (1997). Compare KLITGAARD, *TROPICAL GANGSTERS: ONE MAN'S EXPERIENCE WITH DEVELOPMENT AND DECADENCE IN DEEPEST AFRICA* (1991).

of the United Nations.¹⁵⁹

An alternative approach was to question the meaning and scope of the idea of sovereignty.¹⁶⁰ This questioning generally proceeded on the basis of the entirely counterfactual supposition that those who argued in favor of the proposition that sovereignty is a shield against arbitrary external intervention thereby somehow viewed sovereignty as a plenary and unchanging concept. Having set up this strawman, its easy demolition was then seen as thereby delegitimizing any claim of freedom from external intervention.¹⁶¹ Arguments in favor of human rights were reflexively asserted as authorizing “humanitarian intervention,” and even “regime change” in support of “democratic governance.”

But perhaps the strongest arguments advanced in favor of an international community of persons were provided by the emergence of human rights as a top-tier concern of international law.¹⁶² The end of the Cold War certainly influenced the timing of and the manner in which these concerns were articulated, but the substance of the concerns were hardly the product of the Cold War or its termination.¹⁶³ On the other hand, many of the suggestions advanced for dealing with human rights violations in the post-Cold War era were products of the victorious ethos of the West. In particular, international human rights evangelists of the West began to see international human rights norms less and less in terms of their persuasive effect, and more and more as coercive clubs to be used to bludgeon the rest into conformity.¹⁶⁴ Demands for information, self-reporting, committee reviews, consultations, and exhortations which had been the hallmark of enforcement under the Cold War international human rights order¹⁶⁵ were increasingly replaced with the adversarial process of adjudication, frequently before a national tribunal.¹⁶⁶ This coercive imposition by Western jurists of their views of human rights on the rest of international society could be made palatable only by the insistence of these jurists that

¹⁵⁹For extensive review of these arguments, see Ruth E. Gordon, *Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti*, 31 TEX. INT'L L. J. 43 (1996); Ruth Gordon, *Some Problems with Trusteeship*, 28 CORNELL INT'L L. J. 301 (1995).

¹⁶⁰See, e.g., W. Michael Reisman, *Comment, Sovereignty, and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990). See generally MICHAEL R. FOWLER AND JULIE MARIE BUNCK, *LAW, POWER AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY* (1995).

¹⁶¹Proponents of “human rights are ‘universal’” are particularly prone to this form of argumentation. But it is the exceptionally mediocre intellect that argues for an absolutist view of sovereignty. Indeed, many scholars during the interwar years effectively demonstrated the absurdity of such a view. See, e.g., Dickinson, *supra* note ___. See also POLITIS, *THE NEW ASPECTS OF INTERNATIONAL LAW* (1928). But to suggest that sovereignty is not an absolute bar to external inspection and criticism of the practices of a state, however, is not tantamount to arguing that sovereignty is no shield against certain forms of coercive intervention in the politics and policies of a society. The genuine disagreement around which perfectly reasonable and humanistic minds can differ revolves around when (not if) such intervention is appropriate.

¹⁶²See, e.g., Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U.L. REV. 1 (1982). Post-1980 articles about international human rights are so numerous that entire library buildings can be dedicated to them. I do not intend in this article to parse those writings. My focus is on the weltanschauung that they represent.

¹⁶³See *supra* at ___.

¹⁶⁴See Makua Wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (1996); see also, MAKUA WA MUTUA, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE* (2002).

¹⁶⁵See, e.g., The International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966), arts. 28-42.

¹⁶⁶See, e.g., *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996). See also Belgian 1993 law (as amended). See generally M. O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069 (Summer 1999).

they were acting not as neocolonialists engaged in a new mission civilisatrice, but as the enforcers, on behalf of *all of humanity*, of universally recognized and accepted obligations.¹⁶⁷ Fully recognizing that the legitimacy of laws can only be judged in terms of the values of a community, these jurists attempted to support this exercise of power by insisting that all of humanity formed a single community. Although national legislatures created these courts and gave them their marching orders, the jurists would have us believe that they were nonetheless acting on behalf of the international community, not their national systems.¹⁶⁸

The fourth event that has contributed and lent the aura of plausibility to the idea of an international community of peoples is the revolution in the technology of communications that semiconductors, integrated circuits, and orbiting satellites have made possible. The ability to transmit information at a given time from virtually any spot on the globe and to have that information more or less instantaneously received by the intended audience has seemed to transform the world into an unmysterious open book. The interactions of the television, video cameras, satellite telephones, the internet and e-mail have, since the 1990s, given persons in the West the capacity to observe in real time persons and events occurring quite some distance away, and seemingly to bring home to the observer the immediacy for action in response to these events. The result is that these “remote” events are rarely seen as historical alien tragedies to be mulled, puzzled over, helplessly regretted then dismissed in drawing-room or parlor conversations, but rather as the tragedies of the here and now about which Western political leaders must “do something.” And the failure to act, far from suggesting incapacity, only intensified the illusion that but for the failure, the tragedy could have been averted or at least mitigated.¹⁶⁹ These new technologies fostered the notion that observation is tantamount to understanding, and that knowledge is the power to do something about the observed evil.

The 1990s provided numerous settings for the playing out of the consequences of the mindsets generated by the four factors just discussed. It is by no means certain that the 1990s were any bloodier or more brutish than any of the preceding decades of the 20th century. While tragedies like those in Rwanda, the Balkans, Afghanistan and Chechnya – not to speak of the somewhat less publicized but frequently no less gruesome events in a good part of the rest of Africa (Algeria, Burundi, the Democratic Republic of the Congo, Liberia, Sierra Leone and Sudan, to give the most conspicuous examples) – clearly stretched the bounds of mankind’s inhumanities towards each other, equally tragic parallels can be found for each of these in the preceding decades. To speak of Argentina, Biafra, Bangladesh, Beirut, Cambodia, Chile, Cyprus, El Salvador, Guatemala, Hungary, Indonesia, Viet Nam, the Gulag, the Great Leap Forward and the Holocaust, is to suggest some examples, and to which many others may be added. One may fairly ask, therefore, whether we ought not be applauding and encouraging the 1990s mindset that sought to transform the problems of the other into that of a single international community. And, indeed, if in fact the effects of the end of the Cold War, the

¹⁶⁷ See *Filartiga*, 630 F.2d at 890. “Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.”

¹⁶⁸ Cf. Judge Bork’s concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774, 799 (D.C. Cir. 1984); See also *Ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147 (H.L. U.K. 1998).

¹⁶⁹ SAMANTHA POWER, *A PROBLEM FROM HELL: UNITED STATES FOREIGN POLICY IN THE AGE OF GENOCIDE* (2002) (and its reception in the West) fairly captures the power and popularity of this belief.

West's unquestioned dominance, its proselytization of human rights, and the uses of its preeminent technological advantages were to create an international community. But, as I shall show below, it is one thing for academic scholarship to hypothesize the existence of an international community, and quite another for policy-makers and the population at large to live it. And beyond such a disconnect, I shall argue, this disconnect between theory and reality is itself harmful to the maintenance of a just legal order.

D. *Humanitarian Hegemony As International Order*

One last abstraction about the idea of a community needs to be stated. It is that a community defines itself. It does not exist merely because outsiders say so, but because the members of the community see themselves as sharing bonds with each other. Nor is it a sufficient basis for the existence of a community that one believes oneself to be a member of a community. What counts is whether the "community" recognizes and accepts the belief. The manner in which the community – after all an incorporeal entity – manifests that assent varies. For example, no one doubts that the issuance of a passport (or a national identity card) by a nation-state is dispositive of citizenship, and this is so regardless of the preference of some or even most citizens of the state. By contrast, while a birth certificate is presumptive of membership in a family, the actual belief of the other members of the family is, for most purposes, dispositive. In the latter situation, the "community of the family" is virtually indistinguishable from the aggregation of the members of the family. It is true that in some instances, the family as a unit may be treated differently by the outsider (e.g. the state) than the family as a community. In the case of the nation state, however, the "community" is essentially indistinguishable from the unit. The unit, in this situation, takes on an existence that is separate from its members. In either case, however, it remains entirely within the purview of the members to decide. But the decision may be unconsciously arrived at.¹⁷⁰ Whether a community views someone as a member, or as an outsider, therefore must be assessed by examining the various ways in which assent can be manifested. This entails the exploration of both the use of expressive language and of conduct.

It has been the starting thesis of this essay that the core of the international order across centuries has been shaped by the regulatory imperatives of intercourse among Western societies. The resulting interactions have shaped a conforming belief system in the West, both among countries and their general populace. In the process, these societies have in fact come to constitute a recognizable international community.¹⁷¹ The problematic question that the essay has sought to address explicitly in this Part is whether this community has in fact extended beyond Western societies to embrace, not only non-Western nation states, but the peoples of those states as well. The claim for this latter point has come to the fore only in the last decade or so, and it has been grounded on the purported universality of the liberal ideals of democratic governance and the inviolability of human rights. Yet, it is one of the paradoxes of this claim of universality that Western societies have sought to convince nonbelievers of the legitimacy of these ideals by focusing on the differences between Western and non-Western societies, and the extent to which Western international preeminence is attributable to the superiority of these ideals. As what follows will demonstrate, we find again and again a conflict in Western thought

¹⁷⁰ Compare Charles R. Lawrence III, *The Id, the Ego, and Equal Protection. Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

¹⁷¹ See *supra* at ____.

and practice between the assertion of the existence of an international community grounded on affective ideals, and the use of these ideals as a utilitarian weapon to advance the supremacy of the West over others.

Language has always played a significant role in distinguishing between those who belong and those who do not. The terms “barbarian” “savage” and “uncivilized” have been used normatively to depict, over time and cultures, the demarcation between insiders and others. The hesitation with which these terms were deployed in the post-World War II generation that preceded the neoconservative world order,¹⁷² when contrasted with their resuscitation in the political discourse of the 1980s and 1990s,¹⁷³ illustrates the point.

The environment in the former period was characterized by an inclusive ethos in which the principle of self-determination was the driving force for the creation of an international community of nation states. In our contemporary period, the tendency is to emphasize the differences between the presumptively successfully -- because they're inherently good -- Western institutions and societies on the one hand, and, on the other hand, the systematic failures that are the other. Thus, in the wake of the collapse of a bipolar world order, it has become fashionable, then, to substitute any serious analysis or engagement with those other societies with the facile act of name-calling. The governments of non-Western societies with whose policies we disagree are thus dismissively referred to as “regimes.” Their leaders are routinely referred to as “thugs.” The societies themselves are referred to as “rogue” or “pariah” states. Rather than “collaborative interdependence,” the object has become hegemonic “globalization.” The propriety of replacing the governments of non-Western societies is now debated less on deontological grounds and more in terms of the ease and convenience with which it can be accomplished.

And all of this is justified by reference to the twin concepts of the promotion of democratic rule and the protection of human rights. And the zeal with which these ideas are trumpeted and justified are hardly any less messianic than the “civilizing” ventures of the nineteenth and early twentieth centuries. Of course, many academics and “human rights activists” (but by no means the general population or even their governments) purportedly distinguish between “regimes” and “dictators” on the one hand, and “the people” on the other, but the line between the denunciation of a government and the demeaning of an entire society can and has become quite thin. Recent events demonstrate the fragility of any such line-drawing and, in any event, any such theoretical distinction is belied by actual governmental policies and, of course, their reception by the general public.

Consider, as examples, the responses Western governments and societies have given to the terror attacks on the United States allegedly organized under the auspices of Al Qaeda. These

¹⁷² For a discussion of this era and its animating principles, *see supra* at ____.

¹⁷³ As President Bush has pointedly and repeatedly stated, in the “war” between “civilized” America and “terrorists,” “you are with us or you’re for them”. There is simply no space for being an observer. *See* Bush Address, *supra* note 2. *See also*, among others, State of the Union Address (Jan. 29, 2002), Graduation Address at West Point (June 1, 2002), Address to the 57th Session of the United Nations General Assembly (Sept. 12, 2002), Address to the Nation (Sept. 7, 2003), all available at <http://www.whitehouse.gov>. Cf., David P. Fidler, *Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law*, available at: <http://www.chinesejil.org/fidler.pdf> (presenting an intellectually elegant explanation of why it is impossible to sit on the fence).

responses, admittedly driven by fear, and perhaps therefore somewhat exaggerated, nonetheless expose – or at least bring to the surface – tendencies that are inherent in the forging of a community which, among other things, entails the identification of and separation from the other. Indeed, the similarities between the West's response and those acts of non-Western societies that ordinarily it condemns, reveal the poverty of the claimed linkages between idealized governance mechanisms and the protection of human rights.

In the first place, the coalescing of empathy for the victims of the September 11, 2001 attacks was genuinely communal. *Le Monde* accurately reflected the sentiments of virtually all Westerners when it stated that “we are all Americans.”¹⁷⁴ This sense of shared solidarity was reinforced when the North Atlantic Treaty Organization, the quintessential institution of Western international integration, invoked for the very first time Article 5 of its charter, declaring that the terror attack on the United States constituted an attack on all of its members.¹⁷⁵ Furthermore, these declarations were backed up by affirmative governmental actions. The Financial Accounting Task Force, an agency of the Organization for Economic Co-Operation and Development, which, hitherto, had proved impotent in tracking-down the laundering by Western banks of the proceeds of corruption from developing societies, became an effective fighting force against the use of financial institutions in any way to facilitate the perpetration of any “terrorist” acts against the West. Thus, transactions with only the slightest of incidental connections to terrorism were outlawed without regard to their effects – however massive – on non-Western societies. Overnight, lawful institutions on which non-Westerners had depended such as the “al barakat bank”¹⁷⁶ and the “Hawala” banking system¹⁷⁷ were rendered internationally illegitimate. The costs, however concrete and substantial, thereby imposed on displaced and governmentally unrepresented population groups such as Somalis or Palestinians apparently are automatically outweighed by any potential reduction – however minuscule and speculative – in terrorist activity that may flow from these policies.¹⁷⁸

Secondly, the antiterrorism crusade has accelerated and accentuated latent tendencies that increasingly have seen the imposition of disabilities on non-Westerners within Western societies. Indeed, one of the paradoxes of the last decade is that the vociferous criticism in the West of human rights violations in the non-West was paralleled by increasing differentiation in the West of the treatment among nationals and non-nationals.¹⁷⁹ Apparently the relevant human rights

¹⁷⁴ “*Nous sommes tous Américains*” wrote Jean-Marie Colombani in *LE MONDE*, Sept. 12, 2001.

¹⁷⁵ See the Charter of the North Atlantic Treaty Organization, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243, available at <<http://www.nato.int/docu/basic/txt/treaty.htm>> (last visited Feb. 11, 2004).

¹⁷⁶ See Comprehensive List of Terrorists and Groups Identified under Executive Order 13224, available at: <http://www.state.gov/s/ct/rls/fs/2001/6531.htm> (last visited Feb. 11, 2004). See also *Authorities in at Least Nine Nations Hold Raid, Seize Assets*, *THE WALL STREET JOURNAL*, Nov. 8, 2001.

¹⁷⁷ In keeping with the international system's penchant, in matters of “the other,” to shoot first and ask questions later, institutions such as the World Bank and the IMF are now conducting inquiries into the functioning of these non-Western financial institutions. See, e.g., *The World Bank and the International Monetary Fund, Informal Funds Transfer Systems: An Analysis of the Informal Hawala System* (March 21, 2003).

¹⁷⁸ See, e.g., *Shutdown of al-Barakaat Severs Lifeline for Many Somalia Restaurants*, *THE WALL STREET JOURNAL*, Dec. 4, 2001; *Informal Money Movement System in UAE is Likely Uncontrollable*, *THE WALL STREET JOURNAL*, Nov. 12, 2001; *Leaders of the Somali Factions Call on Washington to Release al-Barakat Bank Assets*, *ARABIC NEWS*, November 12, 2002.

¹⁷⁹ See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104-208, Div.C., 110 Stat. 3009-546 (1996). See generally PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION*

yardstick is not whether a government is repressive of the rights of those subject to its powers, but only whether a government oppresses “its own people.” In any event, whatever lingering constraints Western societies felt in the imposition of burdens on non-nationals have been swept away by the fact that the perpetrators of the Sept. 11 attacks on the United States were demonstrably foreign.¹⁸⁰ They were nationals of the “other” in the sense that that word has had a meaning to Western civilization since at least the eleventh Century.

The state, more explicitly than most communities, outwardly regulates access to membership through the concept of citizenship. International law says virtually nothing about a “right” of access to citizenship, and only slightly more about the right to opt out of it.¹⁸¹ International law, however, has always been concerned with how strangers are treated within a national community.¹⁸² Although in principle a foreigner is entitled to no rights other than those a host state, as a matter of grace chooses to confer, increasingly, the principle of “national treatment,” under which a foreigner receives treatment that is, in identified spheres, the equivalent of that accorded nationals, has become reasonably well established in state practice. The genealogy of this development is instructive.

Until the last decades of the nineteenth century, the sole check on the arbitrary treatment of a foreign national was the intervention of the foreigner’s home government. This intervention might be based on the existence of a bilateral treaty, or more likely under the accepted customary international law norm that an attribute of nationality was the right of a state to intercede on behalf of the national with foreign states. Whatever the ground, such intervention was entirely discretionary, and therefore episodic. Moreover, the process was often capricious, ranging from the use of unofficial channels to diplomatic representations or even the application of military force. By the 1890s, however, and as Europe became unapologetic about colonial domination and the doctrine of “manifest destiny” in the United States was transferred across the seas, these Western governments insisted on explicit legal protections for their citizens sojourning in foreign territories. The quintessential legal instrument was the “capitulations” system which, by treaty, required nominally independent African and Asian societies to accord to European and U.S. nationals residing in their territories privileged access to judicial tribunals.¹⁸³ This system, which resulted in the foreigner receiving treatment much more favorable than that available to the local citizen, could not survive the merging norms of self-determination and the juristic equality of states that followed the formation of the League of Nations.

The denunciation of the system by China and Turkey following World War I, the conscious policies of the Franklin Roosevelt Administration to dissociate the United States in its

DISASTER (1996). For a while, the “economic boom” of the late 1990s stilled the xenophobia embodied in these legislations, but suspicion of the foreigner has returned with the September 11 2001 terror attacks on the World Trade Center and the Pentagon.

¹⁸⁰ See generally DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR AGAINST TERRORISM* (2003).

¹⁸¹ See, e.g., RUTH DONNER, *THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW*, at XV, 17 (2d ed., 1994.)

¹⁸² See *supra* at __ and accompanying text (discussing the views of Vittoria and Grotius.) See also GEORGE CAVALLAR, *THEORIES OF INTERNATIONAL HOSPITALITY: THE GLOBAL COMMUNITY AND POLITICAL JUSTICE SINCE VITORIA* (2002).

¹⁸³ See Fidler, *A Kinder, Gentler System of Capitulations?*, *supra* note __.

foreign policies from the colonial temperament of Europe,¹⁸⁴ and the triumph of “liberal internationalism” following World War II, assured that the capitulations system was effectively delegitimized before the first-half of the twentieth century had run its course. In its place the so-called “Friendship, Commerce, and Navigation” (or “Amity”) treaties undertook to guarantee on reciprocal bilateral bases national treatment for the foreign national in specifically identified areas.¹⁸⁵ These treaties, driven primarily by the desire to protect the private economic interests of nationals emphasized, naturally enough, fair and equitable access to the judicial processes of the host country.¹⁸⁶

Not surprisingly, then, in the post-World War II, post-colonial world, and under both conventional and customary international law, the principle of “national treatment” has become a well established doctrine.¹⁸⁷ At the core of the doctrine is that a foreign national is entitled to treatment that is no less favorable than that accorded nationals. And nowhere is the principle more deserving of application than with regard to the extension of legal process to those charged with legal violations by a government.¹⁸⁸ Indeed, so apparently axiomatic is this nondiscrimination principle that human rights laws ordinarily do not bother to distinguish among sources of nationality in their statements of the obligations that governments owe to persons subject to their jurisdiction.¹⁸⁹

Yet a common phenomenon in the so-called “war” on terrorism has been to subject foreigners to significantly disparate procedural disabilities from those to which nationals similarly situated would be subjected. Thus, it has become customary practice in the United States (although by no means exclusively so)¹⁹⁰ to subject foreign nationals to secret, arbitrary,

¹⁸⁴ See, e.g., Treaty of Friendship, Commerce and Navigation, United States and Liberia, 54 Stat. 1739 (Aug. 8, 1938).

¹⁸⁵ See, e.g., Treaty of Amity, Economic relations and Consular rights U.S.-Iran, Aug. 15, 1955 8 U.S.T. 899; Treaty of Friendship, commerce and Navigation, U.S. and Pakistan, 12 U.S.T. 110, T.I.A.S. 4683, 404 U.N.T.S. 259 (1959).

¹⁸⁶ See, e.g., *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64 (2d Cir. 2003).

¹⁸⁷ See generally World Bank Guidelines on the Treatment of Foreign direct Investment, at III(3) (1992), *reprinted* at 31 ILM 1379 (1992).

¹⁸⁸ “Denial of justice” by limiting the access of aliens to the judicial tribunals of a country is generally acknowledged to constitute a violation of international legal norms. See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 783 (D.C.Cir. 1984) (“Under the law of nations, states are obliged to make civil courts of justice accessible for claims of foreign subjects against individuals within the state’s territory.”) (citations omitted). Compare *Case Concerning Elettronica Sicula S.p.A. (ELST)* (U.S. v. Italy) 1989 I.C.J. 15, par. 128 (defining arbitrariness constituting denial of justice as a “willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety”).

¹⁸⁹ The International Covenant on Civil and Political rights is stereotypical. Article 2.1 of the Covenant states: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” In this, it was reaffirming what the Universal Declaration of Human Rights had eloquently stated: “no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.” And, of course, the view that a government’s obligation to protect an individual’s human rights flows from personal rather than national dignity has rich Western pedigree. It is to be found both in the American “Bill of Rights” which guarantees those rights to “persons” (not “citizens”) and in the French declaration on the “rights of man,” not of “French citizens.”

¹⁹⁰ Approaches taken by other Western societies have been less dramatic. Nonetheless, in the name of the war against terrorism, many of them have revamped domestic legislation so that the foreigner can now be detained without judicial intervention for durations that, when used by the USSR, were uniformly condemned as totalitarian.

and indefinite detention.¹⁹¹ The right to the assistance of counsel has been greatly curtailed, and indeed in the context of so-called “enemy combatants,” the government has argued with mixed success the complete elimination of any right to counsel.¹⁹²

But the deck has been stacked even higher against implying a state’s obligation to provide equal and fair access to judicial process for the foreigner. The use of presidentially decreed and wholly controlled “military tribunals” to process secretly proffered charges against secretly identified persons rightly has generated a good deal of discussion and criticism.¹⁹³ But even where perversion of process is not so blatant, it takes a naïve suspension of disbelief to fail to recognize that much of the Western justice system today proceeds in no insubstantial measure by assigning guilt as much on the basis of mere national association as of actual conduct.¹⁹⁴ And most unhappily, it is no longer possible to deny the sanctioning and use of “extrajudicial killings” as official government policy.¹⁹⁵ And, indeed, the current President of the United States apparently views such extrajudicial killings as “American justice.”¹⁹⁶ And, as yet unresolved –

The United Kingdom, for example, under its “antiterrorism” Act, now permits the indefinite detention of foreigners without judicial intervention. See, e.g., *Scrap Anti-Terror Detention Law*, BBC NEWS (Dec. 18, 2003), available at http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk_politics/3330221.stm. Moreover, this power has been used extensively by the U.K.’s “Special Branch.” See, e.g., John Upton, “In the Streets of Londonistan,” LONDON REVIEW OF BOOKS (Jan. 22, 2004) (stating that 529 persons have been arrested under Britain’s Anti-Terror legislation, of whom only 81 were charged with violations of law, and 16 foreigners under its indefinite detention provision).

¹⁹¹ Consider the detentions of so-called “unlawful combatants” by the United States on Guantanamo Bay. Here, over six hundred persons have been detained for more than two years, and United States courts have upheld those detentions in part on the ground that the detainees are not United States citizens. See, e.g., *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), cert. granted, 2003 WL 22070725 (2003); but see *Gherebi v. Bush*, 2003 WL 22971053 (9th Cir. 2003) (holding that foreigners detained at Guantanamo Bay are entitled to challenge their indefinite detention by filing for a writ of habeas corpus in a United States court). Cf. *Demore v. Kim*, 123 S.Ct. 1708 (2003). Notably, in justifying the permissibility of the indefinite detention (and without the opportunity to be released on bond) of a foreign national who had otherwise spent all but his entire life in the United States, the Chief Justice of the country’s Supreme Court asserted that the Court had previously found acceptable the imposition on foreigners of disabilities that would be unacceptable if applied to citizens. Of course, the “national treatment” concept has always recognized that one state may condition how it treats the nationals of another state on the basis of reciprocity. See, e.g., *Hilton v. Guyot*, 159 U.S. 116 (1895); *Ferreiro v. United States*, 2003 WL 22862350 (Fed. Cir. 2003).

¹⁹² See, e.g., *Hamdi v. Rumsfeld*, 316 F.3d 450, reh’g and reh’g (en banc) denied, 337 F.3d 335 (4th cir. 2003). Compare *Padilla ex rel. Newman v. Bush*, 233 F.Supp.2d 564 (S.D.N.Y. 2002) (holding that a United States citizen may be detained as “an enemy combatant,” but that the citizen is entitled to consult with lawyer); *aff’d* in part and reversed in part, *sub nom Padilla v. Rumsfeld*, 2003 WL 22965085 (2d Cir. 2003) (holding that a United States citizen may be indefinitely detained as an “enemy combatant” only with the expressed authorization of Congress, and that no such authorization has yet been given).

¹⁹³ See, e.g., DAVID COLE, *ENEMY ALIENS*, *supra* note ___. See also, DAVID COLE AND JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* (2002).

¹⁹⁴ See, e.g., Dexter Filkins, *Tough New Tactics by U.S. Tighten Grip on Iraq Towns*, N.Y. TIMES (Dec. 7, 2003) (describing the wholesale “wrapping” of towns in barbed wire, the detention of otherwise innocent family members and friends to coerce surrender and the bombing of buildings suspected as being used by guerrillas without reference to the casualty inflicted on innocent bystanders).

¹⁹⁵ See, e.g., John McWethy, *Predator Drone Kills Six Al Qaeda Suspects*, ABC NEWS, November 5, 2003, available at <<http://abcnews.go.com/sections/wnt/DailyNews/yemen021105.html>>. See also, Thomas C. Wingfield, *Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine*, 22 MD. J. INT’L L. & TRADE 287 (Fall 1998 – Winter 1999).

¹⁹⁶ See, e.g., *Bush: Osama, Saddam Will be Caught*, CBS/AP NEWS, June 24, 2003. See also, David Johnston and David Sanger, *Yemen Killing Based on Rules Set Out by Bush*, THE NEW YORK TIMES, Nov. 6, 2002; James Risen and David Johnston, *Bush Has Widened Authority of CIA to Kill Terrorists*, THE NEW YORK TIMES, Dec. 15, 2002;

because the subject is shrouded in impenetrable secrecy and double-talk by government officials – is the accuracy of persistent reports that some countries, notably the United States, either surreptitiously use torture or hand over their alien detainees to persons or governments likely to use torture in obtaining information from the detainees.¹⁹⁷

One can, of course, draw distinctions between these policies and the pervasive violations of human rights for which “Third World dictators” have justly been criticized. It can, for example, be argued that these are “temporary derogations” essential to the survival of the community.¹⁹⁸ Further, it might be pointed out that many of these measures have been subjected to criticism by human rights activists in the West.¹⁹⁹ But these observations do not go to the point that I seek to make here: namely, that even in this age of advanced international community building, discrimination against the other, even with regard to the most basic of values – fair process – remains an important tool of social cohesion. And there is little evidence that the use of this tool is checked by democratic processes. Indeed, when we combine those processes with the impulse and drive for personal success that is integral to Western liberalism, it may be that the incentive is in fact to “externalize” the costs of community building. The capacity to do so effectively -- while maintaining a front of impartiality or shared costs -- is itself, of course, one measure of the power of the West. And it is a power that after 1990 has been used with increasing frequency. Whether “international law” can in fact act effectively to regulate the apportionment for costs within international society is, therefore, the last set of issues that I shall take up in this essay.

V. PAST IMPERFECTS, PRESENT CONDITIONALS, AND FUTURE SUBJUNCTIVES

A persistent theme of this essay has been that international law, like all law, regulates behavior within the community. It is therefore possible to understand the boundaries of a community by inquiring into the scope of the conduct under regulation. Grotian international law, for example, operated within a community of seafaring European states.²⁰⁰ Even when that law purported to regulate interactions with non-Europeans, it did so in the context of

\$25M Reward for Saddam, Dead or Alive, CBC NEWS, July 3, 2003, available at http://www.cbc.ca/stories/2003/07/03/saddam_bounty030703 (last visited Feb. 12, 2004). More accurately, Mr. Bush should have referred to this policy as one of “American frontier justice.” Indeed, it is difficult to resist the conclusion that current United States policy-makers do not believe in the existence of any constraints, legal or moral, in the means that the country employs to fight its wars. Thus, it is apparently acceptable policy to kidnap and hold as hostages the wife, daughter, and elderly relatives of an Iraqi military officer and an Iraqi insurgent in order to compel their surrender to U.S. occupation officials. See Thomas E. Ricks, *U.S. Adopts Aggressive Tactics on Iraqi Fighters*, WASHINGTON POST, July 28, 2003, at A1. For a penetrating examination of the terminological, moral and legal confusions that have become systemic in the current deployment of terms like justice, punishment and war, see GEORGE P. FLETCHER, ROMANTICS AT WAR (2003).

¹⁹⁷ See, e.g., WASHINGTON POST, Dec. 26, 2002; THE ECONOMIST, Jan. 9, 2003. Compare ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002) (arguing that since torture *inevitably* will be used by U.S. Government officials, it is preferable to put such use under regulation rather than to continue to pretend that its generalized outlawry works).

¹⁹⁸ See, e.g., ICCPR, Art. 4.1.

¹⁹⁹ See, e.g., David Cole, ALIEN ENEMY, *supra* note ___. The Center for Constitutional Rights, for example, has spearheaded the attack on the arbitrary and indefinite detention of non-U.S. citizens on Guantanamo Bay. See, e.g., *Rasul v. Bush*, 215 F. Supp.2d 55 (D.D.C. 2002), *aff’d sub nom*, *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir.), *cert. granted*, 2003 WL 22070725 (2003).

²⁰⁰ See *supra* at ___.

competition among Europeans *vis-à-vis* each other. How the Dutch should behave toward the princes of Batavia was relevant not for its own sake, but only because it provided a measure for regulating how the Portuguese should do so. Just how Javans should relate to Goans was outside the scope of these rules.²⁰¹ In time, of course, the relevant international community came to embrace not only the European world, but the nation states of the non-Western world as well.²⁰² The distinctive contribution of the 1990s, this essay has tried to demonstrate, is that there exists an international community which transcends nation states as actors to embrace the peoples of those states. This contention, the essay has shown, is undercut by the actual practice of states. And yet it is the case that state practice notwithstanding, modern technologies have made it more likely for the average individual to be a participant in the affairs of international society than was ever the case previously. But the existence of capacity is not tantamount to its utilization. Moreover, the nature of the uses to which the technologies are put surely are relevant considerations as well. For example, do the participants employ the technologies primarily to communicate solidarity, or to further differentiate themselves from others? And there remains the extent to which international law suffuses the role played by individuals in the shaping of international society.

A. Of Circuits, Networks, and Communities

The relevance of technology to community formation may be considered at three levels. First, central to the role of technology in shaping a community is its capacity to facilitate communication among persons. Such communication technologies can act both to create and to cement social norms and values. The effectiveness of a technology in thus expanding the horizons of interpersonal communications clearly has a direct bearing on the expanse of a community. It is perhaps therefore not surprising that the emergence of a European-wide culture in the second-half of the fifteenth century parallels the emergence and widespread adoption of the printing press. This technology both strengthened the shared European embrace of Christianity, and fostered creative challenges to the existing orthodoxy in the form of the protestant reformation movement. That European Christians rather than Moslem Arabs became heirs to Greek thought – including “democracy” – probably owes less to any intrinsic affinities between Roman Catholicism and Stoicism, on the one hand, and Islam and hedonism or skepticism on the other, than it does to the greater capacity of Christian Europe to disseminate the works of Aquinas and Wycliffe, made possible by the availability of the printing press.

The technologies of transportation have also played significant roles in the configuring of communities. A mobile culture is a good deal more effective in communicating its views to strangers and learning from those cultures. The traveler of course imparts knowledge, but perhaps even more consequentially, the traveler imbibes the knowledge of her hosts, and then acts as a transmission belt for that knowledge. As suggested early in this essay, that European ideas came to shape international law is attributable in part to Europe’s mastery of the nautical technologies that permitted Christian Europe to establish its unchallenged presence in the Americas and to bypass much of the Moslem World -- and especially the Ottoman empire -- in establishing direct contacts with Africa and Asia.²⁰³ The role of European travelers in spreading knowledge to and from distant lands is well documented. But no less consequentially, Europe’s

²⁰¹ See *supra* at ____.

²⁰² See *supra*, Part III.

²⁰³ See *supra* at ____.

superior maritime technology also permitted it to control not only the terms of exchange of knowledge, but just as importantly, the flow of material resources between and among these cultures. As many historians and social scientists have amply demonstrated, this control, more than virtually any other factor, explains the ascendancy of European civilization over others in modern times.²⁰⁴

Finally, the third set of technologies that have been crucial in forging (and, therefore, also in separating) communities is that of weaponry. Warfare has been essential in shaping communities. Technological developments in the weapons used in warfare have determined the organization of the war waging forces, their mobility, strategies, tactics, and occupation policies. The internecine wars among European societies during the middle ages clearly gave these societies a strong incentive to develop the technologies of weaponry and, by the beginning of the nineteenth century, Europe was clearly without rival in its mastery of the technologies of warfare. European communities were able to project power across the seas, and to maintain effective fighting and occupation forces quite some distance from their home territories.

These three sets of technologies were reinforcing. A communication technology such as the telegraph also served crucial roles in the military sphere. Similarly, steam and jet engine technologies have been equally important in military as in the general transportation arenas. And, of course, there is no bright line between communication and transportation for not only can these function as substitutes, but they have a synergistic relationship. Easier transportation facilitates communication, and communication creates demand for transportation.

These observations are relevant for understanding the nature of the “international community” that purportedly emerged in the 1990s. Developments in technology seemed to give a sense of realism to yearnings that, in the prior three decades, had essentially been dismissed as utopian.²⁰⁵

The seminal technological development of our generation has been the mass deployment of the integrated circuit or semiconductor chip.²⁰⁶ Central to the arguments of claimed formation of an international community have been the effects of this ubiquitous deployment in such seemingly disparate arenas as geosynchronous orbiting satellites, guidance systems – military and civilian – mobile telephones, computer systems, and computer networks. The integrated circuit technology is unquestionably one of a handful of genuinely revolutionary discoveries, but even more crucially is the “paradigm-shift” that its mass deployment has generated.

The most obvious ways in which the new technologies of the semiconductor chip have seemingly contributed to the creation and shaping of an international community are in their

²⁰⁴ See, e.g., ANDRE GUNDER FRANK, *CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA* (1967). But see DAVID LANDES, *THE UNBOUND PROMETHEUS: TECHNOLOGICAL CHANGE AND INDUSTRIAL DEVELOPMENT IN EUROPE FROM 1750 TO THE PRESENT* (1969) (explaining Europe’s ascendancy in terms of its internally generated knowledge rather than exploitation of externally generated wealth). These positions are not mutually exclusive although they clearly differ substantially about the placement of emphasis.

²⁰⁵ For a discussion of the progress of academic thought on this issue, see F. PARKINSON, *THE PHILOSOPHY OF INTERNATIONAL RELATIONS* 155-184 (1977).

²⁰⁶ For a lively account of the genesis of this now ubiquitous technology, see MICHAEL RIORDAN AND LILLIAN HODDESSON, *CRYSTAL FIRE: THE INVENTION OF THE TRANSISTOR AND THE ORIGINS OF THE INFORMATION AGE* (1998).

communication effects. First, and perhaps foremost, these technologies permit near instantaneous communication across the globe. Taken singly and collectively, the internet, the mobile telephone, and satellite broadcasting have shrunk both space and time among the peoples of the world. Secondly, the relative affordability of these technologies to the so-called “ordinary person” – both in the West and a good part of the rest of the globe – makes each such ordinary person a potential participant in the interactive society that these technologies permit. They therefore effectively serve as substitutes for the role that transportation played in prior times, and do so for a much greater portion of the population than the latter ever did. Travel seemingly is no longer necessary in order to observe the locals in their natural habitats, nor does the common person need to rely exclusively on the mediated retelling of stories by adventurers to gain insight into foreign behavior. The ordinary person is thereby equipped with relevant information which he and she can effectively interpret and act on. Because she is able to make judgments for herself based on first-hand information, she can create a genuine relationship with foreign societies that, among other things, legitimate her interference in the affairs of those societies.

But these beliefs would remain essentially that, beliefs, except for the impact of the new technologies on the third aspect of community-building, namely, the use of force. Semiconductor technology has changed radically the projection of force. Embedded in guidance systems, it has made possible the capacity to hit one’s opponent from quite some distance and without having to put oneself directly at risk. The use by the United States of tomahawk cruise missiles against societies such as the Sudan and Afghanistan typifies this new mode of projecting force. The approach is also found in the tactics of warfare adopted by NATO in Kosovo. Rather than face-to-face combat, the tactic requires the launching of missiles some distance from their targets. The “hit” is captured in video, and is observed in real time but from a safe distance by the launcher.

This postmodern projection of force therefore entails several asymmetries, all of which are effectively disguised by the illusion of direct participation both on the part of the launcher combatant and by the civilian observers for whom the reality of this sort of war is indeed “virtual.”²⁰⁷ Before exploring these asymmetries and the challenges that they pose to the argument of the existence of an international community, I shall first return to an evaluation of the validity of the assumption that a shared international communication network is evidence of the existence of an international community.

B. An International Community without the Rule of Charity?

One may question the extent to which the new technologies of communication have, in fact, penetrated particular societies. Unquestionably there are disparities -- a so-called “digital divide” -- among and within societies in access to the internet, the cell-phone, and satellite/cable television.²⁰⁸ But there is now sufficient dispersal of these technologies, and history suggests

²⁰⁷ See, e.g., MICHAEL IGNAETIEF, *THE WARRIOR’S HOMOR: ETHICS, WAR AND THE MODERN CONSCIENCE* (1998).

²⁰⁸ The Digital Divide Network states that, “There are an estimated 429 million people online globally, but even this staggering number is small when considered in context. For example, of those 429 million, fully 41% are in North America. Also, 429 million represents only 6% of the world’s entire population. [And while] [t]he United States has more computers than the rest of the world combined ... White (46.1%) and Asian American & Pacific Islander (56.8%) households continued to have Internet access at levels more than double those of Black (23.5%) and Hispanic (23.6%) households.” *Available at*

there will be greater penetration with the passage of time, that we may fairly assume that the socio-political forces that they have unleashed are at least minimally representative. I shall therefore assume that it is reasonable to take on faith the validity of the descriptive manifestations of a shared ethos of belonging to a more or less “global village.”²⁰⁹ But this is a misplaced sense of belonging. It is misplaced in part because the interpretive capacities of human beings have not caught up with the capacities of these new technologies to deliver evidentiary information, and in part because the asymmetries of the distributions of power that have been deepened by these new technologies undercut any incentive to strive for such a catching-up.

One of the defining features of postmodern sensibilities is the ease with which perception and reality are equated. Indeed, the argument that “appearance” is itself a “reality” is commonplace in the West, and generally, it is rarely questioned. And, while rarely so boldly stated, it is the latter “reality” – if it differs at all from the former – that constructs human behavior. This understanding of perception as constitutive of reality is amply manifested in the ways that international legal scholars have come to identify the “reality” that is worthy of scrutiny and regulation.

Television cameras, and what they are able to display vividly, have become central to the shaping of the new international legal order. This is perhaps understandable. The visual displays of the brutalities of warfare, for example, concentrate the mind on the need for action to stamp out such evils. That those brutalities are being perpetrated by persons who are clearly unlike us make their deeds even more monstrous, and far from generating a desire to examine and understand the causes of their conduct, we are more likely to feel the desire to get rid of their scourge by chastising them. And since we are all witnesses to the evil acts in display, we are all entitled to feel “violated,” and not only to sit in and pronounce judgment, but to determine the appropriate punishment as well. Thus, the thrust of the new international legal order, as I have explained, has been to focus on coercive measures of enforcement.²¹⁰ For this purpose, intellectual rationalizations typically provide inadequate support. The appeal must be visceral. The more graphic and vivid the alleged wrong can be depicted, the more support the proposed coercive corrective measure is likely to garner. Atrocities to which particularized human faces can be attached, therefore, tend to be more the concern of contemporary international law than those atrocities that are less susceptible of direct attribution. Ineluctably, it would appear, contemporary international law deploys its coercive powers to punish Balkan “ethnic cleansers,” Rwandan “genocidaires” and other African “war lords,” but remains entirely silent on the culpability of policy-makers for socio-political and economic policies such as those that result in un-seaworthy ships filled with refugees being towed into the open sea where they break up with consequent loss of life, or the lax regulation of the export of toxic wastes dumped in poverty-

<http://www.digitaldividenetwork.org/content/stories/index.cfm?key=168> (last visited Feb. 12, 2004). *But cf.*, *Digital Divide Figures ‘Flawed,’* BBC NEWS (Dec. 10, 2003) available at <http://news.bbc.co.uk/go/pr/ft/-/1/hi/technology/3303717.stm> (last visited Feb. 12, 2004) (reporting that the International Telecommunications Union is of the view that the gap in accessibility of the internet between developed and developing societies may be exaggerated. Significantly, the ITU does not provide any hard data to back up this belief).

²⁰⁹ This assumption does not foreclose the possibility that, in fact, empirical evidence may prove my faith to be erroneous. It is an assumption made to avoid a potentially interminable and currently inconclusive debate whose outcome is not central to the thesis of this essay.

²¹⁰ See *supra* at ____.

stricken societies, let alone the subsidization of agricultural production with its attendant anticompetitive effects on food production in the needy parts of world.

In a genuine community, these would be perfectly understandable sentiments. But have the cameras and the new communication technologies forged an international community? The very strengths of the new technologies may actually undercut their capacity to do so. One must question the prescriptive entitlement of the illusion that perceiving suffering is tantamount to sharing in it. That distinction is perhaps most clearly illustrated by the speed with which those of us on the perceiving end switch to new issues. It is a speed that, again, the new technologies facilitate. The haste with which we engage and drop conspicuous sufferings in other places, when added to our indifference to sufferings and causes that are not susceptible of visual displays, suggest that experience through perception makes us less participants than observers. That we may possess superior physical resources and technical expertise can only be a partial basis for imposing our preferences and prescriptions on communities based on our understanding of events which tends to be at best shallow and, at worst, nonexistent.

If the strengths of the new communications age are the immediacy and breadth of information flows across communities, equally obvious characteristics are such shortcomings as the fleeting nature of the information acquired and the low rate of absorption. Indeed, it may be said that one way of distinguishing among communities is the level of intensity with which recipients of information engage it. The superficiality of absorption, coupled with the certainty of knowledge, creates what might be termed a credibility gap. That gap has been manifested in a variety of situations. While information about our own societies are routinely revised, updated, and reevaluated, our knowledge -- and more troublingly our views -- of those societies that I have termed "other" remain uncomplicatedly static. Compare, for example, two instances relating to the acquisition and use of data, and their relevance to judicial proceedings.

By July, 1994, it was evident that widespread massacres among the general population had occurred during the prior three months in Rwanda. The death toll of 500,000-800,000 began to be bandied about.²¹¹ Ten years later, more or less the same figures are used.²¹² This is so even though the factual accuracy of these figures is highly dubious. They were figures concocted in the midst of a ranging and emotionally charged civil war. Unquestionably, they were deployed at the outset as the best guess/estimates under the warring circumstances, and because they served as effective propaganda. But neither of these reasons explains why they have continued to command uncontested invocation in the press.

This situation should be contrasted with the treatment of data relating to how many people were killed at the World Trade Center on Sept. 11, 2001. In the fog of the initial tragedy -- as in war-torn Rwanda -- the estimate was that perhaps 6,000 persons had been killed.²¹³ As

²¹¹ See, e.g., Central Africa: the Closest of Enemies, *available at* http://www.britannica.com/worldsapart/4_keyplay_print.html (last visited Feb. 12, 2004).

²¹² The figure of 1.5 million occasionally is invoked, but this figure has no more basis in available evidence than any of the others.

²¹³ See, e.g., BBC News reported, "Thousands of body bags have been requested in New York as corpses are pulled from the rubble of the World Trade Center's twin towers. The city had already requested 6,000 bags from federal officials, and the New York Times reports 5,000 more were expected on Thursday." *Bodies Pulled from the Debris*, BBC NEWS, September 13, 2001.

information became available with the passage of time, this figure was revised, and continually downwards, so that within two years after the event it had been conclusively and authoritatively determined that just about 2,750 persons were killed.²¹⁴ Thus initial estimates proved to be at least double the actual deaths.²¹⁵

The differences between the Rwanda and World Trade Center approaches to the gathering, evaluation, review and, above all, updating of data are neither aberrational nor accidental. In the former situation, initial data, even though known by all to be incomplete and, therefore, unreliable remained unedited. The data had a single purpose: it viscerally to depict the inhumanity of “the other.” As long as it served this purpose, the accuracy of the data – 500,000, 800,000, or 1.5 Million – makes little difference. By contrast, the WTC data served different purposes at different times. Initially the data, as in Rwanda, were used to depict and to obtain condemnation of the inhumanity of the perpetrators of the dastardly acts, as well as to mobilize the population for a counteroffensive. With the passage of time, administrative and bureaucratic demands came to dominate. Accurate data had to be obtained for such purposes as confirmation of fatality to bereaved relatives and friends, payment of insurance, and, of course, adjudication of entitlement to relief. Rwandans may have their own administrative and bureaucratic needs, and for those, precision of data may or may not be as consequential as in the United States,²¹⁶ but it is in the nature of the new communications technologies that the information that is unearthed and disseminated is driven by the demands of those in the West.

This gap between the illusion of knowledge because of the ease of access to information and the reality of the credibility of the information has been demonstrated vividly in the controversies surrounding the issue of the existence of “weapons of mass destruction” in Iraq. That the information disseminated prior to the invasion of Iraq was, in several respects unreliable, seems to have come as a shock to many. But that shock is surely hollow.²¹⁷ The unquestioning acceptance with which the so-called evidence was received prior to March 20, and the skepticism to which such evidence was subjected after May 1, reflects no more than the changed needs that the information were intended to serve. Prior to March 20, Iraq belonged squarely to the camp of “the other.” It was “a rogue state.” Its government was “a regime.” Its people for the most part simply were abstractions; an incidental or “collateral” element of the

²¹⁴See, e.g., Dan Barry, *A New Account of Sept. 11 Loss, With 40 Fewer Souls to Mourn*, N.Y. TIMES, Oct. 29, 2003.

²¹⁵ A common saying is that a society can be judged by how it treats its dead. It is equally true that membership in a community can be determined by how readily the community acknowledges a death as constituting a loss to it. The running data of how many lives have been lost is thus as good an indicator of membership within a community as any other piece of evidence. Typically, we can almost be told with precision how many Westerners -- soldiers, journalists, and aid volunteers -- have been killed in a strife-torn environment (e.g. Iraq), but the death of locals at best is reported sporadically, and no definitive number is ever furnished.

²¹⁶ For example, Rwandans, like most African societies, may store more value on recitation of events rather than on dry statistical evidence. Indeed, the conflict between the West's insistence on adversarial trials and the Rwandan preference for Gacaca (or communal courts) is indicative. Compare Jose Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 25 YALE J. INT'L L. 365 (1999).

²¹⁷ Much has been made of the supposed “failure of intelligence” surrounding the “WMD” controversy. But the same “failure” apparently attended President Clinton's decision to lobby tomahawk missiles at a pharmaceutical plant in Sudan, which his National Security adviser unequivocally assured the world was engaged in the manufacture of chemical weapons. Nor is there shortage of incontrovertible evidence of misbehavior by “rogue states,” the specifics of which cannot be provided, because to do so would be to disclose “sources and methods.” And, of course, in a democratic society, the leaders do not lie.

conflict between the “international community” (actually the United States) and their country. The denials of the regime as to the country’s possession of “WMDs” merited no credence. By contrast, the assertions of the United States based on “intelligence” constituted gospel truth. Not even the experts doubted that “WMDs” existed. The question that divided the West was simply whether the relevant evidence was more likely to emerge through prolonged peaceful inspection or a short “shock and awe” war. After May 1, Iraq began to take on a corporeal reality. This was driven not, however, by the actual needs of the society, but because United States and British personnel began to take on unanticipated casualties. Neither American nor British citizens are abstractions; nor are their fiscal expenditures. And, as long as Iraqi society – in contrast, for example, to Afghani society – imposes such costs on the West, then the available information is real and will be updated. If and when the costs are no longer felt by the West, we will undoubtedly revert to the situation where information is presented primarily to titillate, and static information with the mythology that it represents will remain standard fare.

The superficiality of the transcendence of the new technologies across boundaries of community is also present when we consider their application to the sphere of transportation. In former times, the technologies of transportation mediated the experiences of two different societies through the traveler. The traveler acted both as a transmitter of her home culture, and as a translator of foreign culture. A good traveler spent enough time within the foreign community to imbibe the culture and appreciate its distinctions and similarities to her home culture. Moreover, because her interlocutors on her return were only too aware of the secondary source of the translations that they received, they were more likely to interrogate and critique the received knowledge that the traveler imparted to them. At any rate, they treaded with care and lack of surefootedness in prescribing and imposing rules based on the translations they received from the traveler. By contrast, the near-instantaneity of engagement permitted by the new technologies of communication and transportation has turned every observer into an armchair traveler, competent to discern and interpret foreign culture. At times, we may even question whether there is such a thing as “foreign culture,” for our supposedly unmediated perceptions give us the authority to pronounce on the rectitude of the actions of others, and in doing so, we apply “universal” principles. Surely, we all know that it is wrong to kill. Our own direct observations prove that this is known to all cultures. Therefore, it must follow that the idea of “self-defense” as a justification for killing can only be evaluated universally, and my perception of what constitutes self-defense must therefore be universal. But, surely, to make this contention is to display its shallowness. At one level, we are human because we share the gift of intelligible speech. Yet, no one would seriously contend that this means that languages are the same, or (what is the same thing) that any claim that languages are different must be fallacious. Yet, this is precisely a position that came to dominate international legal discourse in the 1990s, aided and abetted in no small part by the illusion that the capacity to obtain near instantaneous information about a society is tantamount to knowledge of the society.

This arrogance of the intellect is reinforced by the reality of the possession of physical power. Descriptively, we are regularly reminded that there is now one sole superpower, a colossus that bestrides a genuinely narrow world, and that is capable of projecting its power to all corners of the globe. This supremacy of the military might of the United States flows directly from its dominance in the new technologies of warfare. The United States is also said to be an

“indispensable power.”²¹⁸ It is unclear, however, whether this is a descriptive or a normative claim. For example, is it indispensable because its power is uncontested, or because its involvement is seen to be essential in the resolution of all international conflicts? At any rate, its behavior makes plain that it should not be seen simply as a *primus inter pares*, but as the sole arbiter and linchpin of the entire international system. While in the 1990s this disparity of power could effectively be presented in hegemonic terms – an approach that was endorsed wholeheartedly by the rest of the West – more recently the persistence (and indeed expansion) of the disparity of power between the United States and the rest has meant that only by assuming the title as well as the functions of an imperium can the claim and the reality be fairly squared.

Might has always played a central role in the formation and maintenance of communities. Military force has been the primary source of that might. It was used extensively by West Europeans as they first destroyed and then reconstituted colonial societies. Indeed, it was also central to the formation of nation states in Europe. National communities, necessarily, are led and governed. That these communities invariably are organized hierarchically surely is not accidental. And yet proponents of the new international community of peoples would have us believe that we are in an era of association of peoples who form voluntary horizontal communities. Since many of these proponents themselves come from the powerful countries of the world, they must implicitly either view their national power as irrelevant to the formation of an international community, or the exercise of such power as benign. Such views either are conceits or duplicitous. Let us, therefore, explore the relationship of power and law, and what role that relationship plays in the construction of an international community.

C. Law, Power, and Integration

A conventional humane account of the makings of our contemporary international legal order goes something like the following:

Even as war raged around them, far-sighted men in Europe, the Americas and Oceania were determined to create institutions that would assure that there would never be such another war. The primary institution for realizing this hope was the United Nations. In outlawing the use of force, and by adopting the Declaration on Human Rights, the members of the United Nations launched the modern version of the age-old quest to turn swords into ploughshares, and to establish a republic of justice.

These hopes proved to be stillborn. Regulation of the use of force depended on cooperation among the members of the Security Council. But the Cold War made such cooperation impossible. The Security Council stood by while the “great powers,” in complete disregard of Article 2(4), crushed popular uprisings and overthrew duly constituted governments in such satellites as Hungary, Vietnam, the Dominican Republic, Czechoslovakia, Afghanistan, and Granada, among other places. Likewise, the Security Council proved itself equally impotent in dealing with cross-border wars involving mid-level powers such as those over the Suez Canal,

²¹⁸ As Madeleine Albright, then U.S. Secretary of State, succinctly restated the orthodoxy in February, 1998, “[i]f we have to use force, it is because we are America. We are the indispensable nation.” Quoted in ANDREW J. BACEVICH, *AMERICAN EMPIRE: THE REALITIES AND CONSEQUENCES OF U.S. POWER* (2002). See also M. O. Chibundu, *Making Customary International Law through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT’L L. 1069, 1119 N.177 (tracing the claim of the “sole super power, ergo, indispensable nation”).

Bangladesh, and Cyprus. Meanwhile, internal civil strife in the Third World went un-policed on the ground that outside interference was barred under Article 2(4). Thus the international community stood by powerlessly as massacres occurred in Algeria, Indonesia, Nigeria, and other societies. And where the Security Council got involved, as in the Congo, Rhodesia, and the Arab-Israeli conflict, its record was more likely to be counterproductive than useful.

Similarly, the protection of human rights under the Charter depended on a uniformly strong voice from all members of the international community. Yet, counter intuitively, the Cold War also made it impossible to have such a chorus from across the globe. While primary responsibility for maintaining international peace and security was assigned to the Security Council, the promotion of international human rights was seen as the general responsibility of each and all member states. The Economic and Social Council which had direct supervisory responsibility was not subject to the counter-majoritarian disability of the exercise of a veto power. And the General Assembly which ostensibly represented the conscience of mankind had plenary authority over human rights issues. But these two bodies proved equally ineffectual in protecting human rights. The reason, unfortunately, was as simple as it was unpardonable. Because the international system was a system of governments, democratic societies overlooked human rights violations by non-democratic governments in order to obtain the votes of the latter in the bipolar conflict that was the Cold War. Thus, the twin aims of the United Nations remained entirely aspirational until the end of the Cold War. But the lessons to be learned were obvious.

With the fall of the Berlin Wall, international society was offered a second chance to redeem itself. Central to this renewal must be the promotion of democracy, human rights, and the rule of law. Democracy requires that governments be constituted on the basis of the results of “free and fair” elections that are subject to scrutiny by the international community. Human rights demand that governments treat their citizens with respect, and subject to internationally proclaimed rules. And the rule of law requires that governments operate within specified bounds and in a manner universally recognized not to be arbitrary.

What is crucial about the renewal, however, is that it must avoid the fundamental flaw of the Cold War United Nations regime: the lack of enforcement mechanisms. It is not sufficient to proclaim ideas, but the ideas must be enforced. “International community,” therefore, ought not to shrink from the use of force or other sanctions when necessary to implement compliance with the undertakings of the members of the community. Ordinarily, such enforcement should be collectively undertaken, but the lack of a collective will should not bar individual members from acting on behalf of the community when the collective will cannot be mustered. What is paramount is that rogue governments must be constrained, and in this undertaking, governments and nongovernmental organizations must cooperate to identify, isolate and, where appropriate punish such governments.

It is my hope that a reader of this essay can, by now, recognize the poverty of the seemingly lofty objectives in the preceding paragraph. Before summarizing the claims of this essay by outlining the flaws of this vision for our contemporary legal order, let us contemplate a different account from the conventional one just presented. An alternate account would run as follows:

Having witnessed the despoliation of Europe for the second time through widespread war within a single generation, the patrician leaders of the United States and the United Kingdom sought to reconstitute an order that they hoped would spare their generation from a third. This, they believed, could be done in part through the reconstitution of and tinkering with the legal and political institutions that had been created following World War I, provided that United States membership was assured. In keeping with familiar constitutional ideas in both societies, this required an institution that gave both expression to the general population, while assuring that effective power could be exercised only with the affirmative consent of the most materially endowed (and therefore privileged) minority group. Hence, the bifurcation of the decision-making processes between the General Assembly and the Security Council and, just as importantly -- and in contrast to the League of Nations -- the lodging of Chapter VII powers and veto rights within the latter body.²¹⁹

These leaders, however, recognized that the real price of war lay in the economic institutions that would safeguard the peace. For this purpose, the United Nations was given at most symbolic responsibility.²²⁰ The primary institutions, the International Monetary Fund and the International Bank for Reconstruction and Development, although ostensibly allied to the United Nations, functioned as completely independent entities. Crucially, voting patterns in these institutions paralleled those in the Security Council. No decision of any consequence could be taken without the affirmative concurrence of privileged members, especially the United States. This was achieved through the process of “weighted voting.”²²¹

Thus, at the creation, social justice – including human rights – was not envisaged as a primary concern of the post World War II order. That instruments such as the Universal Declaration of Human Rights and the various human rights conventions were adopted is more a testimony to the capacity of subalterns – notably countries in Latin America and Asia – to insinuate themselves into the order-generating process, than it is the product of the far-sighted benevolence of the West. Far from constituting a betrayal of the hopes and aspirations of the founders of the post-World War II international order, Cold War events played out within an order that was foreshadowed and mapped out in the immediate aftermath of World War II. This international order was a bifurcated one in which while lip service was given to the “sovereign equality of states,” it was also recognized that the practical functioning of international institutions was to be based on a classification of states that distinguished between those with power and privilege and those without. “Human rights” was simply not part of the picture.

There was one significant event that the founders of the United Nations did not anticipate: the rapid decolonization movements of the 1950s and 1960s. This was important not so much because it changed the balance of power – exercised through voting rights – in the General Assembly of the United Nations, nor necessarily because it delegitimized the claims of France or the United Kingdom to be “great powers” entitled to the veto power in the Security

²¹⁹ See, e.g., STEPHEN SCHLESINGER, *ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS* (2003); ROBERT HILDEBRAND, *DUMBARTON OAKS: THE ORIGINS OF THE UNITED NATIONS AND THE SEARCH FOR POSTWAR SECURITY* (1990). But see GABRIEL KOLKO, *THE POLITICS OF WAR: THE WORLD AND UNITED STATES FOREIGN POLICY, 1943-1945* (1968) (emphasizing the formation of the United Nations more as a tool of singular United States foreign policy than of a shared enterprise in maintaining global security and peaceful resolution of conflicts).

²²⁰ See Chapter VIII of the Charter of the United Nations, especially Articles 55 and 56.

²²¹ See, e.g., Article XII Section 5(a) of the Articles of Agreement of the International Monetary Fund.

Council (after all, Taiwan “legally” possessed this power for 22 years), but because it presented fundamental challenges to the economic structures of the post-World War II order.²²² The emergence of the colonized societies of Africa and Asia as independent sovereign states could be addressed readily within the existing legal and political institutional structures of the Cold War order. To be sure, that voting blocs formed by these newly independent states were not infrequently in opposition to the West presented, at most, a political nuisance. This was so even when that voting bloc coalesced with that of the Communist world. The political institutions of the United Nations were simply not constructed to bypass the strong opposition of the powerful members.

Decolonization, however, presented more serious challenges to the preconceived institutionalization of the post World War II economic order; and these challenges – and the responses that they generated – were to have significant reverberations in international politics and law. The quintessential consequence of decolonization was to shift the locus of decision-making from the metropolitan country to the new state. While the significance of the change was often exaggerated through rhetoric, one area in which the profundity of the change could not be masked was in the accounting for the economic transactions of the state. No longer could deficits and surpluses between metropolitan and colonial societies be treated simply as bookkeeping entries that could be rounded off by the economic health of the metropolitan state. Local decision-makers had to take responsibility for the economic consequences of these imbalances. The need to do so made explicit the structural shortcomings of the economic order. One of the most obvious of those shortcomings was the extent of the inequality in the terms of commercial intercourse between the colonies and the metropolitan countries. Colonies essentially provided raw materials at prices dictated by demand among metropolitan manufacturers. But it was these same manufacturers who determined, seemingly unilaterally, the price at which finished goods would be sold. Economic independence thus did not follow political independence.

Unsurprisingly, the leaders of the newly independent countries sought to use their political power to effect change in the terms of the commercial intercourse undertaken within and by their countries. In a seemingly choreographed dance -- the steps to which are discernible in virtually all so-called “developing countries” -- these societies began by offering incentives to foreign manufacturers to spur investments within their economies. They offered “tax holidays,” created “industrial parks” and “processing zones,” and offered legal protection by entering into or accepting bilateral and multilateral guarantees such as Amity treaties,²²³ and the New York Convention on the Enforcement of Foreign Arbitral Awards.²²⁴ Next, greatly influenced by the theory of “import substitution” that had been distilled into the mainstream by the United Nations’ Economic commission for Latin America, many of these countries, in seeming disregard of their international legal obligations under GATT, selectively imposed quantitative restrictions and

²²² See *supra*, Part II D.

²²³ See *supra* note __ and accompanying text. See also *Kalamazoo Spice Extraction co. v. Provisional Military Government of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984); *Elettronica Sicula S.P.A. (United States v. Italy)*, 1989 ICJ Rpts. 15.

²²⁴ See, e.g., Treaty Between The United States Of America And The Argentine Republic Concerning The Reciprocal Encouragement And Protection Of Investment, T.I.A.S. 4799 (signed at Washington, D.C., November 14, 1991, entered into force October 20, 1994). See generally Kenneth J. Vandeveld, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT’L L. J. 469 (2000); Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of bilateral Investment Treaties*, 38 VA. J. INT’L L. 639 (1998).

gave preferences to locally manufactured products.²²⁵ In time, these countries would wield their collective political power both in the United Nations General Assembly and in the GATT Council to try to change the international law rules on economic transactions. But these efforts, putting it charitably, met with mixed success. The attempt at institutionalizing a “new international economic order” was a resounding failure, and the GATT’s endorsement of a “Generalized System of Preferences,” while providing somewhat of a legal framework for the differential treatment within the international system that was sought by developing countries, fell far short of meeting those countries’ revolutionary demands for structural changes within the system.²²⁶ Just as in the political arena, the post-World War II economic structures proved sufficiently resilient to accommodate and frustrate the claims and pressures of the new states, notwithstanding their numbers or the “justice” of their claims. The institutions of the post-War Order had taken clear-headed account of the significance of power in international relations, and although the system was occasionally bent to permit the escape of intolerable pressures on it, for the most part the system at its core easily absorbed those pressures.

A third development posed a much more significant challenge to the international order, and the responses that it elicited and their reverberations in important ways have continued into the post-Cold War order. By the late 1960s, two forces from distinct sources had combined to generate this challenge. In the first place, with neither the incentives-driven policies for attracting investments, nor the rule-flouting import-substitution policies able to arrest the economic underperformance of “developing countries,” many of them turned explicitly nationalistic. Invoking “national sovereignty” they dictated the terms on which foreign investment in their countries were to be undertaken. Foreign ownership and control were drastically restricted, and in some cases banned outright.

But it is unlikely that the initial success developing countries met in their use of political power to control foreign multinationals, many of them global behemoths whose economic resources dwarfed those of the regulating Third World state, would have been possible but for a second parallel development. Beyond the anticipation of any one at San Francisco or Bretton Woods, the Federal Republic of Germany and Japan, defeated powers, were, by the middle part of the 1960s, economic superpowers. Their industrial and financial might now exceeded those of all but the two military superpowers. Taken together with the equally frenetic pace of industrial growth that was occurring in most of Europe and North America, the effect was to put sustained demands on raw material production. Developing countries, as producers of increasingly scarce commodities, naturally enough sought to maximize their returns, and as has been explained, invoked their claim of sovereignty to justify the coercive regulations they adopted to divert as much of the returns as they could to themselves and their nationals. Of course, the industrialized countries could have forestalled such diversion through concerted action. Initially, however, this did not happen for two reasons. First, as a trenchant economic observer of the period has pointed out, by the late 1960s, United States companies which had been sheltered from the competitive effects of the reindustrialization of the export-based economies of Germany and Japan by their control of the sizeable U.S. internal market could no longer rely on this ace.²²⁷ The effect of the

²²⁵ See General Agreement on Tariffs and Trade, Articles III and XI.

²²⁶ See JERZY MAKARCZYK, *PRINCIPLES OF A NEW INTERNATIONAL ECONOMIC ORDER: A STUDY OF INTERNATIONAL LAW IN THE MAKING* (1988).

²²⁷ See *generally* ROBERT BRENNER, *THE BOOM AND THE BUBBLE: THE U.S. AND THE WORLD ECONOMY* (2001).

Kennedy rounds of the GATT negotiations had been to drastically reduce the tariff barriers to which industrial products were subjected, and German and Japanese manufacturers had honed their manufacturing and marketing skills in a brutal world of competition to sell goods even in the relatively closed economies of much of the world. They had accumulated a good deal of profit in the process, and they were ready to do battle with U.S. and British companies in the latter's home markets. Thus, the period 1965-1973 was a genuinely competitive period in international commerce among the industrial corporations of the West. Focusing predominantly on this competition, neither these corporations nor their home governments foresaw the raw materials threat from the Third World. Indeed, much of the literature of this period revolved around the threat posed by multinationals and their home countries, not by the clearly impoverished Third World.²²⁸ To the contrary, the economic history of this period (1965-1973) is replete with stories of "competitive devaluations of currencies," the imposition of "interest equalization taxes," and other monetary and fiscal policies by industrialized country governments that were intended to assist their home multinationals in the competition with other industrialized economies and their multinationals.²²⁹ Moreover, German and Japanese companies, closely tied as they were to conservative industrial banks and a risk-averse government, respectively, preferred accommodation over confrontation in their dealings with the Third World. The governments of the latter soon enough recognized that the path to victory often lay in isolating a weak link among the multinationals, reaching agreement with it, and threatening remaining hold-outs with complete disinvestment.²³⁰ For this purpose, it was not necessary that the "weak link" be a Japanese or a German company, as long as it feared that companies stood in the wing ready to take over its concessions or contractual rights.

The "victory" of the Third World, however, was short lived. By 1975, events such as the Yom Kippur war, the use by Arab states of oil embargoes in support of that war, the dramatic increases in the price of oil and of other commodities and, above all, the surprisingly cohesive and concerted effort in 1974 by "the group of 77" to employ the United Nations General Assembly to fundamentally alter the laws of international economic relations. By 1975, the nature of the threat was obvious, and the West presented a coordinated response. The response was occasionally stumbling, but driven by "stagflation" at home, and by such continuing external threats as the Iranian revolution of 1979, a new crude oil crisis, and a neoconservative reaction exemplified by sweeping Conservative and Republican party victories in the U.K. and U.S., respectively, the West confronted directly the challenges of the Third World. Acting through such institutions as the OECD, the IEA, the G7 and, occasionally, the IMF, Western governments coordinated their fiscal and monetary policies through the 1980s.²³¹ And this coordination continued into the 1990s and the current decade.²³²

²²⁸ The classic statement of the period was Jean Jacques Servant-Schreiber's, *THE AMERICAN CHALLENGE* (1968). There were, of course, other forces that masked the nature of the threat presented by the tightening of the supply of raw materials. For example, the Vietnam War and racial strife in the United States, and the alienation (or "counterculture" movement) of the youth in Western Europe clearly commanded governmental resources and attention. Far from detracting from the arguments presented in the text, these reinforced them.

²²⁹ See Brenner, *supra* note ____.

²³⁰ The renegotiation of the Libyan oil concessions was the classic example of this approach. See, e.g., ANTHONY SAMPSON, *THE SEVEN SISTERS*, New York: Bantam Books (1976).

²³¹ See *supra*, Part II D.

²³² Of particular note were the Plaza Accord of 1985, and the so-called "Reverse Plaza Accord" of 1995, under which the governments of the United States, Japan, and Germany, in particular, agreed to coordinate monetary policies to facilitate first a controlled devaluation of the dollar to benefit U.S. manufacturers and exporters, and then

A consequence of the West's response was a precipitation of the "debt crisis" of the 1980s. The flow of capital into the Third World dried up. This put pressures on the West's private banking system, but through coordinated action at the Bank for International Settlement - a cooperative institution of Central Bank Governors -- and at Treasuries and Ministries of Finance, Western economies were to absorb those costs with relative equanimity. The same cannot be said of developing economies. With a handful of exceptions, notably in East and South-East Asia, virtually all developing economies were plunged into sustained recession -- and in many instances outright depression -- by the financial turmoil of the 1980s. Commodity prices slumped, investment inflows dried up, and manufacturing capacities disappeared. The West agreed to furnish assistance in highly selective ways. For a handful of large economies whose industries and control of resources exerted significant impact on Western economies, such as those of Mexico and Brazil, particularized "rescue" programs -- the "Baker" and "Brady" plans -- were crafted.²³³ Most developing economies, however, had the choice either of adopting draconian structural adjustment policies under the auspices of the IMF and the World Bank,²³⁴ or muddling through as best they could. By the end of the 1980s, then, the revolutionary zeal for a restructured international economy was not even a plausible dream for much of the non-Western world.

D. Human Rights and the State: Clarifying the Links

The inclusion within Chapter VIII of the United Nations Charter of two subjects that international lawyers today tend to address as separate items -- human rights and economic growth -- is a reminder that advances in science and technology do not automatically imply social progress. Chapter VIII clearly evinced a recognition at the end of World War II of the intertwining of human rights and economic wellbeing; a relationship that we might fairly refer to as "social justice." As the 1980s drew to a close with an increasingly impoverished, demoralized, and defeated "Third World" on the one hand, and the 1990s opened with a vibrant and triumphant West on the other, the international legal system was offered two distinctive routes to travel. First, one could identify those ideas, institutions, and arrangements of the successful West and impose or otherwise graft them on international society. This was the route, that as I have described, international legal scholars adopted.²³⁵ But there was an alternative approach to international legal scholars. This approach would have required trying to understand why the Third World experiments failed, reasons that are not necessarily the flip sides of those for the successes of the West. International law then could have built on that understanding to formulate standards and rules that took account of the particular circumstances of the Third World, and which reflected those circumstances in the guiding norms out of which international rules are generated. Indeed, this was an approach advocated by those who argued international

a controlled reflation of the currency in response to the lack of confidence in the dollar created by the Mexican "peso crisis" of 1994. Similar coordination of monetary policies was adopted to deal with the "Russian financial crisis" in 1998, but apparently not with the South-East Asian crisis of 1997, nor the Argentine crisis of 2000-2001.

²³³ See, e.g., Ross P. Buckley, *The Facilitation of the Brady Plan: Emerging Markets Debt Trading from 1989 to 1993*, 21 FORD. INT'L L. J 1802 (1998); Manuel Monteagudo, *The Debt Problem: The Baker Plan and the Brady Initiative: A Latin American Perspective*, 28 INT'L LAW 59 (1994).

²³⁴ See, e.g., Enrique R. Carrasco, *The 1980s: The Debt Crisis and the Lost Decade of Development*, 9 TRANSNAT'L L. AND CONTEMP. PROB. 119 (1999); Gwendolyn Mikell, *African Structural Adjustment: Women and Legal Challenges*, 69 ST. JOHN'S L. REV. 7 (1995).

²³⁵ See *supra*, Part II.

law encompassed a “right to development.”²³⁶ The complete failure of these advocates to gain a hearing in the mainstream of international legal scholarship is, in the view of this writer, the best testimonial to the hollowness of the claim of an international community. An exploration of the reasons for going down one road, while rejecting the other, is thus worth undertaking as a penultimate effort at understanding our contemporary conception of “the international community.”

In Part II, I described how international legal norms moved seemingly overnight from being concerned primarily with outlawing the use of force and the protection of a state’s sovereign prerogatives to embracing the selective (but frequently framed as ‘collective’) use of force.²³⁷ Similarly, under the aegis of protecting human rights, international law norms in the 1990s selectively shunned the notion of sovereignty in favor of protecting individual rights.²³⁸ But the legal doctrines that were advanced in support of these policies were neither clearly articulated nor consistently applied. I’d like to suggest that an important reason for this lack of principled intelligibility is that the rules were derived from a very narrow focus on events in international society. As I have shown, the basic driving force of changes in the 1990s was the collapse of communism as an organizing ideology and of the power of the states that invoked it. Western intellectuals -- certainly those who framed international legal doctrines -- transformed the defeat of communism into a license for the propagation and, when necessary, imposition of Western liberal norms. This attitude, in hindsight, may seem (as it was) parochial; but it was not unintelligible under the circumstances. The rules of the international society have been the rules of interstate relations among the European system of states. Did it not follow that an international community, even one that aspired to the regulation and protection of individuals, must be based on those European rules that were left standing after the collapse of an opposing normative system? Certainly the joy with which long-suffering Somalis, under the glare of television cameras, welcomed United Nations “humanitarian relief” and “peace keeping” soldiers in 1992 was not unlike the warmth felt by Germans (and indeed much of the Western world) with the fall of the Berlin Wall three years earlier. Likewise, the failure of the Security Council to adopt adequate measures safeguarding Rwandans from the massacres that occurred in that country in 1994 has been subject to no less criticism than that to which the United Nations has been subject as a result of the Srebrenica massacres in Bosnia-Herzegovina a year later. Yet, to deploy these examples as emblematic of the functioning of international legal rules in the 1990s is to misconstrue exceptions as the rule. These examples, at best, provide superficial parallels. In reality, they mask fundamental differences between the structures of European societies and those of non-European ones. Even more importantly, the reliance on them perpetuates the myth of an evenhanded “universal rule of law” regime. Let us explore that myth by a closer inspection of the underlying premises of the doctrinal developments in international law in the 1990s.

The central and unifying undercurrent of the international legal order of the 1990s was suspicion of and hostility towards the institution of the state. This undercurrent had several sources; many of them well founded. The state, following World War II, had become an

²³⁶ See United Nations Declaration on the Right to Development, G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986); see also Nsongurua Udombana, *The Third World and the Right to Development: Agenda for the Next Millennium*, 22 HUM. RTS. Q. 753 (2000).

²³⁷ See *supra*, Part II B.

²³⁸ See *supra*, Part II C.

omnipresent and excessively intrusive institution. The boundaries of its power had reached far beyond the traditional functions of providing security and infrastructures to extensive and direct participation in the ordinary social and economic life of its citizens. The scope of the involvement varied, and much of it was doubtless beneficial. But by the 1990s, at least in the West, the perception of the state was often more readily associated with a “heavy hand” than with a light touch. And this perception was particularly strong when Westerners thought of the non-West. Communist countries, of course, had been the quintessential state-dominated society, but the “authoritarian dictatorships” that had become the dominant form of governance in the Third World were not far behind. These dictatorships did not only control “with a dead hand” the economic life of the society, but they suppressed civil liberties, arbitrarily imprisoned and tortured opponents, and otherwise silenced opposition. In short, the state had become a “predator.” In contrast, the thriving socio-political and economic life of the West was characterized increasingly by a downplay of the role of the state in the affairs of the community. In Western Europe, ancient nationalisms were giving way to a supranational union and the ensuing liberalization of the movements of people, ideas, and economic activities with minimal state interference had become characteristic not only of the European Union, but of liberal, industrial democracies in North America and parts of Asia. In moving to embrace the Western way of life, Central and East Europeans had shown that “getting the state out” was essential. “Privatization,” the formation of “civil society,” and decentralization were preferable alternatives to the state. Discrediting and undermining the role of the state in Third World governance thus seemed worthy objectives for liberal and neoconservative intellectuals alike.²³⁹ But this sentiment, however sincerely held, was fostered by an unreflective accounting of the differences between the role of the state in European and non-European communities.

That accounting must start with the recognition of the state as a dynamic institution that is shaped more by historical experience than by any ideational conception. It is true that the modern state has its roots in the structures of governance that evolved out of the West European experience. Most Third World countries were not only fashioned by European colonial rules, but at independence they inherited -- virtually lock, stock and barrel -- colonial institutions of governance. And, at the international level, the now-decolonized countries sought and received admission and were otherwise welcomed into the community of states with all of the attributes of *de jure* sovereignty. In time, they learned -- perhaps all too well -- how to play the “balance of power game” which Europe, following World War II, had bequeathed to the U.S. and the USSR. But these similarities masked fundamental differences between the functioning of the state in the West, and its functioning in the newly decolonized states. At the core of these differences is an appreciation of the state as an organic entity -- in a real sense, a community -- that grows and matures through the shared experiences of its members. The European state did not spring into being through fiat. It was the product of continuous conflict, compromises, accords, broken agreements, revised arrangements, and more conflict. Sometimes the state was imposed from without, but it remained fragile until the members accommodated themselves to each other; and often that accommodation did not occur until the members had essentially worn themselves out in their blood-letting. State formation can be and has been romanticized, but it is not romantic.

²³⁹ Of course, Western conservatives and liberals differed on the elements of reconfiguration they deemed essential; but the differences were rooted in subject matter, not in the underlying concept. For example, conservatives were more likely to emphasize privatization than liberals, while the latter focused on political decentralization and individual autonomy. Obviously, such differences were driven by preferred economic and political outcomes rather than conceptual consistency.

It is the product of arduous experimentation. Above all, the ingredients for the experiment and its ultimate success depend entirely on those who come to constitute the state.

This organic understanding of the state was entirely absent in the myriad appraisals of the “failed” Third World state that followed the end of the Cold War. Among Western intellectuals and Third World elites, alike, strife has been seen as undermining the right of a society to claim statehood. The solution to strife, it has more often than not been proposed by liberals and conservatives alike, is the denial of sovereignty or the imposition of a solution from without. Equipped with our clairvoyant technologies and confident of our moral superiority, the object of inquiry has become to identify and classify the victim and the victimizer. Sure of our power, we seek to impose punishment on the wrongdoer. But surely this is shortsighted. A recognition and acceptance of the state as an organic entity entails toleration of strife as a necessary, if unfortunate, component of community formation. Indeed, those affective ties that are present in all true communities typically are strengthened by the processes of conflict, bargaining, and reconciliation. If the state is more than a utilitarian deliverer of services, and there are reasons to believe it is, then its members should be encouraged to interact with each other, and international law should not operate to cut off those interactions.

It is indisputable that, to the extent one of the cardinal functions of a state is to provide a stable environment within which its citizens can undertake peaceably and with satisfaction the broad range of civic engagements that make human coexistence truly social, many Third World states fall short of the standard. Civil wars, the malfunctioning of governmental institutions, poor physical infrastructure, and abuse of power are pervasive. Yet, it is a fundamental misapprehension to believe that any but an insignificant number of the citizens of these states would gladly renounce their connections to the state in favor of an amorphous “international community.” The “community” that matters to the individual – and indeed to the group – is not an ideal garden of Lotus-eaters, but the daily interactions of the shared pain of despair and the joys of euphoria with neighbors that are essential to state formation. The dysfunctional state is not fixed by coercive legal intervention from without, but by the internal tug and pull of the conflicting interests of citizens.

Regardless of the preferences of the international legal scholar or jurist, this untidy process of state formation in the Third World is bound to continue. The international legal system lacks the capacity to terminate it prematurely. What the system can and has done is to impose additional costs on the process. Those costs come in the form of several diversionary illusions which both delay and increase the costs of state formation. One such illusion, for example, is that international law can operate directly on individual wrongdoers without the intervention of the state.²⁴⁰ But the idea presupposes a genuine international community composed of individuals. However, what has become increasingly clear is that the idea is given effect primarily by distinguishing among communities. As the United States succeeds in obtaining exemptions for its citizens,²⁴¹ while encouraging special prosecutors to wield their

²⁴⁰ For the discussion of this proposition, *see supra*, Part II C.

²⁴¹ Thus, in addition to Security Council Resolutions 1422 (July 12, 2002) and 1487 (June 22, 2003), granting immunity from prosecution before the International Criminal Court to “peacekeepers,” the United States has succeeded in extracting undertakings by dozens of countries not to surrender any United States persons for prosecution by the ICC. Indeed, the United States Congress has required that the President must withhold United

powers discriminatorily against others,²⁴² continuing to shroud these obvious duplicities in the rhetoric of international or universal human solidarity will become less and less tenable not only to the Third World states, but more importantly, to their nationals.²⁴³ These citizens, who in the 1990s looked to the international system to satisfy the negative but entirely understandable human desire for punishment, will return to the state to provide the equally essential human bonding that is created by shared struggle and conflict. Indeed, in the Third World, it will have to do so as an essential element of growth.²⁴⁴ The international system and its powerful member states can, of course, exert pressure on individual societies and states, as in fact it has done during the last decade, but the cost of this approach will be so great and the gains so insubstantial that the system will have to bow to the reality that lasting communities are formed less by ideological pull or the pressures of punishment, and more by the interactions of proximity, shared needs, and histories.

Although human rights activists often view themselves as championing the rights of individuals over those of the state, this position is at best chimerical, and not infrequently deceptive. As already demonstrated, the distinctive contribution of human rights activism to international law in the last decade has been not so much the focus on the individualization of rights, but rather on the insistence that those rights be enforced through coercive measures. But whether those measures are judicial compulsion or economic sanctions, they depend for their initiation and enforcement on the intervention of the state. Thus, it turns out that far from limiting state intervention, contemporary human rights law depends for its vitality on the active

States military assistance from all but a handful of favored friends unless the country agrees to grant a so-called Article 98 waiver. *See* 22 U.S.C. 7426.

²⁴² *See supra*, Part II C.

²⁴³ This is likely to hasten as the hypocrisy of human rights positions in the West become more and more obvious. Compare, for example, the adoption by the same United States Congress of a law authorizing the President of the United States to use “all means necessary and appropriate” to free a detained United States (or allied) person from the custody of the International Criminal Court (22 U.S.C. 7427), while authorizing the payment of \$2 million dollars to any one who, in violation of Nigeria’s grant of asylum, seizes Mr. Charles Taylor from Nigeria and hands him over to the Sierra Leone Special Court. *See* 22 U.S.C. 2708. That this invitation has been taken up by private “bounty hunters,” and that such a development is bound to rekindle memories in Africans of the destructive role of white mercenaries in undermining their nascent political independence, will come as a surprise only to those who either have no sense of history or do not care for the relevance of history to international relations. *Compare, e.g., Firm Seeks Charles Taylor Bounty*, BBC NEWS, Dec. 11, 2003, available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/3309203.stm> (last visited Feb. 12, 2004) (reporting that a British private firm, Northbridge Services Group, was looking for investors in a plan to seize Mr. Taylor in Nigeria and thereby claim the \$2 Million U.S. offer); *Nigeria Warns Off Bounty Hunters*, BBC NEWS, Dec. 12, 2003, available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/3314361.stm> (last visited Feb. 12, 2004) (reporting Nigeria’s threat to deal harshly with any bounty hunters found in the country). *Cf.* FREDERICK FORSYTHE, *DOGS OF WAR* (1975) (fictionalizing sympathetically the role of white mercenaries in the Nigerian Civil War).

²⁴⁴ Compare the demands by Rwanda -- backed by the U.S. -- for the appointment of a new Chief Prosecutor for the Arusha tribunal. *See* Betsy Pisik, *U.N. Report, An Arush Prosecutor*, WASHINGTON TIMES, Sept. 1, 2003, available at <http://www.washtimes.com/world/20030831-102441-3739r.htm> (last visited Feb. 12, 2004). *See also* *New Rwanda Prosecutor Named*, BBC NEWS, Aug. 29, 2003, available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/3190833.stm> (last visited Feb. 12, 2004). Of course, Western states have already insulated their nationals from international prosecution through the principle of “complementarity”; but where the non-Western world is concerned, this is apparently a principle that Chief Prosecutors will not need to overly exert themselves in order to avoid. *Cf.* statement of Louis Occampo, *supra* note _____. After all, it would be a travesty to suppose that any of these societies have functioning judiciaries; at least, not unless they are superintended by Western (or at least Western trained) jurists.

involvement of the state.²⁴⁵ But of course, the state whose involvement is insisted upon is rarely that to which the offender claims membership and succor, but rather that of the avenging and paternalistic West. And, furthermore, the costs of the sanctions are imposed directly and disproportionately on the very individuals whose protection, ostensibly, the human rights activists seek to further. Iraqi children²⁴⁶ and undeniably innocent and apolitical Liberian lumberjacks and other workers,²⁴⁷ for example, are made to pay collectively for the sins of their leaders. Thus, human rights activism, driven as it currently is by the smug satisfaction of the certainty of the moral superiority of Western institutions and practices, and a determined if selective application of punitive measures, reinforces the hierarchy and subordination that the West presumably had abandoned when it embraced principles of self-determination and decolonization. This resuscitation of coercion as the default means for imposing legal order might be accepted as a necessary price for civilized interdependence were it not integral to the emergence of the use of force as a policy instrument. Dealing with “impunity,” it turns out, is simply one facet of a much broader phenomenon, the revival of subordination through the use of force. In both instances, the purveyors of compulsion are accountable to communities distinct and different from those that bear the consequences of the exercise of power.

E. Aggregation, Disaggregation, and World Order

Toward the end of the decade of the 1990s, a long-discarded concept gained prominence in the lexicon of international law: “humanitarian intervention.” In reality, the concept was the rehash of an academic idea that the Biafran and Bangladeshi civil wars had provoked, but which had died stillborn. Now, the idea was revived primarily because the issue was no longer “academic.” While the Cold War acted as a check on the translation of theory into practice, the existence of a sole superpower willing and able to impose its fancies as reality made it possible for an idea accepted by its academic scholars to become realizable. And so in Kosovo there was no other recognizable theory on which NATO intervention in Yugoslavia, unsought and unwelcome by the state and unapproved by the United Nations Security Council, could be justified other than the hitherto discarded theory of “humanitarian intervention.” And because “humanitarian intervention” is likely to provide the cloak in which the justifications for the subjugations and the differential treatments of the other will be wrapped, at least in the present and the near-future, it is worth closer attention.

²⁴⁵ See Louis Henkin, *That “S” Word: Sovereignty, and Globalization, and Human Rights, et Cetera*, 68 FORDHAM L. REV. 1 (1999).

²⁴⁶ See, e.g., Joy Gordon, *Cool War*, HARPER’S MAGAZINE, Nov. 2002. While the precise number of Iraqi children - not to speak of adults -- who have been victims of the United Nations-imposed sanctions is unlikely to be known, obfuscated as such information often is by propaganda, no one seriously doubts that the figure is significant, probably in the hundreds of thousands. And, only a handful of persons can with equanimity cavalierly dismiss such sufferings with Madeleine Albright’s well known quip that “we think the price is worth it.” Interview with Lesley Stahl, CBS 60 Minutes, May 12, 1996.

²⁴⁷ See, e.g., U.N. Security Council Resolution 1478, imposing an export embargo on Liberian timber on the ground that the Government has failed to show that it would use the timber for the “social, humanitarian or development” needs of the country. As an August 7, 2003 report of the Secretary-General wryly points out, the cost of this sanction will be precisely the Liberian workers whose “social, humanitarian, or development needs” the Liberian government has failed to show that it has used the export to promote.

Much ink has been spilled debating whether the concept has any basis in existing law,²⁴⁸ or whether while lacking “legal basis,” it may nonetheless be “legitimate.”²⁴⁹ Whatever else may be said about the concept, that it is a logical and probably inevitable follow on from the belief that the international legal order should sanction the use of coercion in furtherance of human rights seems unassailable. If it is appropriate for one state or group of states to employ judicial or legislative power to punish another state or its agents for the violation of the rights of the citizens of the latter states, it surely makes sense for the former group to act preemptively to forestall or to terminate such human rights violations. But who gets to make the decision, and on what evidence? Although these are often presented as posing unique challenges to humanitarian intervention, in fact they are not. They are precisely the same set of issues confronted in the use of international tribunals to adjudicate “crimes against humanity,” or of “genocide,” let alone “war crimes” or “crimes of aggression.”²⁵⁰ The amorphousness of the elements in play in determining when there has been “such massive human rights violations” to as to permit external intervention in the one is no different from those in the other. Both are equally susceptible of gerrymandered dispositions. And while adjudication is retrospective and, therefore, more likely to be bounded by the specificity of the inquiry that is undertaken, that is no assurance that it will not be subverted to serve non-criminal purposes.

The indisputable reality is that the clamors for “humanitarian intervention” and for “war crimes” trials invariably go hand-in-hand. They are used simultaneously to delegitimize the policies of an undesirable government, and to prepare the public for what is now generally referred to as “regime change.” Allegations are proffered. These readily are picked up by media that has learned to expect and to sell the worst, and the broadly disseminated information, now endowed with the aura of veracity by virtue of repetition, becomes a justification for policy. In this environment, it is less what “happened,” but the capacity to influence and manipulate the media that determines outcome. And it is from this vantage point that the justifications for the recent invasion and occupation of Iraq merit some attention; for just as Iraq’s invasion of Kuwait in 1990 (or, more accurately, the international response to that invasion) represented the beginnings of the post-Cold War international legal order,²⁵¹ its recent invasion and occupation -- or more accurately the evidentiary fiasco surrounding the justifications for the invasion -- may

²⁴⁸ A good collection of probing essays on the subject is HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS (J.L. Holzgrefe and Robert Keohane, eds., 2003). An excellent study of the legal history of the concept is SIMON CHESTERMAN, JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW (2001). For a succinct summary of the faddish and inconclusive state of the debate, see Richard B. Bilder and David Wippman, Book Review, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions*, by Brian D. Lepard, 97 AM. J. INT’L L. 457 (2003); Daphne Richemond, *Normativity in International Law: The Case of Unilateral Humanitarian Intervention*, 6 YALE HUM. RGTS. AND DEV. L. J. 45 (2003); see also Glennon, *Prerogatives of Power*, *supra* note ____.

²⁴⁹ The distinction between the “legitimacy” and “legality” of “humanitarian intervention” is generally attributed to Justice Richard Goldstone, who apparently drew that distinction in the course of a Report on the Kosovo intervention. See Tania Voon, *Closing the Gap Between the Legitimacy and Legality of Humanitarian Intervention: Lessons From East Timor and Kosovo*, 7 UCLA J. INTL AND FOR. AFF. 31 (2002).

²⁵⁰ See, e.g., Statute of the International Criminal Court, Art. 5. Crimes against humanity, war crimes, and genocide, are now more or less accepted as justiciable both in specialized international tribunals, and in domestic courts of general criminal jurisdiction purportedly asserting “universal jurisdiction.” Cf. Restatement (Third) of the Foreign Relations Laws of the United States, Article 404. The crime of “aggression,” on the other hand, remains highly contentious.

²⁵¹ See *supra*, Part II C.

well mark a watershed in the unskeptical approval of the use of force to promote purported humanitarian goals.

In August, 1990, Iraq invaded, occupied, and sought to annex Kuwait. While the two countries had disputed the precise demarcation of their borders, the attempted wholesale annexation was highly unusual in the post-World War II era. It certainly presented a direct challenge to the basic principles of international relations that had emerged following World War II. The unanimity of the condemnation of the act was not, therefore, surprising; but the willingness of the Security Council to adopt measures under Chapter VII constituted a radical departure from previous instances in which, despite clear-cut violations of international law, the most that the Security Council generally had been able to muster were recommendatory or condemnatory resolutions under Chapter VI. Most dramatically, under Resolution 678,²⁵² the Security Council authorized member states to use “all necessary means” to restore Kuwait’s territorial integrity. Purportedly acting under this provision, the United States formed a coalition of states -- including West European and Arab countries -- that successfully expelled Iraqi forces from Kuwait.

The end of combat was followed by an equally unusual series of practices. The United States field commander and an Iraqi general signed the armistice, but the terms for peace took the form of a Security Council mandatory resolution. Under Resolution 687, the United Nations undertook to demarcate independently the boundaries between the two countries. Iraq, as a defeated state, was required to account for and return non-Iraqis lost in Kuwait, for Kuwaiti property in its possession, and to pay reparations to injured persons and for lost property. These conditions, together with those which limited its capacity to develop rockets with ranges exceeding 150 km., were relatively uncontroversial. Two other sets of requirements, however, and particularly the means for enforcing those conditions, heralded a new era, and one that was characteristic of the ethos of the 1990s that have been extensively discussed in this article.

In the first place, Iraq was required to identify and destroy all of its holdings of unconventional weaponry: nuclear, biological and chemical, including any means or technologies for their acquisition. An international inspection body to be paid for by Iraq was to be set up to supervise and monitor the destruction of these so-called “weapons of mass destruction” Iraq was required to give to this international body -- initially referred to as the United Nations Surveillance Committee -- unimpeded access to all of its territory and officials. And, to enforce these dictates, the comprehensive economic sanctions that had been imposed on Iraq prior to the war were to be maintained subject to waivers granted by the U.N. Sanctions Committee. The Committee could give blanket waivers for whole categories of imports, or discretionarily grant or refuse waivers on a product-by-product or contract-by-contract basis. Indeed, it could condition a waiver on the modification of the terms of a contract, and a waiver otherwise acceptable to the Committee could be blocked by the capricious act of a single member of the Committee.²⁵³ Furthermore, proceeds from Iraq’s export of oil were to be placed in escrow accounts that were subject to the control of the United Nations. Invoices for authorized imports were submitted to the United Nations, and payments of those invoices were

²⁵² The best known of these latter is probably Resolution 242, adopted following the end of the Arab-Israeli war of 1967. This newfound willingness of the Security Council to exercise its Chapter VII powers is examined in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* (Damrosch and Scheffer, eds., 1991).

²⁵³ See Joy Gordon, *Cool War*, *supra* note __ at __.

subject again to United Nations approval. Meanwhile, individual persons claiming reparations from Iraq could submit their claims to the United Nations, and these claims were approved or rejected by the United Nations. And all of these practices and regulations occurred within a resolution that “affirmed” the territorial integrity and political independence of Iraq.²⁵⁴

Secondly, in a subsequent resolution, Iraq was reminded of its obligation to protect the human rights of its citizens. This rebuke was supposedly made necessary by the treatment of Iraqi Kurds in the North of the country, and of Iraqi Shiites in the South. Although Resolution 688 was enacted under Chapter VI, the United States, the United Kingdom and – for a while – France interpreted the resolution as authorizing them to create a “protected zone” and a “protective corridor” for the Kurds and Shiites, respectively. They asserted the right to fly over Iraq, and to shoot down any fixed-wing Iraqi planes found outside of a narrow corridor in the central part of the country. As a result, the Iraqi government lost administrative control over the northern part of the country, and effective control of two-thirds of its air-space. And these decisions were taken and effected with the United Nations Security Council, and indeed the member-states of the United Nations playing the role of silent bystanders, neither endorsing nor rejecting the decisions taken in Washington and London. Iraq occasionally challenged the fly-overs, but it appears to have paid quite significant penalties for such challenges. Indeed, the only reminders of the persistence of this silent war were the periodic news flashes informing the world of the use of ordinance by U.S. and U.K. military planes in response to Iraqi air-defense measures, or claims by the Iraqi government of the death of Iraqi civilians as a result of the dropping of ordinance on them.

Thus, between 1991 and 1998, the “international community” continued to endow Iraq with the attributes of sovereignty, while comprehensively emasculating its exercise. As one might expect of the defeated state that it was, Iraq by and large had been pliant. By 1998, however, the hierarchical structure of the “new world order” seemed so well settled that those at its apex deemed adherence to form entirely superfluous. What was expected from the likes of Iraq was no longer mere obedience, but abject submission. Humiliation, rather than obtaining a specific substantive policy outcome had become the paramount object of U.K. and U.S. policies towards Iraq.

In 1998, the United States Congress passed legislation authorizing the President of the United States to spend in excess of \$90 million to procure the overthrow of the government of Iraq.²⁵⁵ During the same period, UNSCOM inspections were conducted in a more and more confrontational manner, and the hitherto open secret that several of the inspectors were in fact intelligence agents ceased to receive even pro forma denials.²⁵⁶ In what apparently was the trial run for a technique that was to be applied six months later against Serbia, a non-negotiable ultimatum was issued to Iraq requiring it, among other things, to open up all government buildings, including the residence of its head-of-state to inspection upon demand by UNSCOM.²⁵⁷ When Iraq refused to comply, UNSCOM officials were withdrawn, and there

²⁵⁴ See Resolution 687, Para. ____

²⁵⁵ See Iraq Liberation Act of 1998, Pub. L. 105-338, 112 Stat. 3178 (Oct. 31, 1998).

²⁵⁶ See, e.g., SCOTT RITTER, *ENDGAME: SOLVING THE IRAQI PROBLEM ONCE AND FOR ALL* (2002).

²⁵⁷ *Saddam Under Fire: The Road to Baghdad: How the Desert Fox was Unleashed*, THE OBSERVER, Dec. 20, 1998, 1998 WL 18716395. See also Ambassador Bill Richardson’s Remarks at the Harvard Forum, JFK School of Government, January 16, 1998, available at www.un.int/usa/98_5.htm (last visited Feb. 12, 2004).

followed three days of punitive bombings by the United States and the United Kingdom. At the end of these bombings, matters returned to the *status quo*: The United Nations – or more accurately, the Sanctions Committee of the Security Council – continued to dictate the pace of economic life in Iraq; the United States and United Kingdom controlled Iraqi air space, and the rest of international society essentially stood on the sidelines, tantalized by the occasional flairs-ups, but otherwise more or less indifferent to the plight of Iraqis.

This indeterminate state of affairs might have continued for quite sometime to come, except that for reasons whose explanations remain at best confused, the United States government in August, 2002, decided to precipitate a crisis and to overthrow the Iraqi government. Moving on two fronts, the United States first sought a Security Council Resolution requiring the unconditional readmission into Iraq of U.N. inspectors, and the unfettered access of these inspectors to whatever sites they might seek to investigate in Iraq. The Resolution was duly adopted.²⁵⁸ Concurrently, the United States began to move substantial numbers of its forces into the Persian Gulf area, and made it plain that it intended to go to war with Iraq. This two-track approach generated a good deal of confusion within international society. At the core of that confusion was a poor understanding of what drove U.S. policy. The United States offered a variety of reasons for its policies, and it was far from clear whether these reasons operated independently, or whether they were mutually reinforcing. Furthermore, it was also far from certain that the proffered reasons were not simply pre-textual.

Among the reasons offered by the United States were that: (1) Iraq had failed to comply with mandated obligations under various Security Council resolutions; (2) Iraq presented a threat to the United States and her friends by its possession of “weapons of mass destruction”; (3) Iraq was an ally of terrorists, and the President of the United States had warned that it was the mission of the United States to wage war against terrorists and their allies; (4) the President of Iraq, Saddam Hussein, and his government had oppressed Iraqis and therefore he had to be removed from office; (5) regime change in Iraq would facilitate the development of democratic institutions in both Iraq and the Arab world, generally. Two additional reasons were advanced by commentators. (i) A successful war against Iraq would give the United States control over the second largest proven reserves of crude oil in the World, making it possible for the United States to influence significantly the price and supply of this core commodity. (ii) Control of Iraq would give the United States unparalleled geopolitical leverage over events in the Middle-East, which would include the power to shape determinatively the outcome of the long-persisting Arab-Israeli conflict over Palestine.

Whatever may be the wisdom of the political and economic reasoning that underlay these justifications, only the first three of them merited attention as grounded in serious legal doctrines; and even then, these three as legal arguments had to be reduced to two propositions: First, that the purported violations of Security Council resolutions by Iraq entitled the United States and its “coalition of the willing” to invade Iraq; or, secondly, that Iraq’s alleged possession of “weapons of mass destruction” or its support of terrorists presented such danger to the United States or its allies that a war against Iraq was permitted by the doctrine of self-defense.

²⁵⁸ See SC Res. 1441 (Nov. 8, 2002).

The first proposition, although noisily contended by the United Kingdom²⁵⁹ cannot be given credence by any serious international lawyer.²⁶⁰ Under Chapter VII, the Security Council may of course enforce its own resolutions²⁶¹ and, somewhat more doubtful, it may be that it can “contract out” enforcement to others.²⁶² At issue was whether prior Security Council resolutions were such that the Security Council had already acted to contract out future enforcement. The argument was advanced on two grounds. First, that the authorization to use “all necessary means” to expel Iraq from Kuwait found in Resolution 678, along with the adoption of Resolutions 687, 688, and 1441, somehow conferred authority on individual member states or collection of states to enforce Security Council Resolutions.²⁶³ Secondly, that Resolution 1441 independently conferred such authority. These arguments most charitably can be described as disingenuous. The authorization for the use of force in Resolution 678 was limited to Iraq’s invasion of Kuwait, and it is difficult to see how that authorization survived the adoption of Resolution 687. Nothing in the provisions of Resolution 687 hints that the terms of that Resolution could be enforced by attacking Iraq. To the contrary, the Resolution explicitly provided the means for its enforcement: the continuation of economic sanctions and the use of intrusive inspections. Resolution 688 was not adopted under Chapter VII, and nothing in the wording of the Resolution can be construed as authorizing the use of force against Iraq.

The argument of independent authority under Resolution 1441 had two aspects, both equally weak. The first was that in stating that Iraq’s failure to comply with the Resolution would raise “serious consequences,” the Resolution had thereby authorized the use of force. “Serious consequences” was said to be a term of art identical with “all necessary means.” If so, why the latter term was not used has never been explained. The second aspect of the argument was that members of the Security Council who adopted Resolution 1441 knew that by its adoption they were authorizing the use of force should it become necessary. Diplomacy is, of course, a dismal art; yet when it comes to the Security council contracting out the authority of international society to use force, it is fair to insist on something more than a handful of the members of international society asserting that such authority had been conferred by nods and winks, especially when the majority of the members of the Council asserted both contemporaneously and after the fact that they were conferring no such authority.

While the United States made a pass at invoking similar arguments, it relied primarily on a different set of legal claims. It contended that Iraq presented a military threat, and that the doctrine of self-defense provided the requisite justification for its use of force. But the doctrine of self-defense, at least in its standard formulation, was not readily applicable to the situation. The doctrine ordinarily is triggered by an actual attack, or at least the imminent threat of an

²⁵⁹ See, e.g., Joshua Rozenberg, *How One Word Made the Iraq War Legal*, THE DAILY TELEGRAPH, Mar. 20, 2003, at 18; Patrick Wintour, *Attorney General Rules that Attack is Lawful*, THE GUARDIAN, Mar. 20, 2003, at 9.

²⁶⁰ See, e.g., William Maley, *Bypassing UN Sets Dangerous Precedent*, CANBERA TIMES, Mar. 19, 2003, 2003 WL 2313218; Peter Ford, *As Attack on Iraq Begins, Question Remains: Is it Legal?* CHRISTIAN SCIENCE MONITOR, Mar. 21, 2003, at 5; David G. Savage and Henry Weinstein, *Showdown with Iraq Legal Basis for an Invasion Open to Interpretation*, LOS ANGELES TIMES, Mar. 18, 2003, at A11.

²⁶¹ See U.N. Charter Articles 39 and 42.

²⁶² See, e.g., Jules Lobel and Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AJIL 124 (1999).

²⁶³ See sources cited *supra*, note 259.

attack.²⁶⁴ Although Iraq's alleged possession of "WMDs" was said to present a potential threat, the imminence of that threat was dubious.²⁶⁵ But the United States did not restrict itself to the well-trodden path of the law. It created and amplified the doctrine of "preventive defense," under which it contended that it could and indeed should anticipate any and all threats to its security, and act to forestall such threats well ahead of time.²⁶⁶ The only apparent check on the scope of this doctrine is the policy judgment of the United States; dictated, one assumes, by its capacity to implement it. It is thus difficult to view it as a "legal" doctrine; certainly not one that falls within the realm of international law.

There was potentially a third set of legal arguments available to the British and United States governments. This was the argument of "humanitarian intervention." What is striking is that neither government resorted to it. The two governments, of course, demonized Saddam Hussein and his government. The two governments pointed to the past atrocities and cruelties of the Iraqi government with regard to mass injuries caused by its alleged prior use of Chemical weapons, the suppression of revolts, and to individual cases of torture. These, however, were presented not as legal grounds for waging war against Iraq, but as descriptions of the evils that would be done away with by the overthrow of the Iraqi government. Thus, they were not the bases for war, but the collateral consequences of a successful war. A few journalists and propagandists did argue for the elevation of these considerations to the status of *casus belli*, but neither government accepted this advice.²⁶⁷

Why did governments that were willing to invoke remarkably weak – and indeed extralegal arguments – to justify war with Iraq resist invoking "humanitarian intervention" as the basis for the war? Surely, it cannot be because of the weakness of the factual basis or legal support for the arguments that would have been available to them. The evidence of past Iraqi government atrocities were hardly any less compelling than those of its possession of WMDs. An alternative ground is the lack of a firm basis in international law for the doctrine, but one might validly question whether this absence of support is any weaker for humanitarian

²⁶⁴ See, e.g., Mary Ellen O'Connell, *American Exceptionalism and the International Law of Self-Defense*, 31 DEN. J. INT'L L. AND POL. 43 (2002); Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT'L L. 559 (2003).

²⁶⁵ Although the United Kingdom claimed that Iraq could launch Biological or Chemical weapons within 45 minutes (a claim whose accuracy has become the subject of extensive debate and obfuscation), no one, even in those heady days between September, 2002 and March, 2003, remotely suggested that Iraq would do so unless it were attacked. Indeed, the CIA Director argued otherwise. See, Paul Reynolds, *CIA Undermines Propaganda War*, BBC WORLDNEWS, October 10, 2002. The primary argument with regard to the imminence of the threat posed by Iraq revolved around how long it would take Iraq to build nuclear weapons, and here estimates ranged from six months to ten years or more. See Missile Developments and the Ballistic Missile Threat Through 2015, Unclassified Summary of a US National Intelligence Estimate NIE, approved for publication in January 10, 2002, by the National Foreign Intelligence Board, under the authority of the Director of Central Intelligence. And, of course, there remained the imponderable of whether, even assuming Iraqi possessed "WMDs," it would deploy it against the United States or its "friends." For the "imminence" of a threat is dependent as much on the certainty (or lack) of intent as it is on the immediacy of timing.

²⁶⁶ See The National Security Strategy of the United States of America (Sept. 2002), available at <http://www.whitehouse.gov/news/releases/2002/09/20020920-6.html> (last visited Feb. 12, 2004).

²⁶⁷ A distinctly different argument, but one that is all-too-frequently conflated with the humanitarian one, is that of "bringing democracy" to the Iraqi people. It is a testimony to the short-life of intellectual theorizing that its proponents do not bother to differentiate this argument from those advanced barely a generation ago in support of continued European imperial and colonial rule over Afro-Asian societies.

intervention than it is for “preventive” (or even ‘preemptive’) defense. The former doctrine had been at the core of the Kosovo war, and various facets of it arguably influenced international involvement in the internal governance of such societies as Cambodia, Somalia, Haiti, Bosnia-Herzegovina, and East Timor. Its pedigree, therefore, however suspect was no less firmly rooted than that of “preventive defense.”

There are, of course, two fundamental differences between intervention in Kosovo and the invasion of Iraq. They are “location” and “location.” The “humanitarian intervention” by NATO in Kosovo occurred against a backdrop of the seven-year process of disintegration of the former Yugoslavia in an area of Europe with well-deserved reputation for plunging the continent into unrestrained warfare. The barbarities of the Balkan wars of the 1990s were indeed throw-backs to a period of European history that a generation and more of Europeans had come to believe to be forever buried in the past. Yet, the disintegration of the Federal Republic of Yugoslavia had precipitated long-forgotten alliances and combinations. Here was a United Germany ignoring tentative understandings with her fellow European Community members and extending diplomatic recognition to break-away units of Yugoslavia. There were the French and Russians backing “Serb nationalists,” and the Greek and Russian support of “orthodox” co-religionists. And, of course, there was Srebrenica with its echoes of mass murder camps. Seven years of reversions to type were enough, and Europe was determined Kosovo would not be a repeat. And, then, there was the pending expansion of NATO which was to be consummated at the Organization’s 50th anniversary that was to occur in April 1999. Kosovo was thus a “humanitarian intervention” that was necessitated by the geopolitical interests of Western Europe.

Iraq had oil. In fighting against Iran, another oil-rich state, it had received the active assistance of the United States. But it had made the mistake of invading Kuwait, another oil-rich country, and it threatened Saudi Arabia, yet another oil-rich country that was hosting a large concentration of U.S. military personnel. Nor did Iraq make any secret of its antagonism to Israel. Indeed, of the so-called “rejectionist fronts,” it remained by far the most bellicose of pan-Arab anti-Israeli states. To be sure, it had oppressed the Kurds and might have used chemical weapons against them and Iran, but there was no evidence that the human rights situation in Iraq in 2002 was any different than it had been in 1989 or 1999. But then, the “human right” to life of President George H.W. Bush had apparently been threatened by Iraq in 1993, and his son was President of the United States in 2002. Might it not be unreasonable to insist then that under these circumstances, the leaders of the “free world” should allow their decision-making to be hamstrung by “law,” however venerable one might believe the institution of “the rule of law” to be?

To no one’s surprise, the United States smashed the Iraqi army in virtually no time. Ruling the conquered territory has proved, however, to be more taxing than U.S. leaders apparently had anticipated or planned for. They have gone back to the United Nations²⁶⁸ (a body which the president of the United States had warned would be “irrelevant” if it did not follow his lead),²⁶⁹ and have sought “on humanitarian grounds” the organization’s collaboration in

²⁶⁸ See George W. Bush, Address to the American People, Sept. 7, 2003, available at www.whitehouse.gov (last visited Feb. 12, 2004).

²⁶⁹ See George W. Bush, Address to the 57th Session of the United Nations General Assembly, Sept. 12, 2002, available at www.whitehouse.gov (last visited Feb. 12, 2004).

essentially creating a “trusteeship” over that land. While the specific terms of that trusteeship will be the subject of much bargaining, the outcome is indubitable. It is true that France and Germany, prior to March 18, 2003, disagreed with the United States and the United Kingdom over the wisdom of invading Iraq without giving international inspectors ample time to prove the possession of banned weapons by Iraq, but neither country disagreed with or challenged the policy of “regime change.” Nor did any one in the West appear to give any credence to Iraqi claims that the country had complied with United Nations demands, and that it had disposed of all prohibited weapons. Iraq, as the “other,” could not be believed or trusted. What distinguished the French and the Germans from their Anglo-Saxon brethren and sisters was simply that the former were willing to invoke anthropology and history to temper their legal certainties, while the latter could only think of the present.²⁷⁰ The disagreements among the Western powers thus were over means – and then, only in the short-term – not over facts or goals. No doubt the logic of “humanitarianism,” buttressed by that of economics, will result in the coalescence of means. The reality is that just as no one doubted the “*force de frappe*” notwithstanding that De Gaulle would support NATO in a conflict with the Soviet Union, Western Europe, in solidarity, will hitch its cart to the United States horse. That, after all, is the driving logic of membership in a “community,” and thereby in the definition of who constitutes “the other.”²⁷¹

CONCLUSIONS

Law, no less than history, is written by the privileged. The privileged progressives of any given period are those who invariably find fault with the past, and who are confident that in their prescription for the present, they have identified and removed the causes of that hideous past. The fall of the Berlin wall signified the triumph of the liberal heirs of European enlightenment over their totalitarian competitors. The search for a humane society was at an end because we had arrived at it. All that remained was to make that end-product universal. Western international law scholars – and many of the non-Western mimics – embraced both consciously and subliminally this vision of history. “Human rights law” was natural justice specified, and in its propagation, the best that humanity had to offer was personified. Then, on Sept. 11, 2001, three hi-jacked aircrafts were used as missiles against symbols of United States power, and about three thousand persons were killed. The United States unleashed the full might of its power: military, political, economic, and financial. Legal protections hitherto thought to be integral to core American notions of due process and fair treatment were swept overboard in a flash.

²⁷⁰ Thus, the French Foreign Minister, Dominique de Villepin, in his February 5, 2003 presentation to the Security Council could speak of France as an old country, hinting not only to its European pedigree, but its colonial experience in the Middle-East; an experience that the new United States sure of its present might could only scoff at. See generally ROBERT KAGAN, OF PARADOX AND POWER, *supra* note 1.

²⁷¹ For an apparently unselfconsciously cartoonish proposal of how the post-Iraq revamped structure of Western domination of “the other” might look, see Dominique Moisi, *Reinventing the West*, FOREIGN AFFAIRS 67 (Nov.-Dec. 2003) (“The result might amount to something like the acceptance of two Monroe Doctrines, with the transatlantic partners each holding sway in certain areas, and on certain issues, that reflect their *de facto* spheres of interest. Europeans would concentrate on Europe, with a special emphasis on the Balkans and the Mediterranean, and the United States would have priority in the Americas and in Asia. Both Wests would support moderate leaders and promote the rule of law in their respective spheres of influence. They would collaborate in the Middle East, attempting to close the emotional gap between them over the Israeli-Palestinian dispute. And the two sides would also come together over a new doctrine of enlightened interventionism in Africa.”). *Plus ça change, plus la même chose*.

“9/11,” went the refrain, “changed everything”; and, it might be added, we are back in the dark ages in which might is about all that counts. The last ashes of the pseudo-progressivism of 1989 were thus swept aside. No one today believes that history has ended, or that it is likely to end any time soon. As in the past, contemporary international society is embarked on reconstructing the current order so that it reflects the distribution of power among its participants. In doing so, the division between “us” and “them” continues to be pivotal.

This essay, then, has sought to place the development of international legal concepts within the framework of the social and institutional structures of international society. It has eschewed the tendency to present international law as a neutral instrument for the principled exercise of power. However admirable a normative objective it might be to pretend that international law operates with an international community of more or less equal individuals, the essay has pointed out some of the multiple dichotomies that crisscross the international legal order. The divisions reflect both ideological and institutional interests. It is the basic argument of the essay that only by taking account of these divisions can one fairly articulate with any level of accuracy the operative doctrines and norms in international law. Central to the development of international law, the essay has argued, has been a persistent divide between those accepted as members of the community, and those who were viewed as outsiders. International law did not create those divisions; nor has it succeeded in bridging them for any extended period of time. This was no less true in the last decade of universal sisterhood than it had been in previous decades. To assign international law a task in which it is bound to fail is to do no good to any one.

Without rejecting the relevance of law to the structure and constitution of communities, a core suggestion of the essay is that communities are not created by law; rather, communities create law as a response to their needs. The argument that posits (or which seeks to found) the existence of an international community on the basis of law is therefore to be rejected. International law must take its place as no more than one of the multiple social institutions that function within a community. To assert that the interests of individuals, rather than of nation states, have become instrumental in the composition of international community is to perpetuate the fiction that has long shrouded the domination of the other by the us.