

Fordham International Law Journal

Volume 22, Issue 5

1998

Article 6

A New Human Right—the Right to Globalization

Michael D. Pendleton*

*

Copyright ©1998 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

A New Human Right—the Right to Globalization

Michael D. Pendleton

Abstract

This Essay attempts to give globalization an ideology and suggests that global identity and allegiance will use the law to establish these ideals. It argues that the principal tool will be extensions via the legal device of human rights—an individual's human right to globalization. This Essay also argues that national allegiance and globalization cannot stand together. Today, national allegiance is an anachronism and simply wrong. In the past, it was, in many cases, considered a virtue and resulted often in the highest individual self-sacrifice for the common good. Human rights to globalization, it is argued, entail at least the following rights: to international security; to trade across national borders; to non-partisan dispute settlement that is incorporated across borders; to free movement of persons across borders; and to hold dual or multiple nationality.

A NEW HUMAN RIGHT—THE RIGHT TO GLOBALIZATION

*Michael D. Pendleton**

INTRODUCTION

Globalization appears to be an inevitable fact. How much of the daily news is about the country of media publication or broadcast, and how much relates directly or indirectly to other countries? The high proportion of the latter remains much the same, even in the most parochial of media. Globalization is cause for lament for many. This author takes the opposite of this view.

This Essay attempts to give globalization an ideology and suggests that global identity and allegiance will use the law to establish these ideals. It argues that the principal tool will be extensions via the legal device of human rights—an individual's human right to globalization.

This Essay also argues that national allegiance and globalization cannot stand together. Today, national allegiance is an anachronism and simply wrong. In the past, it was, in many cases, considered a virtue and resulted often in the highest individual self-sacrifice for the common good.

National allegiance is wrong today for the following reasons:

- it threatens our very survival by making war more likely;
- it is no different to racism;
- one cannot be a nationalist and act according to individual conscience when the nation is under threat;
- it causes us to fail to take non-nationals seriously as people, through the fiction and wrong concept of collective responsibility;
- it is contrary to Christian and other religious teaching; and
- finally, some nations have exclusive use of a disproportionate amount of the world's resources.

Globalization offers a realistic vehicle for escaping from failed nationalism to an expanded concept of global rights and duties.

* Professor of Law and Deputy Director, Asia Pacific Intellectual Property Law Institute, Murdoch University, Perth, Western Australia.

Globalization is about far more than trade and commerce. It is about individual identity, sympathies, and aspirations. What gives globalization a realistic chance of working, however, is its economic aspects. This economic potential is what gives globalization power even against antagonistic national governments.

The case for a human right to globalization as presented in this Essay stands or falls on the validity of three assumptions:

- reciprocity in international trade policy does not work;
- global markets are necessary for the same reason as market economies, i.e., self-interest ensures efficiency; and
- globalization does not commodify people, rather it gives people chances for survival and self-betterment that they otherwise would not obtain.

Many see globalization through international trade as an anathema to the development and dignity of persons by somehow “commodifying” them. The villains are the multinationals.

To the contrary, this Essay argues that globalization rights are the newest category of individual rights. They are akin to natural rights from which human rights developed. They are also akin to indigenous rights, ethnic minority rights, suppressed nationality rights, and rights to a clean, bio-diverse environment. This Essay maintains that we do not have any multinationals in the world today, but badly need them in order to carry forward globalization.

Despite what it may seem, this Essay does not reject citizenship *per se*. Citizenship involves a concern for neighborliness and the common good, i.e., fundamental aspects of what it is to be human. Rather, this Essay is about a redefinition and expansion of citizenship concepts. Globalization is achievable, even against the animosity of national governments, through the concept of embryonic, though arguably existing, judicially enforceable human rights to globalization.

Human rights to globalization, it is argued, entail at least the following rights:

- to international security;
- to trade across national borders;
- to non-partisan dispute settlement that is incorporated across borders;
- to free movement of persons across borders; and
- to hold dual or multiple nationality.

I. BACKGROUND

A. *Globalization Defined*

Globalization, or at least internationalism, has been the subject of scholarly discussion since the mid-eighteenth century. In that century, the German philosopher Immanuel Kant wrote of a "development of a universal community with cosmopolitan rights."¹ More recently, Francis Fukuyama,² writing in *The End of History* defined globalization as "a centrifugal force, pushing towards unification of the world, at the expense of national sovereignty, . . . the development of a universal homogenous state where all human needs are satisfied, and activity is primarily economic."³ Fukuyama also described the impact of globalization as "a signal of death for nation states."⁴

For the purposes of this Essay, globalization is defined as follows:

Globalization is the contemporary tendency for persons, corporations and institutions to expand out of the confines of a nation or civilization, towards participation in and identification with a world community. This expansion takes the form of trade, investment, communications, culture, sport, citizen affinities, law, and other contacts. There is an attendant belief in the right and obligation to participate in and identify outside of one's nation or civilization. It is bound up with a conscious or unconscious skepticism of nationalism, leading towards a rejection of patriotism as a virtue. Overall, it tends towards the creation of a foundation for a political basis for one world.

B. *Globalization and National Allegiance Cannot Stand Together as Evidenced by the Demise of State Sovereignty*

Although theoretically based on sovereignty of the nation state, international law is increasingly directed towards curtailing the sovereignty of the nation state. International lawyers are increasingly called upon to invoke this law, in their clients' inter-

1. IMMANUEL KANT, ETHICS 253 (J. MacMurray ed., Louis Infield trans. 1980) (1930).

2. FRANCIS FUKUYAMA, THE END OF HISTORY 15-25 (1989).

3. *Id.* at 8.

4. *Id.*

est, against the nation states of which they are citizens. This result is true of indigenous rights lawyers as well as for commercial lawyers. Judges of national courts are called upon to give judgment contrary to the interests, at least short-term interests, of their country of origin. International tribunal members are required to arbitrate fairly on disputes to which their country may be a party. The nature of state sovereignty, the very basis for the political and juridical concept of a nation, is evolving towards a notion of non-sovereign, interdependent states.

Dr. Samuel Makinda has written of international interdependence eroding national sovereignty and blurring the distinction between domestic and foreign affairs.⁵

While there is no supranational institution that could take away the power of sovereign states, many countries have been constrained to different degrees by international organisations and regimes and by other factors within the international system, such as the emergence of environmental and ecological problems that transcend state boundaries, rapid improvements in the technology of communications and transport, the fast growth in international institutions, and increased interdependence. If interdependence is understood as a situation whereby changes or events in any single part of a system will produce some reaction or have some significant consequence in other parts of the system, no sovereign state, whatever its political or ideological orientation, can successfully insulate itself against foreign influences in the modern world. Interdependence has meant that the boundary between domestic and foreign affairs is gradually being eroded The erosion of state sovereignty through interdependence and the above factors can be termed the subliminal or creeping diminution of state sovereignty, and it tends to affect all states, albeit differently.

Makinda also writes of normative constraints on state sovereignty brought about by globalization that is largely a product of Westernization of the globe.⁶

There have also been what could be termed normative constraints on state sovereignty. These have come about through the process of globalization, which to a large extent is a form

5. Samuel Makinda, *Sovereignty and International Security: Challenges for the United Nations*, GLOBAL GOVERNANCE, 149, 155 (1996).

6. *Id.*

of Westernisation. This process naturally affects non-Western societies more than Western ones. For example, in some cases globalization has come about through the imposition of Western values, norms, and standards on many states, especially the developing countries. These "global" values, which include important issues such as justice, liberal democracy, individual liberties, free markets, and particular forms of environmental objections, are not values that had been arrived at through reflection and consensus in the world community. They are the norms, rules, and standards that have been promoted by the politically, technically, and militarily more powerful Western countries.

Regardless of how they arose, global or universal values do exist,⁷ even if the norms of conduct that reinforce these values are fluid and change with time and context. Contemporary writers are more circumspect than they have been in the past about identifying their epistemology or ethical views, preferring the facade of empirical deconstructionism, or scantily defined hermeneutic theory. This author believes that global or universal values arise from an epistemology and ethical theory based upon religious belief.⁸

Pursuing the same theme in another article, Makinda observes the irony that while the leaders of the Western world have moved some distance away from state sovereignty, Third World leaders see the earlier formulation of sovereignty as a shield against globalization and are championing sovereignty with zeal.⁹ "However, some Western values, such as sovereignty and non-intervention in domestic matters are now held more firmly by Third World leaders and their elites than by Western leaders."¹⁰

7. The post-modern theory of Derrida, Foucault, and Habermas and its antecedents in Heidegger purport to deny universal values, though the thrust of the best of this writing is to reinforce them in the language of another discourse.

8. See JOHN FINNIS, *NATURAL LAW & NATIONAL RIGHTS* (1984) (analyzing contemporary theory of natural rights, which attempts to eschew normative prescriptive dichotomy).

9. Samuel M. Makinda, *International Law and Security—Exploring a Symbiotic Relationship*, 51 *AUSTRALIAN JOURNAL INTERNATIONAL AFFAIRS* 3 (1997).

10. The irony is part of the success of Western civilization. In order to counter contemporary Western trends towards globalization, the old Western concept of state sovereignty must be employed. In this respect, John Roberts has long maintained the thesis that there is no longer a Western civilization, rather it has become so ubiquitous that its logic, culture, and rhetoric are everywhere employed, especially in maintaining

Part of the change in many individual world views, much of which has gone unnoticed by individuals, is that not only does a government lack legitimacy, but also the nation is not to be regarded as sovereign where the fundamental human rights of its citizens are ignored.

Makinda quotes the Commission on Global Governance, which argued that

[s]overeignty ultimately derives from the people. It is a power to be exercised by, for, and on behalf of the people of a state. That view suggests that a country's sovereignty should be respected only if the people of that state have had an opportunity to exercise their fundamental rights. Developments in international norms and practice have shifted the focus of sovereignty from the government to the people of a state, from Westphalian precepts to popular sovereignty.¹¹

Globalization implies an inevitable loss of sovereignty to international bodies, investors, and markets, but also to the ideals of popular sovereignty that include self-determination, elimination of poverty, economic stagnation, and regional and international security.¹²

II. WHY NATIONALISM IS WRONG—CONVERSELY, A JUSTIFICATION FOR GLOBALIZATION

A. *First Reason Why Nationalism Is Wrong: Globalization Assures Survival—Nationalism Assures Global Conflict*

The primary concern of all rational living things, institutions, and commercial, cultural, and other actors is survival. War is an ever-present threat to our own and our children's survival. Its root causes are as inevitable as the last major conflict that you or this author caused or encountered—perhaps with another driver on the way to work, a spouse, a child, a parent, or a neighbor. It involves our preference for self over others, or, when we are in a group, the preference for our group over other groups. By and large, we see it as wrong but it is part of our nature.

arguments for cultural integrity or indigenous identity. What seems clear is that the story of Western civilization is now the story of mankind, because its influence is so suffused that old oppositions and antitheses are now meaningless. The West is hardly now a meaningful term, except to historians.

11. Makinda, *supra* note 5, at 16.

12. *Id.* These conclusions are based on Makinda's observation.

Those who see war and conflict as peculiar to capitalism, patriarchal societies, or something totally manipulated by the military-industrial complex are simply naive, non-introspective, or slaves of contemporary intellectual fashion.

Violence is often only a little distance away from all human conflicts. This fact is also true with the nation state. We tend to play down such things with the end of the Cold War and with over fifty years free from major world conflict; however, nuclear, chemical, biological, and now laser weapons, once invented, cannot be willed or promised away by treaty.¹³

Writing in the mid-nineteenth century, Leo Tolstoy¹⁴ wrote that "[t]he root of war . . . [is] the exclusive desire for the well being of one's own people: it is patriotism. Therefore, to destroy war, destroy patriotism." The interdependence of a family minimizes the occasions when major conflicts can lead to violence. The existence of a police force, punishment, and public shame, as well as many other factors including the social justice regime, mitigates violence arising from conflict within a nation. Among nations, the more economically interdependent a state is with another state; the less likely its interests will be advanced by warfare. The corollary is that the more economically independent a nation is, the more likely it might gain from war.

This argument was the premise articulated by M. Robert Schuman, the post-World War II French Foreign Minister, and is the basis of the Schuman Plan, which is the foundation upon which the European Union was founded. Recognizing that Europe had been plunged into two immensely painful wars in the twentieth century, the 1951 Treaty establishing the European Coal and Steel Community¹⁵ ("Treaty of Paris") and the 1957 Treaty establishing the European Economic Community¹⁶ ("Treaty of Rome") sought to integrate Europe. The coal and iron industries of Germany and France were combined especially, so as to make them economically interdependent and

13. One may ask rhetorically, "how long does it take to rebuild a weapons stockpile when the economy is on a war footing?"

14. Leo Tolstoy, *Patriotism or Peace*, in *TOLSTOY WRITINGS ON CIVIL DISOBEDIANCE AND NON-VIOLENCE* 106-07 (1968).

15. Treaty establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty].

16. Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

thereby render the necessity for war to advance vital national interests as redundant.

A precedent for a New World Order is to be found in the internationalism of the European Community, an institution that despite its recent altercations over the implementation of the Maastricht Treaty¹⁷ and European Monetary Union ("EMU"), and the mass resignations of the European Commission, has remained a stable body for over forty years. The key to the European Union is that the general law-making powers remain with Member States. The Treaty of Rome allows the use of limited special powers¹⁸ designed to bring about key objectives, and any proposal by the European Council or the European Parliament are to be implemented by the European Commission. Some of these key objectives are the establishment of the free movement of goods, services, and citizens of Member States. The European Court of Justice decides when Member States are in breach of their treaty duties and can punish Member States with fines. Even if the European Union reaches the full political union that is now its stated aim, the Member States will still retain much of the law-making powers. This result is typical of any federation and is the case with the United States and Australia. The institutions and dispute resolution processes of the European Union could become, and to an extent have become, a blueprint for the world.

The world must become as interdependent, as engineered as the European Union if another world war, perhaps our last, is to be avoided. This interdependence is beginning with trade pacts such as North American Free Trade Association ("NAFTA"), which follows European Union mechanisms, without its objective of political union, which makes the European Union unique. The World Trade Organization ("WTO") Treaty draws heavily upon the European Union experience, as does the Asian Pacific Economic Council ("APEC") to a lesser extent, although APEC is a far less ambitious trade pact than NAFTA.

17. Treaty on European Union, Feb 7, 1992, O.J. C.224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU] (amending EEC Treaty, *supra* note 16, as amended by Single European Act, O.J. L. 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA].

18. These limited special powers are ever increasing by treaty amendments.

B. *Second Reason Why National Allegiance Is Wrong: Moral Arbitrariness of Racism and National Allegiance*

Some of the most successful early city states, e.g., Jericho, Athens, Xian, and Rome, evolved beyond family, clan, tribe, kingdom, and race to more complex polities with notions of citizenship and empire. Nationality, as a concept, only came into being in the eighteenth and nineteenth centuries. Race has remained a most important criteria that people use to differentiate themselves from others. Only in the latter half of this century has the implication of the concept of nationality for race been taken seriously. That is, discrimination on the basis of race is inconsistent with the very concept of nationality, which uses the differentia of citizenship, not racial group.

As we enter the third millennium, most of us insist that civilized behavior outlaws discrimination on the grounds of race,¹⁹ gender, religious beliefs, or other morally arbitrary criteria. By and large, however, most either agree or fail to consider that we regard discrimination on the grounds of nationality as a morally defensible criterion. Such discrimination, it is argued, is really part and parcel of patriotism. Is it, however, defensible?

Should we feel that we have more in common with and have a higher loyalty to those born within the borders of the polity, which claims by its laws to be our country, than those outside it? The patriot must answer in the affirmative. Nationalism or patriotism means that the objects of our concern for others are deemed by our government—all governments—to be fellow nationals. As a nation, we may give aid and we may insist on human rights, but those starving in Somalia—where their very right to life is denied—will not rate higher than the domestic unemployed.²⁰ Is this merely an application of the adage charity begins at home? Surely not. The adage means that we should do charity when the opportunity presents itself, not wait for a grand stage that we might conveniently never find.²¹ The real

19. Remember that the abolition of slavery only occurred during the last one hundred and sixty years or so.

20. According to nationalistic persuasion, national unemployment figures will rate higher than a Somali famine even after unemployed citizens have conducted a genuinely fruitless, a overly ambitious, or a sham job search.

21. See *Luke* 10:30-35 (King James) (stating parable of Good Samaritan). By spending his money on the injured Jewish traveler, the Samaritan had less money to aid his fellow countrymen. *Id.* He contributed to the Jewish traveler because he was passing

reason for our differentiation between the Somali and the unemployed national is the institution of nationalism itself. The objects of our moral duty are not equal to persons to whom we should owe a duty. We owe a higher duty to nationals than foreigners. This principle is patriotism.

Many people in the nineteenth century, perhaps even before that, felt profoundly disturbed by the institution of slavery. They recognized slaves as human long before the mid-nineteenth century when slavery was abolished, largely due to the power of one nation's navy and its ability to impose its will on other nations. Someone, somewhere must have said what they felt about slavery; they or others wrote and publicized these views, and so this perception gained momentum.²² The same process is occurring with nationalism.

Similarly, the view that patriotism is no longer a virtue is far from revolutionary. Leo Tolstoy condemned patriotism as both

stupid and immoral . . . [It is stupid] because if every country were to consider itself superior to others it is obvious that all but one would be in error [Patriotism] is immoral because it leads all to possess it to aim at benefiting their own country or nation at the expense of every other.²³

Tolstoy argues that patriotism is opposed to the fundamental ideals of morality.

How can patriotism be a virtue . . . [w]hen it requires . . . an ideal exactly opposite to that of our religion and morality—an admission, not of the equality and fraternity of all men, but of the dominance of one country or nation over all others? Morality requires that we take seriously the interests of all people, not simply those of our fellow citizens. Patriotism involves an exclusive interest in members of one's national group and gives no or little moral weight to the interests of others.²⁴

Almost a century later some people are beginning to believe that patriotism is only now, but was not in the past, a betrayal of our

this man and he realized that the traveler needed help at that time. *Id.* The fact that the man was a foreigner is a part of the story that we perhaps have not really thought about.

22. No doubt they felt intimidated and felt that the exercise may have been a waste of time, though they must have persisted.

23. See Tolstoy, *supra* note 14, at 75.

24. *Id.*

human family—the perfidy of patriotism. Patriotism was, until recently, considered a highly moral form of action whereby we serve and protect our neighbors. Much selfless service to others was sacrificed in the name of patriotism. Nothing can detract from that sacrifice. The author is proud of his paternal grandfather who died in the battle of Britain and his maternal grandfather. Ironically, his mother was German. Patriotism requires such matters, even a mother's birthplace, to be set aside in times of conflict. It necessarily requires that we prefer our nation and our fellow citizens to other nations and other people, even if they are family. This preference, like a preference for a race, gender, or religion, is morally arbitrary, i.e., there are no valid grounds to base differential treatment and as such is morally wrong.

We are, it is suggested, forced to disregard rejecting our nationality outright, though we can and should make known our objections to the status of a nation as a sovereign state. To reject nationality outright would allow widespread chaos and civil disobedience of which many would be tempted to take advantage. For example, one might refuse to pay his or her taxes because the taxes are being used to pay subsidies to logging companies or mining companies, or to pay for abortion clinics. You might refuse to sit on a jury because you think the legal system is corrupt. The end result is a dangerous creeping anarchy, and remember most of us, or at least the author, have dismissed anarchy as a naive rejection of the fact that we humans are constantly tempted to take advantage of one another.

No one asked us, however, whether we wanted to be a citizen, so denying our citizenship is not a real option.²⁵ The avoidance of quasi-anarchy requires that we continue to accept our nationality in the same way that we are forced to accept market economies. Accepting market economies, however, does not stop us from advocating mitigating its excesses by the creation of a adequate safety net, usually in the form of welfare. In the same way, nationality should not stop us from advocating the evolution of nationalism to orderly internationalism. One way to do this is through the development of international law with the

25. Stateless persons are a special class of persons in international law who suffer a great many disabilities, not the least of which is that they have no legal right to reside anywhere on this planet.

ultimate objective of whittling away at sovereignty until it becomes vestigial.

1. Views on Patriotism

Leo Tolstoy, the first anti-patriot, may have inspired the naive internationalism of the Soviet COMINTERN. Since then, much more sophisticated views have emerged. Three writers represent the extreme view on the relationship between patriotism and moral conduct. There appears to be three schools of thought in the literature that may be termed hard-line patriotism, moderate patriotism, and anti-patriotism. The most persuasive is moderate patriotism. Is it possible to be a patriot and have real concern for non-nationals?

a. Hard-line Patriotism

Alastair MacIntyre,²⁶ a hard-line patriot, argues that there is no conflict between patriotism and morality as Tolstoy has described it; rather there is a conflict between two different considerations of morality. While some moral systems may require the worth of all persons to be considered equally—such as a universalist conception of morality—patriotism is a particularist conception of morality where only the worth and interests of citizens are to be considered. It emphasizes personal bonds and the moral significance of membership in a particular group. For the patriot, universalist conceptions of morality are insufficiently attentive to the importance of personal bonds and loyalties. MacIntyre argues that it is impossible to construct a moderate patriotism, a convergence of particularist and universalist morality:

Patriotism thus limited in its scope appears to be emasculated, and it does so because in some of the most important situations of actual social life either the patriotic standpoint comes into serious conflict with the standpoint of a genuinely impersonal morality or it amounts to no more than a set of practically empty slogans.²⁷

MacIntyre is suggesting that if moderate patriotism makes loyalty subservient to universalist morality, then it is empty. "The stand-

26. Alastair MacIntyre, *Is Patriotism a Virtue?*, Lecture at University of Kansas (1984).

27. *Id.*

point of impersonal morality requires an allocation of goods such that each individual person counts for one and no more than one, while the patriotic standpoint requires that I strive to further the interest of my community and you strive to further those of yours."²⁸

When survival or other large interests are involved, "patriotism entails a willingness to go to war on one's community's behalf."²⁹ From MacIntyre's perspective, moderate patriotism is but an empty expression of patriotism that instantly evaporates in the heat of the tragic conflicts that recur in the real world.

b. Moderate Patriotism

Macintyre's views are rejected by Stephen Nathanson who seeks to make out a case for moderate patriotism. He prefaces his discussion with the sensitive observation:

It appears, then, that one must either except patriotism in spite of its undesirable features or place oneself in the role of an outsider, whose claims about the national welfare have an uncertain status. The result for many is a chronic form of discomfort and a hope that the subject of patriotism can be kept out of political discussions.³⁰

Nathanson defines moderate patriotism as preference, presumably in action, for one's nation, its traditions and institutions, and for one's fellow nationals, but within the limits of morality,³¹ provided that one does not violate the "legitimate needs and interests of other nations" and their nationals.³²

c. Anti-Patriotism

Paul Gomberg, an anti-patriot, in turn rejects Nathanson's moderate patriotism. Gomberg's principal argument is that patriotism cannot be meaningfully distinguished from racism.

28. *Id.*

29. *Id.*

30. *In Defence of Moderate Patriotism*, *ETHICS*, Apr. 1989, at 535.

31. Consider the actions of the moderate patriot in the light of criticisms of the rescue effort by U.S. Marines after the recent bombing of the U.S. Embassy in Nairobi and Tanzania. It seems that little was done to assist the Kenyan emergency services, which were occupied in the collapsed building adjacent the embassy. Even the Kenyan president, Daniel Arap Moi, was apparently prohibited entry to the U.S. Embassy in the aftermath of the bombing on the grounds of a perceived security threat to U.S. personnel.

32. *Id.* at 538.

Race is not a morally acceptable ground to differentiate between persons. I take it that we all, save the National Front in Britain, Jean Marie Le Penn in France, the One Nation Party in Australia, and the Klu Klux Klan accept that. If that is true, then how is nationality different to race—both were accidents of birth.³³ Gomberg argues that moderate racism is as unacceptable as racism. He also argues that Nathanson's thesis really means that what the moderate patriot would do, is no different to what the moral universalist would do. In this sense he has failed, says Gomberg, to differentiate moderate patriotism from universalism.

Alistair MacIntyre's argument is that in conflicts between nationalities, the moral universalist will not be patriotic. Nathanson's reply is that in conflicts between nationalities, the moderate patriot will act differently from both the unpatriotic moral universalist and the non-universalist patriot.

The first example is the conflict between nations over resources, typically a nation's land, products, and often population. In the extreme case, the way of life of a national community might be at stake. Some claim that this example is often hyperbole, i.e., does the U.S. way of life depend on imported oil?³⁴

MacIntyre claims that the patriot will fight for the national community, while the moral universalist will not. Nathanson replies that moderate patriots will follow a third course, seeking a just compromise between nations, but supporting their nations when and only when such compromise is impossible or conflict is unavoidable. With this course, the moderate patriot puts his condition in both ways.³⁵

Gomberg argues that in reality, the moderate patriot will often remain neutral, a condition that is not patriotic. Gomberg concludes that for a moral person in today's world, the only option is to struggle against patriotism and nationalism³⁶ in the same way that a moral person should struggle against racism.

33. Some may say that talents, abilities, nationality, and race is part of a divine plan. This author will not accept that a Creator intended misfortune for some individuals, rather that people were given the opportunity to ameliorate their misfortune.

34. This statement was written before the Gulf War, although that war was a U.N. sanctioned action.

35. *Id.* at 541-42.

36. *Id.* at 150.

2. Views on Racism

But what is wrong with racism? As we have seen the traditional answer is that it is morally arbitrary, i.e., it provides no good reason for discriminating between people. This reason can be further analyzed. A common method of discriminating between people is to suggest that a particular race has certain racial characteristics, for example, blacks are lazy. Such group generalizations are common to nationality as well, e.g., the English don't wash, the Irish are stupid, and Australians are crude, but "matey." But it does not end there. It is common to generalize about the characteristics of women versus men. Women are sensitive, men are not. What all such generalizations do, though they may contain a grain of truth, is to fail to take seriously the individuality of people, be they of a particular race, nationality, or gender. Taking human individuality seriously, this ironically entails a recognition that humans have more in common than difference: they feel pain; need to eat and drink; seek a sexual partner; desire a plan for their lives, family, and group; seek to be loved and to love; and seek to belong to a group or groups. People everywhere are familiar with the word morality despite some post-modernist claims that the word is meaningless.

This rationale then is the reason why racism and sexism are morally wrong. They fail to take seriously human individuality and the common core attributes of individual humanity. The suggestion is that nationalism is essentially the same. Patriots must believe their nation is a more deserving recipient of their loyalty than other groups. They do not take seriously the individuality and humanity of their nation *vis-a-vis* the members of other nations.

It is not then surprising that contemporary affairs feature indigenous identity, ethnic minority, and suppressed nationality issues. These ideas are not pulling away from trends towards globalization. On the contrary, part of recognizing human individuality, and the underlying reason for elevating human identity issues and globalization trends, is to recognize the impact on individuality of belonging to an indigenous group, ethnic minority, suppressed nationality, or indeed the world community. It is a question of taking individuality seriously. Part of an indigenous group's, ethnic minority's, suppressed national's, or indeed

ordinary citizen's identity is shaped by the perception of membership of the group, which includes the world community.

It is also natural for people to worry that peoples such as indigenous groups should recognize that their indigenous rights are based on recognition of their individuality, not their race as such. Rightly, we fear and reject race-based rights. Perhaps this rationale is why many today feel some antagonism at indigenous and like issues and helps explain why the "One Nation Party" in Australia phenomenon has capitalized on this misconception.

*C. Third Reason for Rejecting National Allegiance: Collective
Responsibility Assumption of Nationalism Is Contrary
to Justice*

Another reason for rejecting patriotism is that it requires citizens to be responsible for their government's actions irrespective of whether the citizen lives in a functioning democracy or whether they approve of the government's actions. The most arbitrary aspect of war is the notion of collective responsibility—a notion rejected in the justice systems of most countries. A soldier might well have become the best friend of the person that he is about to kill, yet he is to be killed because his government is at war with his opponent's government. Individuals are not responsible for the actions of their relatives, employers are generally not responsible for the crimes of their employees, and members of clubs are not responsible for the non-club activities of fellow members. Yet citizens, including those living in non-democracies, are held accountable for their government's actions. This is a legal and political fiction because countries, even collective consciousness cultures such as China, are made up of individuals, not an amorphous mass. While the management, and in extraordinary circumstances, sometimes the members of institutions, can be held collectively responsible in domestic law, their members are not killed for it.

What can we, as mere individuals, do in these circumstances? Most problematic for us is whether, if our country decides to use violence against other countries, e.g. in self-defense, we should refuse to participate and thus be branded traitors. What ideology justifies non-participation if we are not pacifists?

D. *Fourth Reason for Rejecting National Allegiance: Some Nations Have Disproportionate Control of World Resources*

The author is currently a resident in Australia, which has a population a little larger than the number of babies born each year in China,³⁷ yet this country controls roughly eight percent of the world's natural resources. The population of China is roughly twenty-five percent, or one-fourth the people on the earth. Well-endowed countries treat these resources as their own absolute property. Can this be just? Many nations' tax systems are premised on the notion of progressive tax rates, i.e., the more that we earn the larger the proportion taxed and distributed to the general welfare. Are we not trustees of a proportion of "our" natural resources on behalf of the rest of the world? If so, how is this to be translated into action? Aid programs, like all institutional solutions, are based, theoretically, on altruism and do not work in the long run. One workable solution is to allow anyone to invest in any other country's natural resources.

E. *Fifth Reason for Rejecting National Allegiance: Christian Internationalism*

Christianity has been used over the centuries, yet before a rightly more skeptical audience today, to justify many practices from the persecution of an entire race of people to capital punishment, from the so-called just war to the more vicious forms of capitalism and the subjugation of women. Given the central message of Christianity, it seems that a good test of authenticity is whether its interpretation accords with this central message of a compassionate and selfless love. Applying the test of the central message of Christianity, love of neighbor, and bearing in mind the divisions in society that existed in the first century, what do you make of St. Paul's words that in Christ "[t]here is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female"³⁸ This view of the world is not

37. China has a population of 1.2 billion people. Its population growth rate, factoring in the death rate, is one percent. Thus, twelve million babies a year are born in China. This result is, in fact, Zero Population Growth, which is largely due to the one child policy. A statistical survey of China in 1998 does not give a head count of babies, but birth rate times population suggests those 1997 births were 20,484,828.

38. *Galatians* 3:28 (King James).

confined to Christianity, but is perhaps most starkly articulated there.

III. *THE CASE FOR GLOBALIZATION HEREIN STANDS OR FALLS ON THE VALIDITY OF THREE ASSUMPTIONS*

As stated in the Introduction, the case for globalization traced in this Essay stands or falls on the validity of three assumptions. The first is that reciprocity in international trade policy is self-defeating. The second is that global markets are necessary for the same reason as market economies, i.e., self-interest ensures maximum efficiency. The third reason is that globalization does not commodify people—rather it gives them a chance that they otherwise would not have to survive and prosper.

A. *First Assumption of the Globalization Argument: Reciprocity in International Trade Policy as Self-Defeating*

According to teleological ethical theory, one form of which is utilitarianism, an action or rule is wrong if it fails to provide the greatest benefit³⁹ to the greatest number.⁴⁰ Even assuming the persons to be benefited are citizens, national trade policy that seeks to make trade concessions to other nations only in return for reciprocal concessions fails to raise living standards and is self-defeating. Some of the strongest reciprocal trade policy proponents are developing countries, though they are not alone. A developing country is by definition one that has insufficient access to capital to facilitate development. If such a nation refuses to allow domestic market access to foreign traders and investors on the ground that reciprocal access is not available to them in those foreign states, then they have satisfied national pride but deprived themselves of opportunities to gain foreign capital—the one commodity that they must have if they are to develop.

Hong Kong is a good example of a territory where the opposite policy of unilateralism was adopted from the beginnings of British rule in the former colony—now special Administrative Region of China. In fact, the policy, in regard to investment,

39. Utilitarians differ on whether it is benefit, happiness, edification, or, even Jeremy Bentham's initial formulation, pleasure.

40. Another problematic area is who are to be counted in utilitarian theory, i.e., citizens, foreigners, the environment, the biosphere, etc.

market access, and protection of intellectual property,⁴¹ was to provide a larger bundle of rights to the foreigner than was available to the local resident. Colonialism, one might say, but this characterization is clearly wrong as otherwise the concession would only be to British traders and investors, not to all foreigners.

The fact is that giving other nations more access to your markets than they give you, in fact, helps you in the long run. Governments know this to be true, but can rarely allow themselves to be seen by their constituents to be pursuing unilateral trade liberalization.

Economic theory shows that unilateral trade liberalisation also increases the economic welfare of the liberalising country; under flexible exchange rates as they exist since 1971, unilateral trade liberalisation plus monetary adjustments can also generate similar compensatory payments and employment effects as reciprocal trade liberalisation. The main reasons why governments prefer, nonetheless, to liberalise trade through reciprocal agreements, rather than unilaterally, are political and legal rather than economic.⁴²

Leaving aside the European Union, virtually the only nation that stands to benefit from reciprocity in trade policy, at least in the short term, is the United States, the world's largest market and investor.⁴³ In signing the WTO Treaty, this nation has chosen to forgo this option. This rationale was one reason that many U.S. congressional opponents of the WTO Treaty rightly say loss of American sovereignty, as a concomitant of accession to the treaty, was a loss that the United States did not need to make in order to obtain the trade benefits it sought.⁴⁴ The United States could have, in fact for a time it did, seek bilateral reciprocal agreements with all its trading partners, threatening where nec-

41. For an overview of the law and policy, see Michael Pendleton, *Colonial IP Law Discourages Local Innovation and Design*, 3 INTELL. PROP. ASIA 2 (1989). The writer is no longer critical of the policy and is not convinced that it did discourage indigenous design expertise.

42. E.U. Petersmann, *Why Do Governments Need the Uruguay Round Agreements, NAFTA and EEA?*, SWISS REVIEW OF INTERNATIONAL ECONOMIC RELATIONS ("Aussenwirtschaft") 31-55 (1994).

43. The United States itself comprises almost half of world trade by volume.

44. The United States continually relies on Section 301 and Super 301 of the U.S. Trade Act, which allows retaliation against a nation found to be engaged in unfair trade practices—an inevitably partisan process.

essay to withdraw market access to the United States if they were rebuffed.

B. *Second Assumption of Globalization Argument: Global Free Trade Is Necessary for the Same Reason as Market Economies' Self-Interest Works*

The desirability of free international trade is based on a raft of assumptions about the universal primacy, though not moral primacy, of the self-interest of individuals. These assumptions are essentially the same as the arguments for the desirability of market economies. Market economies clearly work. Based as it is on the same self-interest assumptions, free international trade should also work. Let us briefly unwrap some of these ethical, psychological, economic, but at base epistemological assumptions about self-interest.

Both the demise of communism in the former Soviet Union and in Eastern Europe in the 1980s and the demonstrated efficiency of privatization in the same decade conclusively foreclosed debate on the desirability of market economies except among the academic Marxist faithful and post-modernist apologists. These principles are now taken as axiomatic everywhere, except perhaps Cuba and North Korea. This judgment is not a fundamentally economic conclusion, but stems from what most of us already know about others and ourselves.

Implicit in most moral and religious teaching is the recognition that we humans are all inclined to prefer the interests of self and to refuse to care for others, unless they are significant others such as family, whose interests therefore corresponds with self-preference anyway. In most situations in life, a person's initial motivation will be selfish. Selfishness need not involve a crude and blatant disregard for the interests of others. There is a more sophisticated form that may be termed "prudential selfishness." This type of selfishness involves actually paying careful attention to the interests of others, but not because they are our prime concern. Rather, our aim is to be able to disguise our selfishness when it conflicts with the interests of others. We do so only to avoid a negative response, such as being branded selfish and not worth caring about, which would run counter to our own interests. In one sense, this denotation is no more or no less than a

definition of rational conduct.⁴⁵ I think that this concept is also what is meant by the admonishment. In much moral teaching, inherent in most of the world's major religions, it is against the inherent tendency, temptation if you prefer, to refuse to care or to be concerned for others—in Judeo-Christian writing this is probably what is meant by original sin. Moral and religious teaching presents this selfish inclination as a personal challenge to resist, knowing as we do that we will frequently succumb. If we accept this, then apart from our personal life, this fact has consequences for the way that we should, and in fact generally do, arrange the institutions and laws of our society. I will return to this later.

There is much in contemporary science that supports this view of the world. Evolutionary psychologist Jerome Barkow wrote that the mind is designed, through its evolutionary history of survival, to be dependent upon reproduction.⁴⁶ Individuals who can best interpret one another's motives leave behind more descendants than those who cannot. To succeed, man, like many social animals, depends on knowing and manipulating his or her fellows. This principle, Barkow and his fellow authors argue, is the key to understanding all human conduct. They argue for the need to rescue the concept of a universal human nature, what I have termed the inherent tendency to refuse to care and to be concerned for others and the knowledge. They contend that this is wrong, from the anthropologist's obsession with human differences, giving rise to theories based on cultural relativism or the arcane prose of the post-modernist.

Similarly, Richard Leakey has recently hypothesized in *Origins Reconsidered*⁴⁷ that what made people different from other apes and proto-people was that they reached a critical threshold of imagination that enabled them to get progressively better at deceiving their fellow people: the so-called Machiavelli hypothesis. Deception and detecting deception both gave ever greater advantage to larger brain size. Leakey argues that humanity began with a lie, or I would argue, at least the temptation to lie. Is this argument really at variance with Biblical account in Genesis?

The primary assumption of moral, religious, and familial

45. Machiavelli and Freud would probably agree with this.

46. JEROME BARKOW ET AL., *THE ADAPTED MIND* (1993).

47. RICHARD LEAKEY, *ORIGINS RECONSIDERED* (1992).

training and example should be to implore the individual to overcome this basic instinct and to seek to serve others. Given this inherent drive to refuse to care for others, it would be naive and disastrous to set up institutions, economic systems, and laws that assumed people would always act altruistically.⁴⁸ On the contrary, they must be arranged in such a way as to take account of persons acting mostly out of self-interest. Theoretical Marxism, and to the extent that Marxist systems were sought to be emulated in communist countries, failed and will ultimately fail in Cuba and North Korea. The reason for its failure is because they assume that at a claimed historical point—the end of the class struggle, the successful dictatorship of the proletariat leading to the final stage of communism—people will act spontaneously and cooperatively in a truly human manner.⁴⁹ The Paris Commune, Bakunin, revisionist anarchism, even certain forms of Kibbutzim, and unrevised socialism—though moderate welfarism is, I believe, immune—will in the long term fail because people's first instinct is to act for themselves. If this analysis is correct, then it has inevitable consequences for the choice of economic systems and the international community.

Two such institutional choices are market economies⁵⁰ and free global trade. You cannot be convinced of one and not the other, as this implies contradiction. Self-interest of individuals assures the success of both. The job of religion and morality is to redirect and temper the excesses of exclusive self-interest towards the care and concern for others, knowing that they will never fully succeed unless the nature of humanity itself changes.

48. Consider this analogy: should loving parents assume that their children will always tell the truth? Some parents will say to protect children, they need to be able to verify. They make it clear that the child's room is shared property and that they have the right to inspect it. Reflecting sociological fashion, some parents, particularly liberal educated parents, may say that they respect their children's privacy. How many preventable juvenile drug users come from such admittedly loving, yet naive families?

49. For a damning refutation of the historicism inherent in Marxism and other historical inevitability theories, see SIR KARL POPPER, *THE POVERTY OF HISTORICISM* (1957).

50. Some right-wing theorists argue that there is a contradiction between market economies and a welfare system, see CHARLES MURRAY, *THE BELL CURVE* (1994). In the writer's view, there is no such inconsistency.

C. *Third Assumption of Globalization Argument: Globalization Does Not Commodify People—Rather It Gives Them a Chance that They Otherwise Would Not Have to Trade and Survive*

Aid recipient countries are the very countries that tariffs, subsidies, and other trade barriers are principally directed against. Textiles from Bangladesh, Somalia, or Laos cannot compete in most developed country markets because about twenty percent or more has to be added to the cost of their products as an import duty. This situation exacerbates economic conditions at home and attenuates the need for aid.

So too do "Buy the Flag" campaigns of many developed countries. Huge amounts of public funds are spent to promote "Buy American Made," "Buy European Made," "Buy Japanese Made," or "Buy Australian Made." These campaigns are a form of trade distortion and rob poor countries of markets.⁵¹ If the Chinese made the best kettle or toaster at the best price and the decision to buy the flag is made on patriotic grounds, then the best product is denied a market. If the poor country produces the best products yet still cannot sell, then its likelihood of needing humanitarian aid in the near future is greatly increased. It might implore the rich world: "What can we do? You will not allow us to sell our goods!"

Oddly, donor countries are willing to help with the plight they have helped create. Decency together with electoral concerns require many nations to be seen to aid developing and under-developed nations and to respond to emergencies such as famine and disaster relief through international humanitarian aid. Some countries pay as much as one percent of their gross domestic product ("GDP") to international humanitarian

51. Paul Gomberg, *Patriotism is Like Racism*, ETHICS, Oct. 1990, at 149. A different argument can be made against patriotism that is not directed against oppressed nationalities. Consider the statement "Buy American!," which is certainly presented as a patriotic duty. Now, if directed against Philippine, Brazilian, or Chinese imports, the earlier argument applies. Suppose it is directed against Japanese imports. Here, the Japanese are regarded as both privileged and unfair, although the main consideration offered in favor of this imperative is common national interest. This imperative, however, may contribute toward a climate of war, as did similar movements toward national autarky in the 1930s. Anti-Japanese sentiment in the United States has already been reciprocated in Japan. The effect of the imperative "Buy American!" is likely to be increased national antagonism.

aid⁵²—Australia pays only 0.1% of GDP. Of this amount, a large proportion is paid to successful Australian companies who tender aid contracts, e.g. the Thailand bridge project. In fact, our own Asia Pacific Intellectual Property Law Institute was paid a grant by AUSAID in 1996 to present a course of lectures on intellectual property to the Vietnamese Office of Innovation (“Patent Office”) in Hanoi and Ho Chih Minh City. In our own case, there was definitely no one in Vietnam who could have done this job. In many areas, however, the recipient country has an entity that can do the job,⁵³ yet notwithstanding, the job goes to a company of the donor country. Recently in Australia, the Howard government, probably with the acquiescence of the opposition, announced that aid contracts will be restricted to tenders from Australia, thereby inevitably making the job more expensive and curtailing the total amount of the aid budget. It also excludes recipient tenderers. The argument that this is necessary to contain corruption is unsustainable as funds can be released on a progress payments basis or thorough other procedures.

By far, the most effective form of international humanitarian aid is to allow recipient nations unfettered access to local markets so they can sell the fruit of their labors. Oddly again, when this threatens to happen, the political rhetoric of all parties—one nation is not alone here—is in terms of exploited labor in Asian sweatshops that threatens local employment. Exploited as they may be and sweaty as they are, they at least give a promise of life, the most basic of all human rights and one of the most ignored.

IV. AN IDEOLOGY FOR GLOBALIZATION INDIVIDUAL RIGHTS—THE COMMON BASIS FOR GLOBALIZATION, INDIGENOUS, ETHNIC MINORITY, SUPPRESSED NATIONALITIES, AND ENVIRONMENTAL ISSUES

A. *Rights Language and Law*

Rights and their supremacy are the lifeblood of modern law. They are essential to the law’s role in protecting against abuse,

52. AUSTRALIAN GOVERNMENT DEPARTMENT OF FOREIGN AFFAIRS & TRADE, REPORT ON FOREIGN AID (1996).

53. We should have had to tender, however, against foreign intellectual property institutions.

though this rights supremacy has created a number of problems in relation to what is moral conduct. If one has or ought to have a legal right, then it does not automatically mean one ought to exercise it. Moral codes invariably elevate the community, group, or common good over individual rights. Moral conduct often requires the legal right holder to give way, or in Confucian terms, yield. Herein lies the reason many countries in Asia regard Western culture as diseased. When this is used as an excuse to deny rights in Asia,⁵⁴ the West is rightly critical. All of this, however, is another matter. It is important to express rights.

Rights are essentially claims that have a large degree of acceptance, though not universal acceptance—witness free speech. Such rights may or may not become legal rights. Free speech is not a legal right in Australia, though a right of free political speech may be. But rights language itself is relatively new. The grammar of human rights has had an enormous influence on the way that we think. In the past, citizens were the subjects of governance. They had duties, but until Thomas Jefferson's Declaration of Independence, there was not even an intellectual notion of rights, except in the natural rights usage, which was heavily dependent on a shared theology and acceptance of our place in the world. Today, we believe that we, as individuals, are the objects of governance and that we can legitimately assert claims against those who govern us. This belief is an enormously changed perspective, and it explains what is shared with indigenous rights, suppressed national minority rights, and globalization. These perspectives are not conceivable without the concept of rights. Like indigenous rights and suppressed national minority rights, globalization begins with individual, not national, rights and embraces other rights that have commercial ends. Many of these rights are sought to be implemented through the concept of national treatment.

National treatment requires a nation to treat foreigners no worse than it does its own citizens. National treatment stands in distinction to reciprocity—we treat your nationals in the same way that you treat ours. In the long term, the principle of national treatment will be made justiciable at the behest of individ-

54. See K. Mahbubani, *Live and Let Live: Allow Asians to Choose their Own Course*, *FAR E. ECON. REV.*, June 17, 1993, at 27 ("There is no unified Asian view on human rights and freedom of the press. These are Western concepts.")

uals across a wide range of international treaties: from security to environment to international unionism to a guaranteed daily calorie intake for all people. National treatment has great promise for spreading the wealth of Western democratic states to the rest of the world—the majority of our species. The section below deals with a number of categories of rights.

B. *Human Rights*

We talk freely today of human rights,⁵⁵ the descendant of Jeffersonian natural rights, and implicitly thereby deny the right of otherwise sovereign states to abuse the human rights of its citizens. Though I know little of this important area of law, I do know it has grown in importance since the Universal Declaration of Human Rights in 1948.⁵⁶ Now, it is of daily concern to national leaders. The constituents of democratic nations demand their politicians to take these rights seriously. We have also seen these demands, abused by governments seeking to promote sectoral trade interests, disguised as human rights concerns. We have witnessed a proliferation of detail in international instruments detailing fundamental human rights. Discrimination law is endemic to virtually every developed country. We have seen an embracing of the old Marxist critique of human rights, namely that they are only concerned with rights to do acts, free speech, assembly, etc., and will see the beginnings of an attempt to provide basic rights from evils like poverty, illiteracy, disease, etc. It is unlikely that a guaranteed international basic wage could ever be achieved in the absence of an international currency, an international central bank, and a variety of other economic preconditions. There is, however, no reason in principle why we could not realistically achieve international agreement on a guaranteed daily calorie intake for all humans. The United Nations Right to Food concept is a start.

C. *Indigenous, Ethnic Minority, and Suppressed Nationality Rights*

The basic premise of this Essay is that the movement from national to global loyalty is based upon individual rights and re-

55. The 1945 North Atlantic Treaty helped to create the United Nations' Universal Declaration of Human Rights.

56. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 135, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

sponsibilities. This premise is derived from the same basis for the concern for indigenous and ethnic minorities, suppressed nationalities, the right to a clean and bio-diverse environment, and the right to commercial freedom.

It is unrealistic to allow an international agency access to all alleged human rights abuses. For example, an Australian citizen might seek to impugn, before an international agency or court, the allocation of resources by the Australian government to Aboriginal people when equal resources were denied to non-Aboriginals. Irrespective of whether the complaint is held justified or not, the degree of international intervention is too intrusive for governments. International review of budgetary allocations for disadvantaged groups is unlikely to progress the interests of the disadvantaged or globalization. Regrettably matters such as health are largely fiscal in nature.

But this is not true of large scale abuses of human rights such as indigenous demands for specific recognized rights such as land rights, non-discrimination, and the like. Similarly, the near genocide in Africa and the Balkans is a recent example. So too, examples include the massacre of students in Tiannamen Square, the expulsion of Asians from Uganda on the basis of race alone, or the attempt to make indigenous people trespassers on their own land. These incidents involve large numbers of individual human rights abuses and could meaningfully be dealt with by international agencies.

D. Environmental Rights

Prohibiting the degradation of the environment in such a way that it has spillover effects beyond national boundaries might be thought uncontroversial. It is not. What would happen to a very poor country with not enough resources to feed all its population? Surely, it should be allowed to choose that it is better to deplete rainforests than allow its citizens to starve. Why should not such a country be allowed to locate toxic industries within its borders, knowing they will cause premature death to citizens and neighbors alike, yet the income so generated will at least let all live for some period when otherwise many would be doomed to infant death. These realities are the stark choices that make so many undeveloped countries angry at the moralizing of rich country environmental activists. Yet, the activists are

right in that such degradation of the environment must not be allowed, otherwise our planet may be destroyed for all people. Somehow, the mechanism has to be worked out whereby rich countries pay poor countries not to exercise their option to degrade the environment. The right to degrade the environment with spill over effects beyond national boundaries must be denied to all nations alike. The recent Hydrocarbon Emission Targets Treaty signed in Tokyo in 1997 is an example of many countries shirking their duty to preserve the environment for the future children of all nations.

V. AN INDIVIDUAL HUMAN RIGHT TO GLOBALIZATION

While human rights are a type of fundamental individual right, so too globalization may be conceived as spawning rights allied to human rights such as the right to trade across borders and rights to invest and travel across borders. Most developments in respect of these new rights have the principle of national treatment at their core. We might term them "Globalization Rights."

These Globalization Rights are not merely commercial rights, rather the commerce that they seek to protect underpins the aspiration of a global community erected on a sustainable economic base. Political developments, particularly representative governance in regard to the institutions of globalization, can come later.

A non-exhaustive list of Globalization Rights might include the right to trade across borders, the right to non-partisan international dispute settlement, the right to invest across borders, the right to free movement of persons—including non-residents—across borders, and the right to hold multiple nationalities.

A. *Globalization Right No. 1: Right to International Security*

The attainment of this most basic of rights seems far in the future. We all have a basic right to be safe and therefore defended. The deployment of a national defense force outside of national borders without any specific international authorization, such as a U.N. Security Council authorization, is historically justified by the concept of sovereignty of the nation state. The U.N. Charter specifically provides for the right of collective self-

defense that is a further justification of locating military forces beyond national borders. Such was the justification for the Warsaw Pact and is the justification for North Atlantic Treaty Organization ("NATO") and other military alliances. The right to security can never be assured while the right to deploy national defense forces outside of national borders without U.N. Security Council authorization continues. U.N. Secretary General Boutros Boutros Ghali's suggestion of a standing United Nations peace keeping force was strongly rejected by the Security Council and, it is rumored, was the real reason for not renewing his term as Secretary General of the United Nations.

*B. Globalization Right No. 2: Right to Trade Across
National Borders*

Democracies often respond to electoral concerns, however wrong headed the populist view may be. This principle is the realm of the "level playing field," political hyperbole if ever there was one.⁵⁷ Reciprocity in trade policy is doomed to failure unless you are one of the largest, most profitable markets. For most developed, and for all developing and underdeveloped nations, it is better to give as favorable terms to foreign traders—more favorable if you wish—as you do to your own citizens. This way, foreign capital and investments will flow freely. The reason is that developing and underdeveloped by definition means a shortage of capital needed to develop. Even a country such as Australia desperately needs foreign capital to sustain or increase living standards. Tariffs, subsidies, and bounties and other market distortions hamper or deny market access, lower living standards, and increase unemployment. These programs take many forms and are often disguised, e.g. local television program content rules are really protectionism for local media. If local programs are good, then they will command an audience and sell. If not, why force them on viewers who may wish to watch foreign programming such as New Zealand programs that until recently were classified as foreign. American cultural hegemony will only

57. Anti-dumping laws are symptomatic. If a nation can produce goods or commodities so cheaply that it can afford to sell at or below production costs, then why should this practice be prohibited. If done by a national of your country, then it would be applauded.

proliferate through this medium so long as the rest of the world provides no competition.

Globalization tends to make consumer interests different from those of consumers' governments. Consumers want cheap quality goods and services. Protecting local employment, balancing the trade deficit, and saving for domestic reinvestment are secondary, if considered at all. Subsidies, tariffs, bounties, and prohibitions on dumping and other distortions to free international competition hurt the consumer. It is estimated that trade barriers cost the U.S. consumer US\$80 billion a year,⁵⁸ yet U.S. citizens have no right to a role in most trade proceedings in the U.S. International Trade Commission and the U.S. Department of Commerce. The reason is that consumer interests may be different from U.S. government trade policy, which may favor economic rent seeking U.S. interests, e.g., Midwest wheat farmers who wish to deny access to foreign grain by dressing up the restriction in terms of agricultural regulations that in the name of public health allow the use of only one fertilizer, namely the one routinely used in the United States.⁵⁹ This protection is definitely worth a sizeable donation to the political party implementing the protectionism.

Countries do not, in fact must not, have the right to cheat their citizens and global neighbors by creating tariffs, subsidies, and other distortions to trade. The recent decision to retain tariffs in the automotive industry and the textile, clothing, and footwear industries in Australia are examples of this behavior. For the short-term political expedient of being seen to do something about unemployment, the government has assured the industries' non-competitiveness and deferred the resultant unemployment until a little later, but on a much larger scale. In the short term, Australians donate their tax dollars to help the industries break even and pay a great deal more than the international market price for cars and clothes.

Nationality must be deemed legally irrelevant to all aspects of international trade. All subsidies, tariffs, prohibitions on dumping, and other distortions to free international competi-

58. J. BOVARD, *THE FAIR TRADE FRAUD* 4 (1991).

59. To be fair, other than in the area of commodities, the United States has the most open markets and investment regime to be found anywhere, except perhaps Hong Kong.

tion should be outlawed. To make this effective, individual citizens and corporations must be given the right under international treaties to sue their own governments in international tribunals for distorting international trade.

1. International Trade Organizations

During the period of colonial expansion, it has been said that the flag followed trade, i.e., the nation and its laws traced the footsteps of its traders. The same is happening today in the sense that trade is demanding supranational action. Yet, there is no supranational polity to bring the flag as it were. International trade institutions such as WTO, International Monetary Fund ("IMF"), the Group of 8, and others including the trade blocks such as European Union, NAFTA, and APEC are stop gap measures towards a supranational entity to fulfill the same function as flag. By far, the most important international trade institution is the WTO.

2. The WTO

The WTO was created in 1995 at Marrakesh and is the only international body dealing with the rules of trade between nations. It replaces the General Agreement on Tariffs and Trade⁶⁰ ("GATT") created in Havana in 1948 and takes over administration of former GATT treaties and functions. WTO is comprised of 133 members with the notable exception of China, which is literally desperate to join.⁶¹ The WTO administers a large number of trade agreements, the legal ground-rules for international commerce and for trade policy. The agreements have three main objectives: to help trade flow as freely as possible, to achieve further liberalization gradually through negotiation, and to set up an impartial means of settling disputes.

a. Subject Areas of the WTO Agreements

The WTO agreements deal with agriculture, textiles and clothing, banking, telecommunications, government purchases, industrial standards, food sanitation regulations, intellectual property through the Trade Related Intellectual Property Rights

60. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

61. Currently, negotiations with China are proceeding.

Agreement⁶² ("TRIPs" or "TRIPs Agreement"), and numerous other areas. The key principles of the WTO are as follows:

- Non-discrimination—a country should not discriminate between its trading partners. They should all equally be granted "most-favored-nation" ("MFN") status.
- National treatment—once goods or services arrive in a country, it should not discriminate between its own and foreign products, services, or nationals.
- Trade barrier reduction and opening up markets through negotiation.
- Transparency—foreign companies, investors, and governments should be confident that trade barriers, including tariffs, non-tariff barriers, and other measures, will not be raised arbitrarily. More and more tariff rates and market-opening commitments are "bound" in the WTO.
- Competition—by discouraging "unfair" practices such as export subsidies and dumping products at below cost to gain market share, competition should be promoted.

According to the WTO Director, Renato Ruggiero, the dispute settlement procedure is the WTO's most individual contribution to the stability of the global economy. He is quoted as saying:

Without enforcement, the rules-based system would be worthless. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. It is clearly structured, with flexible timetables set for completing a case. First rulings are made by a panel. Appeals based on points of law are possible. All final rulings or decisions are made by the WTO's full membership. No single country can block these.⁶³

The WTO is a major beginning, but it does not require international trade to be completely free of import duties, tariffs, subsidies, and other distortions to the market. A member state is prohibited from discriminating between WTO members, and in certain areas, duties, tariffs, and subsidies are controlled. This

62. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, LEGAL INSTRUMENTS—RESULT OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPs].

63. World Trade Organization ("WTO"), *WTO Dispute Settlement* (visited Mar. 22, 1999) <<http://www.wto.org/wto/about/dispute2.htm>> (on file with the *Fordham International Law Journal*).

protection is not in all or even most areas. While services are covered by one of the WTO agreements, it is far from comprehensive. Some tariffs do not look like a tariff at first blush. For example, a national or local content law on television and other media is in fact a disguised tariff with the usual justification of protecting the home industry and in this case the national culture. If a culture is so weak that it can apportion priority to raising cultural consciousness in order to differentiate itself from the all-pervasive American program, then perhaps it deserves to be subsumed.

The 1994 Agreement Establishing the WTO⁶⁴ ("WTO Agreement") is the world's most ambitious concluded globalizing treaty. The key feature of the WTO Agreement, marking international law apart from domestic law, is its enforceability. Generally, international law is not directly enforceable but is reliant upon sanctions imposed by individual countries on the basis of political decisions by the executive. The WTO Agreement is the first international treaty that is not reliant upon political decisions in order to impose sanctions to enforce its stipulations. It also creates an integrated legal and dispute settlement system whereby disputes are resolved by judicial means and sanctions may be ordered by the judicial body. This is considered below at Part IV.C.

b. The TRIPs Agreement

If the assertion is true and, barring global war, it seems likely, then society will soon move to an information based society where information is more valuable than the present society based on land, labor, and capital. Trade in information is only possible if legal rights to information are devised. Information cannot be protected by possession, high fences, or guard dogs, unlike most other forms of property. This task is sought to be addressed by intellectual property. If global trade in information is to be possible, then national intellectual property laws needs to have a degree of uniformity and be complimentary. The Paris Convention and the Berne Convention of the late nineteenth century have made intellectual property law more

64. Agreement Establishing the Multilateral Trade Organization [World Trade Organization], Dec. 15, 1993, 33 I.L.M. 13 (1994) [hereinafter WTO Agreement].

uniform across nations than virtually any other area of law.⁶⁵

With the recent linking of international trade to intellectual property in the WTO TRIPs Agreement, thereby making every trade lawyer into an overnight intellectual property lawyer—at least in their eyes—this uniformity has been increased by leaps and bounds and in a revolutionary way. Essentially, the private legal copyright and related rights consist of the following: rights of performers, broadcast organizations, and producers of sound recordings; trademarks including service marks; geographical indications including appellations of origin; industrial designs; patents including the protection of new varieties of plants; layout-designs of integrated circuits; and undisclosed information including trade secrets and test data. These rights have been precisely defined and required by nations to be applied under threat of quasi-judicial automatic sanctions.⁶⁶ At the heart of the Paris and Berne conventions, the TRIPs Agreement, and the draft convention the Multilateral Agreement on Investments⁶⁷ (or “MAI”) is the principle of national treatment.

The TRIPs Agreement requires member states of the WTO to provide, in their national laws, for precise and specific intellectual property rights. Some of these rights were incorporated by reference by requiring full compliance with the Paris and Berne conventions, irrespective of whether the country is a member, and some by detailing the rights afresh. Failure to comply with the TRIPs Agreement results in automatic trade sanctions, which effectively withdraws the right to trade with WTO members. Non-compliance with the TRIPs Agreement is determined by a special dispute resolution process with a right of appeal to an appellate body. This process is discussed below.

C. *Globalization Right No.3: Right to International Non-Partisan Dispute Settlement*

The WTO dispute settlement system and the European

65. This international uniformity is the reason why intellectual property lawyers enjoy, subject to language constraints, a high degree of employment mobility.

66. For a full and critical assessment of the Agreement on Trade-Related Aspects of Intellectual Property Rights, see MICHAEL BLAKENEY, *TRADE RELATED INTELLECTUAL PROPERTY RIGHTS* (1997).

67. See Organization of Economic Co-operation & Dev., *Multilateral Agreement on Investment* (visited May 15, 1999) <www.oecd.org> (on file with the *Fordham International Law Journal*)

Union's Court of Justice are two of the most effective, quasi-judicial international bodies. Their orders are enforceable and enforced.

1. European Court of Justice

The European Court of Justice has the task of ensuring compliance by Member States with European Community law. There are a variety of mechanisms that trigger the court's jurisdiction from suits by the European Commission against Member States to references to the court by national courts.⁶⁸ National governments, such as the U.K. Thatcher Government, which was one of the worst, have railed against the European Union institutions and the court. Yet, the European Court of Justice has stood for over forty years. Judges for the European Court of Justice are selected from Member States, but do not represent them. Their duty is to determine cases on their merits and according to law. Decisions of the European Court of Justice have been especially mindful of the need to step lightly and to assure Member States of their remnant sovereignty and only to override that sovereignty when absolutely necessary. Judicial activism, of the type seen in Australia with the High Court's free political speech decisions, is avoided and is seen to be avoided, so as to preserve the fragile institution of a court telling hitherto sovereign states what they must do.

The task for law in regard to international settlement of disputes is immense. To a large extent, it stands or falls on the perceived ability of arbitrators and judges to be seen as acting across cultures—irrespective of their own cultural orientation or citizenship—detached from the political stage, committed to applying law, not making it, and as unbiased as is humanely possible.⁶⁹

A permanent international criminal court is currently being mooted. Already the United States and Australia among others have rejected the view that there be an independent prosecutor. The United States and Australia prefer that references to the court only originate through the political processes of the U.N. Security Council. This response is a great pity as it is akin to

68. EEC Treaty, *supra* note 16, art. 177, 298 U.N.T.S. at 76-77.

69. In his various articles, Prof. Greg Craven has drawn attention to the activism of the High Court of Australia, especially in the political speech cases.

making a decision to try a person for murder under domestic law depend on ministerial or cabinet decisions.

2. WTO Dispute Settlement System

The WTO dispute settlement system⁷⁰ has heard a large number of cases.⁷¹ A recent decision, which is illustrative of the process, was the first case to arise under the TRIPs Agreement. In *United States and India*,⁷² the United States, via its Trade Representative Ambassador Charnel Barshefsky, was persuaded by a U.S. pharmaceutical company to bring a complaint in the WTO against India's failure to comply with certain TRIPs provisions relating to patent protection of pharmaceuticals. The United States was successful at the initial dispute before the WTO dispute resolution panel and before the WTO Appellate Body. The entire process took a little less than a year. India must now comply or lose the right to trade with WTO members, which effectively comprise the rest of the world.

The Indian Government had in fact made two attempts to pass laws implementing the TRIPs requirements,⁷³ but due to electoral defeat and a change to a government hostile to such laws, the legislation lapsed. These facts, however, were held irrelevant to India's responsibility. Some, indeed many, people may die indirectly because of being unable to afford pharmaceuticals as a result of this decision and that is horrendous. More, however, will live who may have died, due to the incentive created for pharmaceutical companies to invest in India and the resultant competition leading to lower prices and greater varieties of drugs.

This case demonstrates that the ultimate appeal on matters that can be argued to come within the WTO treaty is not the apex court of a nation's judicial hierarchy, in Australia's case the High Court. Rather, the ultimate court in these circumstances is

70. The forerunner to this settlement system is the General Agreement on Tariffs and Trade ("GATT") dispute resolution system.

71. Many World Trade Organization decisions have been against the United States and European Union.

72. See WTO, (visited Mar. 22, 1999) <<http://www.wto.org/wto/dispute/tripub.pdf>> (on file with the *Fordham International Law Journal*); see also C. Macdonald-Brown & Leon Ferera, *First WTO Decision on TRIPs*, EUR. INTELL. PROP. REV. 69 (1998); M.N. Schlesinger, *WTO Dispute Panel Finds for US in India Patent Case*, IP ASIA, Nov. 14, 1997.

73. TRIPs, *supra* note 62, art. 70.8-9.

the Appellate Body of the WTO. This system augurs well for the future, as a greater homogeneity of law will lead to a more integrated global economy and all that I have argued that such integration implies, principally less risk of war. Regrettably, individuals cannot bring actions against governments under the WTO dispute resolution system but must persuade other governments to bring action. There is no good reason to exclude individual actions against governments under international treaties, or at least by non-governmental organizations ("NGOs") such as national and international consumer groups. Consumer interests are different from government interests.

D. Globalization Right No.4: Right to Invest Across Borders—Draft Multilateral Agreement on Investments

The MAI is a draft convention of the Organization of Economic Cooperation and Development ("OECD") that has drawn huge criticism. It is intended as a response to globalization of business. The cornerstone of the agreement, like the Paris Convention, the Berne Convention, and the TRIPs Agreement, is the principle of national treatment. Investments by foreigners are to be treated no worse than a citizen's investments.⁷⁴

Discrimination is prohibited in respect of the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposition of investments. Investment is defined as "every kind of asset owned or controlled, directly or indirectly, by an investor."

The MAI also creates uniform rules⁷⁵ that limit the sovereignty of member states to legislate in a great many areas relating to investments: immigration laws regulating the entry into a contracting state of investors and key personnel; investor participation in the privatization of public enterprises; export require-

74. See Fiona Macmillan, *Corporate Disclosure On-Line: An Appropriate Response to Globalization*, 21 U.S. WALES L.REV. 514 (1998) ("The central plank of the MAI is to require signatory states not to discriminate between investors. This is to be achieved through the principles of national treatment and Most Favored Nation treatment."). The principle of national treatment will require signatory states to treat foreign investors as least as favorably as it treats its own national investors, for the purposes of its laws and regulations on investment. Most Favored Nation treatment, on the other hand, requires signatory states not to discriminate between investors or investors emanating from other Multilateral Agreement on Investment member states.

75. These uniform rules are termed "specific disciplines" and "performance indicators."

ments; domestic content requirements; territorial restrictions on the acquisition of goods or services; export, import, or foreign exchange restrictions; territorial sales restrictions; technology transfer restrictions; rules on location of head offices; requirements relating to minimum levels of research and development; requirements relating to a minimum level of national employees; requirements for domestic participation in joint ventures; and requirements relating to domestic equity participation. These rules have caused a considerable amount of controversy.

Investment in regard to services is protected by national treatment and MFN provisions in certain areas by the Fifth Protocol to the General Agreement on Trade in Services ("GATS").⁷⁶ These services are confined to insurance services, banking services, and a range of other types of financial services relating to matters such as foreign exchange, securities underwriting, derivatives, and asset management.

Foreign investment on equal terms to residents in countries worldwide creates a high degree of interdependence between nations and is a very effective curb on national sovereignty. It bolsters all the rights listed here as globalization rights and brings closer the notion of global citizenship.

E. *Globalization Right No. 5: Right to Incorporate Across Borders—
The Case for a Multinational Corporations Treaty*

There are no true multinational or global corporations in the world today. So-called multinationals are really U.S., European, or Japanese companies with operations overseas. They are not true multinational or global corporations because a foreign company is required to nominate a parent company and a country of initial incorporation.⁷⁷ As Fiona Macmillan comments:

Prior to the conclusion of the MAI, the strongest argument in favour of the existence of a global corporate sector hinges upon the business activities of a very small group of multina-

76. General Agreement of Trade in Services, in *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31 (1994), 33 I.L.M. 1125 (1994) [hereinafter GATS].

77. Macmillan, *supra* note 74, at 514 ("However, the direct effect of these agreements, especially the MAI, is to render almost meaningless the distinction between a corporation registered in a particular jurisdiction and a corporation registered outside that jurisdiction.")

tionals[,] the operation of which might have been said to have transcended the merely international and embraced the global. Hovering in the background, however, is the fact that, while the activities of a corporate group may well have been global or international, the legal structure of the group recognises national borders. This tends to suggest that it is probably more appropriate to regard the group as internationalised rather than globalised. Nevertheless, it is important not to overlook the fact that the globalization of markets has already given rise to the type of business strategies which have tended to internationalise corporate power and, as a result, make the relationship between the corporate sector and the governments of nation states problematic.⁷⁸

It is suggested that the most useful ally for achieving globalization would be a true multinational or global company.⁷⁹ Some would argue such global companies would be immensely more powerful than present day, so called multinationals, and thus become dangerous. In some respects, they would be dangerous, but corporations are predictable actors. Unlike governments, corporate entities are motivated by profit, not jingoism, realization of historic ambitions, lebensraum, or hidden agendas. They may well be bent on running fascist corporatist communities or becoming global media villains such as those of populist screen fame,⁸⁰ which rightly promote exaggerated populist fears of the corporation. Free competition and agreement on laws against monopolistic and oligopolistic practices, however, can effectively prevent this as they have within nations. The author's choice of enemy is the corporation rather than government.

Governments will always control the police and military, the ultimate enforcer in any community. Democracy is powerful institution and unlikely to be given up to fascism at the behest of the most powerful corporation. Undemocratic governments are on the defensive everywhere. After all, corporations sell goods

78. *Id.*

79. Career choices for law students are often narrowed, especially among the more able, by the perception that to work for multinational corporations is to sell one's soul; to act for multinationals or indeed any foreign corporation is to sell out one's country; and to work for the international civil service is to accept a nice junket—but not do anything socially useful. Nothing could be farther from the truth.

80. Such villains are found in the movies *ROBOCOP* or, the barely disguised global media villain in the James Bond series, *TOMORROW NEVER DIES*.

and services—healthy, wealthy, and informed people are good for business.

The corporation is most dangerous when it is an agent of the nation. Hitler was able to entice the industrialists, principally Ruhr valley coal and steel producers, to bankroll his abominable plans by the promise of profit at the expense of its business rivals, principally in France. The whole idea of the original common market from which the European Economic Community, later the European Union evolved, was to combine the coal and steel industries of France and Germany so as to make war unprofitable.

Why must corporations have an initial place of incorporation in one country? Why not all allow a true multinational company incorporated on an international stock exchange and not beholden to any country. It still must obey the laws of countries that it trades in and must pay tax there. Companies pursue profit. Nations pursue glory, ambition, realization of historic ideals, and power beyond profit, as well as moral ends. It is difficult to predict the behavior of nations due to multiplicity of motives. Corporations are easy to predict and therefore to control, as profit is the only motive.

F. *Globalization Right No. 6*

1. Right to Free Movement of Persons Across National Borders

Only peripherally addressed by the MAI is the right concomitant to trade, namely a right to travel across national borders in order to allow the realization of WTO, MAI, and other major trade treaty objectives.⁸¹ On this basis, it seems the right to travel across borders of itself is a globalization right.

This statement is not to say visa restrictions are illegitimate, at least for the short term, but rather that there is a right to travel and reasons of a specific type for refusing a visa must be given, e.g. a criminal record. A nation should not be allowed a general discretion to refuse a visa, and the class of permissible reasons for withholding a visa and the procedures for appeals need to be the subject of an international agreement.

81. The present draft of the MAI denies sovereignty to a nation to impede the entry into a contracting state of investors and key personnel.

2. The Right to Dual or Multiple Nationality

Many countries prohibit dual or multiple nationality.⁸² Australia is an example of a country that has attempted to prohibit its acquisition. Since the 1984 amendments to the Citizenship Act of 1948, which came into effect in August 1986, an Australian citizen who does any formal act with the sole and dominant purpose of acquiring a foreign citizenship will automatically lose Australian citizenship. The 1984 amendments import a test of dominant intention, which was absent in the pre-1984 law.

The situation prior to 1986 is illustrated by *Allan v. Department of Foreign Affairs*.⁸³ Allan was an Australian citizen whose mother was born in Ireland. In order to obtain an Irish Passport and thus have a right of free movement across the European Union, he registered his birth at the Irish Embassy in Bonn. This act was held by the Administrative Appeals Tribunal ("AAT") to be a formal act to trigger his Irish citizenship with the result that he automatically lost his Australian citizenship.

The post-1986 law requires a formal act with the sole intention of acquiring citizenship. Marriage, however, to a foreign national that results in acquisition of foreign nationality is not so characterized within the law. This formulation can bring about results quite different to the Allan's case. *Guergli v. Department of Immigration, Local Government and Ethnic Affairs*⁸⁴ was on its facts similar to the Allan case. The case involved an Australian citizen, whose mother was born in Switzerland and the daughter applied for recognition of her rights to Swiss citizenship.⁸⁵ The lady had checked with the Australian Consulate on two occasions, four years apart, which confirmed she would not thereby lose her citizenship. She in fact did, according to the Passport Office, and appealed the decision. The AAT held that she did not lose her Australian citizenship, as she was not acquiring a foreign nationality, which right was vested at her birth. In other words, the AAT held that she had inherited her nationality and only carried out a minor administrative procedure to verify her rights. The operative word in the legislation is "acquire." The High Court

82. Incidentally, the United States, one of the most nationalistic of states, revised its prohibition on acquiring dual nationality some time ago.

83. *Allan v. Department of Foreign Affairs* (1986) 5 Austl. Admin App. 432.

84. *Guergli v. Department of Immigration, Local Government and Ethnic Affairs* (1991) 13 Austl. Admin App. 40.

85. The case is an appalling example of relying on Consular advice.

subsequently confirmed⁸⁶ that Australian common law recognizes the international law concept of dual nationality, albeit that the purpose of the Citizenship Act of 1948 was to discourage it.

Prohibitions against dual nationality are wrong and an unacceptable face of nationalism. You cannot logically endorse multiculturalism and oppose dual nationality. Such prohibitions are an attempt by a nation to force on an individual choice of allegiance by recognizing that conflicts may arise between nations in the future and securing allegiance by pre-empting any real potential to leave the country. This point was graphically demonstrated in Hong Kong prior to the 1997 reversion of sovereignty to China. The law was considered moot in order to give the entire population British passports so people could vote with their feet and leave if necessary. China was aghast—it could see the leverage that this provision would give the populace against it; so too was British popular opinion, much to their loss. In reality, a large percentage of people in Hong Kong have dual nationality, most Australian or Canadian combined with Chinese nationality. This situation is a major constraint on how China treats Hong Kong.

No person of conscience should be forced to give *carte blanche* exclusive allegiance to a nation in the absence of knowledge of specific actions by governments. How many Jewish people and people of good conscience might have left Nazi Germany had they the option of another citizenship. If people are to be held responsible for actions of their governments as they currently are, i.e., you have to bomb Iraqis in order to attack Saddam Hussein, then they should have the choice to reject governmental action by leaving the country if necessary. To do this, another nationality is usually necessary. Sometimes, one would not qualify as a refugee, since that definition turns on a real threat of persecution on account of political beliefs. To seek a new nationality at short notice is also not an option.

CONCLUSION

How we see ourselves explains much of what changes in history. At one time, we recognized our family and clan as human

86. *Sykes v. Cleary & Ors* (1993) 67 A.L.J.R. 59.

only—all else was enemy, food, or both. Later, we recognized other clans and families as human. This recognition made possible the establishment of villages, fortified towns, and city-states. Later still, we considered those of our race as human. Kingdoms became integrations of kingdoms and in very recent times led to the concept of sovereign nation states and citizenship.

No doubt controversially, it is this author's deep conviction that, contrary to that cornerstone of public international law, nations can no longer be regarded as sovereign states and are not so regarded by most of their citizens. This, however, does not mean people should regard themselves as morally free to ignore odious national laws, aside from the rare moral imperative of civil disobedience. Chaos would undermine our very survival, though the future will see many would be global patriots who try to ignore this. Legitimacy is an elusive concept, but it is deeply bound up with widely held popular beliefs and moral convictions. It is suspected that the adage "my country, right or wrong" has never been less true than at the present time. While we remain Chinese, Americans, Britons, Australians, and other "ese," "ans," and "ons," we have never before regarded our "human-ness" in quite the same way. However poetic, we do look back to earth with an astronaut's eye and see depicted our world rather than our nation. Our loyalties are to both our world and our home. Why should we be forced to choose between them?

Paul Gomberg wrote that "genuine universalism is possible, but only as a result of a struggle against patriotism and nationalism."⁸⁷ Tolstoy wrote of "destroying patriotism."⁸⁸

Rather, I would suggest, patriotism and the attendant constraints that it puts on our moral, political, and legal imagination need not be struggled against nor destroyed, but redefined. Patriotism, in essence, is a moral concern and caring for our neighbors sometimes calls for the ultimate sacrifice. For twentieth century patriots, neighbors exclude aliens and foreigners. In the next millennium, the neighbors who are the subject of patriotic concern and care must and will expand outward to comprehend all human beings equally. Global patriots will test the resources of law to its limits in achieving this evolution—mindful that too much too fast can lead to the chaos that it is the first duty of law

87. Gomberg, *supra* note 51, at 150.

88. Tolstoy, *supra* note 14.

to avoid.⁸⁹

So what are the possibilities? In the very long term, a world federation with specifically defined, limited powers. It will be comprised of member states with broad general law making powers, representing unique cultural traditions and achievements, and overseen by a world federation court with power to enforce its decisions. This vision is a worthy and ultimately achievable political goal. In the short term, it is the need to whittle away the notion of sovereign state and to build up the concept of globalization rights as fundamental individual rights. This realization can be done by continuing the present trend to work for irrevocable agreement that certain areas of human conduct are beyond the authority of sovereign states and that those states are subject to enforceable obligations in respect of them. These obligations are to be formulated and arbitrated by international agencies. They are to be enforced by NGOs, individuals, and probably most productively in terms of outcomes—though perhaps for the most venal of motives—by corporations.

89. Is it a legitimate protest to refuse to stand for the national anthem? If it is, then surely one should refuse to stand for all national anthems and this action seems a discourtesy whether at home or abroad. Consider the United States and the Pledge of Allegiance—that may be another matter.