

Beyond Rationalism and Instrumentalism: The Case for Rethinking U.S. Engagement with International Law and Organization

Peter G. Danchin

Today it's become fashionable to disparage the United Nations . . . and other international organizations. In fact, reform of these bodies is urgently needed if they are to keep pace with the fast-moving threats we face. Such real reform will not come, however, by dismissing the value of these institutions, or by bullying other countries to ratify changes we have drafted in isolation. Real reform will come because we convince others that they too have a stake in change—that such reforms will make their world, and not just ours, more secure.¹

Introduction

Like Odysseus seeking to navigate his ship through the perilous Strait of Messina, international law and organization has for the last seven years been caught between two seemingly inescapable perils: on the one side, the Scylla of unparalleled American military and economic dominance; on the other, the Charybdis of a rationally reconstructed and purportedly universally authoritative morality. The details are by now well-known. The former has manifested itself in a series of foreign policy maneuvers characterized by unilateralism and militarism: the invasions of Afghanistan and Iraq; the initiation of an amorphous global war on terrorism; and strident opposition to any international legal regime or institution perceived to impose limits on American liberty of action.² The latter has been articulated in varying forms of neoconservative ideology and is today perhaps best reflected in the 2002 U.S. National Security Strategy which declares that the values of freedom, democracy, and free enterprise are “right and true for every person, in every society” and that “the duty of protecting these values against their

Peter G. Danchin is Assistant Professor of Law, University of Maryland School of Law. B.A. LL.B. (Hons.) 1994, University of Melbourne; LL.M. 1998 J.S.D. 2006, Columbia University. I would like to thank my colleague Maxwell Chibundu for his thoughtful criticisms and comments on this Essay. All errors and omissions are my own.

enemies is the common calling of freedom-loving people across the globe and across the ages.”³

The U.S.-led invasion of Iraq in March 2003 vividly illustrated the interrelationship between these two forms of politics. The war split the Security Council, divided NATO, and sent tremors through both the UN and leading capitals. To much of the world, this kind of unilateral military action violated both the rules and underlying logic of the UN Charter, paramount among which is the aim “to save succeeding generations from the scourge of war.” Such a perspective rests on a particular conception of world order: a formalist vision of multilateral cooperation and collective security and a resulting politics of international law premised on the *Grundnorm* of sovereign equality.⁴ To the United States, however, this overly legalistic view is simultaneously too constraining and insufficiently normative. Why, for example, should a formal legal principle such as sovereign equality or the prohibition on the use of force between states⁵ shield a rogue state which transparently poses a threat not only to other states but to its own people? Conversely, who can argue with action taken to promote the ideals of freedom, democracy and free enterprise, universal values self-evidently “right and true for every person, in every society”? From this perspective, world order looks rather different. As against an imagined international community subject to a utopian rule of law, there is instead a Great Power (or coalition of such powers) presiding over a civilized core of nations preemptively on guard against a shadowy periphery of rogue states and non-state outlaws. This is not a politics of law, but a politics of morality which rests for its ultimate justification on moral claims and which manifests itself in a series of us/them, good/evil, center/periphery dichotomies.⁶

In this Essay, I seek to advance an argument for rethinking the current terms of engagement of U.S. foreign policy with international law and institutions. My primary contention is that doing so offers a preferable path to the current two extremes of power politics and imperial moralizing. This is for two reasons. First, it is necessary to distinguish between force and the status of political domination on the one hand, and consensus and the status of normative meaning on the other. While it may be possible for a single superpower to exercise factual authority and control over foreign states and peoples through sheer assertions of force and will, the attainability of such a situation should not be confused with the ideals of justice or political community. At bottom, the move from *Realpolitik* to legal formalism rests on a simple idea: while certain views of the good may reasonably be denied, it is inherently unreasonable to deny the autonomy of others as “reason-giving” and “reason-receiving” subjects. In the absence of a basic “right to justification,” inherently-contested questions of how it may be possible to conceive and organize an international political community do not arise. To appreciate why such a notion of mutual respect should commend itself to us, we must first understand how and why current rationalistic accounts of state interests and state freedom are inherently unreasonable. Second, and as a corollary to this, in asserting any claim to “universal right” the boundaries and finitude of all forms of modern natural law reasoning must

be acknowledged. The unavoidability of pluralism and reasonable disagreement argues for a form of social ethics, i.e. the idea that all moral norms be intersubjectively contested and justified. The first argument explains and justifies the move to international law; the second explains and justifies the need for international regimes and institutions.

Rationalism and International Law

The deep skepticism of the current Administration toward international law *qua* law is hardly unprecedented in U.S. foreign policy. Ever since Hans Morgenthau and the influential work of the “realist” school in international relations beginning in the 1940s, doubts have been expressed whether international law is really “law” properly understood.⁷ To the extent international law exists, general skepticism regarding its practical utility has been the dominant school of thought and a discernable pragmatism has influenced the conduct of foreign relations as the U.S. has sought to shape international law and organization to accord with its vision of American national interests. This was especially the case during the 1990s when, as the sole superpower at the end of the Cold War, the U.S. found it comparatively easier to reshape international norms and institutions to conform with its ideological and foreign policy preferences. Consistent through all this time has been an implicit rejection of the function of international law in terms of some notion of the Rule of Law in the conduct of international relations and thus of international law as a meaningful constraint on the policies, behavior and responsibilities of states.⁸ In this respect, what distinguishes the philosophy of the Bush Administration is merely the stridency of its tone and the dogmatic insistence on the irrelevance at best, and danger at worst, of international law to vital U.S. national interests.⁹

What is striking today, however, is the prominence of conservative international legal scholars who now argue that views such as Bolton’s are not only descriptively accurate, but normatively justifiable: international law imposes no moral obligation on states; states thus have the *right* to place their sovereign interests first when self-interested calculations indicate to do so, even if this means departing from international law; and liberal democratic states are even *obligated* to do so and to follow the dictates of their own people rather than some abstract cosmopolitan duty.¹⁰ As suggested above, this may well describe the actual flexibility and freedom of action open to the world’s single superpower in its decision-making, although even descriptively such an account is arguably incomplete and overly reductionist.¹¹ But why, as a *normative* matter, should a state’s rational self-interest be understood *automatically* to trump competing notions of say objective morality or the various potential reasonable claims of others? In particular, why should this be so when legal positivists have always argued that international law is itself the product of states’ rational self-interest but nonetheless binds those states which have consented to it?¹² What particular conception of rationality is at work here?

The case for international law and organization rests on the merits of the response to these questions. My central claim is that this account of

rationality is not only inherently unreasonable, but in fact impossible. At its core it rests on a species of skepticism which challenges the objective nature of morality, indeed the very possibility of moral obligation itself. It concedes a degree of objectivity to “descriptive” claims regarding, say, state behavior or state interests, but it denies any objective validity to “evaluative” moral or ethical claims. This skepticism owes its appeal to a naturalistic world picture in which humans, including their interactions and moral judgments, are surveyed as part of the natural material world. A moral claim, for example that genocide is wrong, is not a claim to objective Truth but only the expression of a certain emotive or mental attitude, or perhaps a social norm accepted by a particular group or society. However expressed—and there are many versions of this anti-objectivist view—the critical move is to take a position *outside* of or *external* to morality.

As many contemporary philosophers have argued, this is simply impossible: however one may try to step outside of morality and view it as part of the natural order, moral questions simply repose themselves and cannot be avoided.¹³ What such “archimedean” skeptical accounts seek to do is to justify their claims (i.e. that moral or ethical judgments cannot provide objective truth) from premises that are “not themselves evaluative.”¹⁴ But the insuperable difficulty is that all denials of the objective Truth of moral judgments themselves imply moral judgments. Is genocide really permissible if State A says that it is or if the society in State A holds it to be acceptable in certain situations? My ability to accept or reject this proposition necessarily engages my moral beliefs and cannot be decided exclusively from a naturalistic position external to morality. As Thomas Nagel has recently argued, however much I may try to assume an external position, I am propelled into a moral stance which it turns out is very difficult to occupy.¹⁵ In this respect, all external skeptics are committed to *some* first order moral judgments; either that or they must deny basic moral claims in a way that is morally difficult to accept.

External skepticism has a long and complex history as regards the question of the basis of obligation in international law. For any legal thinker schooled in the post-enlightenment secular society of the West, the origins of this story are usually traced back to the Peace of Westphalia in 1648 and the rise of the idea of social contract. The Westphalian moment is said to mark the “great epistemological break” when religious medieval “unity” gave way to a secular system of “plural” territorially-limited sovereign states leading to the emergence between the sixteenth and eighteenth centuries of what Koskenniemi has termed the “liberal doctrine of politics,” the driving force of which was the attempt to “escape the anarchical conclusions to which loss of faith in an overriding theologico-moral world order otherwise seemed to lead.”¹⁶ The myth postulates free and independent if still vulnerable “states” which voluntarily trade some of their autonomy for a measure of collective security. The myth thus makes the collective arrangement of a “community of States” or “international community” the product of individual choice and thus secondary to the autonomy of the individual. The “rights” or “sovereignty” of states are the fundamental category because

“it is the normative category which most nearly approximates that which is the source of the legitimacy of everything else.”¹⁷ While some sovereign rights are given up for collective security, other rights are retained and at least some of these are “inalienable.”

The critical point to note here is that *all* accounts of obligation in the liberal tradition involve elements of both voluntarism and rationalism. The puzzle of “why nations obey” has never been a question about the consensual basis of international law, but rather about how the *normativity* of law creates distance between itself and the behavior, will and interest of States. This question remains essentially- and widely-contested today with many so-called “compliance” theories variously grounded in notions of rationalistic instrumentalism,¹⁸ Kantian liberalism,¹⁹ social constructivism,²⁰ and international legal process²¹ struggling for predominance. In each case, an “ascending” strand of argument is posited based on the “factual” behavior, will and interest of States and thus all these accounts derive their authority from individual consent. But in each case, there is also a relevant “descending” strand of argument which is based on varying notions of justice, common interests, progress, the nature of the international community or similar ideas which justify certain limitations or constraints on the behavior of States, what it is they may reasonably will, or what their legitimate interests can be.²² It has been the continuing struggle to *reconcile* these two strands of argument which tells the story of modern international law with each competing conception of and interrelationship between state “sovereignty” and “social contract” yielding different configurations of both community and autonomy.

However we proceed then, we cannot avoid the deep and complex problems raised by the relationship of morality to law. Even if we start from the premise that morality concerns only the *internal* perspective that the individual adopts regarding her relationship to others and thus concede that the emergence of and respect for law does not necessarily require the individual to internalize the interests of others (i.e. even if we accept that morality is thoroughly selfish), law may nonetheless emerge from a purely introspective self-interested conception of morality if the individual realizes that she alone cannot be safe because she is not omnipotent. As long as she will have to compete with others, and as long as she cannot always be certain she will prevail, there are inherent incentives for her to subjugate her preference (and redefine her self-interest) for immediate satisfaction to her longer-term interest of self-preservation.

This was Hobbes’s basic explanation of how law arises and why persons and States can and do enter into forms of cooperation and coordination with each other.²³ But even the strongly positivistic structure of Hobbes’s argument was simultaneously ascending and descending. While it began from the assumed non-existence of a constraining natural law so as to posit an (ascending) justification of social order by reference to individual ends, this was inextricably associated with a (descending) construction of these ends in terms of an overriding need for security or what we might term a “natural right of self-preservation.”²⁴ The question then became what account

of objective interests based on the natural right of self-preservation could be advanced in order to allow for the overriding of particular individual ends. Hobbes's wide conception of tacit consent allowed him to formulate a theory where private rights and the absolutism of the Leviathan could co-exist. Like Grotius, he viewed man's natural state as giving rise to a minimal sense of mutual respect and sociability, but unlike Grotius he believed that this "minimal natural morality was not sufficient to prevent conflict, since there was no objective criterion for determining what is necessary for our preservation."²⁵ Unsurprisingly, later theorists in the liberal tradition such as Pufendorf, Locke, and Vattel would advance strikingly divergent accounts to Hobbes of the relationship between freedom and social order.²⁶

Even the most minimal accounts of the relationship between law and morality thus rest in this respect on some notion of natural right or objective morality which seeks to shape and limit what we mean by the terms "rationality" or "rational self-interest". The critical point then is that denials of the existence of objective truth in a given domain cannot be established outside of that domain. Skeptical rationalism must therefore contend with the countervailing force of the judgments in the domain it is trying to devalue. How this argument will be resolved will thus be determined, at least in part, by the answer to *internal* questions. Reflection upon these internal questions will show that solely instrumental rationalistic arguments which seek to abandon moral truth claims *altogether* are unreasonable. This point was made powerfully by John Rawls in his final work *The Law of Peoples* in which he drew a basic distinction between the character of "States" on the one hand and "Peoples" on the other:

How far states differ from peoples rests on how rationality, the concern with power, and a state's basic interests are filled in. If *rationality* excludes the *reasonable* (that is, if a state is moved by the aims it has and ignores the criterion of reciprocity in dealing with other societies); if a state's concern with power is predominant; and if its interests include such things as converting other societies to the state's religion, enlarging its empire and winning territory, gaining dynastic or imperial or national prestige and glory, and increasing its relative economic strength—then the difference between states and peoples is enormous. Such interests as these tend to put a state at odds with other states and peoples and to threaten their safety and security, whether they are expansionist or not. The background conditions also threaten hegemonic war.²⁷

For Rawlsians in the social contract tradition, the idea that peoples limit their basic interests as required by the *reasonable demands of others* is thus the necessary premise for the move from unbounded self-interest to binding law. This view is premised on a duty to recognize the autonomy of others and to adopt an attitude of mutual respect. Rational choice is understood to be limited and constrained by the notion of reasonableness in the sense of reciprocity and the offering of fair terms of cooperation to others. This is an inherently intersubjective and dialogic undertaking: the limits which reasonableness imposes on rational self-interest cannot be established unilaterally or in a vacuum; they need to be worked out in conversation and dialogue with others.

In a vastly pluralistic world of different peoples, religions, cultures, languages, ideologies and ways of life, the function of international law is thus to allow the international political community to mediate conflicting interests and values on agreed terms. As argued below, it is this basic philosophy which underlies the United Nations Charter and post-Second World War attempts to forge a liberal international legal order. How the material content and scope of that law is to be worked out is, of course, essentially-contested. But the need and justification for an agreed system of rules and norms between differently-situated states and peoples rests on the cogency of this moral premise, whether this be in the communitarian and universalistic tradition of Rawls or the autonomy-oriented and positivistic tradition of Hobbes.

This formidable and arguably improbable task is facilitated by the technique of legal formalism. As suggested by Koskenniemi, international law provides the “flat substanceless surface’ [which] expresses the universalist principle of inclusion at the outset and makes possible the regulative ideal of a pluralistic international world.” This is absolutely critical as the form of the law

constructs political adversaries as equals, entitled to express their subjectively felt injustices in terms of breaches of the rules of the community to which they belong no less than their adversaries—thus affirming both that inclusion and the principle that the conditions applying to the treatment of any one member of the community must apply to every other member as well.²⁸

In any decision to attach meaning to legal norms, sovereign equality means that states are entitled as of right to articulate their interpretations on conditions of equal standing. They are thus included in the “normative universe as subjects of rights and duties or carriers of distinct identities”. It is only because the regime comprises *noninstrumental* rules (i.e. “understood to be authoritative independent of particular beliefs or purposes”) that the freedom of its subjects to be different becomes possible.²⁹ This is the essential idea, what we might term the “gift of formalism.”³⁰

On this view, international law is best understood as a project to reach political settlements and forms of reconciliation between the conflicting claims to freedom of differently-situated subjects and the divergent assertions of right and justice to which they continually give rise. If political power is to be exercised in the name of some common social end—say to protect international peace, or security, or justice—such that the sovereignty of a particular State or States is to be limited, then that exercise of power must be done according to legal norms and thereby justified to the State or States so affected. This remains the case even though States may differ greatly in their comprehensive views about the good and true way of life. In this respect, the animating virtues of the modern view are notions of peace, toleration and value pluralism.³¹

How then does this conception of international law differ from that advanced by contemporary rational choice theorists such as Jack Goldsmith and Eric Posner? Here it is important to distinguish analytically between

the descriptive and normative claims at issue. For it is only if we do so, that we can appreciate both the causes and consequences of the current two extremes of power politics and imperial moralizing in U.S. foreign policy. First, as noted above, rational choice theory is premised as a descriptive matter on the unfettered freedom of choice of States in the conduct of their international relations.³² This is an attractive and logical position for powerful states, even more so for the world's single remaining superpower. But it fails to address the normative or "descending" question of how or on what grounds a State's liberty of action *should*, if ever, be subject to limitation or constraint. Even for a superpower, the normative logic of the Hobbesian argument needs to be addressed: i.e. the normative claim that voluntary cooperation between States is a demand of rationality itself because it is in their long-term or "enlightened" self-interest.

Second, however, rational choice theorists are not silent on the normative dimensions of international law. Rather, many in fact advance a thick and substantive "descending" argument of their own: i.e., again as noted above, not only do States have the *right* to place their sovereign interests first, but liberal democratic states even have an *obligation* to do so.³³ As a matter of international law, this is a striking prescriptively normative claim premised on deeply contested notions of Enlightenment and post-Enlightenment conceptions of individual autonomy and democratic theory. Indeed, it was the intractable nature of claims of this very kind that eventually led Rawls to distinguish between a political conception of justice on the one hand and a comprehensive philosophical doctrine on the other.³⁴ And it was this very issue that led Rawls late in his life to reject any comprehensive liberal notion of global cosmopolitan justice in international law and to distinguish between "liberal" rights on the one hand and a more minimal conception of "human" rights on the other.³⁵ Not only is the rationalist conception of what we might call the autonomous or "choosing" agent a comprehensive (and culturally contingent) moral claim, it also functions in Western normative legal discourse as a maximalist restriction and constraint on the autonomy of individuals, groups and States adhering to or advancing competing conceptions of the relationship between individual freedom and social order.

The dramatic reduction and limitation on freedom resulting from such claims are less visible in societies, political traditions and academic cultures such as in the U.S. which trace their intellectual origins to eighteenth century notions of reason and personal autonomy. But in many other diverse States, societies and traditions, this account of a supposedly "universal rationality" distinct and independent from any and all convention or custom is seen as highly subjective and imperialistic. Indeed, much academic work today is devoted to interrogating the *limits* of rational choice theory and to challenging more directly the philosophy of history embodied in the so-called "Enlightenment project."³⁶ What this work reveals is that as between the polarized dualism in modern political thought of moral universalism and cultural relativism, there is a third intersubjective position which denies that relativism is the only alternative to universalism: the

idea of *value pluralism*.³⁷ Nowhere is this more evident than in contemporary debates and struggles over the meaning and application of (universal) human rights norms. It is to this issue that we now turn.

Instrumentalism and International Organization

The idea of legal formalism as a means to promote and secure the ideals of peace, toleration and value pluralism is an attractive picture so far as it goes. The difficulty, however, is that any argument for such a formal view is ambiguous. Formal legal norms are always suspended precariously between two other virtues which international law simultaneously seeks to incorporate and mediate: the seemingly opposing ideas of justice and consent. On their own, these two further virtues appear to threaten the coherence of international law *qua* law: justice because it substitutes vague and subjective ideas about international morality for the rules actually obtaining between states;³⁸ consent because it identifies international law primarily with State will thus making it only external municipal law.³⁹ The genius and paradox of international law is that it tries valiantly to maintain its autonomy *qua* law by seeking to reconcile these seeming opposites within a single form. It does so in two ways: first, by positing a *social ethics* (formal positivism) expressing the freedom of each State as a function of community values and justice;⁴⁰ second, by positing an *individualistic morality* (humanistic universalism) which expresses the international community as a function of each State's unique identity and awareness.⁴¹ This dialectic structure creates the distinctive double-bind of international legal argument.

In the one case, community is interpreted as negative collectivism and autonomy (independence, self-determination) is presented as the normative goal. In the other, autonomy is interpreted as negative egoism and community (integration, solidarity) as what the law should aim at. Neither community nor autonomy can be exclusive goals. To think of community as the ultimate goal seems utopian: as there is no agreement on the character of a desirable community, attempts to impose it seem like imperialism in disguise. To think of autonomy as the normative aim seems apologist: it strengthens the absolutist claims of national power-elites and supports their pursuits at international dominance.⁴²

In this way, each strand of argument generates its opposite within itself. The humanistic universalism of the communitarian argument is limited by implicit acknowledgment of the boundaries and finitude of deontological reasoning (whether arrived at from notions of God or Natural Reason) and thus by the unavoidability of pluralism and reasonable disagreement. The moral notion of universal right is thus premised on the idea of a *social ethics*, i.e. the claim that all moral norms must be intersubjectively contested and justified. In this way, community-oriented arguments contain within themselves the normative aims of self-determination and may be constructed without lapsing into totalitarianism. Conversely, the formal positivism (or legal formalism) of the autonomy argument is premised on a *moral* idea: the duty to respect the autonomy of others as "reason-giving" and "reason-receiving" subjects. This idea underlies the universal norm of

inclusion and formal status as a legal subject in the first place. In this way, autonomy-oriented arguments contain within themselves the normative aims of communal integration and solidarity and may be constructed without degenerating into unlimited egoism.

The international legal project is driven by this dialectic which creates a dynamics of contradiction and constant oscillation between patterns of argument seeking to legitimate social order against individual freedom. The result is that international law—and its actual application and practice in and by international organizations—provides a site of deliberation and contestation which opens a possible pathway by which to transcend the twin dangers of power politics and imperial moralizing discussed above.

In order to illustrate the point, let's consider the idea of fundamental or "universal" human rights—a notion today deeply embedded in the modern structure of international law and international relations.⁴³ What is the source of this law? In the case of core human rights treaties such as the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights and the Conventions against Genocide and Torture, the legal validity of the relevant norms is the consent of the member states themselves. The act of state acceptance by ratification of the treaty unites the ideas of consent and justice: a material norm such as to free speech or freedom of religion is thereby transformed into a legal norm which in turn creates corresponding rights and duties both as between and within the states parties to the convention. This is what I mean by the social ethics of formal positivism, the key point of which is the need to engage with others as equals in the pursuit of a normative consensus reflected in law. This does not eliminate power politics, but it does ensure that powerful states need to obtain the agreement of less-powerful states for any putative international regime or normative framework.

But what if State A asserts that certain religious or cultural norms are the exclusive basis or "source" for any legal rule on human rights acceptable to that society and thus that further deliberation on at least some norms is fruitless? Or, conversely, State B asserts that its sovereignty is subject to no external limit other than that to which it expressly consents and thus that it too rejects certain norms? In each case, a gap is now evident between consent and justice with the result that both the integrity and universality of the law is threatened. How is this impasse to be resolved? These questions compel us to look *behind* the "formal validity" or "binding force" of legal norms and to consider the *purpose of* or *reasons justifying* such norms.⁴⁴ In so doing, we implicitly acknowledge that no formal doctrine of sources of human rights in international law is capable of excluding political considerations, and no doctrinal theory of human rights law can be advanced that is entirely disconnected or "external" to the actually-existing interests, values and ends of differently-situated States and Peoples.⁴⁵ This is what I mean by an individualistic morality of humanistic universalism, the key point being the need to recognize the *limits* of any particular conception of justice, and the need to *justify* any instrumentalist claim regarding the substantive meaning of materials norms of justice. As above, this does not eliminate

imperial moralizing, but it at least lessens the likelihood of international law becoming no more than an apology for the (contested) interests or ends of powerful States and thus legitimizing force as “enforcement” in a manner that conflicts directly with target States’ self-understanding.

The Example of International Human Rights

Both of these dynamics have played out in spectacular terms in the field of human rights in recent years. Indeed, the strength of the argument for rethinking U.S. engagement with international law and organization is best appreciated here. This is possible, however, only once we recognize that the view of instrumental rationalism discussed in Part I itself rests on essentially-contested (i.e. subjective) normative premises. In particular, it is now commonplace in U.S. foreign policy to equate rational self-interest with the basic tenets of a liberal democratic regime. To the extent international law is said to exist, it is thought to apply only or primarily as between liberal democratic states.⁴⁶ On this basis, the traditional attributes of state sovereignty—political independence, autonomy, dignity, territorial integrity—are viewed merely as legal forms. What really counts is whether they help or hinder certain (as-yet unspecified) objectives, values or ends.⁴⁷ Do such formal rules stand in the way, for example, of protecting fundamental norms of liberal democracy and human rights? Do they shield *un-democratic* states which lack a system of government based on free periodic elections and are unaccountable to their citizens? Do they shield also *illiberal* states which fail to offer their citizens individual rights?

Missing from this argument is the notion of formal legal subjecthood—of the “state” as opposed to the “liberal democratic state” as the subject of international law. The defining feature of this view is the notion that the *internal* characteristics of a state determine its standing in the family of nations.⁴⁸ Undemocratic, illiberal, or so-called “rogue” states such as Iraq, Iran or Cuba are not to be regarded as full members of international society and are seen to lie outside of the “zone of law.”⁴⁹ Like the history of colonialism by European nation-states during the nineteenth century, force may therefore be required to transform or “civilize” the internal identity of such states in order to bring them into the community of democratic nations. While terms such as “civilized,” “non-civilized,” and “barbarian” distinguished states in the 19th and early 20th centuries on the basis of an equation between Christianity and the highest forms of civilization, today the “democratic,” “non-democratic,” and “rogue” state distinctions rest on a purportedly universal theory which finds its origins in Enlightenment notions of individual autonomy and popular sovereignty. Such norms, by definition, lie *beyond consent* and thus rest on premises which are not themselves open to evaluation. This is precisely the type of hegemonic move which legal formalism, with its underlying rationale of liberal toleration and political inclusion, seeks (and arguably is able) to prevent.⁵⁰

From Human Rights Commission to Council

We can see this by examining the way in which the mere existence of an international institution such as the UN Commission on Human Rights provides the necessary political space for material norms of this kind to be contested intersubjectively. A cursory review of the instruments and declarations emerging from this intergovernmental body over the last half-century reveals the inherently instrumentalist and subjective nature of U.S. human rights policy in the post-war era. Despite early leadership in the drafting of the Universal Declaration and the two Covenants, the U.S. is today party to strikingly few human rights treaties and even then these have been ratified subject to extensive reservations, declarations, and understandings preventing any noticeable domestic effect (“non-self-executing”) and acceding to obligations already coincident with the U.S. Constitution and laws.⁵¹ As Louis Henkin famously put it, the basic philosophy has been one of international human rights for “export only,” essentially “designed for other states.”⁵² Correspondingly, the predominant U.S. criticism of the UN Human Rights system has been on account of its “toothlessness” and “ineffectiveness” in enforcing and implementing human rights standards (so defined) in other parts of the world.

By contrast, the main objections of states in other parts of the world have not concerned the proposition that civil and political rights are human rights nor the institutional assertion of multilateral monitoring, reporting and supervisory mechanisms. Rather, states have asserted instead that the concept of human rights extends *beyond* civil and political rights and includes notions of economic, social and cultural rights (including “collective” rights) and further that where states are to be subject to international rights-based regimes this must be on the basis of considerations of reciprocity, fairness and equality. To the extent then that international law and organization has been perceived as a mere instrument for the projection of the (subjective) ends, policies and interests of powerful Western states, it has increasingly been met with fierce political counter-mobilization and resistance. While this dynamic is most evident today amongst states in the so-called “Muslim world,” it is also clearly visible among coalitions of states in Asia, Africa and Latin America.

For these reasons, the last annual sessions of the Commission on Human Rights in Geneva increasingly were described as having become “hostage to human rights abusers” and a “forum for defending government’s records rather than examining them”.⁵³ At the same time, the Commission’s most effective tool—its capacity to name and shame human rights violators—became dangerously eroded. Acute politicization became evident in relation to both country situations and thematic areas and a clear north/south divide created polarized voting on many resolutions. This accelerated noticeably in the wake of the events of September 11, 2001, the bitter cycle of violence in the Middle East, and the fissures exposed at the World Conference Against Racism in Durban. In 2003, Human Rights Watch went so far as to observe that an “‘abusers club’ of governments hostile to human rights had consolidated its position and blocked several important coun-

try initiatives, while the United States and to a lesser extent, the European Union was failing to exert positive leadership".⁵⁴

This trend first emerged in May 2001 when in an unprecedented diplomatic fiasco the U.S. was not reelected to a three-year term for the first time since the Commission's founding in 1946.⁵⁵ Having rejoined the Commission in 2003, the U.S. then proceeded to play a largely spoiling role at the 59th session in an effort to defend the prosecution of its unfolding global war on terrorism and invasion of Iraq.⁵⁶ But arguably the greatest controversy occurred when Najat Al-Hajjaji of Libya was elected in early 2003 as the Commission's Chairperson.⁵⁷ This prompted the Washington Post angrily to declare that "grotesquely, [the Commission's] leader will be one of the charter's worst violators, a dictatorship with a long record of support for international terrorism whose treatment of its own people was recently summed up by Human Rights Watch with a single word: 'appalling'".⁵⁸ This controversy subsequently sparked an important debate regarding both the "perverse incentives" for states to join the Commission and the need to introduce minimum membership criteria or "conditionality" requirements of the sort employed for states seeking entry to membership to the EU. This debate would in time result in the final abolition of the "discredited" Commission and its replacement by a new Human Rights Council.

The idea of a new UN human rights body to replace the Commission and stand at the same level as the Security Council and ECOSOC was in fact first proposed in 2004 by the Secretary-General's High-Level Panel⁵⁹ and subsequently endorsed in the 2005 World Summit Outcome document.⁶⁰ Negotiations then began in earnest among States with the criteria for membership being the central issue and with little debate regarding what the Council would actually do once created. Earlier in 2003 the High Commissioner for Human Rights had proposed that the Commission should "develop a code of guidelines for access to membership . . . and a code of conduct for members while they serve on the Commission".⁶¹ Similarly Human Rights Watch had recommended that member states of the Commission or governments aspiring to membership should be required to meet the following four minimum criteria: they must (1) ratify and basically observe the six leading human rights treaties; (2) fulfill obligations to provide reports on their compliance with conventions already ratified; (3) issue a standing invitation to UN investigators and special rapporteurs; and (4) not have been condemned by the Commission in the recent past.⁶²

The difficulty with these otherwise sound proposals is that they are unacceptable to the major powers, especially the United States which is not itself in compliance with criteria (1) and (3) and is dangerously close to falling foul of criterion (4). Normative and institutional difficulties such as these (and importantly also the diplomatic breakdown within the UN Security Council over legal authorization for the war in Iraq) has thus prompted neo-conservative policymakers to advocate the complete abandonment of the UN human rights system (new Council or not) and its replacement with a league or alliance of solely "democratic nations." As discussed above, this move would have the effect of breaking the double-bind of international law

by defining the autonomy or subjecthood of states according to a one-sided, subjective account of community leaving “non-democratic,” “illiberal,” or otherwise “rogue” states so defined with two alternatives: either to adopt the political and economic form of the Anglo-European nation-state as that “single representative form of humanity,”⁶³ or where necessary to be compelled by force to do so.⁶⁴

In the end, the debate over membership criteria for the new Human Rights Council fell along predictable lines.⁶⁵ On the one hand, the UN High-Level Panel and Secretary-General proposed increasing the current membership of fifty-three states to universal membership as a means to “de-politicize” the UN’s human rights work and to underscore the commitment of all members states to promote human rights.⁶⁶ On the other hand, the United States and its allies also sought to depoliticize and reform the body but rather by drastically reducing its membership to around twenty states. As noted by Rajagopal, under this proposal states would be “further subjected to elimination by strict application of the criterion of liberal democracy, so that member-States would be either from the West or be pliant allies of the West.”⁶⁷ The United States also pushed for election of members by a two-thirds majority of the General Assembly and automatic exclusion of any states subject to coercive measures imposed by the Security Council (where the United States and the other four permanent members have the right of veto) for gross human rights violations or acts of terrorism. The final agreement was a new Council still selected on the basis of geographical representation but reduced to forty-seven members which was achieved by reducing the number of European states and increasing the number of African and Asian states.⁶⁸ With its proposals defeated, the United States voted against the General Assembly resolution establishing the new Council and refused to stand for election. The resolution itself was finally adopted on March 15, 2006 by a vote of 170 in favor, four against.

The debate over membership criteria for the Human Rights Council reveals both the contested and subjective nature of a particular “rationalist” account of human rights and the unreasonableness of blunt instrumentalism. The real problem for the U.S. is a human rights body which it is unable to bend to its will either normatively or institutionally. Again, as observed by Rajagopal:

When the post Cold War order has come to rest on the idea of human rights, and its concomitant doctrine of democracy in so many fields of policy from security to development, the West plausibly needs the human rights organ of the U.N. to act in ways that provides legitimacy and moral cover for their actions elsewhere from globalization to the war against Iraq and the war on terror. . . . The impatience exhibited by the U.S. towards the Council is also symptomatic of the U.S. attitude towards any international organization which can, even only in theory, serve as a source of critique of its hegemonic policies and imperial design.⁶⁹

The effect of the double-bind of international legal argument as contested in political bodies such as the Human Rights Council is that powerful states such as the United States are thereby required to engage with rather than

simply avoid or unilaterally override the views and demands of other States and peoples. Increasingly, what this type of political contestation raises for consideration is an argument like the following: human rights, at least in the specific form they have assumed in modern international law, have tainted Western liberal origins; the West embodies a particular legal tradition premised on a stridently individualistic account of moral personality; and the “universal” rights asserted by powerful states such as the United States are thus merely another form of Western imperialism—universalizing the tenets of a distinct tradition or “being illiberal about being liberal, forcing people to be free.”⁷⁰

Such arguments challenging the claims to universality of international human rights law raise difficult questions. But they are questions that urgently demand our intellectual and practical engagement rather than arrogant dismissal. David Kennedy, for example, has pointed to the fact that the idea of human rights has a particular time and place of origin — “[p]ost-enlightenment, rationalist, secular, Western, modern, capitalist” — and has therefore argued that, to the extent the international human rights project is linked to liberal Western ideas about the relationship among law, politics, and economics, it is itself “part of the problem.”⁷¹ In accordance with its rationalistic underpinnings, the main difficulty is the way that human rights positions itself as an “emancipatory political project” that operates *outside politics*. The implicit logic is that

emancipation *means* progress forward from the natural passions of politics into the civilized reason of law. The urgent need to develop a more vigorous human politics is sidelined . . . [and] [w]ork to develop law comes to be seen as an emancipatory end in itself, leaving the human rights movement too ready to articulate problems in political terms and solutions in legal terms. Precisely the reverse would be more useful.⁷²

From this perspective, the Commission on Human Rights has been far from a failure; rather it has “provided a very important forum for leveling a moral critique of the world order based on a rejection of colonialism, racial discrimination and a struggle for equality. . . . [struggles which] form the roots of the modern human rights movement.”⁷³ This is not to deny, of course, the intense and often abysmal politics of denial and obfuscation which shape the proceedings and often poor functioning of the UN human rights bodies and their various *ad hoc* implementation and monitoring mechanisms. But it is a reason to pause and rethink the full scope and implications of the politics of human rights at the UN. On a formal legal or noninstrumental view, the flight from politics in either the form of small technocratic committees of experts or a strictly limited membership of similarly-situated states are both, in Kennedy’s words, part of the problem rather than the solution.

Conclusion

This Essay has sought to rethink two justifications advanced in U.S. foreign policy for the rejection of international law and organization: one which

rejects sovereign equality on moral grounds because it places democratic and rogue states on the same footing; the other which rejects formal legal norms such as sovereignty and human rights on the basis of a particular ethical conception of the good. The former threatens international law's underlying commitment to value pluralism and its denial of the right of any one state to impose a single model of political order; the latter results in imperialism by force. Conversely, the double-bind of international legal argument and its application and contestation in international organizations seeks to moderate these two extremes on the basis of the claim that states are both free and unfree at the same time. Like Odysseus self-bound to his ship's mast, states are free to find ways and reasons to live with the Sirens—despite their bad beliefs and the dangers they pose to civilized seafarers. Conversely, states can break the double-bind in one or both of two ways: by seeking to rule and dominate the Sirens on the basis of a universal law projected as an object of their own reflection and intentionality; or by seeking to transform, coerce, or otherwise civilize the Sirens into becoming members of the civilized community of states.

Notes

¹ Barack Obama, "The American Moment: Remarks to the Chicago Council on Global Affairs," 23 April 2007, available at http://www.barackobama.com/2007/04/23/the_american_moment_remarks_to.php.

² Since September 11, 2001, the U.S. has repudiated an array of widely supported multilateral treaties including the Kyoto Protocol, the ABM treaty, and the Biological Weapons Convention and following various losses in the International Court of Justice, withdrew in 2006 from the Optional Protocol to the Vienna Convention on Consular Relations. The U.S. has also rejected new treaties such as the Small Arms Convention, the Land Mines Convention, and the Rome Statute of the International Criminal Court. In the waging of the war against international terrorism, the U.S. has either evaded or sought to reinterpret key tenets of both the Geneva conventions and human rights treaties.

³ George W. Bush, Preface, National Security Strategy of the United States of America (September 2002).

⁴ Article 2(1) of UN Charter provides that that the United Nations "is based on the principle of the sovereign equality of all its [Member States]".

⁵ Article 2(4) of the UN Charter provides that Member States "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."

⁶ See, e.g., Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* 278–9 (Cambridge University Press, 2004) (observing that in the vivid imagery circulating at the 50th anniversary celebrations of NATO in 1999 the western European and North American "core" was projected as "ordered, unified, lawful; a place where human rights flourished" while the periphery of the rest of the world was variously portrayed as "lawless, anarchic, chaotic, backward, and dangerous").

⁷ Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (1948); *In Defense of the National Interest: A Critical Examination of American Foreign Policy* (1951). For related works on U.S. foreign policy, see the writings of Kenneth Walz, William Appleman Williams, Gabriel Kolko, and Philip Bobbitt. The so-called "New Haven" school and the claims of international lawyers such as Myers McDougal, Harold Lasswell and Michael Reisman arose as a counter and in response to Morgenthau and the claims of the realists.

⁸ See Simon Chesterman, "An International Rule of Law?" 56 *American Journal of Comparative Law* (2008) (forthcoming).

⁹The tone was set early by John Bolton: "International law is not law; it is a series of political and moral arrangements that stand or fall on their own merits, and anything else is simple theology and superstition masquerading as law." See John R. Bolton, "Is There Really 'Law' in International Affairs?," 10 *Transnational Law and Contemporary Problems* 1, 48 (2000).

¹⁰See Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* 185, 205–24 (2005). For discussion, see Oona A. Hathaway and Ariel N. Lavinbuk, "Book Review: Rationalism and Revisionism in International Law," 119 *Harvard Law Review* 1404, 1419 (2006) (defining "rationalism" as motivated by self-interest in an anarchic international system and "compliance" as a matter of choice not obligation: states adhere to obligations only to enhance their own interests and strategic behavior and law is completely "endogenous to politics and has no independent force, moral or otherwise"). *Id.* 1416.

¹¹How, for example, does the U.S. identify or form its "sovereign interests"? As a matter of both history and practice, can U.S. national interests really be explained within a solely rationalist paradigm? This appears to ignore basic tenets of constructivism which asks "how norms evolve and how identities are constituted, analyzing, among other things, the role of identity in shaping political action and the mutually constitutive relationship between agents and structures." Hathaway and Lavinbuk, *supra* note 13, at 1411.

¹²Hans Kelsen, *Principles of International Law* 438–39 (Robert W. Tucker ed., 2nd rev. ed. 1966). This notion can be illustrated by the basic international legal principle of *pacta sunt servanda* (agreements must be respected).

¹³See Ronald Dworkin, "Objectivity and Truth: You'd Better Believe It," 25 *Philosophy and Public Affairs* 87 (1996).

¹⁴*Id.* 88. Such accounts thus claim to argue "not from moral or ethical or aesthetic assumptions, but from non-evaluative theories about what kind of properties exist in the universe, or how we can gain knowledge or reliable belief about anything." *Id.*

¹⁵Thomas Nagel, "Objectivity," Lecture at the Holberg Prize Symposium 2007 in honor of Ronald Dworkin, 27 November 2007, available at http://www.holbergprisen.no/HP_prisen/en_hp_2007_symposium.html.

¹⁶Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* 52 (1989).

¹⁷Robert M. Cover, "Obligation: A Jewish Jurisprudence of the Social Order," 5 *Journal of Law and Religion* 65, 66 (1987).

¹⁸So-called "rational choice" accounts view international rules as instruments through and by which States seek to attain their interests in wealth, power, influence etc. On this view, states obey international law only when it serves their self-interest to do so. See, e.g., Robert O. Keohane, "International Relations and International Law: Two Optics," 38 *Harvard International Law Journal* 487 (1997).

¹⁹Liberal theories of international law have tended to divide into two schools: one looking at the legitimacy of international rules, the other at the identity and domestic political structure of States. On the former, see Thomas M. Franck, *The Power of Legitimacy Among Nations* (1990); on the latter, see Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda," 87 *American Journal of International Law* 205 (1993).

²⁰Constructivist accounts are based on notions of identity-formation and international society and argue that, rather than state interests being fixed or "given," rules and norms shape international relations and play a critical role in the formation of national identities. See, e.g., Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989). On this view states obey international law not because of explicit calculations of their interests, but because a repeated habit of obedience remakes their interests in such a way that they come to value rule compliance.

²¹The international legal process tradition involves three stages: first, interaction with international legal processes and actors; second, the interpretation of international norms; and third, the domestic internalization of norms. See, e.g., Harold Koh, "Why Do Nations Obey International Law?" 106 *Yale Law Journal* 2599 (1997). On this view, compliance is "normative, dynamic and constitutive" with each transaction generating a legal rule which

will guide future transnational interactions, which in turn will further internalize those norms, and eventually through repeated participation in the process will help to reconstitute the interests and even identities of the participants.

²² Koskenniemi, *Apology to Utopia*, *supra* note 19, at 40.

²³ A modern version of this positivist argument is found in H.L.A Hart, *The Concept of Law* (2nd ed., 1961) at ch 10, 213–37. Hart notes that individuals and States comply with law for a variety of reasons and that law itself emerges from custom as much as from sovereign commands. In this respect, a sense of moral obligation is not a necessary condition of the existence of international law:

It is, of course, true that rules could not exist or function in the relations between states unless a preponderant majority accepted the rules and voluntarily co-operated in maintaining them. . . . It may well be that any form of legal order is at its healthiest when there is a generally diffused sense that it is morally obligatory to conform to it. None the less, adherence to law may not be motivated by it, but by calculations of long-term interest, or by the wish to continue a tradition or by disinterested concern for others. There seems no good reason for identifying any of these as a necessary condition of the existence of law among individuals or states.

Id. 231–2. I am most grateful to Maxwell Chibundu for his thoughts and clarifications on these issues.

²⁴ See Koskenniemi, *Apology to Utopia*, *supra* note 19, at 59. See also Richard Tuck, *The Rights of War and Peace: Political Thought and International Order from Grotius to Kant* 12 (1999).

²⁵ Tuck thus suggests that Hobbes and Grotius did not actually differ over ethical matters. Rather, Hobbes' different conclusions "all follow solely from a disagreement about the material conditions for the application of the ethical principles." Tuck, *Rights of War and Peace*, *supra* note 27, at 135.

²⁶ As Tuck notes, in the eighteenth century it was common to "contrast Hobbes' 'unsociable' theory of human nature with the 'sociability' of Grotius, Pufendorf, and their successors (including Locke and Vattel)." Tuck, *Rights of War and Peace*, *supra* note 27, at 12–13. Pufendorf, in particular, recognized that the result of Hobbes's theory was that the idea of a set of rules binding on a sovereign was irreconcilable with the definition of the sovereign as a separate and egoistic individual in a state of nature. This made a nonsense of any idea of international order. The great contribution of Pufendorf was thus to show that both "Grotius's and Hobbes's theories about the conversion of interests into rights could be used as the basis for a quite different set of political conclusions." He thus dismissed Hobbes's radically subjective account of natural morality by "imposing a sovereign on men in the state of nature, responsible for controlling the basic ethical terminology, namely God." *Id.* 148.

²⁷ John Rawls, *The Law of Peoples* 28–29 (1999).

²⁸ Martti Koskenniemi, "What is International Law For?" in *International Law* 102–3 (Malcolm D. Evans ed., 2003). The claim that the law "constructs political adversaries as equals" is presumably intended by Koskenniemi to be a normative rather than descriptive assertion. For useful discussion of sovereign equality as the founding assumption of the international legal order, see Michel Cosnard, "Sovereign Equality: The Wimbledon Sails On," and Nico Krisch, "More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law," both in *United States Hegemony and the Foundations of International Law* (Michael Byers and George Nolte eds., 2003) at 117 and 135.

²⁹ See Terry Nardin, "Legal Positivism as a Theory of International Society," in D. R. Mapel and T. Nardin, *International Society: Diverse Ethical Perspectives* 17, 31 (1998), cited in *id.* 102.

³⁰ Anne Orford, "The Gift of Formalism," 15 E.J.I.L. 179 (2004).

³¹ In the UN Charter era, the sovereign equality of States has accordingly extended to republics, centrally-planned socialist states, theocracies, kleptocracies, and modernizing post-colonial territories.

³² For Goldsmith and Posner, international law does not constrain self-interest but instead "emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power." Goldsmith and Posner, *The Limits of International Law*, *supra* note 13, at 3.

³³ See *supra* note 13 and accompanying text.

³⁴ Due to the fact that modern democratic societies are characterized by a pluralism of “incompatible but reasonable” comprehensive religious, philosophical and moral doctrines, Rawls argued that the aim of political liberalism is “to uncover the conditions of the possibility of a reasonable public basis of justification on fundamental political questions.” John Rawls, *Political Liberalism* xxi (1993). Thus, the move from comprehensive to political liberalism arose from the need to resolve the problem that the account of stability advanced by Rawls in his *Theory of Justice* was unrealistic and inconsistent with realizing its own principles of a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible comprehensive doctrines: *id.* xviii–xx.

³⁵ Thus, Rawls’s “Law of Peoples does not say, for example, that human beings are moral persons and have equal worth in the eyes of God; or that they have certain moral and intellectual powers that entitle them to these rights. To argue in these ways would involve religious or philosophical doctrines that many decent hierarchical peoples might reject as liberal or democratic, or as in some way distinctive of Western political tradition and prejudicial to other cultures. Still, the Law of Peoples does not deny these doctrines.” Rawls, *Law of Peoples*, *supra* note __, at 68.

³⁶ John Gray, for example, has described the core of the Enlightenment as the “displacement of local, customary or traditional moralities, and of all forms of transcendental faith, by a critical or rational morality, which was projected as the basis of a universal civilization.” John Gray, *Enlightenment’s Wake: Politics and Culture at the Close of the Modern Age* 123 (1995). For Gray, however, allegiance to a liberal form of life must always be a matter of “cultural solidarity,” not of “universalizing rationality.” *Id.* at 80. See also Sankar Muthu, *Enlightenment Against Empire* (2003) who argues that the Enlightenment severed the connection between the human self and cultural diversity on the basis of the uniquely rational ideal that cultural difference is not *integral* to the universal human subject. Fort Muthu, however, to view human beings as fundamentally *cultural agents* “acknowledges their status as artful, reasoned and free individuals who are partly shaped by their social and cultural contexts, yet who also through their actions and through changing perceptions alter such contexts themselves.” *Id.* at 274.

³⁷ In summary terms, the central features of value pluralism are its anti-monistic position as an ethical theory, its view that conflicts of values are an intrinsic part of human life and that there is no single right answer in choosing between them, and that conflicts between entire ways of life suggest that not only individuals but also communities may be the principal bearers of rights (and duties) in pluralist political orders. Gray, *Enlightenment’s Wake*, *supra* note 39, at 69, 138.

³⁸ John Austin, *Province of Jurisprudence Determined* (1832).

³⁹ Georg Jellinek, *Die Rechtliche Natur der Staatenverträge* (1880).

⁴⁰ The UN Charter begins from a presumption of initial State freedom in Article 2(1). But as soon as States are regarded as members of an international community, this initial State freedom is limited by the normative demands of the same “equal” freedom of other States.

⁴¹ Article 2(7) of the UN Charter provides that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state”. While international law is normatively universal and binding on all States, it is limited by the factual existence and unique “internal” identity of and thus need for consent of each State.

⁴² Koskenniemi, *Apology to Utopia*, *supra* note 19, at 424.

⁴³ Indeed today the Universal Declaration of Human Rights (1948) and the two covenants, the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966), are commonly referred to as the “International Bill of Rights.”

⁴⁴ Martti Koskenniemi, *The Politics of International Law*, 1 *EUR. J. INT’L L.* 4, 10–11 (1990).

⁴⁵ Koskenniemi, *Apology to Utopia*, *supra* note 19, at 28–29.

⁴⁶ See Anne-Marie Burley, “Toward an Age of Liberal Nations,” 33 *Harv. Int’l L. J.* 393 (1992); Anne-Marie Slaughter, “International Law in a World of Liberal States,” 6 *Eur. J. Int’l L.* 503 (1995).

⁴⁷ Thus on “liberal internationalist” views of international law, the classical norms of state autonomy and non-intervention are read as qualified by or subject to the law’s commitment to particular fundamental ends and values such as “democracy,” “human rights,” and the “rule of law.” This logic has consistently underpinned rationales advanced (especially in the U.S.) for “pro-democratic” or “humanitarian” intervention by one State into the internal affairs and territory of another. Apart from U.S. military interventions in Indochina, Cuba, Granada, Nicaragua, El Salvador, Libya, Panama, Sudan and Kosovo (to name only a few), the policy of regime change and forcible overthrow of the Iraqi government was, e.g., explicitly adopted through legislation in 1998 under the Clinton Administration.

⁴⁸ Especially since the end of the Cold War, powerful Western States and the international institutions they control have advanced strongly anti-pluralist arguments which seek to give greater moral substance to the criteria for recognition as independent and equal subjects of international society. The criteria of inclusion and exclusion turn not on the *external* behavior of States (which would raise familiar issues concerning the scope of the attributes of sovereignty) but rather on their *internal* identity.

⁴⁹ Thus, “[f]lipping the now-familiar Kantian maxim that ‘democracies don’t fight one another,’ [liberal] theorists posit that liberal democracies are more likely to ‘do law’ with one another, while relations between liberal and illiberal states will more likely transpire in a zone of politics.” Koh, “Why Do Nations Obey,” *supra* note __, 2633.

⁵⁰ See further Peter G. Danchin, “International Law, Human Rights and the Transformative Occupation of Iraq,” in Brett Bowden, Hilary Charlesworth, and Jeremy Farrall (eds.), *Great Expectations: The Role of International Law in Building Democracy and Justice after Conflict* (Cambridge University Press, forthcoming 2008).

⁵¹ For U.S. reservations to the ICCRP, see *International Human Rights in Context: Law, Politics, Morals* 1039–43 (Henry J. Steiner & Philip Alston eds., 2nd ed. 2000). The U.S. also has extensive RUDs in the case of the Genocide and Torture Conventions and is not a party to any of the ICESCR, the Race Convention (CERD), the Women’s Rights Convention (CEDAW), the Children’s Rights Convention (CRC), or the American Convention on Human Rights (ACHR). See further Peter G. Danchin, “U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative,” 41 *Columbia Journal of Transnational Law* 35 (2002).

⁵² Louis Henkin, *The Age of Rights* 74 (1990).

⁵³ Adrien-Claude Zoller, “Commentary,” *International Service for Human Rights*, August 2002.

⁵⁴ Human Rights Watch, Press Release, “U.N. Rights Body in Serious Decline,” Geneva, April 25, 2003. In the “abuser’s club,” Human Rights Watch pointed to hostile governments who joined the Commission post-2002 including Algeria, the Democratic Republic of Congo, Kenya, Libya, Malaysia, Saudi Arabia, Sudan, Syria, Togo, Vietnam, and Zimbabwe. Joining China, Cuba and Russia these governments effectively derailed many of the most important country initiatives. The African governments, led by South Africa, circled their wagons to oppose scrutiny and criticism of gross rights abuses in Zimbabwe and Sudan while usually more rights-friendly Latin American states such as Brazil and Argentina failed to support important resolutions and were “muted in their criticism of Cuba”. Accordingly, this left only Canada, Mexico, Costa Rica, Norway, New Zealand and Switzerland as “among the few to hold a firm and principled line on many key human rights issues”.

⁵⁵ This apparently reflected growing irritation by other member states—importantly mainly European and traditionally allied and friendly states—over intransigent U.S. exceptionalism on a host of issues from missile defense to the Kyoto Protocol to the non-payment of U.N. dues. See further Peter G. Danchin, “Human Rights and the United Nations,” in *A Global Agenda: Issues Before the General Assembly of the United Nations* 112, __ (2003).

⁵⁶ For the first time, the U.S. refrained from cosponsoring a resolution condemning Russian human rights violations in Chechnya; it abandoned its usual practice of sponsoring a resolution criticizing China’s human rights practices; it blocked debate on the humanitarian crisis in Iraq and resisted the monitoring of human rights issues during its occupation of the country pending a transition to Iraqi self-government; it vigorously opposed criticism of the human rights situation in Afghanistan and calls for accountability under international

law for past human rights abuses; it insisted that a reference to execution of juvenile offenders be removed from a resolution on children's rights (the U.S. being the only country in the world in 2002 known to have executed persons under eighteen years of age when they committed the offense); and it fought (unsuccessfully in the end) to block the Commission from calling on states to ratify the Rome Statute for the International Criminal Court. *Ibid.* ___. Similarly at the Commission's 57th session in 2002, the U.S. strongly opposed a Mexican proposed resolution calling for counter-terrorism measures to be compatible with international human rights law and for the UN High Commissioner to monitor counter-terrorism laws and make recommendations to governments and U.N. bodies including the new Security Council Counter-Terrorism Committee. Despite receiving broad support, the U.S. asserted that this proposal would unduly limit the work of the Security Council and lead to potential criticism of U.S. policies and measures taken post-September 11 including its use of military commissions and refusal to grant prisoner of war status to Taliban detainees. [cite]

⁵⁷ The vote was 33 in favor, 3 opposed and 17 abstentions. Chairpersons are customarily elected by acclamation but a vote was unusually requested this year by the U.S. It should be noted that previous chairs of the Commission have included Egypt (1953–4), Argentina (1960), Lebanon (1962), Pakistan (1965), Iran (1970), Bulgaria (1982), and Uganda (1983).

⁵⁸ Editorial, "Libya: U.N. Leader," *Washington Post*, January 23, 2003, at A20. Libya reportedly won the support of the African states (who on the basis of regional rotation had the right this year to choose the chair of the Commission) through its generous financial support for the African Union.

⁵⁹ High-Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility (Report of the High-Level Panel on Threats, Challenges, and Change)*, 1 December 2004, UN Doc A/59/565. This proposal was then adopted in the Secretary-General's own 2005 report: Kofi Annan, *In Larger Freedom: Towards Security, Development and Human Rights for All*, UN Doc. A/59/2005, March 21, 2005, online: UN <<http://www.un.org/largerfreedom>>.

⁶⁰ 2005 World Summit Outcome Document, General Assembly Sixtieth Session, UN Doc. A/Res/60/1 (16 September 2005), online: UN <http://un.org/summit2005>.

⁶¹ Report of the U.N. High Commissioner for Human Rights, E/CN.4/2003/14, February 26, 2003 at para. 5.

⁶² HRW, Briefing to the 59th Session of the UN Commission on Human Rights, February 27, 2003, at p. 2.

⁶³ Martti Koskenniemi, "The Civilizing Mission: International Law and the Colonial Encounter in the Late 19th Century," unpublished paper, Rechtshistorikertag, Bonn, 12–17 September 2004, at 6–8.

⁶⁴ It should also be noted that quite apart from normative disagreement over competing conceptions of "democracy" and the incoherence of the "liberal/nonliberal" state distinction, if honestly pursued this proposal would have the effect of isolating the U.S. from many of its major allies and recipients of military aid in the war on terrorism (such as Saudi Arabia, Egypt, Indonesia, Turkmenistan and Pakistan) while at the same time binding it closer to those established democracies (such as Germany, France, Canada and Mexico) which vigorously opposed the war in Iraq.

⁶⁵ For a useful discussion, see Philip Alston, "Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council," 7 *Melbourne Journal of International Law* __ (2006).

⁶⁶ High-Level Panel Report, ¶¶ 283, 285. At the World Summit, the General Assembly endorsed the establishment of the Council but left all the details to the sixtieth session of the General Assembly. Virtually all subsequent negotiations centered on the issue of membership.

⁶⁷ Balakrishnan Rajagopal, "Lipstick on a Caterpillar? Assessing the New U.N. Human Rights Council Through Historical Reflection," 13 *Buffalo Human Rights Law Review* 7, 14 (2007).

⁶⁸ The only other substantive difference between the former Commission and new Council is the position of the Council relative to other UN bodies. Rather than being a subcommittee

of the Economic and Social Council, the new Human Rights Council is a subsidiary organ of the General Assembly. High-Level Panel Report, ¶¶ 285, 291.

⁶⁹ Rajagopal, *supra* note 67, at 14.

⁷⁰ H. P. Glenn, *Legal Traditions of the World* 244 (2000); see also Bhikhu Parekh, *The Cultural Particularity of Liberal Democracy*, 156–175.

⁷¹ David Kennedy, “The International Human Rights Movement: Part of the Problem?,” 15 *Harvard Human Rights J.* 115, 114–5 (2002).

⁷² *Id.* 115.

⁷³ Rajagopal, *supra* note 67, at 9.