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International Law in a Time of Change: Should International Law Lead or Follow?

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THE GROTIUS LECTURE: ASIL 2010

INTERNATIONAL LAW IN A TIME OF CHANGE: SHOULD INTERNATIONAL LAW LEAD OR FOLLOW?

ANTONY ANGHIE*

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Dean Anne-Marie Slaughter's comments in response to this lecture are included here as well.

LECTURE

1. INTRODUCTION

It is an enormous honor to be invited to deliver the Grotius lecture and to be given the opportunity to address all of you today. I would like to thank the Washington College of Law, especially Professor Daniel Bradlow and Dean Claudio Grossman, and the American Society of International Law for granting me this great honor. It is also a particular pleasure and privilege for me because my friend Nathaniel Berman and my teacher and mentor Judge Christopher Weeramantry were the speakers at the inaugural Grotius lecture delivered at the American Society of International Law in 1999.¹ I would also like to thank Dean Anne-Marie Slaughter for being generous enough to participate in this event, and I look forward to her comments.

I would like to dedicate this lecture to someone who would be usually sitting in the first few rows of the audience on this occasion. I would like to dedicate this lecture to Tom Franck. This is the first annual meeting to be held after his passing and we already miss him enormously.

Two main themes are raised by the title of this lecture. First, the theme of change in international law, and second, how we, as lawyers, respond to change—should we lead or follow? These two broad themes in turn raise a number of further questions. For example, should we see change as progress, as has been the tendency of many of the historians of international law?² Or should we see change as repetition, as suggested by David Kennedy, who has powerfully argued that what is seen as renewal takes the form of repetition.³ Further, of course, we must ask the question: change for

1. Christopher Weeramantry & Nathaniel Berman, *The Grotius Lecture Series*, 14 AM. U. INT'L L. REV. 1515, 1515 (1999).

2. For a critical discussion of the importance of the idea of “progress” to the discipline of international law, see generally THOMAS SKOUTERIS, *THE NOTION OF PROGRESS IN INTERNATIONAL LAW DISCOURSE* (2010); *PROGRESS IN INTERNATIONAL LAW* (Russell A. Miller & Rebecca M. Bratspies eds., 2008).

3. See generally David Kennedy, *When Renewal Repeats: Thinking Against The Box*, 32 N.Y.U. J. INT'L L. & POL. 335 (2000) (remarking that, historically, the international legal field experiences renewal through the reintroduction of old ideas, and suggesting that the development of genuinely new ideas would be beneficial to the field).

whom? And, given that change is inescapable, how does change register? What type of change matters? Hilary Charlesworth argued that international law is a discipline of crisis.⁴ If this is the case, does international law respond only when confronted by dramatic and immediately devastating events, such as a massive war or the tragedy of 9/11, which are taken to signal some profound change? How then does international law respond to problems that seem ever present: poverty, environmental damage, the intensifying problems relating to the migration of desperate peoples? Another obvious question posed by the topic “Should international law lead or follow?”, is what is there to lead or follow? The answer that most quickly comes to mind, of course, is politics, as international lawyers are preoccupied with the issue of the relationship between international law and politics, hence the ongoing interest in studying the field of international law and international relations.

These are some preliminary observations, and I hope to explore these issues by focusing on five themes: (1) Grotius; (2) generational change in the American Society of International Law; (3) change from President Bush to President Obama; (4) change and the rest of the world; and finally, (5) change and Third World approaches to international law.

2. GROTIUS, CHANGE, AND THE AMBIGUITIES OF WAR AND PEACE

It is customary at the beginning of this lecture to make some reference to Hugo Grotius; but on this occasion, given the theme of this lecture; it is also extremely apt to reference Grotius given that Grotius’s career and writings provide us with such rich material for a discussion of both leadership and change. Grotius was an international lawyer who devoted his career to ensuring that international law would lead and not simply follow. Grotius, designated the founding father of our discipline, is also surely and appropriately, the archetypal leader. In the words of Judge Weeramantry:

4. See Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 MOD. L. REV. 377, 391 (2002) (asserting that international law relies on crises to fuel its development which, in turn, merely perpetuates the status quo, and suggesting that focusing on daily injustices would allow the entire field to progress).

It was an unprecedented situation that faced the newly emerging states of Grotius's time. Detached from their traditional moorings to church, empire, and a higher law, they were groping for new principles of conduct and interrelationship to provide a compass for the tempestuous waters that lay ahead.

Grotius rose to the occasion—a towering intellect with a passionate vision of an ordered relationship among nations—a relationship based not on the dogma of religion or the sword of conquest, but on human reason and experience.⁵

Grotius was a man who, through his vision, insight, and learning created a new theory of international law and relations that would endure for many centuries. Every period of change and crisis seems to demand a person whose vision compares with Grotius; as Roscoe Pound made clear in his comments facing the international community at the end of the First World War: “Our chief need is a man with that combination of mastery of the existing legal materials, philosophical vision and juristic faith which enabled the founder of international law to set it up almost at one stroke.”⁶

The genius of Grotius is so closely linked to the phenomenon of profound change that the term “Grotian moment” has been coined—I believe by Richard Falk—to refer to a situation where a monumental change has occurred in international relations, and what is required, as Pound suggests, is a person with Grotius's talent to identify the character of this change and to formulate an adequate legal response to it.⁷ This requires far more than the formulation of a new set of doctrines or a comprehensive treaty regime; what it demands is nothing less than a new jurisprudence, for only this can somehow encompass and address the radical change suggested by the phrase “Grotian moment.”⁸ Sovereignty, security, and the relationship

5. Weeramantry & Berman, *supra* note 1, at 1516.

6. Roscoe Pound, *Philosophical Theory and International Law*, in 1 BIBLIOTECA VISSERIANA DISSERTATIONUM IUS INTERNATIONALE ILLUSTRANTIUM 73, 90 (1923).

7. See Richard Falk, *Some Thoughts on the Decline of International Law and Future Prospects*, 9 HOFSTRA L. REV. 399, 408 (1981) (describing the term “Grotian moment” as a time when a declining world order is synthesized with a newly emerging world order so as to successfully address modern challenges); Pound, *supra* note 6, at 90 (explaining that a Grotian-like leader is necessary to guide the international legal community through periods of immense transition).

8. For various uses of the phrase “Grotian moment,” see INTERNATIONAL

between war and peace—these are the great themes that concern our discipline, and a “Grotian moment” occurs when novel events compel a new conceptualization of these issues.

It is therefore no real surprise that Grotius is such a venerated figure in our discipline. Before it was renamed, the British Institute for International and Comparative Law was the Grotius Society. Britain has its own Grotius lecture. In fact, Yevgeniy Primakov was awarded the Hugo Grotius Prize in 2000 for “outstanding state and social activity, for the creation and realization in international relations of his doctrine of the primacy of international law and realism.” So Grotius has been continuously lauded in all these sometimes puzzling ways, by a range of figures who themselves were extraordinarily distinguished.

But if we are to focus on the idea of change, what is clearly evident is the change that occurred in Grotian scholarship. He is no longer seen as simply the intellectual founder of a new world order, seeking to speak law to power, but as a far more ambiguous figure—as a lawyer to the Dutch East India Company whose early work, *The Law of Prize and Booty*, and in particular, a chapter in that work which was to be the foundation of *The Free Sea*, presents a very different set of ideas and concerns that focus on the issue of expanding the power and reach of the Dutch East India Company in its ongoing competition with Portugal in relation to trade in the East Indies.⁹ Indeed, as a consequence of his influence on the

LAW: A CONTEMPORARY PERSPECTIVE 7 (Richard Falk et al. eds., 1985) (defining the phrase “Grotian moment” as descriptive of a transition between two different world order systems); Boutros Boutros-Ghali, *A Grotian Moment*, 18 FORDHAM INT’L L. J. 1609, 1609 (1995) (suggesting that the modern international community has reached a “Grotian moment” and that the old international system must be replaced); Samuel K. Murumba, *Grappling With A Grotian Moment: Sovereignty and the Quest for a Normative World Order*, 19 BROOK. J. INT’L L. 829, 832 (1993) (“A ‘Grotian moment’ is an epoch in which a confluence of circumstances portends the birth of a new era in international law so long as a Grotius is on hand to wrest the new order from the chaos and ambiguities of the dying one.”); GROTIAN MOMENT: THE INTERNATIONAL WAR CRIMES TRIAL BLOG (Feb. 22, 2011), <http://law.case.edu/saddamtrial/> (stating that the phrase “Grotian moment” refers to a legal development that is so significant that it may create new customary international law, or radically transform the interpretation of treaty-based law).

9. See generally HUGO GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY [1603] ch. XII (1950) (arguing that the sea must be considered public and open to all nations and peoples, and that the Portuguese may not restrict trade

development of Roman-Dutch law—another aspect of his genius—Grotius is a part of the living jurisprudence of Sri Lanka, which was partially colonized by the Dutch East India Company in the seventeenth century. Thanks to the recent work of scholars such as Richard Tuck,¹⁰ Peter Borschberg,¹¹ Martine van Ittersum,¹² Edward Keene,¹³ Ileana Porras,¹⁴ and Eric Wilson,¹⁵ we now know how this

activities by the Dutch East India Company in the East Indies).

10. See generally RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* 78-108 (1999) (reviewing the way in which Grotius contributed to the development of international relations theory as it pertains to boundaries of legitimate action by sovereign states).

11. See Peter Borschberg, *The Santa Catarina Incident of 1603: Dutch Freebooting, the Portuguese Estado da India and Intra-Asian Trade at the Dawn of the 17th Century*, *REVISTA DE CULTURA*, Nov. 2004, at 13, 14, available at http://www.borschberg.sg/index_files/RCStaCatarina.pdf (positing that Grotius likely developed much of the knowledge and many of the views that influenced *The Rights of War and Peace* while studying and defending the *Santa Catarina* Incident).

12. See Martine Julia van Ittersum, *The Long Goodbye: Hugo Grotius' Justification of Dutch Expansion Overseas, 1615-1645*, 36 *HIST. OF EUR. IDEAS* 386, 391-93 (2010) [hereinafter van Ittersum, *The Long Goodbye*] (asserting that Grotius's observations about third-party liability and trading monopolies in *The Rights of War and Peace* suggest that his writing was influenced by his prior experiences with the Dutch East India Company). See generally MARTINE VAN ITTERSUM, *PROFIT AND PRINCIPLE: HUGO GROTIUS, NATURAL RIGHTS THEORIES AND THE RISE OF DUTCH POWER IN THE EAST INDIES 1595-1615* (2006) (arguing that the rights and contract theories articulated by Grotius in *The Law of Prize and Booty* were developed to address practical issues faced by the Dutch East India Company, and to defend and legitimize the company's actions in the East Indies).

13. See EDWARD KEENE, *BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS* 40 (2002) (indicating that Grotius's arguments that, under the law of nations, sovereign powers were transferable, and that private individuals possessed rights over their persons and property, were used to justify Dutch actions).

14. See Ileana M. Porras, *Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius' De Iure Praedae—The Law of Prize and Booty, or "On How to Distinguish Merchants From Pirates"*, 31 *BROOK. J. INT'L L.* 741, 742-43 (2006) (maintaining that *De Iure Praedae* was primarily written to justify the Dutch seizure of a Portuguese vessel in the East Indies, and moreover, that this Grotian work contained the foundational concepts of his later work on the rights of war and peace).

15. See generally ERIC WILSON, *THE SAVAGE REPUBLIC: DE INDIS OF HUGO GROTIUS, REPUBLICANISM, AND DUTCH HEGEMONY WITHIN THE EARLY MODERN WORLD-SYSTEM (C. 1600-1619)* xiii (2008) (utilizing a critical analysis of Grotius's *De Indis* to demonstrate the utility of multiple methodologies in scholarship regarding the genesis of the modern international legal system).

earlier work of Grotius¹⁶ influenced the text that is generally regarded as his masterwork, and that is the focus of traditional Grotius scholarship: *The Rights of War and Peace*.¹⁷ The “Grotian tradition” was powerfully shaped by the work of Sir Hersch Lauterpacht.¹⁸ In this version, Grotius, like Sir Hersch himself, is a heroic figure seeking to control the escalation of violence and to reconstitute a ruined Europe. But the Grotius that emerges from newer scholarship that explores his dealings with the Dutch East India Company (“VOC”) is a more ambitious and self-interested figure, seeking his own advancement and writing on the themes of war, commerce, privateering, mercenaries, and trade in a manner clearly linked with his immediate employment. This is the Grotius that engaged in the dual enterprise of establishing the Dutch Republic and asserting Dutch sovereignty as an incipient trading empire.¹⁹ Given the traditional view of Grotius as the bringer of peace and justice to a political order driven by religious conflict, it is also disconcerting to note that his great work, which is understood as a blueprint for peace, is principally about war, and that war appears to be placed under little restraint in Grotius’s system. Thus, when Gustavus Adolphus set about the conquest of Pomerania, he did so with justification from Grotius. As the historian Peter Wilson argues in his recent work on the Thirty Years’ War, “[t]his claim (by

16. For a collection of essays reassessing Grotius’s early work, see also 30 GROTIANA 1 (2009).

17. 2 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* (Richard Tuck ed., Liberty Fund 2005) (1625).

18. See generally Hersch Lauterpacht, *The Grotian Tradition in International Law*, 1946 BRIT. Y.B. INT’L L. 1. Interestingly, Sir Hersch himself makes the point that a great deal of material in *The Rights of War and Peace* was taken from *The Law of Prize and Booty*. See *id.* at 4 (contending that *The Rights of War and Peace* lacks fluidity because Grotius included within it material he wrote several years before in *The Law of Prize and Booty*). Only in more recent times were the implications of this borrowing examined. See, e.g., A NORMATIVE APPROACH TO WAR: PEACE, WAR, AND JUSTICE IN HUGO GROTIUS (Onuma Yasuaki ed., 1993) (reflecting on the significance and limitations of *The Rights of War and Peace*).

19. See van Ittersum, *The Long Goodbye*, *supra* note 12, at 388-89, 399-407 (describing Grotius’s dedication to the Dutch East India Company and his continuous efforts to act and write on its behalf, and explaining how Grotius’s son essentially acted as his proxy while employed at the Dutch East India Company). See generally WILSON, *supra* note 15. These two works provide a detailed study of the close and ongoing links between the VOC and Grotius. These links extended to the point where Grotius’s sons were employed by the VOC and used their father’s work to justify Dutch claims to engage in the cinnamon trade in Ceylon.

Gustavus Adolphus) rested on Hugo Grotius's helpful recent book that implied that the Swedes could do as they pleased provided they treated conquered peoples humanely."²⁰ This aspect of Grotius's work was recognized and commented on by Lauterpacht, even as he gallantly attempted, with his considerable ingenuity, to salvage from all this an image of Grotius as the author of a new, just, and peaceful order. Thus, Lauterpacht pointed to the fact that Grotius's preoccupation with order and stability—perhaps understandable given the circumstances—were such that he refused to recognize the right of people to rebel against a tyranny and he justified slavery.²¹ Further, as Lauterpacht notes, according to Grotius, “[c]aptives taken in war may be killed. So can those who surrender but whose surrender is not accepted. Water may be polluted, though not by poison. Both by the law of nations and by the law of nature it is permissible to use assassins.”²² Many of these actions violate contemporary international law norms. So a work that is supposed to advocate peace appears instead to advocate violence of an almost unrestrained sort. For Grotius, the suffering of an injury was the basis of a right to go to war: “The *first Cause* therefore of a *just War*, is an *Injury*, which tho' not done, yet *threatens* our *Persons* or our *Estates*.”²³ A survey of *The Rights of War and Peace* indicates that Grotius permitted recourse to war in an extraordinarily broad range of circumstances, including breach of contract.²⁴ *Just war* doctrine, of course, was also especially useful to justify war against non-European peoples who resisted the expanding European trading

20. PETER H. WILSON, *THE THIRTY YEARS WAR: EUROPE'S TRAGEDY* 463 (2009).

21. Lauterpacht, *supra* note 18, at 43-44.

22. *Id.* at 12 (internal footnotes omitted in cited material).

23. GROTIUS, *supra* note 17, ch. I, ¶ II.3. This passage seems to approve what we might now called preemptive action. However, Grotius seems to qualify his position later when he states: “But I can by no Means approve of what some Authors have advanced, that by the Law of Nations it is permitted to take up Arms to reduce the growing Power of a Prince or State, which if too much augmented, may possibly injure us.” *Id.* ¶ XVII. He continues saying: “but to pretend to have a Right to injure another, merely from a Possibility that he may injure me, is repugnant to all the Justice in the World: For such is the Condition of the present Life, that we can never be in perfect Security.” *Id.*

24. As Lauterpacht points out, however, it is not always clear what Grotius' position was after he cites innumerable authorities. See Lauterpacht, *supra* note 18, at 3-4 (attributing the disjointed nature of *The Rights of War and Peace* to Grotius's reliance on a myriad of sources).

Empires.²⁵

Actually reading *The Rights of War and Peace*, battling through all the difficult and distracting text, its invocation of religion and scripture, and historical and classical precedents, one is struck by how much violence inhabits and permeates that text, which is yet supposedly intent on establishing peace and restraining force. But perhaps this is inevitably the case. Any system that appeared to outlaw war could seem naïve and utopian, and Grotius certainly would not want to be seen in such terms. It is hardly surprising then that Grotius, together with Vattel and Puffendorf, was dismissed by Kant as being one of the “sorry comforters” who justify violence.²⁶

If the great text that is regarded as the foundation of our discipline, and that is understood as restraining the recourse to war and limiting the use of force, is indeed more ambiguous and can be read instead as somehow legitimizing, if not enabling, violence, then crucial questions arise as to whether international law adapted and developed to overcome these deficiencies and inadequacies. Or perhaps violence is an inextricable aspect of international law, and Grotius was simply reconstituting this relationship and providing it with a different intellectual foundation.

It is clearly the case that war has taken different forms over the centuries.²⁷ And yet, the relationship between war and peace, the seeming inescapability, if not pre-eminence of war, so problematic in Grotius’s time, is no less complex in our own.²⁸ President Obama’s speech on the occasion of being awarded the Nobel Peace Prize could very accurately, I believe, be termed precisely *The Rights of War and Peace*. Indeed, President Obama invites the comparison when he asserts that he is “filled with difficult questions about the relationship between war and peace, and our effort to replace one

25. See, e.g., TUCK, *supra* note 10, at 67.

26. IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL SKETCH (1795), reprinted in KANT: POLITICAL WRITINGS 103 (Hans Reiss ed., H.B. Nisbet trans., Cambridge Univ. Press 2d ed. 1991).

27. See generally STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY (2005) (reviewing the past several centuries of warfare, including religious and philosophical views of war and “just war” theories).

28. See generally DAVID KENNEDY, OF WAR AND LAW (2006) (illustrating the perplexities and challenges arising from the intersection of war, peace, and law that confront the modern international community).

with the other.”²⁹ Although ostensibly a speech about peace—the title of the Nobel Prize he was awarded—President Obama’s speech makes it clear that war is sometimes necessary. Thus, the teachings of Gandhi and Martin Luther King, Jr., the great champions of non-violence, may not always be applicable. In asserting that “[w]e will not eradicate violent conflict in our lifetimes,” and that we “will find the use of force not only necessary but morally justified,” President Obama acknowledged that he was departing from the words and example of one of his inspirations, Dr. Martin Luther King, Jr., who, in his own Nobel prize ceremony, stated that “[v]iolence never brings permanent peace. It solves no social problem: it merely creates new and more complicated ones.”³⁰

Violence has its uses. Further, civilian casualties are inevitable, even in the most just war. President Obama asserts that one of the conditions of a “*just war*” is satisfied “if, whenever possible, civilians are spared from violence.”³¹ The implication appears to be that the necessities of war prevail, and that civilians are to be spared only when the military imperatives permit this. The sad inevitability of civilian deaths in the cause of a greater good is emphasized by President Obama again when he asserts that, even in the most just war, civilian casualties are massive: “And while it’s hard to conceive of a cause more just than the defeat of the Third Reich and the Axis powers, World War II was a conflict in which the total number of civilians who died exceeded the number of soldiers who perished.”³²

The general view emerging from President Obama’s speech is that war is, if not in some ways interchangeable with peace, then at least essential for peace. This of course is a very traditional argument, the goal of war is the achievement of peace. But adopting such a view

29. Barack Obama, President of the United States of America, Remarks by the President at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>.

30. *Id.* (citing Martin Luther King, Jr., Nobel Lecture: The Quest for Peace and Justice (Dec. 11, 1964), *available at* http://nobelprize.org/nobel_prizes/peace/laureates/1964/king-lecture.html).

31. *Id.*

32. *Id.*; see also Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 50-51 (1994) (asserting that instead of humanizing war, the laws of war actually enable and further legitimize wartime violence).

places very heavy emphasis on distinguishing between just and unjust wars, and President Obama both recognizes and extends this line of thinking to the end of war; he urges us to “think in new ways about the notions of just war and the imperatives of a just peace.”³³ The question may then arise as to whether a “just peace” can in some way remedy an otherwise unjust war. To revert to the framework of Grotius, the question then might be whether conquest is permitted if it results in the humane treatment of the subjected peoples. This was certainly the view taken by colonial powers for many centuries.

The unavoidable, necessary, and even useful aspect of war in relation to the achievement of peace appears to be recognized by the Nobel Prize committee itself. Gandhi, of course, was never awarded the Nobel Peace Prize—an enduring scandal. Rather, it is notable that many of the recipients of this prize proved themselves earlier to be extremely adept at the waging of war. This is also evident in the award of the prize to the founding President of our own Society, Elihu Root. Root won the Nobel Peace Prize in 1912 for his sustained efforts to promote the resolution of international disputes through judicial mechanisms, rather than by resort to war.³⁴ Root’s dedicated work on this still compelling project resulted, for instance, in the creation of the Permanent Court of International Justice. Nevertheless, even as he attempted in this way to promote peace, he intimately and actively engaged in the prosecution of a ruthless war against the insurgents of the Philippines. The war arose after the United States defeated the Spanish in the Philippines, one consequence of the war between the United States and Spain that began in 1898. Presenting itself initially as a liberator of the Filipino people, the United States then found itself at war against a new enemy, the Filipino nationalists. The subsequent guerrilla war lasted for several years. Thousands of Filipinos were killed and many atrocities were committed by American troops in their battle against the “insurgents,” prompting inquiries by various commissions. Root was one of the principal architects of the American war in the

33. Obama, *supra* note 29.

34. *Elihu Root – Biography*, NOBEL PRIZE.ORG, http://www.nobelprize.org/nobel_prizes/peace/laureates/1912/root-bio.html (last visited Oct. 1, 2011) (describing Root’s participation in creating international dispute bodies, including the Central American Court of Justice, the World Court, and a Permanent Court of International Justice).

Philippines. One of his major early works is titled, precisely, *Military and Colonial Policy of the United States: Addresses and Reports*.³⁵ There he elaborates on themes, outlined in chapter headings, such as “The Suppression of Insurrection and the Building-up of Civil Government;” “Military Operations in the Islands;” “Continued Military Operations in the Philippines;” and “The Beginnings of Civil Government.”³⁶

Root basically adopted a two-fold strategy to deal with the challenge of creating a civilian government. First, the United States sought to win over the Filipino population and assure them of the good intentions of the United States by establishing local governments, and placing suitable Filipinos into the structure of that government. It had to be ensured, in the stern words of Root, that any such Filipinos must show “absolute and unconditional loyalty “to the United States.”³⁷ Secondly, it was recognized that certain tribes would not be amenable to the ministrations and benefits of civilization. In dealing with this situation, Root drew on America’s own experience with the Native Americans:

In dealing with the uncivilized tribes of the islands the Commission should adopt the same course followed by Congress in permitting the tribes of our North American Indians to maintain their tribal organization and government, and under which many of those tribes are now living in peace and contentment, surrounded by a civilization to which they are unable or unwilling to conform. Such tribal governments should, however, be subjected to wise and firm regulation, and without undue or petty interference constant and active effort should be exercised to prevent barbarous practices and introduce civilized customs.³⁸

Ideally then, tribal rule and the advancement of civilization were to be reconciled in this way. The proper intentions of the United States, and what distinguished them from the egregious European

35. ELIHU ROOT, *THE MILITARY AND COLONIAL POLICY OF THE UNITED STATES: ADDRESSES AND REPORTS* (Robert Bacon & James Brown Scott eds., 1916).

36. *Id.*

37. See Letter from William McKinley, Secretary of War, to Bd. of Comm’rs to the Philippine Islands, in ROOT, *supra* note 35, at 291 (requiring that the central authority in the islands maintain the absolute power to remove and punish any native given a position of public office who failed to exhibit “unconditional loyalty” to the United States).

38. ROOT, *supra* note 35, at 321.

colonial powers, were manifest in the fact that even as it inflicted this massive violence on the Philippines, the United States also extended many of the rights contained in the United States Bill of Rights to the Philippines. We return here to the Grotian argument that force and conquest could be justified if it resulted in the creation of a more humane society. Root, in addition, argued that the military action in the Philippines was not a conquest because it was directed towards preparing the Filipinos for self-government. Mark Twain, however, was not persuaded by any of these arguments. He was emphatically and vocally opposed to the war, and was a prominent member of the American Anti-Imperial league.³⁹ His antipathy to imperialism was directed earlier at the excesses committed by King Leopold in the Congo.

It would be, of course, interesting to compare Root's strategies with those deployed by the United States in other wars with insurgents in countries where the United States professed itself to be intent on liberating a hapless population from all manner of tyranny and medieval barbarity. Root was, from 1899 to 1904, the U.S. Secretary of War. There was no ambiguity about the duties of the holder of this office. The fact that the title of this office was changed to "Secretary of Defense," as it currently reads, is a product, perhaps, not so much of a change in outlook, as a reflection on the interchangeable and ambivalent nature of the relationship between *war and defense*, and *war and peace*.⁴⁰ Further, Root, like Grotius, is something of a heroic figure. His extraordinary career extended for many decades;⁴¹ and yet, like Grotius, he was a more complex figure than much of the literature about him would suggest. Root's commitment to the work of peace combined with highly developed

39. See generally MARK TWAIN'S WEAPONS OF SATIRE: ANTI-IMPERIALIST WRITINGS ON THE PHILIPPINE-AMERICAN WAR (Jim Zwick ed., 1992).

40. This interchangeable nature of the relationship between war and peace permeates President Obama's Nobel Peace prize speech as well. Thus, when referring to the soldiers of NATO and other U.S. allies, he states: "That's why we honor those who return home from peacekeeping and training abroad to Oslo and Rome; to Ottawa and Sydney; to Dhaka and Kigali—we honor them not as makers of war, but of wagers—but as wagers of peace." Obama, *supra* note 29.

41. See generally PHILIP C. JESSUP, I ELIHU ROOT (1938) (documenting Root's life and career, from his early legal career, through his service in the cabinets of President McKinley and President Theodore Roosevelt, to his receipt of the Nobel Peace Prize in 1912).

skills of war and, his humanitarianism was intimately connected with an outlook that was, in the end, imperial. In this respect, he was no different from many of the prominent international lawyers of the late nineteenth century who were closely connected with the imperial, and inherently violent, enterprise.⁴² The dual stature of war and peace and the people who decide these issues, is suggested by President Obama at the outset of his speech. He is the recipient of the Nobel Peace Prize but he is also the Commander in Chief of a nation that is at war in several countries. But, if it is accepted that war is a means to peace, then there is no necessary contradiction, and it may even be the case that a Commander in Chief is especially qualified to win a Nobel Peace Prize. The Grotian ambiguities inescapably remain with us.

3. GENERATIONAL CHANGE

Only change is permanent, as it were. And I look forward to hearing the different panels on whether, in particular areas of law, this is somehow an especially dramatic time of change, as suggested by the fact that this conference is based on this idea. But there is one change that affects us all no matter what area we specialize in. With the passing of Tom Franck and Ian Brownlie, a sense that generational change is now upon us is now somewhat palpable.

It is, of course, impossible to generalize about an entire generation, and there is a particular difficulty in speaking about people who are known so well to all of you. I would simply suggest that each of them provided, in different ways, models of international lawyers who were leaders, and who were powerfully committed to the idea that international law should lead rather than follow. In this case, *leading* meant upholding international law, and being committed to international law and the expansion of international

42. See generally MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2001) (arguing that the legal profession was “depoliticized,” while simultaneously infused with an imperialist objective); Frédéric Mégret, *From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Humanitarian Law’s ‘Other’*, in *INTERNATIONAL LAW AND ITS OTHERS* 265, 265-317 (Anne Orford ed., 2006) (explaining that while international humanitarian law presumably assumes the inclusion of all, from the time of its emergence, it has excluded the colonial “other” from its protection).

law. In different ways, Tom and Ian Brownlie contributed immensely to this tradition.

Tom, in *The Power of Legitimacy Among Nations*,⁴³ sought to answer one of the oldest questions that we as international lawyers confront: why should we regard international law as binding? He brought to this question a particularly American sensibility - one that attempted to incorporate the political into a legal framework. As Tom demonstrated so brilliantly in his work, the concept of legitimacy acts as an effective bridge between the spheres of the legal and the political to provide a very persuasive answer to a question that has preoccupied our discipline.⁴⁴ The notion of the binding quality of international law was so important to Tom that he returned to this theme in the essay he wrote on the occasion of the one-hundredth anniversary of the publication of the *American Journal of International Law*.⁴⁵

In his other very influential work on democratic governance, Tom engaged in a quintessentially Grotian exercise.⁴⁶ He acknowledged the dramatic turn to democracy that was taking place in Eastern Europe and other parts of the world after the end of the Cold War, and sought to give these political developments a legal expression—a legal form; hence his argument for an evolving right to democratic

43. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990). Like Grotius, Tom was deeply knowledgeable about many colonial issues and wrote his first book on the topic of "Race and Nationalism." See Karen Knop, *Reflections on Thomas Franck, Race and Nationalism (1960): 'General Principles of Law' and Situated Generality*, 35 NYU J. INT'L L. & POL. 437 (2003).

44. See generally *id.* (emphasizing that questions regarding the binding or consensual nature of laws are most often directed towards international, versus domestic, law).

45. See generally Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT'L L. 88 (2006) (noting the evolution in the views of American international law professors and practitioners from the belief that international law would triumph over nationalism and promote a cooperative approach for resolving international issues, to the contemporary sense that international law is merely one of many avenues for advancing the national interest).

46. See generally Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992) (asserting that there has been an emergence of an entitlement to democratic governance through the development of entitlements to self-determination, free expression as a human right, and participatory elections).

government.⁴⁷ For Tom, then, politics always affected the formation of the law, and yet, the law had its own independent reality which would in turn shape the character of politics.

I always saw Sir Ian Brownlie as a brilliant embodiment of the positivist tradition. He begins his classic text, *Principles of Public International Law*,⁴⁸ in the most uncompromising way: not with the issue of whether “international law really is law”—a topic that many American textbooks, somewhat defensively, discuss in their very first chapters, but rather Sir Ian (I could never bring myself to call him “Ian,” although he invited me to do so) simply begins with the sources of international law.⁴⁹ International law is law and we simply proceed from that point onwards to understand the elements of international law and how they are applied. He was possibly controversial, but he was also something of a hero to me as he argued so many cases that might be regarded as unpopular. He was on the “other side” in Nicaragua,⁵⁰ in Nauru,⁵¹ and in the Lockerbie⁵² and NATO cases.⁵³ He always projected the belief that the price of adhering to the rule of law is to accept its operation, even in the most difficult and complicated circumstances, and even in the midst of ongoing armed conflict. To Sir Ian, it seemed, the rule of law either existed or it did not exist. It is unsurprising that his Hague lectures, given in the year of the fiftieth anniversary of the United Nations, are

47. See, e.g., *id.* at 90-91 (recognizing that there exists an evolving entitlement to democratic governance, but also warning of “residual problems” inherent in democracies).

48. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (6th ed. 2003).

49. *Id.* at 3-4 (indicating that “the sources of international law and the law of treaties . . . must be regarded as fundamental: between them they provide the basic particles of the legal regime”).

50. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27).

51. *Certain Phosphate Lands in Nauru* (Nauru v. Austl.), Preliminary Objections, 1992 I.C.J. 240 (June 26).

52. *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libya v. U.K.), Preliminary Objections, 1998 I.C.J. 9 (Feb. 27); *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libya v. U.S.), Preliminary Objections, 1998 I.C.J. 115 (Feb. 27).

53. See, e.g., *Legality of Use of Force* (Yugoslavia v. Belg., Can., Fr., Ger., It., Neth., Port., Spain, U.K., U.S.), 1999 I.C.J. 124 (June 2).

entitled *The Rule of Law in International Affairs*.⁵⁴

There is another member of this generation that I would like to mention in terms of the whole theme of international lawyers as leaders or followers, and that is Professor Abe Chayes, a major figure of that generation whom I was privileged to know. Abe, of course, was Legal Advisor to the United States. He often told the story about himself, of how at his confirmation hearing, he advocated the greater use of the ICJ (“International Court of Justice”) by the United States. When asked how many judges sat on the International Court, he was unable to answer! In an opinion he gave in 1961, Professor Chayes advised on General Maxwell Taylor’s recommendation that more troops should be deployed in South Vietnam.⁵⁵ While providing legal advice that generally authorized the proposed action, Professor Chayes proceeded to articulate, because of his “deep concern with these matters,” a less technical approach to the issues raised:

The central feature of the course would be the initial introduction of substantial numbers of United States troops to help in pacifying the country . . . In assessing the prospects for this course the long history of attempts to prop up unpopular governments through the use of foreign military forces is powerfully discouraging . . . In my view, a more promising course of action would be to seek to internationalize the problem with a view to a negotiated settlement or a United Nations solution.⁵⁶

For Abe, then, international law and the U.N. system were powerful instruments that guided his approach to international relations, and he was very astute in understanding the relationship between legal and political approaches to a particular issue. His acute understanding of the relationship between law and politics was also powerfully demonstrated by his approach to the Cuban missile crisis,

54. IAN BROWNLIE, *THE RULE OF LAW IN INTERNATIONAL AFFAIRS: INTERNATIONAL LAW AT THE FIFTIETH ANNIVERSARY OF THE UNITED NATIONS* (1998).

55. See Memorandum From the Legal Adviser (Chayes) to the Secretary of State (Nov. 16, 1961), available at www.state.gov/www/about_state/history/vol_i_1961/y.html (advising that proposed U.S. actions in Vietnam from the 1961 report by U.S. General Taylor largely posed no insurmountable legal problems, but advocating that a United Nations or international negotiated solution would be more promising).

56. *Id.*

which contributed to the successful resolution of what was surely one of the most dangerous crises ever to confront the international community.⁵⁷ His own commitment to the idea of the international rule of law was most dramatically demonstrated, perhaps, in his decision to appear with Sir Ian for Nicaragua against the United States. For him, it seemed, the rule of law applied even when, indeed particularly when, it acted against his own country. I think, further, that Harold Koh, now following in his teacher's footsteps as Legal Advisor, pointed to another aspect of Professor Chayes' legacy in his eulogy:

He had taught me, more fundamentally, what it means to be a lawyer committed to the rule of law in international affairs. For if international relations are to be more than just power politics, Abe showed us, international lawyers must be moral actors. Our job is not simply to do as we are told. We must fuse our training and skill with moral courage, and guide the evolution of legal process with the application of fundamental values.⁵⁸

Apart from providing us with insight into Abe's concern for the rule of law in international affairs, Dean Koh very importantly stressed the role played by international lawyers in upholding the international rule of law. International law then is not in itself some neutral instrument that is simply applied to a situation. Rather, international law is given its force and its efficacy through the agents, the international lawyers that use and develop and elaborate it. The topic of this lecture could then be rephrased as "Should international lawyers lead or follow?" And of course, the question is what leadership means, in this context. The Chilcot inquiry that is now unfolding in the United Kingdom has heard from a number of very distinguished and senior international lawyers in relation to legal issues surrounding the decision to invade Iraq.⁵⁹ And these

57. See generally ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* (1974) (drawing from his experience as a Legal Advisor in the U.S. Department of State to conclude that during the Cuban Missile Crisis international law provided a structure through which the United States made and legitimized its decisions).

58. Harold Hongju Koh, *An Uncommon Lawyer*, 42 HARV. INT'L L. J. 7, 9 (2001).

59. See generally *About the Inquiry*, THE IRAQ INQUIRY, <http://www.iraqinquiry.org.uk/about.aspx> (last visited Oct. 1, 2011) (identifying that the Chilcot Inquiry was launched officially on July 30, 2009, and generally

lawyers provide very different models of what leadership might suggest.

So when we survey this generation, and this attempt is only cursory, needless to say, I do think that we have fine examples of international lawyers as leaders in the form of people like Tom, Sir Ian, and Abe Chayes. The younger generation, my own generation, might see itself as being more sophisticated, more sensitive to the nuances of the relationship between law and politics, more methodologically advanced, more formidably multidisciplinary, and more sophisticated in its understanding of power and less inhibited in using it.⁶⁰ But, and I could be succumbing to cliché and sentimentality here, my view is that we still have something very important to learn from the older generation. I think they understood only too well that law is inevitably affected by politics, that states may be driven by their interests. This idea recently enjoyed a powerful revival, but was eloquently stated almost two centuries ago by Jeremy Bentham.

I think Tom, Sir Ian, and Abe, understood this argument very well when they confronted the great crises of their time. But I think they took the long view of international law and politics, and appreciated the point that international law, whatever its weaknesses, proved over the centuries and through great turbulence and dislocation, to be extraordinarily resilient. Their approach, which might be regarded as the traditional approach, has returned once more. As President Obama makes clear in his Nobel Prize speech: “Nevertheless, I am convinced that adhering to standards, international standards,

describing the purpose of the inquiry as to unearth lessons that can be taken away from the Iraq conflict).

60. For example, the memoranda authored by John Yoo have been extensively analyzed and criticized. One of the features of his memoranda that I find most interesting is the dismissive, triumphal, and even contemptuous tone that Professor Yoo adopts in his repudiation of the views of two very experienced and distinguished individuals: Colin Powell and the then-legal adviser, William Howard Taft. See Memorandum from John C. Yoo, Deputy Asst. Attorney Gen., to William J. Haynes II, Gen. Counsel, Dep’t of Def. 1-2, 81 (Mar. 14, 2003), available at http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf (concluding that alien enemy combatants held abroad are not protected by the Fifth and Eighth Amendments, that generally applicable criminal laws do not apply to the military interrogation of these combatants, and that the United States has no obligations regarding the conduct of interrogations under international law beyond its obligations under U.S. law).

strengthens those who do, and isolates and weakens those who don't."⁶¹ President Obama also states: "Furthermore, America—in fact, no nation—can insist that others follow the rules of the road if we refuse to follow them ourselves."⁶² Perhaps, even the second Bush administration realized that the United States, for all its power, could not isolate itself from the international community and international law.

4. SOVEREIGNTY AND INTERNATIONAL LAW: WHERE ARE WE NOW, WHAT CHANGES HAVE OCCURRED?

The change that occurred in U.S. foreign policy from the Bush administration to the Obama administration is an issue that will be extensively explored in the course of this conference. Whether consciously or otherwise, the Bush administration treated 9/11 as what we might term a "Grotian moment"—one in which the entire character of the international system changed irrevocably. As a consequence, the old system of international law and relations appeared inadequate, to many, to deal with these unprecedented challenges. The Bush administration responded by unilaterally amending fundamental aspects relating to various areas of law, including the law of war and international human rights law. The Bush doctrine of "preemptive self-defense" was one of the most prominent examples of this radical attempt to revise long established principles of international law. As the then Secretary-General of the United Nations, Kofi Annan asserted, the Bush doctrine would have greatly altered, if not undermined, the foundations of the U.N. approach to the use of force. The Bush administration generally argued that it was acting within a new legal framework, one that was appropriate for the harsh new international realities that emerged from 9/11. The United States itself was the author and legislator, of this new system; a system that was revealed unmistakably to favor and legitimize the United States and its own practices and policies, some of which would have been clearly illegal under established international law. As Detlev Vagts remarked, it suits the hegemon to act within the law, suitably amended.⁶³ The Bush administration's

61. Obama, *supra* note 29.

62. *Id.*

63. Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843, 845 (2001) ("[I]t can be convenient for the hegemon to have a body of law to work

response to 9/11 suggests how the trope of the “Grotian moment” might be used by a hegemonic power rather than a visionary jurist.

It is clear that President Obama, through his affirmation of the importance of international law, seeks to distance himself from the Bush administration’s position. He is particularly forceful in affirming the application of international humanitarian law in America’s fight against terror:

And even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is a source of our strength. That is why I prohibited torture. That is why I ordered the prison at Guantanamo Bay closed.⁶⁴

Despite these contrasts, one respect in which President Obama and President Bush may share a certain commonality is in their view that democratic sovereignty is somehow distinctive and that international law should recognize this in some way.

The allegedly unique character of democratic sovereignty can be placed within a more general context of an ongoing debate about the contemporary status of sovereignty. My broad argument here is that, in recent times, while there have been major developments in undermining, disaggregating, dividing, or sharing sovereignty, and while these developments will have a continuing effect, what we might be witnessing is a return to more classical ideas of formal sovereignty. In examining these themes I will focus on the relationship between democracy and international law—a theme that President Obama alludes to in his Nobel Prize speech; the idea that democratic sovereignty is distinctive. This idea was developed by international relations scholars and political scientists who studied extensively the thesis that democratic states do not go to war with each other. The Bush administration, in its two National Security Strategies, also focused on the significance of democracy. Can we trace a shift between these positions? What does that suggest? How should we see these developments in the broader context of international law and sovereignty?

The classic idea that ostensibly was established by the Peace of

with, provided that it is suitably adapted.”).

64. Obama, *supra* note 29.

Westphalia was that a sovereign has absolute power within its own territory. Recent studies of the Peace of Westphalia, and indeed, even some classic, older studies, have suggested that this view of Westphalian sovereignty is badly mistaken.⁶⁵ Nevertheless, the idea of an all-powerful sovereign exercised an enduring influence on the thinking of peoples and states. In recent times, globalization, the expansion of international human rights law, and the formulation of new principles, such as the responsibility to protect, have all, in different ways, undermined the idea of classical Westphalian sovereignty.

Tom Franck, as already mentioned, drew attention to the emergence of democratic government, and this was part of a much broader and ambitious attempt to understand the distinctive character of democratic sovereignty and its significance for international law and relations. In the field of international law, states, regional organizations, and international human rights institutions were all attempting to promote democracy. Democracy of course is an end in itself, but in the 1990s, democracy was also linked to various other areas of international concern, such as development, and it was argued that democracy was in some way essential for development.

The traditional position of international law is that a sovereign state has the right to adopt any form of government, whether a democracy or dictatorship. The character of this government does not legally affect or diminish in any way the sovereignty of a state. The growing power of democratic sovereignty, however, was suggested by the fact that in different ways, the idea was promoted that only democratic states were properly sovereign. Thus, for instance, the Badinter Commission applied a set of criteria that must be satisfied by any entity seeking to win the recognition of the European Community as a state. Among the criteria was democratic governance.⁶⁶ Further, democracy was posited as being of such importance that its maintenance and promotion could prevail even

65. See STÉPHANE BEAULAC, *THE POWER OF LANGUAGE IN THE MAKING OF INTERNATIONAL LAW: THE WORD SOVEREIGNTY IN BODIN AND VATTTEL AND THE MYTH OF WESTPHALIA* 91-97 (2004) (refuting the notion that the Peace of Westphalia gave rise to the idea of state sovereignty as “historically unfounded” and “a myth”).

66. Declaration on Yugoslavia and on The Guidelines on the Recognition of New States, Dec. 16, 1991, 31 I.L.M. 1485, 1486-87 (1992).

against well-established principles of international law, such as the principle of non-intervention.

The Security Council authorized intervention in Haiti to challenge a government that came to power by displacing a democratically elected government led by President Aristide.⁶⁷ This emphasis on democracy was not in any way a purely Western phenomenon. The African Union intervened in a number of cases, without Security Council authorization or any suggestion of self-defense, in an attempt to restore democratic regimes. Latin American countries were equally insistent on the importance of democratic governance. Inevitably, a number of arguments were made to the effect that the international system had reached a point where democratic intervention was permissible.

In the field of international relations, democratic sovereignty was attracting a great deal of study. In his famously influential essay, *Perpetual Peace*, Immanuel Kant argued that states with republican governments did not go to war with each other.⁶⁸ Kant was opposed to the idea of a world government being necessary for the establishing of peace.⁶⁹ Kant viewed such a government as undesirable and unworkable for many reasons, not least the propensity of such a government to become dictatorial and far removed from the people that were its subjects. Instead, Kant argued, a world comprised of states that were governed internally by republican constitutions, would result in a stable and peaceful system.⁷⁰ Kant's theory was based on his view that the internal

67. The subsequent history of this regime and of governance in Haiti in general is both ironic and tragic. See generally China Miéville, *Multilateralism as Terror: International Law, Haiti and Imperialism*, FINNISH Y.B. INT'L L. 18 (2009), available at <http://eprints.bbk.ac.uk/783> (suggesting that the international community merely legitimizes acts of imperialism in the name of promoting democracy when it declares as legal invasions of sovereign states such as Haiti and Iraq).

68. See generally KANT, *supra* note 26, at 99-102 ("The republican constitution is not only pure in its origin . . . it also offers a prospect of attaining the desired result, i.e. a perpetual peace . . .").

69. *Id.* at 102-104 (arguing that the world should not be one government but instead a "federalism of free states").

70. *Id.* at 100. Kant notes that republican constitutions require action by the citizens to go to war whereas other governmental structures do not—they only require the head of the state to make a decision. Therefore, going to war in a republican state is harder, causing republican states to be more peaceful).

checks that were part of the republican system would prevent states from going to war for reasons of aggression and expansion. Kant suggested, further, that his vision could become a reality through a process by which a federation of republican states would form, and then gradually expand in their reach and membership. Kant's theory exerted an extraordinary power in the fields of American political science and international relations—disciplines anxious to formulate a set of empirically verifiable principles that would plausibly explain and predict the behavior of states. Thus, emerged the democratic peace theory—the theory that democratic states (rather than the republican states mentioned by Kant) do not go to war with each other. As President Obama points out, apparently adopting and affirming this thesis, “America has never fought a war against a democracy.”⁷¹ For political scientists, this principle is the closest political science comes to establishing a principle of international relations.

The Bush administration made the promotion of democracy a center piece of many of its most significant policies, as articulated in its two National Security Strategies.⁷² Democratic states were not only peaceful, but they were an antidote to the emergence of terrorism. Thus the reconstruction of Iraq and Afghanistan into democratic societies became a central feature of U.S. policies regarding those countries. “Rogue states,” most prominently the “Axis of Evil,” were posited as the contrast to legitimate, democratic states. Preemptive self-defense could be deployed against these states, even if they did not actually engage in action that would, under the U.N. Charter, justify the use of force.

Even as the United States sought to promote democracy abroad, its own practices and policies raised new issues about the relationship between democracy, international law, and international community.

71. Obama, *supra* note 29.

72. See generally THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/> (asserting that “freedom, democracy, and free enterprise” represent the “single sustainable model for national success”); THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2006), available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/> (reiterating that “the advance of liberty [in other countries] will make America more secure”).

A very influential and articulate group of scholars, sometimes termed “The New Sovereignists,” argued that international law suffers from a democratic deficit.⁷³ While there is certainly some truth to this claim, it is somewhat ironic that this argument is made in relation to the United States which, after all, is the most powerful country in the world, possesses a permanent seat on the Security Council, and holds decisive control over the actions of many of the most significant international institutions in the world, including the World Bank and the International Monetary Fund. The broad argument made by these scholars is that international law lacks legitimacy and that—its binding power is only to the extent that it is incorporated into the domestic law of the United States in accordance with the Constitution. It is the Constitution that governs, as opposed to international law. It is the Constitution that properly embodies a legitimate system of governance, established by, and responsive to, the needs of the American people. This line of argument corresponds to Kant’s view that international government could easily become a tyranny. But, the position is further complicated by another related set of arguments which assert that in a time of emergency, executive powers expand significantly; the “War on Terror” represents such an emergency. In this situation, the constraints that democratic sovereignty is supposed to ensure are diminished.

The overall and somewhat disturbing result may be one in which the democratic sovereign is unconstrained by external laws—international laws—precisely because these would violate the principles and values underlying democratic norms. At the same time, domestic constraints on the executive are diminished by the invocation of emergency—a condition whose existence is to be determined by the Executive. The consequence is the emergence of a democratic state that is in some way a hyper-sovereign state free of any restrictions. The question then arises: what are the limits, if any, on what a democratic state in a time of emergency may do? This is

73. *But see* Peter J. Spiro, *The New Sovereignists: American Exceptionalism and Its False Prophets*, 79 FOREIGN AFF. 9, 11-12 (2000) (rejecting the New Sovereignists’ arguments that international lawmaking is democratically deficient because international organizations lack accountability and certain regimes persist in committing human rights violations and contending that the New Sovereignists overlook the fact that “international organizations are not free-floating entities with unconfined powers,” but rather “they are kept on the usually tight leash by their nation-state members”).

especially problematic when the whole democratic process is distorted by powerful and persistent invocations of grave danger and of weapons of mass destruction. If then, in the name of democratic government, a state is entitled to disregard the basic principles of international law regarding human rights and the use of force, the distinction between a democratic state and a rogue state becomes unclear. Indeed, paradoxically, it is the hyper-sovereign, that may, in the name of democracy, cause massive disruption and instability in the international system.

A broader set of issues arises about the relationship between democracy and international law. For instance, the NATO war against Kosovo was clearly illegal. Does the fact, however, that this war was conducted by a group of democratic states give it a different quality, and make it somehow legitimate, even if illegal? Should democratic states have a special status when it comes to participation in international institutions, or indeed, in international law making?

Many of the projects that derive, in one way or another, from democratic peace theory must now be seriously challenged and questioned. It may be true that democratic states do not go to war with each other. But it is clear, even from a cursory study of United States foreign policy, that democratic states undermined other democratic states. The United States presents itself as striving to create democratic states from rogue states - and the transformation of Japan and Germany in this regard, after the Second World War, count as very notable successes. However, the United States, in several instances, also transformed democratic states into *rogue states*. Iran, now a pre-eminent rogue state was once a democratic state, but then the United States displaced the democratically elected leader and installed the Shah of Iran in order to protect its own oil interests.⁷⁴ Similarly, the United States displaced the democratically elected leader of Chile, Salvador Allende, and enabled the dictatorial rule of Augusto Pinochet.

In other cases, democratic states continue to support various

74. See generally STEPHEN KINZER, ALL THE SHAH'S MEN: AN AMERICAN COUP AND THE ROOTS OF MIDDLE EAST TERROR (2003) (chronicling the events surrounding the 1953 U.S. CIA-staged coup d'état that replaced Iran's democratically elected government, led by Mohammed Mossadegh, with a dictatorship led by Mohammed Reza Pahlavi).

tyrannies for strategic and policy reasons, even while proclaiming the virtues of democracy. The project of promoting democracy, such a central part of the “War on Terror,” also confronted many problems that make it somewhat doubtful that sustainable and meaningful democracy can be imposed from above, through external agencies. The initial grand ambitions to transform Iraq and Afghanistan into democratic states have been somewhat diminished.

The democratic peace theory, which seems to have implicitly been adopted by both Presidents Bush and Obama, appears now to be problematic for a number of reasons. The idea that democratic states should enjoy a special status in international law undermined a fundamental principle of international law—that all sovereign states are equal, regardless of their government. Furthermore, the idea that democratic states are somehow more inherently virtuous in their international dealings is extremely questionable given that two famously democratic states, the United States and the United Kingdom, caused such massive disruption to the international system through their illegal invasion of Iraq. Related to this issue is a danger of dividing the world into democratic and non-democratic states to the extent that it suggests that different systems or principles should be used for each set of states. This could easily result in a replication of an older, imperial system of international law, one which is founded on the basic premise of a division of the world into civilized states that are bound by international law, and uncivilized states that are somehow outside the pale and the realm of international law.

I attempted to trace the trajectory of the evolution of democratic sovereignty, a relatively new version of sovereignty doctrine that builds on the powerful idea of human rights. It is very much a product of the world that came into existence with the fall of the Berlin Wall. Doctrines of sovereignty and human rights exist in tension with each other. Additionally, the basic idea of democratic sovereignty challenges the conventional idea that sovereignty prevails by asserting that a state that does not preserve democratic rights is somehow less sovereign. The broad idea that a state’s failure to adhere to fundamental human rights norms will undermine its own status is now powerfully expressed through the principle of the responsibility to protect.

In the midst of these recent developments, however, it is useful to

return to another alternative vision of sovereignty, one that arguably endured through all these recent renditions of sovereignty. The principles underlying this approach derived from the Bandung Conference in 1955⁷⁵ and include: “(1) mutual respect for sovereignty and territorial integrity; (2) mutual nonaggression; (3) noninterference in each other’s internal affairs; (4) equality and mutual benefit; and (5) peaceful coexistence.”⁷⁶ This approach disavows a system based on a distinction between friends and enemies. This conceptualization of sovereignty served as the foundation of the *Declaration of Friendly Relations Among States*, one of the most notable documents to emerge from the efforts of the recently de-colonized states to establish a new system of international law.⁷⁷ The Non-Aligned Movement broadly espouses this traditional approach to sovereignty, one which clearly gives greater emphasis to sovereignty than to human rights, as suggested by points 1 and 3. In this respect, the Bandung version of sovereignty contrasts markedly with the democratic sovereignty approach. The Bandung version of sovereignty is more aligned with a classical approach to international law whereby the internal character of a state is irrelevant and what matters is whether a state abides by its

75. Final Communiqué of the Asian-African Conference, Bandung (Apr. 24, 1955), available at [http://www.namegypt.org/Relevant%20Documents/00Asian_African_Conference\[1\].pdf](http://www.namegypt.org/Relevant%20Documents/00Asian_African_Conference[1].pdf) (declaring the common concerns, interests, and intentions of twenty-four participating countries to achieve fuller economic, cultural, and political cooperation for their people through specific steps of economic cooperation).

76. See Zhiyuan Cui, *The Bush Doctrine and Neoconservatism: A Chinese Perspective*, 46 HARV. INT'L L.J. 403, 410 (2005) (confirming that in 1982, five principles elicited at the Bandung Conference “were written into the Constitution of the People’s Republic of China”); see also Final Communiqué of the Asian-African Conference, *supra* note 75 (listing ten principles that Bandung Conference participants agreed would assist in the practice of “tolerance,” “liv[ing] together in peace,” and “friendly cooperation”).

77. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (Oct. 24, 1970) (proclaiming the principles that States shall refrain from threat or use of force against the territorial integrity or political independence of any State; that States shall settle their international disputes peacefully; that States not interfere in the domestic jurisdiction of any State; that States cooperate with one another in accordance with the U.N. Charter; that States promote the realization of equal rights and self-determination; that all States have sovereign equality; and that all States fulfill in good faith their obligations under the U.N. Charter).

international obligations in its external relations with regard to other states. As discussed, the democratic sovereignty thesis suggests that a clear distinction should be made between democratic and non-democratic states, and that the internal, sociological character of a state should affect its sovereign status. In this respect it reverses many of the most central tenets of the more traditional view. How the tensions between these different ideas of sovereignty will be managed remains to be seen.

In conclusion, let me be clear. I think democracy—whatever its problems, and however complex its definition—is the best form of government, and I believe that the international system should be oriented towards its promotion. It is, of course, within the rights of a country to decide on the countries with which it will affiliate and how it will affiliate with them. However, I do not think that the issue of democracy can be usefully connected to the sovereign status of a country and I am unsure whether the international system as a whole should adopt this approach. We require new ways of thinking about this relationship between sovereignty and democracy. The principle of responsibility to protect embodies many of the ideas of democratic sovereignty and what we are witnessing now is an ongoing debate, if not contest, between these two versions of sovereignty which differ in the significance they attribute to the character of internal government.

5. NATIONAL AND REGIONAL APPROACHES TO INTERNATIONAL LAW

My broad theme here is that there now seems to exist a sense that international law is more open to non-Western initiatives than it was for many decades. One sign of this is the emergence of the Asian Society of International Law and the African Foundation for International Law. More generally, the emergence of Brazil, India and China led many scholars to refer to a power shift in international relations. The implications of these developments for international law have yet to emerge, but it is arguable that the non-Western world has not had such an opportunity to engage with and shape international law since the days immediately following decolonization in the 1960s and 1970s. In seeking to understand this phenomenon, I attempt to explore, however superficially, the ways in which African and Asian states responded to the challenges and

opportunities presented by international law.

Following the fall of the Berlin Wall, the twenty year period from 1989 to 2009 was powerfully driven by the thesis of *The End of History?*, even though this thesis was recognized as superficial and inadequate.⁷⁸ *The End of History?* thesis appeared to be affirmed by events that occurred over the years between 1989 and 2009: history ended; the West emerged triumphant; and the Western model of society, liberal democracy and free markets, decisively was established as the model that all sensible societies should aspire to become. The task confronting the non-European world, then, was to work out a way of replicating this model. In broad terms, all the answers to the most important social, political, and economic problems lay in the West. Indigenous knowledge was only useful to the extent that it could provide information about the peculiar and unique local conditions and languages that needed to be translated and transformed to enable progress towards the decisive model of the Western liberal-democratic state. This hierarchy, this division, is preserved in the organizational structure of many international institutions and agencies working in the developing world; the authoritative international expert has access to the universal disciplines of human rights or development, whereas the local workers are only knowledgeable about their own particular conditions. In the field of international law, *The End of History?* thesis translated into several initiatives of intervention and transformation that were embraced by numerous international institutions. The promotion of free markets and the rule of law became central projects for international economic law and its many sub-disciplines. International human rights law too played a crucial role in this overall process by espousing the related cause of good governance that was seen as essential to promote development and human welfare.

All the major international legal and policy initiatives that emerged at this time were driven by the West. These included the creation of the World Trade Organization (“WTO”), and the intensification of globalization through the actions of international

78. Francis Fukuyama, *The End of History?* THE NAT'L INT. (1989), available at <http://courses.essex.ac.uk/GV/GV905/IR%20Media%202010-11/W4%20Readings/Fukuyama%20End%20of%20History.pdf>

financial institutions that expanded their activities to an unprecedented extent and, more broadly, through the International Criminal Court and the “Responsibility to Protect” doctrine.⁷⁹ While the developing countries were sufficiently concerned about the expansive ambitions of the WTO to oppose, for instance, the Multilateral Agreement on Investments,⁸⁰ they were largely reactive to Western initiatives rather than authoring any ambitious and coherent international initiatives themselves. The ill-fated Durban process was the one possible exception to this situation. The “Asian Values” debate was also a limited, and not altogether helpful, challenge to the dominant view.⁸¹

In recent times, however, the global prospect has altered significantly as a result of two major developments, the war on terror and the global financial crisis, both of which have profoundly undermined Western claims to moral authority and superiority. The war on terror raised extremely difficult problems regarding the relationship between security and human rights. While the Obama administration took a number of measures to restore human rights, the ongoing controversies about the closure of Guantanamo, the treatment of prisoners, and interrogation techniques all represent an unmistakable shift towards giving security priority over human rights. This shift in the West is especially ironic for a number of reasons. The West continuously asserted the primacy of human rights over other values such as development and stability, most notably in response to Asian states that argued that human rights needed to be adapted and qualified in some way in order to achieve some measure of security and economic growth. Now, when the United States was attacked, the Bush Administration dispensed with the inalienable character of significant human rights and proceeded to launch two major wars against countries that were not directly responsible for those attacks.⁸² It appears to me that many commentators in the West

79. See generally Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, FOREIGN AFFAIRS, Nov./Dec. 2002.

80. The Multilateral Agreement on Investment, Draft Consolidated Text, OECD Doc. DAF/MAI(98)7/REV1 (Apr. 22, 1998).

81. For a far reaching analysis of the Asian values debate, see Yash Ghai, *Asian Perspectives on Human Rights*, 23 HONG KONG L.J. 342 (1993).

82. U.S. involvement in Afghanistan and Iraq has been collectively deemed “The War on Terror,” but Afghanistan itself was not directly responsible for the attack of 9/11 and, despite various claims made leading up to the war on Iraq, the

still do not properly appreciate how these wars, particularly the war in Iraq, are viewed by the larger international community.⁸³ The irony, then, was that the West was replicating in many ways a version of the “Asian Values” argument regarding the priority that security should be given over human rights. In the West, very importantly, active human rights and other non-governmental organizations and resolutely independent judiciaries ensured some measure of transparency and accountability and placed some restraint on government power. However, the “War on Terror” made things very difficult for human rights organizations and activists within developing countries because their arguments for rights seemed far removed from reality—a reality that appeared to be grasped by the United States in its response to the threats posed by terrorism.

The global financial collapse further undermined Western claims to omnipotent knowledge. The ironies involved in this situation were many. In 1997, Timothy Geithner and Larry Summers were hailed as the brilliant economists who rescued the world from potential calamity following the Asian economic crisis. In 2008, however, Geithner and Summers were desperately attempting to salvage the U.S. economy, the excesses of which had undermined the entire global system. Asian countries did not fail to notice that Western countries seeking to consolidate their economies adopted precisely the policies that they had wanted to implement, reducing interest

Bush Administration provided no direct evidence that Iraq had any connection with that attack. This is discussed in greater detail below.

83. One glimpse is provided by the prominent Singaporean scholar and diplomat, Kishore Mahbubani, who states that: “The decision by the US and UK to invade and occupy Iraq in March 2003 will go down as a seismic error, one of the greatest acts of folly of our age. Few recent disasters are as multidimensional.” KISHORE MAHBUBANI, *THE NEW ASIAN HEMISPHERE: THE IRRESISTIBLE SHIFT OF GLOBAL POWER TO THE EAST* 177 (2008) [hereinafter MAHBUBANI, *NEW ASIAN HEMISPHERE*]. It is especially notable that Mahbubani sees himself as a friend to the West, and has attempted in his work to provide what might be described as a friendly critique. *See, e.g.*, KISHORE MAHBUBANI, *BEYOND THE AGE OF INNOCENCE: REBUILDING TRUST BETWEEN AMERICA AND THE WORLD* xiii-xx (2005) (suggesting that Americans have generally been unaware of how heavily the decisions of the United States impact the rest of the world and contending that the United States can no longer act without regard for the effects of its actions).

rates and increasing government spending in an attempt to stimulate the economy. However, international financial institutions prevented Asian countries from doing so because their policies were, in effect, dictated by the Western countries. Rightly or wrongly, this was perceived as a double standard.⁸⁴ Further, the crisis suggested that the International Monetary Fund (“IMF”) and the World Bank were structurally incapable of addressing the crisis in any meaningful way because the crisis originated in the West—in the most developed states—and these were same the states that effectively ran these institutions. The models of economy and society that the West has been advocating are now powerfully undermined, and it is difficult to think of a time where the credibility of the West is more in question. The one corresponding time may be the end of the Great War. With all due respect, the credibility of the West will be undermined for as long as the war in Afghanistan continues.

The Geneva Conventions legitimize violence, even as they seek to control the manner in which it is inflicted.⁸⁵ But, even the limits of the Geneva Conventions are invariably exceeded and outright atrocities will, I fear, be a common and ongoing feature of these wars. This will all inevitably undermine the credibility and status of the West. The failure of the Afghanistan war is looming as a real likelihood, and it is now difficult to know how actually to conceptualize success in Afghanistan. Further, here in the West we are preoccupied with the issue of the inequality arising from the fact that terrorists do not obey international humanitarian law, but the other inequality is the inequality of means—using drones versus real people—however violent and fanatical they may be. This inequality is, I think, evident to many people in the Third World. And then of course there arises, once again, the issue of civilian casualties.

It is in the midst of these changes that many non-Western states are seeking, once again, to make their voice heard in the international

84. An argument could be made, however, that the Asian Crisis of 1997 and Global Financial Crisis of 2008 were quite different, as they involved very different actors and required different policy responses.

85. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (proffering rules for the treatment of the wounded and of civilians not taking part in the hostilities of a civil war, but permitting states to otherwise engage in violence within their own territory).

arena. The Asian Society of International Law was founded in 2007 for this purpose. In the program of the Society's 2009 Second Biennial Conference, held in Tokyo, Japan, it was stated:

In the past, the international legal order was led by the West. The Asian nations and peoples were limited to taking a reactive stance, merely utilizing the given systems of international law and criticizing the points with which they were dissatisfied. Such a reactive stance is not appropriate for an Asia which equals the West economically and makes arguments on an equal footing with the West. Asia needs to make its own proposals regarding the manner in which international law can support the world of the 21st century and realize the common interests of human kind.⁸⁶

Correspondingly, Asian leaders, such as the prime minister of India, Manmohan Singh, have argued that:

Just as the world accommodated the rejuvenation of Europe in the post-War world, it must now accommodate the rise of new Asian economies in the years that lie ahead.

What this means is that we need global institutions and new global 'rules of the game' that can facilitate the peaceful rise of new nations in Asia. It also means that existing global institutions and frameworks of cooperation must evolve and change to accommodate this new reality.⁸⁷

Given these significant claims and developments, the question then arises of briefly addressing, and assessing, the situation of international law in the developing world.

Pioneering third world scholars, such as R.P. Anand, wrote incisively about the claims and expectations of the new states as they emerged from colonialism.⁸⁸ Crucially, the new states sought to

86. *International Law in a Multi-polar and Multi-civilizational World: Asian Perspectives, Challenges and Contributions*, THE SECOND BIENNIAL GENERAL CONFERENCE OF THE ASIAN SOCIETY OF INTERNATIONAL LAW AT THE UNIVERSITY OF TOKYO (Aug. 1-2, 2009).

87. Dr. Manmohan Singh, Prime Minister of India, speech to the LSE Asia Forum 2006, (Dec. 7, 2006), available at http://www.lse.ac.uk/collections/LSEAsiaForum/pdf/ManmohanSingh_OpeningAddress.pdf, cited in MAHBUBANI, *NEW ASIAN HEMISPHERE*, *supra* note 83, at 235.

88. See generally R.P. ANAND, *SOVEREIGN EQUALITY OF STATES IN INTERNATIONAL LAW* (2008) (noting that while sovereignty and independence of states are becoming fictions as the international community becomes more interdependent, new states emerge that claim sovereignty and equality, but often

reform international law and institutions to reflect the changed realities of the international system; they did not attempt to completely repudiate the international law that was so important in furthering colonialism. It is clear, in retrospect, that the new states had a somewhat optimistic idea that international law would promote the cause of global justice. Correspondingly, they set about formulating very large and ambitious programs relating, for example, to the Law of Sea, the creation of a New International Economic Order, and a Declaration on Friendly Relations Among States.⁸⁹ All these initiatives were furthered through the General Assembly, the most representative organ of the United Nations, and the one body in which the large numbers of the developing countries could have some impact. The Third World countries enthusiastically adopted the cause of international human rights law. Third World countries promoted, for instance, norms of anti-discrimination, and initiated a powerful campaign against apartheid in South Africa. Further, new states attempted to use human rights as a means of furthering projects of self-determination⁹⁰ and development.⁹¹

Few of the great aspirations of the new states regarding international law were fulfilled. As a consequence, as B.S.Chimni argued in his important article on international law in India, many

require protection and assistance from the international community to maintain their independence because of their meager populations and resources); R.P. ANAND, *NEW STATES AND INTERNATIONAL LAW* (1972) (addressing issues arising from the emergence of new, post-colonial states in Asia and Africa, which claim legal sovereignty as a result of decolonization).

89. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397; Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202 (S-VI), U.N. GAOR, 6th Special Sess., Supp. No. 1, U.N. Doc. A/9559 (May 1, 1974); Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8018 (Oct. 24, 1970).

90. *See, e.g.*, International Covenant on Civil and Political Rights arts. 1(1), 2(1), Dec. 16, 1966, 999 U.N.T.S. 171 (1976) (granting all peoples the right of self-determination, which includes the ability to “freely determine their political status and freely pursue their economic, social and cultural development”).

91. *See, e.g.*, Declaration on the Right to Development, G.A. Res. 41/128, art. 1(1), U.N. GAOR, 41st Sess., Supp. No. 53, U.N. Doc. A/41/53 (Dec. 4, 1986) (defining development as a “comprehensive economic, social, cultural and political process,” and declaring that the right to development is an inalienable human right).

new states lost faith in the ability of international law to actually change the system in order to further the interests of the people of the Third World.⁹² Disillusion set in amongst many Third World scholars of international law when the major initiatives relating to the Law of the Sea and the New International Economic Order, for a number of complex legal, political, and economic reasons, failed to make any real progress.

It is also evident, however, that during this time, many developing countries, while they no longer harbored any illusions about changing the global system, began to use international law in developing regional arrangements. Further, international human rights law provided inspiration for the constitutional rights found in many countries, such as South Africa. South Africa, in particular, incorporated extensive economic and social rights in its constitution.⁹³ And, the efforts of the South African courts to give effect to these rights have generated extraordinary jurisprudence, as in the *Grootboom* case.⁹⁴ It is in these settings, then, in both domestic and regional systems, that many developing countries internalized and adapted international legal norms for their own purposes. In so doing, they added new and innovative dimensions to areas such as international human rights law. Scholars such as Henry Richardson,⁹⁵ Adrien Wing,⁹⁶ Penny Andrews,⁹⁷ Makau Mutua,⁹⁸ Jeremy Levitt,⁹⁹

92. See B.S. Chimni, *International Law Scholarship in Post-colonial India: Coping with Dualism*, LEIDEN J. INT'L L. 23, 42 (2010) (describing the 1980s and 90s as a period of disillusionment with international law for reasons such as the refusal of the United States to ratify the Law of the Sea Convention, the collapse of the Soviet Union, and the general neglect of the United Nations).

93. See generally S. AFR. CONST. ch. 2, 1996 (providing South Africa's Bill of Rights).

94. See *Republic of South Africa v. Grootboom* 2000 (1) SA 1 (CC) at 1-3, 65-68 paras. 1-4, 93-99 (S. Afr.) (declaring that the government failed to provide adequate housing under its constitutional obligations and ordering the state to create a program to ensure adequate housing for South African citizens); see also JEANNE M. WOODS & HOPE LEWIS, HUMAN RIGHTS AND THE GLOBAL MARKETPLACE: ECONOMIC, SOCIAL, AND CULTURAL DIMENSIONS 743-54 (2005) (reviewing *Grootboom* and providing commentary).

95. See, e.g., HENRY J. RICHARDSON III, THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW (2008) (studying the ways in which people of African heritage began to participate in international law even though they lacked formal standing to engage in the international legal process because it emerged during the slave trade).

96. See, e.g., GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER

and Hope Lewis and Jeanne Woods¹⁰⁰ all did important work in exploring the ways in which Africa and African-Americans absorbed and contributed to the development of international law. Obiora Okafor's recent work, for instance, superbly examined how international norms may be used to animate local activists in their work.¹⁰¹

This same theme is evident in the creation of regional organizations such as the African Union, and, in particular, Article 4 of its protocol, which basically endorses intervention in the event of humanitarian problems.¹⁰² In this respect, Africa significantly moved towards embracing some of the fundamental principles of the responsibility to protect which, despite being discussed and

(Adrien Katherine Wing ed., 2000) (acknowledging the failure of international law to adequately protect and promote the rights of women of color).

97. See, e.g., Penelope E. Andrews, *Making Room for Critical Race Theory in International Law: Some Practical Pointers*, 45 VILL. L. REV. 855 (2000) (claiming that developing nations have encouraged the evolution of international human rights law to address the variety of needs that face the developing world).

98. See, e.g., MAKAU MUTUA, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE* (2002) (critiquing the human rights movement as a Eurocentric attack on non-Western cultures and peoples, and encouraging that movement to adopt a more multicultural approach).

99. See, e.g., AFRICA: MAPPING NEW BOUNDARIES IN INTERNATIONAL LAW (Jeremy Levitt ed., 2008).

100. See, e.g., WOODS & LEWIS, *supra* note 94 (addressing the need for greater recognition of economic, social, and cultural rights as globalization continues to increase the disparity between the wealthy and the poor).

101. See generally OBIORA CHINEDU OKAFOR, *THE AFRICAN HUMAN RIGHTS SYSTEM, ACTIVIST FORCES, AND INTERNATIONAL INSTITUTIONS* (2007) (asserting that although the African human rights system may not achieve direct state compliance with international norms, its principles can be implemented by local human rights activists through the establishment of a human rights network that infiltrates key domestic institutions).

102. Protocol Relating to the Establishment of the Peace and Security Council of the African Union art. 4(j)-(k), July 9, 2002, available at http://www.africa-union.org/rule_prot/PROTOCOL-%20PEACE%20AND%20SECURITY%20COUNCIL%20OF%20THE%20AFRICAN%20UNION.pdf (affording the African Union the right "to intervene in a Member State . . . in respect of grave circumstances, namely war crimes, genocide and crimes against humanity" and giving Member States the right to "request intervention from the Union in order to restore peace and security"). The Peace and Security Council's intervention decisions require either a consensus or a two-thirds majority vote by Member States. *Id.* art. 8(13).

elaborated at many international conferences and U.N. forums, remains a controversial issue internationally. Furthermore, a great deal has happened in Africa which raises questions about intervention, sovereignty, and restoration of democracy. It certainly may be the case that this legal regime did not work as it should have. The ongoing conflict in Darfur presents an enormous problem to the African Union and the international community generally.¹⁰³ Nevertheless, the fact that such a regime, which quite radically undermines traditional concepts of sovereignty should exist in the first place, is quite remarkable.

Asian states do not possess a regional human rights system that compares with the African or Inter-American systems. Integration in the Association of South East Asian Nations (“ASEAN”) has not progressed as far as in many other parts of the world. While integration for political and human rights purposes was limited in Asia, however, many Asian countries entered into free trade and investment agreements, such as the treaty between China and ASEAN.

It is clear now that Asia, with the emergence of India and China, is one of the most dynamic regions of the world. Yet, it is interesting to note that a recent conference that took place in Singapore concluded that Asia is a status quo power. The conference described the state of governance in Asia in the following way:

There is wide agreement in Asia that the approach to global governance should be one of *evolution* rather than *revolution*. Asians want to grow and perpetuate the global system, not revolutionize or reset it. . . . The challenge to redesigning global governance is that Asians are generally ‘status quo’ powers. The rising powers are *reluctant* to lead, and the falling powers are *unable* to lead. At the same time, the region’s evolutionary approach towards greater cooperation is by nature messy and random.¹⁰⁴

103. See MAHMOOD MAMDANI, SAVIORS AND SURVIVORS: DARFUR, POLITICS, AND THE WAR ON TERROR 39-47 (2009) (acknowledging that rebels in the Darfur conflict specifically targeted the African Union in violent attacks and kidnappings, but ultimately arguing that the African Union had a coherent political response to the complexities of the Darfur conflict and that the Union’s response was weak because the United Nations, driven by the EU and the United States, failed to support it).

104. KISHORE MAHBUBANI & SIMON CHESTERMAN, ASIA’S ROLE IN GLOBAL

Asian states, then, have not perhaps adopted and adapted international law to the same extent as Latin-American and African states. And yet, it is clear that Asian states such as Korea were extremely successful in promoting development and establishing themselves as significant economic powers. In explaining how this occurred, scholars such as Ha-Joon Chang pointed out that the Korean model involved a dual process of manufacturing for exports while also protecting infant industries until they were capable of competing in the international arena.¹⁰⁵ This led to the emergence of major Korean corporations such as Samsung and Hyundai, all of which are now world famous brands. It is this approach to the global economy, rather than the neo-liberal version that calls for complete liberalization of all aspects of the economy, that proved successful. Clearly, Korea, like many of the emerging developing countries, became experienced in dealing with major international institutions. Brazil, for instance, another emerging economy, became one of the most active and successful countries in using the WTO to further its own trade policies.¹⁰⁶

The economic success of many Asian countries was widely noted and analyzed; however, no less remarkable, although less commented on, is the relative political stability established in South-East Asia. It is quite astonishing, for example, that Indonesia, the largest Islamic country in the world, has not been racked by instability, particularly given that the country went through so many different crises: the Asian economic crisis of 1997, the independence

GOVERNANCE (2009), available at http://www.spp.nus.edu.sg/docs/Jan2010_Special_Report_Asia_Role_in_Global_Governance.pdf.

105. See HA-JOON CHANG, *BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM* 72-73 (2008) (asserting that free trade policies work well for rich nations, but are a poor fit for developing nations that lack organizational structure and mechanisms to support free trade); HA-JOON CHANG, *KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE* 59-66 (2002) (recognizing that many of today's successful industrial nations, "from eighteenth-century Britain to twentieth-century Korea," followed infant industry protection policies at some point, but noting that there is no proof that such policies contributed to the industrial success of those nations).

106. See, e.g., Gregory Shaffer et al., *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 *CORNELL INT'L L.J.* 383, 387-94 (2008) (linking the rise of partnerships between the private sector, civil society, and the public sector on trade matters to Brazil's success and ability to effectively engage in trade negotiations and dispute settlements).

of East Timor, the end of the Suharto regime, and then the tsunami of 2004. It is a remarkable achievement of Indonesia and its leadership that the country made so much progress despite all these difficulties.

I argued that, broadly, Asia adopted and adapted international law rather than innovating in the way that Africa and Latin America did. And yet, as scholars such as Christopher Weeramantry and Onuma Yasuaki pointed out, the old civilizations of Asia have much to offer the world in terms of some of the most fundamental issues of international law, including sustainable development, and questions of war and peace. Some of these ideas are quite unique. In his judgment on the Nuclear Weapons Case, for instance, Judge Weeramantry quotes the Buddhist approach to war:

According to Buddhism there is nothing that can be called a 'just war'—which is only a false term coined and put into circulation to justify and excuse hatred, cruelty, violence and massacre. Who decides what is just and unjust? . . . Our war is always 'just' and your war is always 'unjust'. Buddhism does not accept this position.¹⁰⁷

The position asserted here is radical; it contrasts markedly with the just war tradition that emerged in the West over many centuries, influenced by major scholars such as St Augustine, by undermining the very concept of just war. The quotation may also seem entirely unrealistic because, while repudiating the idea of just war, it does not present any solution to the ongoing problem of violence. It seems to advocate non-violence without presenting any real alternative means of addressing the world as it is—which is in a situation where, in the words of President Obama, “[e]vil does exist . . .”¹⁰⁸ In this respect, the Buddhist position stated here has much in common with the non-violence advocated by Gandhi and King, and which President Obama finds so persuasive at one level, and yet, like Buddhism, inadequate, as he stated in full: “For make no mistake: Evil does exist in the world. A non-violent movement could not have halted Hitler’s armies. Negotiations cannot convince al Qaeda’s leaders to lay down their arms.”¹⁰⁹

We might think of the teachings of Buddhism, as having limited

107. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 481 (July 8) (Weeramantry, J., dissenting).

108. Obama, *supra* note 29.

109. *Id.*

application, the whole stance of non-violence being contingent on the particular political forces in place at the time. However, rather than dismiss this passage as unrealistic or theoretical, I would like to suggest that it should be taken seriously—and that it is powerfully realistic in a number of compelling ways. The passage points to one of the fundamental problems with just war—who is to decide? And of course, in the world of international law, the problem is especially acute, as it is very rare for some impartial body to declare a particular war to be just or unjust. Furthermore, at the very least, the passage suggests that we need to think very scrupulously and carefully about the deployment of the term ‘just war.’

President Obama implicitly speaks of the war in Afghanistan as so manifestly a ‘just war’ that the issue requires no elaboration: “The world rallied around America after the 9/11 attacks, and continues to support our efforts in Afghanistan and . . . the recognized principle of self-defense.”¹¹⁰ There appeared to be widespread support for some sort of military action against Afghanistan in 2001. A question might arise as to how universally the American and NATO efforts in Afghanistan are indeed supported now. My own anecdotal view is that a significant disparity exists between the way in which the United States and the European Union view this war, and how it is perceived elsewhere. Furthermore, I would question the argument that the war on Afghanistan falls within the scope of traditional just war theory—at least to the extent that this theory can be said to be embodied in the U.N. Charter.¹¹¹ The U.N. Security Council passed a somewhat ambiguous and open-ended resolution regarding Afghanistan, which cannot easily be read as explicitly and unequivocally authorizing the use of force against Afghanistan.¹¹² Neither, of course, did Afghanistan actually attack the United States; rather, the attacks were orchestrated by Al-Qaeda, which was operating in Afghanistan. Under international law, as developed in

110. *Id.*

111. This points to two issues—first, whether “just war” has a particular scope (the Grotian idea of a just war was extraordinarily broad); and second, the relationship between customary law relating to the use of force and the U.N. Charter. Arguments have been made that customary law is more expansive and has survived the U.N. Charter.

112. See generally S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001) (authorizing Member States to take all necessary measures to maintain a secure environment in Afghanistan, but declining to explicitly authorize the use of force).

the Nicaragua Case,¹¹³ the actions of Al-Qaeda could only be attributed to Afghanistan, if a series of tests were satisfied. It is only then that the Al-Qaeda attack could be characterized as an attack by Afghanistan on the United States, justifying the use of force in self-defense by the United States under Article 51 of the U.N. Charter, which speaks of the use of self-defense in response to an armed attack.¹¹⁴

It is doubtful whether the Nicaragua test was met by Afghanistan. Neither can it be easily argued, under the rules of state responsibility, that the actions of Al-Qaeda were those of Afghanistan,¹¹⁵ or that Afghanistan committed an internationally wrongful act of state with regard to direct involvement in the 9/11 attacks. Harboring or failing to surrender Al-Qaeda leaders, particularly of course, Osama bin Laden, may have given rise to state responsibility. But, then there is the question of whether this would have legally justified the all-out war waged on Afghanistan. This analysis depends on making a distinction between committing terroristic acts and harboring terrorists. Under international law as it existed in 2001, this distinction would have been valid and different rules would have applied. President Bush, of course, precisely and famously dispensed with this distinction when he asserted in his very first speech after 9/11 that no distinction would be made between terrorists and those who harbor them.¹¹⁶ This position has been the basis of the war

113. See generally *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14 (June 27) (resolving a dispute between the United States and Nicaragua regarding whether certain military and paramilitary actions within Nicaragua were an unlawful intervention by the United States and ultimately deciding that the United States was not responsible for those actions because it did not have complete control over the military and paramilitary operations at issue).

114. See U.N. Charter art. 51 (affording U.N. Member States with the inherent right to individual or collective self-defense in the case of an armed attack, but also requiring that Member States report an exercise of this right to the Security Council).

115. The issue of state responsibility has been widely analyzed and discussed in the International Law Commission. For articles relevant to the questions of an internationally wrongful act of state giving rise to state responsibility, and the question of countermeasures, see *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2 Y.B. INT'L L. COMM'N pt. 2, arts. 9, 11, 40, 49, 52, U.N. Doc. A/56/10/2001.

116. See George Bush, President of the United States of America, Speech to a Joint Session of Congress (Sept. 20, 2001), available at

against Afghanistan.

It is also clear that, from a political perspective, the war against Afghanistan was very broadly supported by the international community, at least at the time it was commenced. From a legal point of view, the question remains as to what the law is in relation to states that harbor terrorists and whether the act of harboring now justifies the use of force in self-defense. This would represent a significant change to interpretations of Article 51 of the U.N. Charter as it has been traditionally understood.¹¹⁷ More particularly, for our purposes, it would suggest a major transformation in terms of just war as articulated in the Charter.¹¹⁸ What is interesting, however, is that this profound change appears to have occurred in a way that does not attract much attention, even though it has generated much uncertainty. Is one action, one war, capable of changing the fundamental law relating to the use of force? What are the implications of such a change for many of the other tensions existing around the globe? Can India now legally use force against Pakistan for supporting guerrilla groups in Kashmir?

The basic question, then, is who decides what is just and unjust? Is it only when the world's major super power decides on a particular use of force that falls outside the conventional understanding of the U.N. Charter that this action itself generates new law in some way? The question posed by Buddhist teachings, then, is not something to be simply dismissed as idealistic or theoretical: rather, it raises issues that are timely and urgent and enduring.¹¹⁹ And Martin Luther King,

<http://middleeast.about.com/od/usmiddleeastpolicy/a/bush-war-on-terror-speech.htm> (condemning Afghanistan for sheltering and supplying terrorists and declaring that any nation that continues to harbor or support terrorism will be regarded as a "hostile regime" in the "War on Terror").

117. See U.N. Charter art. 51. There is also the issue of what sorts of actions are justified under the Security Council Resolutions passed shortly after 9/11. See generally S.C. Res. 1386, *supra* note 112; S.C. Res. 1383, U.N. Doc. S/RES/1383 (Dec. 6, 2001); S.C. Res. 1378, U.N. Doc. S/Res/1378 (Nov. 14, 2001).

118. See U.N. Charter art. 51.

119. Carl Schmitt, seems to make the same point about the indeterminable and expedient nature of just war doctrine, although his approach to the issue is simply to assert that the sovereign decides what is just and unjust. See CARL SCHMITT, *THE NOMOS OF THE EARTH: IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM* 156-57 (G.L. Ulmen trans., 2003) (noting recognizing all sovereign states as equals, it has made it more difficult to determine authoritatively whether a war is just). Given all the complexities of the criteria of just war, Schmitt argues:

Jr.'s great 1967 speech on America's involvement in Vietnam contains, I would suggest, a profound wisdom from which we might still learn.¹²⁰

There is another aspect of President Obama's qualified use of Martin Luther King, Jr. and Gandhi that I find problematic—his broad argument that their great teachings are relevant in some circumstances, and not in others. That has to do with precisely the crucial question of how this critical issue of relevance is to be decided. It is notable, for instance, that President Obama, speaking explicitly as Commander in Chief, asserted the hard truth that “[t]here will be times when nations—acting individually or in concert—will find the use of force not only necessary but morally justified.”¹²¹ In his major speech in Cairo, however, President Obama asserted that “[r]esistance through violence and killing is wrong and does not succeed.”¹²² Further, he also stated: “This same story can be told by people from South Africa to South Asia; from Eastern Europe to Indonesia. It’s a story with a simple truth: that violence is a dead end.”¹²³ Of course, the context in which President Obama made this powerful claim was extremely fraught. He urged that

“There can be only a decisionist answer: each sovereign state-person decides autonomously concerning *justa causa*. The state that does not decide remains neutral and, vice versa, the neutral state abstains from deciding the justice or injustice of the belligerent states.” *Id.* at 157. Schmitt’s views, of course, have profound implications for the non-European/Western world, which while central to his jurisprudence, is entirely absent from his concern because the non-European world was regarded as lacking sovereignty for many centuries. As a consequence, non-European entities would be inherently incapable of making ‘just war.’ I have explored some of the implications of this position in *Imperialism, Sovereignty and the Making of International Law*. See generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2004).

120. See generally Martin Luther King, Jr., Speech at Riverside Church, New York City: Beyond Vietnam – A Time to Break Silence (April 4, 1967), available at <http://www.americanrhetoric.com/speeches/mlkatimetobreaksilence.htm> (condemning the United States’ justification of its involvement in Vietnam as a way to combat communism, particularly as the United States had previously refused to help liberate the Vietnamese people from French control, and advocating for the promotion of democracy through peaceful means).

121. Obama, *supra* note 29.

122. Barack Obama, President of the United States, Remarks at Cairo University, Cairo, Egypt: On a New Beginning (June 4, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-cairo-university-6-04-09>.

123. *Id.*

“Palestinians must abandon violence.”¹²⁴ This is completely in keeping with the teaching of King and Gandhi. However, violence engaged in by the United States is termed *force* and given a different resonance and legitimacy. How then are we to distinguish between different forms of violence, between legitimate and illegitimate violence? We may also return to the question posed by the Buddhist teaching: “[w]ho decides what is just and unjust?”¹²⁵ Is it only sovereign entities that can engage in “just war?”¹²⁶ Or do we distinguish even further between democratic and undemocratic states, whereby democratic states may engage in wars that are illegal under the strict application of law, but nevertheless somehow legitimate?

It is for this reason that I believe the unrealistic teachings of the great philosophers and religious thinkers are eminently practical and equally capable of presenting hard truths about which we need to keep reminding ourselves. Similarly, while there has been an immense effort to promote democracy within states, democracy between states, in the international system itself, continues to present a major challenge. This is precisely the argument made by developing countries—that they should be granted a greater role in the international system. Complex factors caused the failure of the Copenhagen summit to make any real progress on climate change issues; but it is notable, for example, that Sir Nicholas Stern, attributed that failure at least in part to the arrogance of the developed countries.¹²⁷

6. THIRD WORLD APPROACHES TO INTERNATIONAL LAW

I belong to a network of scholars called Third World Approaches to International Law or “TWAIL.” Everything I have said so far in

124. *Id.*

125. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 481 (July 8) (Weeramantry, J., dissenting).

126. I have argued elsewhere that one of the beliefs of the sixteenth century jurist Francisco de Vitoria was that Christians may wage just wars whereas, it seems, the Saracens are inherently incapable of engaging in just wars and therefore incapable of sovereignty. See ANGHIE, *supra* note 119, at 26.

127. See Richard Black, “Arrogance” *Undid Climate Talks*, BBC NEWS (Mar. 16, 2010), <http://news.bbc.co.uk/2/hi/8571347.stm>.

this lecture is influenced by this background, this tradition. However, I would like to make a few comments that directly relate to this tradition in the context of the theme of change in international law.

As I mentioned earlier, the TWAIL tradition began with the attempt on the part of the new states, those that recently acquired independence, to transform the system of international law and turn it into one that reflected the aspirations and interests of the peoples of the Third World. The term "Third World" is inherently problematic, however successfully we might trace its origins. The usefulness of the term has been questioned almost since its inception. Recent events exacerbated this trend—the Global Financial Crisis and the emergence of various "developing countries," such as China, India, and Brazil, shifted the global distribution of power. It is unsurprising, therefore, that at a conference I attended a few months ago, a scholar from one of these emerging countries asserted that the term Third World was now entirely obsolete. He proceeded to say that it was now the Third World's turn to use the instruments of international law to further its own progress.

Is a TWAIL analysis, then, one that is heavily influenced by the history of imperialism, relevant in a world where the dichotomy between the First World and the Third World (an inheritance, largely, of that colonial history) is eroding in various ways? Will the recent emergence of some Third World states lead to renewed attempts to transform the international system, as was the great ambition of the new states in the 1970s? Or will these emergent Third World states now find that the existing rules operate in *their* interests and, consequently, that the rules should be conserved and deployed rather than changed. For instance, these emergent developing states (or "EDS" to coin an acronym) are investors, rather than the hosts of investments. Thus, if it can be said that the current international law of investment, particularly as developed by arbitral tribunals, is imbalanced and favors investors over host governments—and this is a powerfully made argument by some scholars—the question then arises as to whether these EDS would really seek to change that law. More broadly and conceptually, these questions return us to the fundamental point made in Gerry Simpson's pioneering book: international law is a product of power and operates in the interests of the powerful, and those who acquire power would naturally seek to preserve and extend their power

through law, rather than transform that law.¹²⁸ I think then, that this is an important issue that TWAAIL must address. The developing states in the 1970s possessed a compelling vision of a new international system, which they articulated through numerous U.N. General Assembly resolutions, such as the Charter on Economic Rights and Duties Among States,¹²⁹ but which they lacked the power to implement. By contrast, it is arguable that now, that developing states have relatively more power but lack the vision, program, and unity of their predecessors in the 1970s. A number of complex factors divide the states of the Third world.

In attempting to assess the relevance of TWAAIL and the future of TWAAIL, let me then suggest some broad issues. The first regards what some scholars termed, somewhat dramatically, the “Second Scramble for Africa.” A number of Asian and Middle Eastern countries leased or bought large tracts of land in various African countries in an attempt to ensure what might be termed food security. Similarly, these countries secured concessions to the resources of these African countries. Details about the legal aspects of these arrangements remain obscure. Nevertheless, it can be argued that the very term “scramble” is misleading and distorting to the extent that it suggests that these events can be compared to the entirely unconscionable European scramble for Africa that occurred in the late nineteenth century and was furthered through massive violence and conquest.¹³⁰ After all, this recent engagement with Africa is furthered through commerce. It is an engagement enabled through

128. *See generally* GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER (2004) (addressing the power struggle between sovereign states, and suggesting that power discrepancies exist between sovereign states and that the dominant states use international law to justify and legalize this inequality).

129. *See* Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), pmbl., U.N. Doc. A/RES/29/3281 (Dec.12, 1974) (promoting the development of an international order based on sovereign equality, interdependence, and cooperation among all states).

130. *See generally* ADAM HOCHSCHILD, KING LEOPOLD’S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AMERICA (1998) (describing the human rights movement that emerged to combat King Leopold II’s brutal conquest of the territory surrounding the Congo River in the 1880s); THOMAS PAKENHAM, THE SCRAMBLE FOR AFRICA: WHITE MAN’S CONQUEST OF THE DARK CONTINENT FROM 1876 TO 1912 (1991) (depicting the events and motives behind the European colonization of Africa).

negotiated agreements entered into by sovereign African states rather than through the brutalities of conquest.

Against this, however, TWAIL scholarship asserted that a very close relationship exists between commerce and conquest, and that while commerce may often be seen as an alternative to conquest, it is often complementary. In his recent important work, for instance, James Gathii examined precisely this intricate and intimate relationship between war and commerce.¹³¹ Indeed, even in the first scramble for Africa, some attempt was made to achieve the same goals of acquiring access to the riches of Africa through the process of commerce, rather than conquest. In the negotiations surrounding the Berlin Conference that led to the division of Africa, an event that still has tragically violent reverberations for the region, the U.S. representative at the Conference, Mr. Kasson, argued that Western states could acquire rights over African territories through treaty, which involved recognizing the legal personality of African societies and the capacity of Africans to dispose of themselves. Mr. Kasson's suggestion was not accepted by the conference.¹³² The close relationship between advocating that the natives had a right to dispose of themselves and access to natural resources has proven to be so resilient and powerful that even the resolution on Permanent sovereignty over natural resources, which Third World states passed in order to regain control of their natural resources, entrenches and again asserts the rights of these people to dispose of their resources.¹³³

131. See generally JAMES THUO GATHII, *WAR, COMMERCE, AND INTERNATIONAL LAW* (2010) (contending that commerce and war seem to depend upon one another and refuting the traditional notion in international law that commerce can insulate communities from war).

132. See M. F. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW: BEING A TREATISE ON THE LAW AND PRACTICE RELATING TO COLONIAL EXPANSION* 33-34 (1926) (noting that the other parties to the Berlin Conference hesitated to adopt a rule that would restrict their methods of occupying African territory and require voluntary consent from the African natives). This approach has its historical connections with the view that treaties and consent provided the better way of acquiring sovereignty over backward areas. See ANTHONY PAGDEN, *LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE C.1500-C. 1800* 80-86 (1995) (explaining that the English and French believed legitimate claims to Native American land could be achieved only through purchase).

133. See Permanent sovereignty over natural resources, G.A. Res. 1803 (XVII),

The further point is that a focus on the mutual benefits of an apparently free exchange between parties may obscure the violence that is intensified through this process. Questions should arise as to whose lands have been taken, who is being displaced, whether there were alternatives, whether they consented to such actions. It is clearly the case that the attempts of sovereign Third World states to achieve development—and the whole question of African concessions may be seen in this context—led to the displacement and misery of thousands of tribal peoples and peasants whose fragile livelihoods were dependent upon tenuous access to the land. For many indigenous peoples, furthermore, the land is simply not a commodity that can be bartered away. This reality needs to be recognized. Imperialism has very often been furthered through the ostensibly neutral and mutually beneficial process of expanding commercial relations, as a study of the works of Vitoria and Vattel reveals.¹³⁴

The character and operation of the post-colonial state has been an enduring concern of TWAIL scholars. One of the broad questions that may be asked about the post-colonial state is the extent to which it is, in fact, significantly different from the colonial state. Generalizing broadly, the colonial state was constructed in a way to enable the extraction of resources and the integration of the colonized society into a system of political economy controlled by the colonial power and operating in the interests of that power. It is in this mediated and problematic way that the colonial entity was integrated into the larger, global system as a subsidiary of the metropolitan power. Another prominent feature of colonial authority was the practice of *divide and rule* which was based on the crude but often effective practice of dividing up local populations into different ethnicities and then favoring one ethnic group—the minority group—over the other, thus generating lingering and often violent resentments. Multicultural communities that had interacted with each other over many centuries and developed forms of interconnection, mutual dependency, accommodation, and tolerance to enable them to survive and prosper were now polarized by the decisive significance

U.N. GAOR, 17th Sess., Supp. No.17, U.N. Doc. A/5217 (Dec. 14, 1962) (recognizing the inalienable right of all states to freely dispose of their natural wealth and resources in accordance with their own national interests).

134. See, e.g., ANGHIE, *supra* note 119, at 13-31, 269-70.

given to one extremely problematic aspect of individual identity: ethnicity.

The post-colonial state, of course, was supposedly committed to reversing the effects of colonialism and operating in the interests of the local people rather than the colonial ruler. And yet, some of the fundamental features of the colonial state, a formidable apparatus of power, were arguably maintained and deployed by indigenous elites for their own purposes, even while they presented themselves as representatives of the people. The colonial state intent on extraction was replaced by the post-colonial state intent on development. In many post-colonial states, furthermore, racial politics became a prominent, and indeed defining, characteristic of the system of elections and governance. Simply, once the modern state established itself as having a monopoly of legitimate power over the entire country, control over the state, naturally, became of paramount importance. In democratic societies that were ethnically divided, the temptation to use racial politics as a means of winning electoral success was considerable, and often overwhelming. In cases such as Rwanda, the racial politics that led to such disastrous consequences were especially tragic because the ethnic categories used by the protagonists, the Hutus and the Tutsis, were an invention of Belgian colonial rule. Ironically and often tragically, then, unprincipled leaders merely reproduced colonial categories to consolidate their own power and exacerbate crippling divisions within their own societies. In asserting their sovereignty, their right to self-determination from colonial rule, through the politics of race, many post-colonial states were instead tragically following a script written for them by their colonial masters.

In these circumstances, the truly and radically anti-colonial policy would have been to completely repudiate the racial politics that colonial powers instantiated—for the great nationalist leaders of the Third World to declare that the new states would not succumb to the trap of ethnic politics that had been set by the colonial authorities and would survive their departure and be an enduring source of conflict and division, eventually justifying various forms of neo-colonial intervention. Unfortunately, in many cases, this is not what occurred. The leaders of many post-colonial states who have vociferously proclaimed their nationalist credentials have inflicted enormous suffering on their own people even while using themselves many of

the techniques and technologies of colonial rule.

An extraordinarily powerful and perceptive book that deals with the disappointments and failures of the post-colonial state is *Dreams from My Father: A Story of Race and Inheritance*.¹³⁵ Although it is not usually read as a post-colonial text, it seems to me that President Obama's father's own dreams and ambitions were focused on serving the newly independent state of Kenya. These ambitions were to be disappointed by the racial politics and authoritarian rule that overwhelmed Kenya.

The role of the Third World or developing country states in relation to the well-being and dignity of their own people is thus a subject that requires ongoing analysis. Whatever the successes of countries such as Brazil, Russia, India, and China ("BRIC"), it should not be forgotten that the vast majority of developing countries, particularly in Africa, continue to suffer great difficulties, and that, even in the BRICs, large numbers of people remain in poverty. This is also the case in relation to the plight of indigenous peoples, both in developing countries and the West. As several scholars pointed out, TWAIL scholarship has not adequately engaged with the difficulties faced by these peoples, the objects of a form of "internal colonialism" whose ways of life are often threatened by development projects over which they have no control.¹³⁶ Another area that demands close analysis is the plight of displaced peoples, such as refugees and migrant workers.¹³⁷

135. BARACK OBAMA, *DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE* (2004).

136. See, e.g., Gerardo J. Munarriz, *Rhetoric and Reality: The World Bank Development Policies, Mining Corporations, and Indigenous Communities in Latin America*, 10 INT'L CMTY. L. REV. 431, 432, 436 (2008) (arguing that the World Bank's lending programs and legal framework have contributed to an expansion of mining activities, which has directly contributed to the destruction of Indigenous cultures and their environments); see also Prabhakar Singh, *Indian International Law: From a Colonized Apologist to a Subaltern Protagonist*, 23 LEIDEN J. INT'L L. 79, 95-96 (2010) (criticizing the exclusion of Indian aboriginal tribes from notable TWAIL scholarship, particularly since certain tribal leaders played a large role in fighting against British colonial rule, and remarking on the failure of the Indian government to adequately protect these tribal peoples).

137. See, e.g., SATVINDER SINGH JUSS, *INTERNATIONAL MIGRATION AND GLOBAL JUSTICE* (2006); Ernesto Hernández-López, *Sovereignty Migrates in U.S. and Mexican Law: Transnational Influences in Plenary Power and Non-Intervention*, 40 VAND. J. TRANSNAT'L L. 1345 (2007).

It is for all these reasons, then, that I believe that the work of TWAIL scholars is indispensable to addressing and comprehending these evolving complexities and shifting realities. It is especially heartening to note here that a new generation of TWAIL scholars, TWAIL III perhaps, has already made immense contributions to our understanding of a variety of topics that have not previously been analyzed from a TWAIL perspective.¹³⁸ For all of us, however, the dualities of TWAIL present an ongoing challenge. We are for Third World sovereignty and yet also against it; sometimes for human rights and sometimes critical of human rights;¹³⁹ for international law at times, and suspicious of it at others. The enduring riddle we confront is how to formulate a position that is neither imperial, on one hand, nor narrowly nationalistic on the other. Both imperialism and the pathologies of the post-colonial state have caused immense suffering to the peoples of the Third World. The challenge for TWAIL is to articulate an alternative to these two very powerful realities. This is the major issue that post-colonial scholarship

138. See, e.g., Mohsen Al Attar & Rosalie Miller, *Towards an Emancipatory International Law: The Bolivarian reconstruction*, 31 *THIRD WORLD Q.* 347, 347-63 (2010) (proposing that TWAIL scholars use the Bolivarian Alliance for the Americas treaty to launch a movement to reform the international legal regime away from a Eurocentric model).

139. See, e.g., Upendra Baxi, *Voices of Suffering and the Future of Human Rights*, 8 *TRANSNAT'L L. & CONTEMP. PROBS.* 125, 126 (1998) (noting the contradiction between the proliferation of human rights rhetoric during the twentieth century with the simultaneous human rights atrocities and violations that permeated throughout the century, including the Holocaust and post-Cold War ethnic wars); Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 *HARV. INT'L L.J.* 201, 204-07 (2001) (criticizing the human rights movement as Eurocentric and advocating for a new movement that recognizes the moral equivalency of all cultures); Yash Ghai, *Human Rights and Social Development: Toward Democratization and Social Justice*, U.N. RESEARCH INST. FOR SOCIAL DEV. (Oct. 2001), [http://www.unrisd.org/80256B3C005BCCF9/\(httpAuxPages\)/ECD0417EB1177C5280256B5E004BCAFA/\\$file/ghai.pdf](http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/ECD0417EB1177C5280256B5E004BCAFA/$file/ghai.pdf) (presenting various criticisms of the notion that human rights are universal and indivisible, such as claims that many societies and religions place importance on duties rather than rights, that human rights cannot be universal because they vary with each culture, and that many fundamentalists deny the equality of all human beings). BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW* (Cambridge University Press 2003); Balakrishnan Rajagopal, *Counter-hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy*, 27 *THIRD WORLD Q.* 767 (2006); Vasuki Nesiah, *The Specter of Violence that Haunts the UDHR: The Turn to Ethics and Expertise*, 24 *MD. J. INT'L L.* 135 (2009).

attempted to address.

My broad concern, then, is that sovereignty is, perhaps somehow inherently imperial. It always seeks to expand its reach and power, whether internally or externally. Furthermore, given the growing demand for limited resources—an issue that was recognized as a central feature of international relations even by the earlier scholars, such as Vattel and Grotius—the question arises as to whether some form of economic imperialism can be avoided or, indeed, whether imperialism itself is an inevitable aspect of international relations. These questions particularly resonate in the light of the fact that for many historians, empire has been the most enduring form of political organization in human experience. Thus, scholars such as John Darwin argue that it is the region of the land mass stretching from the Pacific to the Middle East, an area that encompasses parts of China, Russia, and India that historically exercised the most influence over international affairs.¹⁴⁰ For Darwin, the emergence of India and China signal a return to that older order, significantly, that older imperial order that was interrupted by five hundred years of Western imperial expansion. If indeed the American Empire that historians of international law such as Grewe and Schmitt concluded their great works by examining is in decline, what will replace it?¹⁴¹ Is it possible to imagine a non-imperial world?

7. CONCLUSION

These are confusing times. It is unclear as to which particular paradigm or theoretical model may best capture this era and the challenges it presents.¹⁴² Every period that experiences great change

140. See generally JOHN DARWIN, *AFTER TAMERLANE: THE GLOBAL HISTORY OF EMPIRE SINCE 1405* (2008).

141. See, e.g., WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* (2000); SCHMITT, *supra* note 119.

142. See, e.g., JAN KLABBERS ET AL., *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* (2009) (constitutionalism); B.S.Chimni, *Prolegomena to a Class Approach to International Law*, 21 EUR. J. INT'L L. 57 (2010) (class); Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005) (global administrative law); Onuma Yasuaki, *A Transcivilizational Perspective on International Law* (Oct. 11, 2003) (Paper submitted for Japanese Society of International Law symposium, "Unity in Diversity: Asian Perspectives on International Law in the 21st Century"), available at http://www.soc.nii.ac.jp/jsil/annual_documents/2003/autumn/houkoku-abstr/Panel%20A4%20Onuma%20paper.pdf (civilization); David Kennedy,

and confusion raises the question: are we in a “Grotian moment”? Is there any instruction or guidance that Grotius can offer us in this time of change?

There are many aspects of the present that are undoubtedly novel and unprecedented. And yet, there are many aspects of the present that perhaps would be recognizable, to Grotius: religious wars; fundamental questions of the meaning of just war, the rights of war and peace, who can and cannot make war, the means of war, and the tensions between competing empires; the sense of a new economic order of unknown character struggling to emerge; the effort to somehow comprehend the character of this new order and to account for it coherently through sheer force of intelligence; and enduring importance of the qualities of understanding and tolerance. As we confront the Global Financial Crisis, let us not forget that *Tulip Mania*, which resulted in a financial crisis that overwhelmed Holland, occurred in the 1630 in the later part of Grotius’s life—although I’m not sure whether Grotius has written anything about this.

But it is perhaps Grotius the person, rather than his writings and teachings alone that may be of importance to us. This is the Grotius who is not only the champion of a new system of international law, but also the Grotius struggling to justify Dutch imperial expansion and the rights of the quintessential multi-national corporation, the Dutch East India Company. He played many roles, but he is more human and accessible to us in this way, rather than as the Olympian figure legislating for the world, the majestic founder of a new global order. Perhaps it is better to see him in all his existential complexity and doubt: leader, follower, and advocate of world peace, enabler of massive violence, and conquest, poet, theologian, and scholar—a brilliant and intensely ambitious individual continuously seeking power and patronage. Further, Grotius was also a playwright. So perhaps we could read Grotius less as a historical figure and more as a drama, a text to be read and experienced in the way we read and experience something like *Hamlet*¹⁴³ or the *Ramayana*,¹⁴⁴ or, given

Kormendy Lecture at Ohio Northern University, Pettit College of Law: The Mystery of Global Governance (Jan. 25, 2008), available at <http://www.watsoninstitute.org/blss/media/docs/kennedy.pdf> (global governance or expert rule).

143. WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET (1603).

the significance of the Thirty Years' War for our discipline, *Mother Courage*,¹⁴⁵ finding new dimensions and insights into the issue of what the vocation of international law involves as our own experience changes.

Needless to say, these are simply my own impressions, my own efforts to understand some of the puzzles and difficulties that we as international lawyers confront in this 'time of change'. Buddhism suggests that each of us must be the source of our own salvation. It is a very individual and personal process and I wish you well in your own journey. Thank You.

COMMENTARY ON 2010 GROTIUS LECTURE: ANNE-MARIE SLAUGHTER

I do also, though, want to begin, actually, where Tony began—remembering the generation that is passed and starting also with Tom Frank. I really can't quite believe that this is an annual meeting without Tom. For the longest time Tom *was* the annual meeting. He was the life of the meeting. I remember him so clearly in his extraordinary theater in the round performances where he managed to assemble 10, 12, 14 distinguished government officials, practitioners, professors, judges, and he would simply begin a conversation and keep it going with wit and erudition and constant insight. And his kindness and ability to befriend all, regardless of ideology, politics, gender, nationality, race, ethnicity. He was a truly global person. He embodied the ideals of the discipline that he studied.

So, I also would dedicate these remarks to him. He was there at the beginning of my career, and I really can't quite believe that he's not still physically with us. He is very much with us in spirit. I also wanted to pay tribute to Abe Chayes and to Ian Brownlie, whom we also mourn this year. They were my second and third teachers of International Law, respectively. I then worked with both of them on the Nicaraguan Legal Team when Nicaragua sued the United States.¹⁴⁶ It was my introduction to international legal practice. It is

144. VÁLMIKI, *THE RÁMÁYAN* (Ralph T. H. Griffith trans., 2000) (1895).

145. BERTOLT BRECHT, *MOTHER COURAGE AND HER CHILDREN: A CHRONICLE OF THE THIRTY YEARS' WAR* (2006).

146. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v.

hard to imagine two more different practitioners of international law in just about every way. From the pace of their deliberation, to their—I can remember many, many times, Abe hurrying Ian Brownlie through a particular meal or a particular event to get on to various things that we had to do. They were very different, and yet, they both stood for two different spectrums of profound reverence and love for international law.

Ian, as Tony, I think, put very well, never bothered with law and politics or whether law was law. Law was law and he took it as such and he explicated it as a body of independent and binding precedent and principle. Abe, on the other hand, was always deeply wrapped up in the intersection of law and politics. Indeed, Richard Falk assigned Abe's book on the Cuban Missile Crisis¹⁴⁷ to me as a senior in college, and it is what decided me to go to law school and hopefully to study with Abe, but to practice international law. And now, on a daily basis in the State Department, where I often go down and look at Abe's picture, happy to see that Harold Koh is the incumbent in his office, but to think about how law shapes politics on a daily basis. You can watch it happen in the State Department, happily, day to day, in our meetings, and in our statements, but it's a very different vision.

And yet it was Abe who said, on that team, that when Nicaragua sued the United States and people asked why, as the legal advisor, he had done so, he said, "There is nothing wrong with holding the United States to its own [highest] standards."¹⁴⁸ I pay tribute to both of them. I think both of them saw international law as a way of holding not just a country, but all of humanity to our own highest standards. With that tribute to generations, I will comment. I couldn't possibly comment on Tony's entire lecture. We would not have dinner, and it's so rich. I think I'm going to pull out a couple of specific themes and respond, and maybe raise a few more questions.

So, starting with the idea of a "Grotian moment," of a moment when politics has sufficiently changed, a constant process, but there

U.S.), Merits, 1986 I.C.J. 14 (June 27).

147. ABRAM CHAYES, *THE CUBAN MISSILE CRISIS* (1974).

148. David E. Rosenbaum, *Abram Chayes, John Kennedy Aide, Dies at 77*, N.Y. TIMES, Apr. 18, 2000, available at <http://www.nytimes.com/2000/04/18/us/abram-chayes-john-kennedy-aide-dies-at-77.html>.

are periods where we stand and recognize we are at a period of particularly great change, the moments when that change crystallizes into law. It is commonplace to recognize that the moment that gave birth to Grotius's great works was a moment in which the greatest causes of devastation and human suffering resulted from wars between states, religious wars, primarily, or—as I think Tony points out: “well ship-worn marauders”—attackers on private commerce. This is, interestingly, a place we are again. I've spent quite a bit of time on piracy in the last year, which I certainly did not expect.

But in that world, the veneration, or the upholding of state sovereignty and state power was the best protection of the individual. So, if you started from the perspective of a politics in which the wars around you were the result of aggression or complete lawlessness, then state power and absolute sovereignty—or as absolute as anyone has ever been able to make it—was the greatest source of protection for individuals. It strikes me that the project of sovereignty today is quite different. It is still true, and Tony and I would agree—I told you I'm afraid we're going to agree more than you might expect. It is still absolutely true, in my view, that upholding sovereignty—the basic sovereignty of states against other states—is an enormous source of protection.

And we still see plenty of cases in which those traditional protections, the protections in Article 2(4)¹⁴⁹, are necessary. At the same time, we are seeing, increasingly, the devastation and the violence that comes within states, and indeed, in President Obama's Nobel Prize lecture, as Tony quoted, President Obama said that wars between states are “increasingly giv[ing] way to wars within [them].”¹⁵⁰ In that context, if we want to crystallize those politics in a way, into law, in a way that protects individuals, absolute sovereignty is the opposite of what we need. We need instead what we call now, or what is evolving as, the “responsibility to protect”—the protection of individuals against their government.

And it strikes me that our challenge, the challenge for this decade,

149. See U.N. Charter art. 2(4) (prohibiting states from threatening or utilizing force against the territorial integrity or political independence of any state).

150. Barack Obama, President of the United States of America, Remarks by the President at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>.

for the next decade, is balancing those two—that we see those two political realities and we have those two doctrines. One very well-established, one very new and certainly not established as binding law around the world, but nevertheless, I think, strengthening, and it is getting that balance exactly right. That's where I think democracy comes in. I won't disappoint Tony and talk about democracy, but again, I will just say: (a) that my own views have evolved, and (b) that I speak for an administration and agree with its position that there is no desire to distinguish between democracies and non-democracies as a matter of sovereignty or sovereign protection.

I agree with where Tony came out—that if we are talking about conditions on sovereignty, democracy is a radically imperfect concept and sufficiently difficult to define. You are wading into an entire subjective thicket, but also, even if we could define it more precisely, it is not the right way to condition sovereignty. But let me turn to what President Obama said there and see if we can advance the discussion a little bit. He did say that democracies do not go to war with other democracies, but I think, more importantly, in his Nobel Prize lecture, he said, “peace is unstable where citizens are denied the right to speak freely or worship as they please; choose their own leaders or assemble without fear.”¹⁵¹ He also said, “Only when Europe became free did it finally find peace.”¹⁵²

That is not a claim about the moral superiority of the citizens in a democracy. It is not about good versus evil. It is an instrumental claim. It is a claim that says: where people are free to express themselves, to assemble, to choose their own religions, to worship, to associate with whom they please—in those states, those states will be more stable, more secure, and less likely to attack their neighbors. That is the claim. It is still, ultimately, an empirical claim. I think you can find lots of support for it. I am not going to make claims that it holds absolutely and we certainly know it holds of mature democracies, not fledgling democracies. But I think it is important to emphasize the instrumental nature of the claim as a statement about what we aspire to do as a matter of politics and not as a matter of law.

I would also say that there is nothing in that statement that

151. *Id.*

152. *Id.*

absolves or, indeed, elevates the West. It is striking, Tony, that you cited exactly the example I was going to cite, in terms of imperialist fault for much of the violence we see within states. And I chose Rwanda because I am half Belgian and feel a particular connection, a very bad one there, and exactly as you said, the ways in which imperialism has twisted society so that even in democratic forms, it is much harder to reach the stability that President Obama was talking about. But it is, I think, essential to recognize, particularly for President Obama, for this entire administration, even for this country, in many ways after recent experiences, that to talk about democracy—even to promote or uphold democracy—is not a statement about the moral superiority of one part of the world versus another.

So, as I said, I conclude on that point where you did. I would agree with Tom Frank, on a right of democratic governance. I would agree that regional institutions certainly have the right. And I would argue often, it is a benefit to condition membership on democracy, on liberal democracy as the EU¹⁵³ did, or to adopt declarations or charters as the Organization of American States (“O.A.S.”) has done,¹⁵⁴ something that played an important role when President Zelaya was deposed in Honduras. The reaction of the United States, the reaction of many countries, was informed by the democratic charter of the O.A.S. This is further illustrated by the actions of the African Union today in Madagascar, which is really quite unprecedented—that a group of African states in a fellow state where there has been a coup not only conditioned statements, but really conditioned actions on what they perceived, they saw, as a violation of the democratic process.

All of that, yes, but justifying intervention on the presence or absence of democracy, the poor protection of sovereignty, no. So, let me leave that on democracy and sovereignty, and talk just a little bit about your very interesting discussion of regional contributions or

153. See Consolidated Version of the Treaty on European Union, arts. 6(1), 49, 1997 O.J. (C 340) 145, (conditioning membership on adhering to the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law).

154. See Organization of American States Charter arts. 2(b), 3(d) (proclaiming the promotion of representative democracy, while simultaneously upholding the principle of nonintervention).

civilization contributions to international law. And here, too, I think, as in international relations, we are to take a much more multicultural perspective. I think we could debate, I do not think we are completely in a multi-polar world. I think we are in a world in which power has defused quite dramatically, not only among states, but also from states to non-state actors. But I would define a pure multi-polar world as a world in which you not only have different centers of power, but they are actively competing with one another.

Or they are competing and colluding and switching back and forth. I don't see that. We are in a world of diffusion of power, but I would stop short of calling it a multi-polar world. But it is certainly a world in which different regions, different countries, are emerging and contributing far more in the international system. Indeed, I would say one of our great tasks, as we talk about sovereignty and the responsibility to protect, is to implicate the very idea of responsibility for solving international problems into the idea of what it means to be a great power. That has to be part of the definition of great power—it is not only the size of your military, the size of your economy, the size of your population or territory, but your ability and willingness to take responsibility to help solve collective problems.

But different countries will do that in different ways and they will bring their own ideas to the table in ways that I think are very important. And, indeed, as somebody who has argued strongly, that humility is a basic American value and something that certainly, I think, this administration is trying to practice—we don't always succeed. It is part of the value of humility to recognize how much you can learn from other societies, from other cultures, and also from taking responsibility for our part.

More broadly, in looking at what has worked around the world in development practices, we should not only accept that we do not know better, but we should actually learn from developing countries. In this process, we come back to the perennial dilemma of multiculturalism versus cultural relativism. And I will just put down my marker. Many of you have heard me speak on this before. I think it still comes down to what I call the concept of "legitimate difference." That is, we welcome the contributions of multiple civilizations, multiple countries, religions, legal traditions, but we

still have to be prepared to draw absolute lines. I think of them as “universal lines”—and I will just give you a couple of current examples. Slavery is out of the question. So is trafficking in women and girls and children—which might anyways be characterized as female slavery or slavery of young people. I would say I would rule those out, absolutely. Apartheid too, I would rule out regardless of the culture; that is no longer acceptable.

I would probably go as far as to say, on balance, that the idea of political prisoners is something that is similarly unacceptable. I absolutely reject the idea that you can be imprisoned only because of what you believe, because you fight, or because you disagree with a power. I am not saying any of those would merit intervention, or that others would not. But to give you a spectrum of what I still think, we as lawyers have an obligation to try to draw those lines between cultural differences and legitimate differences.

Finally, let me just talk a little bit about power and the different nature of power. And, Tony, you raised this in your reflections on the post-colonial state. There is still a great deal of power in the international system and there will be as long as I can foresee of power meaning dominion—that is, power over others, whether it is power of individuals over other individuals, the power of states over other states, the power to compel, or the power to coerce.

On the other hand, in many of our daily lives, certainly the lives of those of you who are under thirty or under twenty-five, those of you who live in a deeply connected and much more horizontal world, there is far more discussion of “power with” than “power over.” The power of co-creation, the power of mass collaboration, the power of diverse minds coming together and the ability then to solve problems in ways we have never been able to do before. That is not a new concept. The first time I ever heard it was in one of Lani Guinier’s books. But that basic notion of a power to make things happen, not by dominion, but by connection and, as I said, co-creation, is a very powerful force in our world. It is a very powerful force in corporate management, in everything from Wikipedia, to modes of solving development problems, collectively, to scientific research. It is the source of systems thinking in much of the new science.

It is an extraordinarily difficult concept even to think about in international law. If we are to think about crystallizing political

reality, this is a reality that I see more and more on a daily basis from television commercials to scientific texts. And yet, maybe it is because I am now in government, I have lost the ability to expand my theoretical imagination. I find it extraordinarily difficult to think about how we would even express that kind of power, much less crystallize it. You might say that something like the G-20 versus the U.N. expresses some notion of it. In the G-20, obviously, nobody has any formal power over anyone else. It is not even a consensus organization. It does not have formal decision making rules. It is a horizontal group. Its source of power is the ability to solve problems and, indeed, none other than Leslie Gelb, who is a typically realist international relations practitioner, writes that the source of leadership in the twenty-first century is the ability to solve problems.¹⁵⁵ So, that captures something of this horizontal idea and the source of power. But how to then think about how it relates to more formal vertical sources of power, how to capture it, how to harness it in our own discipline, I think I will leave that to you. I think you should be able to get it done in the next three to four days. I also want to end by paying tribute to "Third World approaches to international law." To TWAIL, as I still call it. But in a different way than Tony did. And I want to come back to where I started on generational passing.

The international lawyers we paid tribute to, Sir Ian, Abe Chayes, Tom Frank, and many others, were wonderful international lawyers. They were also male and white and Western. That was not their fault. It is not a fault, but as I look out on generational passing, I am ever more struck, and I said this last year as well, but it strikes me every time I stand up at a podium in the American Society of International Law and I look out on an audience that is no longer even majority white and male and Western. That is in no small part, due to TWAIL, to the efforts of the many faculty members and younger scholars and mentors who have opened our doors so that if we are not completely global, we are much more so. And that, at the risk of being guilty, and Tony will know of what I speak, of a liberal progressive narrative, is to me a positive tribute to changing generations in international law. Thank you.

155. LESLIE H. GELB, *POWER RULES: HOW COMMON SENSE CAN RESCUE AMERICAN FOREIGN POLICY* (2009).