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The Incoherence and Functional Incompetence of International Law: Toward a New Paradigm of Human Relationship

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INCOMPETENCE OF INTERNATIONAL LAW:
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RELATIONSHIP

Ibrahim J. Gassama *

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INTRODUCTION

All I maintain is that on this earth there are pestilences and there are victims, and it's up to us, so far as possible, not to join forces with the pestilences.¹

The regime of international law is illegitimate. It is a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West. Neither universality nor its promise of global order and stability make international law a just, equitable, and legitimate code of global governance for the Third World. The construction and universalization of international law were essential to the imperial expansion that subordinated non-European peoples and societies to European conquest and domination.²

Our generation has witnessed the unmasking of international law and it is not necessarily a bad thing. This unmasking process might well culminate in a "Grotian Moment"³ of sorts, but, in the end, international law as we have come to know it will not survive.⁴ The international law of today, modern international law, is an inheritance from the age of conquests that has gone through periodic regeneration to

1. ALBERT CAMUS, *THE PLAGUE* 253–54 (1st Vintage International ed. 1991).

2. Makau Mutua, *What Is TWAIL?*, 94 AM. SOC'Y INT'L L. PROC. 31 (2000).

3. A "Grotian Moment" has been defined as "a period in world history that seems analogous at least to the end of European feudalism . . . when new norms, procedures, and institutions had to be devised to cope with the then decline of the Church and the emergence of the secular state." BURNS H. WESTON ET AL., *INTERNATIONAL LAW AND WORLD ORDER* 1369 (3d ed. 1997). It has also been defined "as that historical time of uncertainty and controversy when one framework of world order is being challenged by an alternative framework." BURNS H. WESTON ET AL., *INTERNATIONAL LAW AND WORLD ORDER* 1269 (4th ed. 2006) [hereinafter *INTERNATIONAL LAW AND WORLD ORDER* 4TH EDITION]. See also Sir Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L. L. 1, 18–53 (1946); Ibrahim J. Gassama, *International Law at a Grotian Moment: The Invasion of Iraq in Context*, 18 EMORY INT'L L. REV. 1 (2004). But for a more restrained assessment of Grotius' influence, see Hedley Bull, *The Grotian Conception of International Society*, in *INTERNATIONAL LAW AND WORLD ORDER* 4TH EDITION, *supra*, at 1281, 1281–85.

4. See *INTERNATIONAL LAW AND WORLD ORDER* 4TH EDITION, *supra* note 3, at 1269 ("In our time, the resilient framework of relations among sovereign states that has persisted since the 1648 Peace of Westphalia that ended the Thirty Years War is being challenged by several contending approaches to global governance.").

emerge as it is today: incoherent and incompetent. It has found sustenance in a convincing retelling of its lineage and has nurtured exaggerated promises among those who have long suffered under its savage embrace and who should have rationally rejected it. Instead, these victims made pragmatic accommodations and adopted their masters' restatement of history. The law that once aided conquest and domination was thus transformed into guiding principles of a future world built on sovereign equality, self-determination, human rights, peace, and economic cooperation. The venerable Hersch Lauterpacht proclaimed broadly that, "international law, which has excelled in punctilious insistence on the respect owed by one sovereign State to another, henceforth acknowledges the sovereignty of man. For fundamental human rights are rights superior to the law of the sovereign state."⁵ Professor Mary Ann Glendon wrote passionately of "a world made new," where "the mightiest nations on earth bowed to the demands of smaller countries for recognition of a common standard by which the rights and wrongs of every nation's behavior could be measured."⁶

The dispossessed generally signed on to this renewal mission, presented as the progressive realization of law. They often infused it with their own hopes for transformative global change. Indeed, over the course of the decades since the Second World War, the re-casted regime of international law did nurture noble aspirations and inspire courageous efforts to remake the world. Nelson Mandela and many others in the decolonization movement testified to this.⁷ The decolonization movement was matched by a spirited international commitment to transnational institution building and frenzied standard-setting initiatives. The Genocide Convention, the United Nations and its many agencies and affiliates, international finance and development institutions, the Universal Declaration of Human Rights ("UDHR"), and the human rights covenants, all mark just the tip of this effort. The overarching goal was to remind us of who we thought we were before the nastiness of

5. See HENRY STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 145 (3d ed. 2008).

6. MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* xv (2001).

7. See NELSON MANDELA, *LONG WALK TO FREEDOM* 83–84 (1994).

unrestrained war making, slavery, genocide, ethnic cleansing, and economic exploitation took us off course. The language of international law was applied liberally. Some, of course, may have cynically signed on knowing that the game had not really changed at all and that the outcome was rigged.

The post Second World War evangelical recommitment to international law sustained the quest for a new secular Holy Grail, for a future in which, in Tennyson's words, "the kindly earth shall slumber, lapt in universal law."⁸ Yet, the refurbished regime has grown unwieldy under the weight of its contradictions, and increasingly inconsequential in the face of humanity's greatest concerns and demands.⁹ Our common heritage of general war making with all its attendant savagery is as vibrant and attractive as ever. The threat of nuclear annihilation, ironically introduced in the infancy of the new international regime, has not receded. In fact, it poses a greater threat to human survival and happiness today than ever. Moreover, the persistence of human misery policed by structured violence continues to astound. Our commitment to material development built around exploitation of fossil fuel has not only given us an even more unequal world, it has also given us the new threat of catastrophic climate change. Thus, even as devoted legions of believers in the new global regime of international law continue to press on with happy talk, our hopes are increasingly stressed and our faith unhinged from everyday realities of life for much of humanity. How long can the faithful continue to assert the reality of the enterprise called international law in the face of persistent evidence of its doctrinal incoherence and functional incompetence?

Not long ago, Cuban dictator Fidel Castro was asked by members of a delegation of prominent human rights activists why racial discrimination remained so stubbornly prevalent in the socialist country.¹⁰ To the evident consternation of

8. ALFRED LORD TENNYSON, *LOCKSLEY HALL* 54 (1842).

9. See *INTERNATIONAL LAW AND WORLD ORDER* 4TH EDITION, *supra* note 3, at 1265–70.

10. See *TRANSÁFRICA FORUM CUBA DELEGATION, FORTY YEARS OF HOSTILITY IS ENOUGH—CONSEQUENCES OF THE UNITED STATES' ECONOMIC EMBARGO ON CUBA* (Mar. 1999). See generally Roberto Zurbarano, *For Blacks in Cuba, the Revolution Hasn't Begun*, *N.Y. TIMES*, Mar. 23, 2013, <http://www.nytimes.com/2013/03/24/opinion/sunday/for-blacks-in-cuba-the-revolution-hasnt-begun.html>.

subordinates, he admitted that his authoritarian regime had failed to stamp out racism but not for a lack of laws and governmental policies. With a degree of resignation, he suggested that psychology might provide a more helpful answer to the hardness of racism in Cuba. Perhaps his observation has relevance to the situation facing international law today. As global crises, from climate change to nuclear confrontation, endemic misery to assorted crimes against humanity, escalate, international law theorists and activists strive to secure a role for the regime of international law, impelled by a devotion unjustified by history or necessity. Their fidelity is misplaced. International lawyers and activists, looking objectively at the critical issues facing humanity today, should come to a conclusion that the discipline as currently conceived is not the proper vehicle for the change the world needs now.

The simple fact that this much venerated object of faith has not fed a single starving child, freed oppressed peoples anywhere, stopped recurring genocide or crimes against humanity, nor held back the oceans should engender a more reflective perspective. Doctrine is not fate. So much energy is being wasted trying to justify and maintain this essentially bankrupt system. Is this being done because there is not a reasonable alternative? Or is it because its adherents are much too invested in the edifice? It would be more worthwhile to embrace the radical changes that are needed and engage more forthrightly the process of developing a new paradigm for human relationships unfettered by tired and discredited doctrines, processes, and faiths, all accouterments of fidelity to a fictive narrative.

In a 2004 article on the invasion of Iraq, I asked whether international law was on the verge of a “Grotian Moment.”¹¹ I wrote:

This age cries for humility. We don’t need a Grotius to tell us that. So much has been tried and the landscape is littered with regrets, failures, and catastrophe. But the problem was not trying. It was the conviction. The past century offered too many solutions and not enough questions.¹²

11. Gassama, *supra* note 3, at 30.

12. *Id.* at 50.

In retrospect, that was a restrained assessment of the role of international law as it saw a continuing role for the discipline, properly refurbished. That article urged that we keep trying, an expression of optimism that is common even among the severest critics of international law. Such optimism is an integral part of the heritage of progressive development of international law catechism.¹³

This Article argues that modern international law in the areas where it should matter most is dying under the weight of doctrinal incoherence and general functional incompetence. In other words, international law is not meeting its prime justifications in critical areas. It is not doing what it was supposedly refurbished to do after the Second World War and it exists today largely in a state of disarray doctrinally and functionally when it comes to dealing with critical problems afflicting humanity. Further, this Article insists that international law has not relinquished its foundational role in helping to rationalize a global order that is characterized by a predatory international economic system, systematic violence that ultimately serves powerful states and interests, broad tolerance of structured misery, as well as a general incapacity to get nations to act in concert in the interest of humanity as a whole. On the other hand, international law has succeeded magnificently as the source of faith or numbing happy talk for those who believe that we have, or could, develop the will and expertise to do better, identify and civilize savages, and fix the world.

To support my argument, I examine international law's contributions to how we deal with problems in three critical areas of human life: avoidance of catastrophe, containment of destructive conflicts, and promotion of decency in terms of the reduction of global misery or structured poverty.¹⁴ Within these

13. See U.N. Charter art. 13, para. 1(a).

14. This categorization is borrowed from Richard Falk, who suggested that international law's capacities and limits should be tested across four broad areas: (1) the management of complexity; (2) the containment of conflict within tolerable limits; (3) the promotion of decency in the world; and (4) the avoidance of catastrophe. Like the 2004 article, this one is also influenced by Professor Falk's work. See Richard A. Falk, *The World Order Between Inter-State Law and the Law of Humanity: The Role of Civil Society Institutions*, in *COSMOPOLITAN DEMOCRACY: AN AGENDA FOR A NEW ORDER* 163 (Daniele Archibugi & David Held eds., 1995) [hereinafter Falk, *World Order*]; see also

categories, I look specifically at the challenges posed by climate change, the threat of nuclear annihilation, the 2003 invasion of Iraq, the on-going civil war in Syria, and the persistence of misery policed by violence in much of the world as well as the Millennium Development Goals (“MDGs”) initiative designed to address it. These case studies support the argument that an unjustifiable importance is placed on international law as we now conceive of it instead of accepting and confronting the reality of international politics.

This Article builds on the Third World Approaches to International Law (“TWAIL”)¹⁵ critique of international law going back to luminaries like Mohammed Bedjaoui, R.P. Anand, and Georges Abi-Saab.¹⁶ It also benefits from other critical perspectives on the limits of international law, including Marti Koskenniemi’s *From Apology to Utopia: the Structure of International Legal Argument*,¹⁷ and David Kennedy’s *The Dark Sides of Virtue*.¹⁸ These critical perspectives should be distinguished from those of positivists who actually question whether international law is really law at all,¹⁹ or critics who argue that international law is merely law that “emerges from states acting rationally to

RICHARD A. FALK, REVITALIZING INTERNATIONAL LAW (1989) [hereinafter FALK, REVITALIZING INTERNATIONAL LAW].

15. See Mutua, *supra* note 2, at 31; see also Antony Anghie & B.S. Chimni, *Methods of International Law: Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 36 STUD. IN TRANSNAT’L LEGAL POL’Y 185 (2004). See generally SIBA N. GROVOGUI, SOVEREIGNS, QUASI-SOVEREIGNS, AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW 16–20 (1996); Antony Anghie, *Francisco De Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321 (1996) [hereinafter Anghie, *Colonial Origins*].

16. See, e.g., Mohammed Bedjaoui, *No Development Without Peace, No Peace Without Development*, in THE UNITED NATIONS AND A JUST WORLD ORDER 178–83 (Richard Falk et al. eds., 1991); R.P. ANAND, INTERNATIONAL LAW AND THE DEVELOPING COUNTRIES: CONFRONTATION OR COOPERATION? (1987); Georges Abi-Saab, *The Changing World Order and the International Legal Order: The Structural Evolution of International Law Beyond the State-Centric Model*, in GLOBAL TRANSFORMATION: CHALLENGES TO THE STATE SYSTEM 439–61 (Y. Sakamoto ed., 1994).

17. MARTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989).

18. DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (2004).

19. See, e.g., JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 133, 201–17 (Weidenfeld & Nicholson eds., 1954); H.L.A. HART, THE CONCEPT OF LAW 209 (1961). For a summary of these perspectives, see INTERNATIONAL LAW AND WORLD ORDER 4TH EDITION, *supra* note 3, at 20–67.

maximize their interests, given their perceptions of the interests of other states and the distribution of state power.”²⁰ Both positivists and the latter rational choice theorists adopt narrow and shortsighted understanding of both the nature of law and how people and countries define their interests. The perspective offered here does not reject a place for law in global affairs. On the contrary, it presumes a need for it in the classic sense of law as sanctioned regularity, or legitimized politics of the common, helpful, indeed essential, in varying degrees to some areas of international life.²¹ Furthermore, while the criticism of the dominant conception of law presented here does not develop a different vision of law for the global community, such as a “law of humanity,”²² it does not reject the possibilities for such.

I. A RESTRAINED CONCEPTION OF INTERNATIONAL LAW

The conception of international law that is challenged in this Article and criticized as incoherent and functionally incompetent is found in treaties as well as in custom.²³ It is modern international law in the various forms in which it has been articulated and promoted since at least the end of the Second World War: the international law of peace, humanitarianism, human rights, sovereign equality, torture, aid, free trade, structural adjustment, and other similarly venerated doctrines, principles, goals, as well as the whole complex of multinational institutions created to defend and advance them. Thus it is the international law of the United Nations and its principal organs, the law of the International Criminal Court (“ICC”), the World Trade Organization (“WTO”), the International Monetary Fund (“IMF”), the World Bank, as well as that of regional bodies such as the North American Treaty

20. JACK L. GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3 (2005).

21. See Burns H. Weston, *The Role of Law in Promoting Peace and Violence: A Matter of Definition, Social Values, and Individual Responsibility*, in *TOWARD WORLD ORDER AND HUMAN DIGNITY* 114, 116–17 (W. Michael Reisman & Burns H. Weston eds., 1976); Louis Henkin, *International Law: Politics, Values and Functions*, 216 *RECUEIL DES COURS* 21, 21–22 (1989).

22. See Falk, *World Order*, *supra* note 14, at 163.

23. See, e.g., Statute of the International Court of Justice art. 38, June 26, 1945, 59 *Stat.* 1055, 33 U.N.T.S. 993 (annexed to the U.N. Charter).

Organization (“NATO”), the African Union, and the Organization of American States.

There are indeed areas of human life where international law, understood in a quite restrained sense, is making positive contributions today. These areas include what Richard Falk has grouped into a category called “the *management of complexity*.”²⁴ In international business, for example, rules, practices, and authoritative bodies have been developed to facilitate global trade and diverse other cross border transactions. Thus Microsoft, Apple, Toyota, British Petroleum, Lloyds, CNOOC, and other global corporations are able to facilitate their interests with the “sanctioned regularity”²⁵ that defines any system of law. This is also substantially true with much more modest business interests and routine cross border transactions. International law also plays important roles in managing expectations and interactions across a broad swath of everyday interactions from air travel to electronic communications to diplomatic relations. The development of international law in these aspects has allowed scholars to make large claims such as:

Every hour of every day ships ply the sea, planes pierce the clouds, and artificial satellites roam outer space. Every hour of every day communications are transmitted, goods and services traded, and people and things transported from one country to another And in all these respects, international law . . . is rather well observed on the whole²⁶

However, even the perceived success of international law in these areas should not be accepted uncritically. It should be analyzed in context. It is important to recognize that a huge number of people are excluded from or deprived of the benefits of such transactions even as they absorb the hidden costs. Travel and tourism, immigration, global trade and investment, intellectual property protections, and routine diplomatic or security activities governed by the international order are not inherently benign and consistent with the interests of the whole of humanity. Examples of “successful” observance of

24. See FALK, REVITALIZING INTERNATIONAL LAW, *supra* note 14, at 91.

25. See Weston, *supra* note 21, at 117.

26. Burns H. Weston, *Law and Alternative Security: Toward a Nuclear Weapons-Free World*, 75 IOWA L. REV. 1077, 1080 (1990).

international law are also subject to the critique of functional incompetence and doctrinal incoherence made against the whole discipline here. The often tragic costs of these rules, practices, and bodies are actually not well disguised and could be easily seen in environmental devastation, massive corruption, and misery policed by public and private violence. As such, these successes are less about the triumph or efficacy of law than they are about the persistence of unequal relationships and absence of pragmatic alternatives. In any case, examples of the “successful” operation of international law in these areas make its failures in the critical areas discussed here all the more revealing about its nature and limits. At a minimum, one should ask whether liberal internationalism got carried away in the post Second World War era with the music of its own virtues, and so promised way more than could be delivered by a functionally competent and coherent international legal regime under the circumstances. A more humbling or restrained understanding of what international law has actually accomplished and is capable of accomplishing could free up human and material resources from a vain quest for certitude and channel them toward the hard politics needed to transform a violent, unstable, and structurally unequal global structure.

II. *THE EVOLUTION OF MODERN INTERNATIONAL LAW:
FROM CHRISTIAN IMPERIAL CONQUEST TO PAX
AMERICANA*

The law of humanity is associated with the future; it is more a matter of potentiality than of history or experience.²⁷

Professor Richard Falk has suggested that, “the [contemporary] notion of world order is situated between inter-state law and the law of humanity, although not necessarily at all in the middle. The inter-state is presumably the past, a time when clearly the inter-state dimension dominated our understanding of international law”²⁸

27. Falk, *World Order*, *supra* note 14, at 163.

28. *Id.*

The attitude of embracing structural changes that would rid humanity of the stranglehold of the inter-state order would actually be more in keeping with the traditions of early doctrinalists and practitioners of international law like Francisco de Vitoria and Hugo Grotius, who developed foundational aspects of modern international law out of functional necessity.²⁹ This attitude would also be consistent with the perspectives and actions of the interwar and post Second World War generation of legal intellectuals and practitioners who refused to allow a reluctant stodgy sovereign nation state the privileging field to shield either war criminals who claimed to have acted legally under laws and superior orders or national leaders who wanted the freedom to continue oppressing their citizens.³⁰

This section briefly reviews how the dominant conception of international law came to be. Assorted theologians, moralists, policymakers, and lawyers, usually in the service of powerful state or corporate interests, have chronicled the form and substance of regimes of order, inequality, violent subjugation, and plunder since at least the Fifteenth Century. Dutch jurist Hugo Grotius' much celebrated *De Jure Belli ac Pacis*³¹ was essentially a restatement of practices that had evolved from antiquity that he cautiously recommended to fretful sovereigns of a later age busy with savage domination of an expanded world and desperate to accumulate resources for ongoing conflicts. Grotius, dubbed Father of international law, meticulously built on earlier surveys and commentaries by other European Christian theologians and jurists like Vasquez, Vitoria, Ayala, and Suárez to argue for a more orderly process.³² The "law" elaborated by these agents of empire should be understood as a useful set of signals, or guidelines to both the weak and the powerful on how to behave either to preserve their advantages and prosperity or just simply survive under the circumstances.

29. See Anghie, *Colonial Origins*, *supra* note 15.

30. See Thane Rosenbaum, Essay, *The Romance of Nuremberg and the Tease of Moral Justice*, 27 CARDOZO L. REV. 1731 (2006). See generally TELFORD TAYLOR, NUREMBERG TRIALS: WAR CRIMES AND INTERNATIONAL LAW (1949).

31. See HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (1901).

32. See Sergio Moratiel Villa, *The Philosophy of International Law: Suárez, Grotius and Epigones*, 37 INT'L REV. RED CROSS 539 (1997).

Necessity has often been the springboard for creative change in transnational human relations for good or ill. If we consider the international law of the present as the direct descendant of the regime that began in the late Fifteenth Century with “discovery,” and the savage conquest of “lesser” others in a supposed new world, we could identify at least four subsequent critical periods in which doctrines and policies governing “transnational” relations have had to be adjusted to solve practical problems and maintain the relevance if not the coherence of the regime. Much could be learned from this history as we contemplate the possibilities of a future in which the interests of humanity, not those of the inter-state order of the last several centuries, will be paramount.

In the first of these critical periods, a sort of pre-Grotius “Grotian Moment,” circa 1492, the basic problem facing the progenitors of modern international law was how to divide the spoils of conquest and new world colonialism between the imperial powers, Spain and Portugal. This was resolved, at least temporarily, by appeal to Christian imperialism under the authority of the Pope.³³ Pope Alexander VI issued two papal bulls in 1493 that divided the new world between the two Western superpowers of the time, Spain and Portugal, in the interest of Christianity. The two powers entered into other treaties built on this papal law foundation. This Christian imperialism-based order of international relations persisted within the spheres of European influence until other European rulers challenged it from outside divine law to further their particular interests. These challenges led to another critical moment.

As more European powers joined in the business of plunder outside their home continent, they rejected the authority of the Pope both as arbiter of inter-sovereign relations as well as relations between European sovereigns and native people in other continents. This challenge opened up space for a more secular approach to resolving disputes among European sovereigns as well as disputes between them and non-Europeans. Francisco de Vitoria, a Spanish jurist, helped to fashion a rules-based process of resolving these disputes. As Professor Antony

33. GROVOGUI, *supra* note 15, at 16–20.

Anghie puts it, Vitoria rejected “old medieval jurisprudence” that gave primacy to the Pope, and replaced it with a more secular version based on natural law administered by sovereign rulers.³⁴ Vitoria saw “the problem [as one] of creating a system of law which could be used to account for relations between societies which he understood to belong to two very different cultural orders”³⁵ This legal resolution paved the way for the complete domination of native people in the New World dictated primarily by secular material interests of European powers. It gave the various European powers the freedom to pursue their expanded national interests while they nurtured rules that formed the basis for the present inter-state legal order.

Hugo Grotius, a loyal subject of Dutch power and lawyer for the Dutch East India Company, did not enter the picture until several decades after this foundation.³⁶ He focused on how to restrain the continuing destructive competition and conflicts among the growing number of European potentates attracted to conquest and pillage in far away societies.³⁷ It is noteworthy that many accounts of modern international law’s origins focus on narrower and more benign interpretations of Grotius work, ignoring not only its indebtedness to Vitoria but also its essential facilitation and rationalization of European as well as royal supremacy.³⁸ Grotius’ contributions were largely derivative of Vitoria’s. He reaffirmed Vitoria’s secular foundations of an inter-sovereign or international law. He sanctified the development of principles of sovereign equality among European nations in order to reduce the destructive consequences of war. He also

34. See Anghie, *Colonial Origins*, *supra* note 15, at 322.

35. *Id.*

36. Hugo Grotius (1583–1645). There were of course many others who preceded Grotius and wrote seriously about what we now call international law, including the Spaniards Vázquez de Menchaca (1509–1566), Balthazar Ayala (1548–1584), and Francisco Suárez (1548–1617). Another important figure in the development of international law in that era was the Italian jurist, Albericus Gentilis (1552–1608).

37. See GROTIUS, *supra* note 31.

38. See Lauterpacht, *supra* note 3, at 18–53. Lauterpacht argued that “notwithstanding shortcomings of method and defects of substance . . . the principal and characteristic features of *De Jure Belli ac Pacis* are identical with the fundamental and persistent problems of international law.” *Id.* at 18–19. One may accept this observation while disagreeing with the post Second World War assertion that international law has substantially broken off from its state interest anchor. Desire is not a substitute for reality and does not trump experience.

helped to heal fractured European imperialism and to make the process of colonial domination by Europe of outside peoples more orderly, more efficient, and more permanent. Grotius' arguments in defense of freedom of the seas were similarly oriented. Grotius argued for humanity and decency as consistent with the interests of imperial sovereigns and their nascent European nation states. It would be truly an exaggeration to suggest that Grotius foresaw a future in which the interests of the sovereign would be subordinate to those of individuals.

Another critical moment in the development of rules of conduct among European nations occurred in the mid-to-late Nineteenth Century and served to refine the processes and substance of European imperialism and colonial domination of non-Europeans through international law. This is the period generally referred to as the Scramble for Africa, a process by which European colonialism, now broadened to include once marginal players such as Germany, Italy, and Belgium, devised rules to make the European partition and pillage of Africa more orderly and thus more profitable for the Europeans.³⁹ By this time, European powers had jettisoned Christian imperial rationalization or divine law for conquest and plunder. A newer foundation built on "humanitarian" ideas of spreading civilization, the suppression of savagery, promoting free trade, and such was now deployed.⁴⁰ The scramble for Africa occurred in conjunction with the ongoing race to dominate much of the rest of the world outside Europe. This is also the period in which

39. See generally THOMAS PAKENHAM, *THE SCRAMBLE FOR AFRICA: THE WHITE MAN'S CONQUEST OF THE DARK CONTINENT FROM 1876 TO 1912* (1991). "The Scramble for Africa is one of the most extraordinary phenomena in history. In 1880 most of the continent was still ruled by its inhabitants and was barely explored. Yet, by 1902, five European powers—Britain, France, Germany, Belgium and Italy—had grabbed almost all of its ten million square miles, awarding themselves thirty new colonies and protectorates, and 110 million bewildered new subjects." From the Publisher, ZENOSBOOK, <http://204.93.202.168/our-book-blogs/945-the-scramble-for-africa-the-white-mans-conquest-of-the-dark-continent-from-1876-to-1912-by-thomas-pakenham.html> (last visited Nov. 20, 2012) (describing PAKENHAM, *supra*).

40. As David Livingstone stated at his Cambridge University address on December 5, 1857, "I beg to direct your attention to Africa; I know that in a few years I shall be cut off in that country, which is now open: Do not let it be shut again! I go back to Africa to try to make an open path for commerce and Christianity" See PAKENHAM, *supra* note 39, at 1 (quoting Livingston's address). See generally ADAM HOCHSCHILD, *KING LEOPOLD'S GHOST* (1998).

a new more powerful player, the United States, emerged into the broader world stage to extend its own unique concept of the civilizing mission, or manifest destiny throughout the Americas and into Asia.⁴¹ The United States provoked a war against Spain in 1898, several decades after a similarly manufactured *casus belli* with Mexico, to herald the beginning of its own expansion outside of the Americas into Asia.⁴² It was perhaps fitting that Spain, the once great imperial power that initiated the process of global conquest by European powers, met its demise through an unimagined consequence of its quest. Centuries of efforts to create an international law to regulate the process of conquest and domination did not protect its spoils from the desires of a greater power.

The most recent moment has given us our present version of international law, the specific regime of conquest and exploitation under which we are still muddling and in which the United States remains the dominant force in the world community. The end of the Second World War gave the United States extraordinary ideological and material advantages. The desire to secure these advantages encouraged it to recast western history and power under an overarching vision of a Pax Americana, an American-supervised world order bathed, yet again, in the language of international law.⁴³ Post-war US dominance allowed it to claim the old European mantle of civilization's vicar and to try to rehabilitate the discredited memory of past civilizing missions. US economic and military supremacy in the post Second World War world gave critical ideological and programmatic dominance to its interpretation and management of critical aspects of international relations.⁴⁴ This includes not only the use of force, human rights,

41. See HAROLD EVANS, *THE AMERICAN CENTURY* 48–67 (1998). Mark Twain satirized the pretensions and unmasked the true agenda of the period: “I bring you the stately nation named Christendom, returning bedraggled, besmirched, dishonored, from pirate raids in Kiao-chou, Manchuria, South Africa, and the Philippines, with her soul full of meanness, her pocket full of boodle, and her mouth full of pious hypocrisies. Give her soap and a towel, but hide the looking glass.” *Id.* at 50 (quoting MARK TWAIN, *GREETINGS FROM THE NINETEENTH TO THE TWENTIETH CENTURY* (1990)); see also DOUGLAS BRINKLEY, *HISTORY OF THE UNITED STATES* 303–21 (1998).

42. See EVANS, *supra* note 41, at 62–63.

43. See *id.* at 386–403.

44. *Id.*; see also DANIEL PATRICK MOYNIHAN, *ON THE LAW OF NATIONS* 120–77 (1990).

decolonization, and international trade, but also, crucially, how we remember the past. Pax Americana recognizes that it should separate its processes from the past in order to justify them. The ideology of international law is a crucial aspect of this recognition.

Expanded participation by non-state actors in the development of international legal doctrines, processes, and programs has been a key strategy in reconstituting the vision of international law in this period of Pax Americana. The international law of this moment also emphasizes recognition of the individual as both a subject and object of international law, as well as renewed commitment to global economic and cultural cooperation. This is the lure of progressive realization, the golden object that entices liberal internationalists of all sorts, from human rights campaigners and international criminal law fetishists to good governance and development world travelers, to abide the dissonance in the world and keep striving for something better.

The embrace of this post-war Pax Americana vision of international law was so broad and deep that the Cold War never seriously challenged its influence. Even those who fought Western hegemony had to claim adherence to this vision in form and substance in order to advance their particular concerns or simply to be tolerated. Algerian jurist Mohammed Bedjaoui, for example, spoke of a “heavily darkened international horizon,” and about “distress for some, anxiety for others, and destitution for most” in his seminal address, “No Development Without Peace, No Peace Without Development.”⁴⁵ Yet, his prescriptions for change fell well within the existing liberal international order. It was a call for dialogue, for reform, and not a radical restructuring of the international order.⁴⁶ The broader decolonization and economic self-determination movements eventually succumbed because at their core, they were creations of the moment.

It is the case that states gave up important elements of sovereign power to join the United Nations and other transnational institutions underpinning the post-war global

45. See Bedjaoui, *supra* note 16, at 178.

46. *Id.* at 178–83.

order. States have also yielded to a multitude of international agreements that seek to restrain state power and enhance the freedoms of non-state actors. Witness the manner in which the ad-hoc international criminal tribunals and the International Criminal Court have been embraced by the very actors who are most likely to be impacted negatively by its operation. Note also the significant devolution of state economic power to the World Bank, the IMF, and the adjudicative panels of the WTO. However, in reality, it is the weakest of the states that have had to make substantive concessions. As far as the more powerful states are concerned, these commitments remain entirely subject to how they perceive their national imperatives. The United States had no legal difficulty torturing international terror suspects, China is still in Tibet, Russia's war against separatists remain outside international legal supervision, India, Pakistan, Israel have illegally developed nuclear weapons, and Iran moves toward developing the same. A major incentive for some of those who support this refurbished vision of international law has been the belief that it is the best hope for humanity, and that a commitment to hope backed by a common acceptance of a strategy of progressive realization gave them a better chance of remaking the savage world they had inherited. But it is time to ask in the manner of the poet whether:

Hope was ever on her mountain, watching
till the day begun—
Crown'd with sunlight—over darkness—
from the still unrisen sun.⁴⁷

Truly, what has changed? Have the post war limitations of state power, the growth of international institutions, the entrance of new subjects of international law, the promotion of international criminal accountability, really challenged the status quo that old international law helped to defend? What good were the limitations of UN doctrine of *jus ad bellum* when the United States under President Bush wanted to go to war against Iraq? Did the Convention against Torture form an actionable barrier to torture in the US War on Terror? What role has the opinion of the International Court of Justice on the nuclear weapons possession and use played on the growing

47. ALFRED LORD TENNYSON, LOCKSLEY HALL SIXTY YEARS AFTER 465 (1886).

threat of nuclear catastrophe? Is the International Criminal Court engaged in promoting justice or re-affirming that savagery is essentially the province of the dispossessed? Was the turn to MDGs not a reaffirmation that global inequality and misery are outside law and subject to the generosity or lack thereof of the haves?

In terms of its rhetoric and promises, the international law that emanated from the post Second World War's "Grotian Moment" of history was actually a radical restatement of how international law had long functioned. What used to be a modest, slowly evolving and indeed rather restrained effort to get first Christian, later secular powers, to play nice with each other was reinterpreted to justify a full blown assault on global disorder in an American-led campaign to create a new world order that would have provoked envy from Alexander the Great or Julius Caesar. The deliberate strategic decision by American-led allied powers to cast the decisive defeat of their Second World War enemies in timeless moral language, elevated and sanctioned by multinational institutions and legal proceedings, was an audacious success. It erased enormous inconvenient chapters of their own histories. Even the most outrageous behavior only a few decades old, such as the European partition and colonization of Africa or the conquest of Spain's former colonies by the United States seemed cleansed by this recasting of the victors as defenders of a timeless secular faith backed by law. Furthermore, exaggerated assertions of actually quite incoherent and indeterminate principles in a brave new world of supposed sovereign equality covered up tragic realities such as that there were more-than-equal members of the UN Security Council with vetoes, that a few more-than-equal states possessed nuclear weapons, that a tiny number of more-than-equal states possessed the might to intervene militarily and subvert unfriendly regimes, and that a few more-than-equal states controlled the international economic order.

The establishment of the international human rights movement was perhaps the greatest innovation of the post war liberal international world orderists. The movement franchised the creation of a new world order, enlisting citizen idealists in the center and periphery of imperialism in the spread of the new joyful ideology of Western supremacy. Civil society was thus

co-opted as humanitarian imperialists to continue the tradition of civilizing missions to suppress native savagery in far off places. Core justifications such as the primacy of the right to self-determination of peoples ignored the inconvenient truth that the resulting states were often the deadliest threat faced by their citizens and that in any case, oppressed peoples often have to keep fighting terrible wars against other peoples to keep their supposed birthright. The movement also unwittingly conspired to normalize the unspeakable horror of everyday misery by relegating economic, social, and development imperatives to mere aspirations.

The spectacular embrace of this new post Second World War iteration of international law is reflected in the innumerable international agreements, ceaseless gatherings, and a multitude of international bodies that serve to secure the privileges of the powerful, while devising more roles and opportunities in the international order for self-righteous international bureaucrats and aspiring do-gooders whose necessary supervisory work will, of course, never end.

A. Incoherence and Functional Incompetence

Liberal critics of international law have generally reconciled themselves into two camps: the pragmatic reformers, who persist with the next law suit, aid project, initiative, conference, guidelines, protocols, convention, or demand for humanitarian interventions, and the “Grotian Moment” theorists, who watch eagerly for the next great crisis that would open our eyes to the need and possibilities of fundamental change that would finally give us the international law promised to us by someone or something (nature, self or collective interest).⁴⁸ Both camps are seriously mistaken. Reviewing the history of international law’s development, going back to 1492, it is clear that international law has not justified such a privileged position. Perhaps nothing should be that privileged. For one thing, international law has not been shorn of its historic function to define, interpret, and implement the rules for domination and submission among

48. These “internal” critics should be distinguished from those who deny the existence of international law or reduce it to an appendage of international politics.

organized groups of humans, presently constituted at least formally as states or nations.⁴⁹

Why persist with this charade? Why not admit the doctrinal incoherence and functional incompetence of post Second World War international law, and embrace, even hasten, its demise? Why engage in rhetorical excesses like “the mightiest nations on earth bowed to the demands of smaller countries for recognition of a common standard by which rights and wrongs of every nation’s behavior could be measured?”⁵⁰ Some of this reflects the enduring pull of utopianism, or the vanity that allows some to persist with the myth of enduring solutions that only law could provide to the living. Undoubtedly, there is also credible fear that something terrible or worse may develop in a vacuum unfilled by a vision of law no matter how fragile. But do we need international law to tell us that genocide and crimes against humanity are bad? Does the regime prevent more genocide and crimes against humanity? Without international law would we have more wars than what we have had? Is it international law that is keeping more people from joining the ranks of those surviving on less than a dollar a day? Would we be more destructive of the environment or more oppressive to women and disfavored minorities without international law? In truth, what does international law have to do with anything that is of vital importance to humanity as a whole today? This Article examines the threat of nuclear annihilation, destructive conflicts in the Middle East, and globalized misery to illustrate the incoherence and inconsequence of international law to how we struggle with these critical issues.

B. *Avoiding Catastrophe*

In the Twenty-first Century, humanity will likely burn out in a nuclear holocaust or fade away amid the gradually mounting effects of climate change. That was Noam Chomsky’s prediction during a question-and-answer session in 2009 that still resonates today. By moving forward with a

49. See generally GROVOGUI, *supra* note 15, at 16–20; Anghie, *Colonial Origins*, *supra* note 15, at 321–36.

50. GLENDON, *supra* note 6, at xv.

missile defense policy that upsets the balance of nuclear deterrence with Russia, “we’re consciously increasing the threat of nuclear war,” Chomsky said. As for the effects of climate change, “nobody knows the exact details, but everybody knows that the longer you wait, the worse it’s going to be.”⁵¹

1. Climate Change

Already, glaciers are melting, heat waves and heavy rains are increasing, the food system is under stress and the sea is rising. The best that can be hoped for, scientists say, is to limit the damage slow enough to provide society more time to adjust.⁵²

There is solid international consensus today on the threat posed to humanity by global warming and climate change and considerable efforts have been made by diverse collection of people across to the world to meet the challenges.⁵³ There is clear understanding today that efforts to deal with this urgent threat to communities around the world should involve everyone, and should be coordinated across the world. This is not a problem that any one nation can fix, no matter how powerful or committed. As such, the United Nations has become a critical forum for encouraging, supporting, and coordinating initiatives to deal with climate change. With a matter of this

51. Noam Chomsky, Address to On The Earth Productions and The Nation: If Nuclear War Doesn’t Get Us, Climate Change Will (Mar. 28, 2013), *available at* <http://www.thenation.com/video/173205/noam-chomsky-if-nuclear-war-doesnt-get-us-climate-change-will>.

52. Justin Gillis, *Obama Puts Legacy at Stake With Clean Air Act*, N.Y. TIMES, June 25, 2013, http://www.nytimes.com/2013/06/26/science/earth/clean-air-act-reinterpreted-would-focus-on-flexibility-and-state-level-efforts.html?pagewanted=all&_r=0.

53. See Ruth Gordon, *Climate Change and the Poorest Nations: Further Reflections on Global Inequality*, 78 U. COLO. L. REV. 1559, 1623–24 (2007). Gordon highlights the particular vulnerability of poorer nations to climate change and its consequences. She concludes that the economic interests of the most powerful nation will prevent action on this issue “until the consequences become intolerable.” *Id.* at 1623. She adds that “the peoples of small island nations, the lowest income nations, and the inhabitants of rapidly deteriorating habitats such as the Arctic region have no voice in this scenario and will suffer until it is in the interests of the powerful to take a different path.” *Id.*

urgency and with undeniable recognition of the need to take immediate and extraordinary steps to mitigate and arrest the slide toward devastating consequences for humanity, one would expect that the machinery of international legality would be at its best. This has not been the case. While so much of the efforts have gone toward employing international law as the foundation for legitimate and efficacious action, the reality is that international law, in any sense, has been a sideshow. The fitful movements that have occurred have been without regard to international law. With regard to climate change, international law, whether of the traditional sort or the post Second World War variety, has not been a significant contributor in any substantive sense. The realities of international politics have prevailed.

An examination of the journey toward global consensus on climate change illustrates brightly the very limited capacity of international law on this matter of utmost importance. Several decades of warnings from scientists and others beginning in the 1960s about increasing concentrations of carbon dioxide in the atmosphere and related steady increases in global temperatures eventually nudged an international response to the problem. The first World Climate Conference took place in 1979. The Intergovernmental Panel on Climate Change (“IPCC”), whose reports have been critical to subsequent international responses to climate change, was set up in 1988.⁵⁴ The first global legal response to the developing crisis was the UN Framework Convention on Climate Change (“UNFCCC”), adopted at the Earth Summit in 1992.⁵⁵ That document, although consciously limited in its legal capacity, provided a foundation upon which international legal action could be taken.⁵⁶ It acknowledged

54. The Intergovernmental Panel on Climate Change (“IPCC”) was established in 1988 jointly by the World Meteorological Organization and the United Nations Environmental Programme (“UNEP”). *Organization*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, <http://www.ipcc.ch/organization/organization.shtml#UlroCmR4ZDE> (last visited Oct. 13, 2013).

55. See United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 165, 31 I.L.M. 849 [hereinafter UNFCCC]. The Convention has 195 Parties. *Id.*

56. The UNFCCC includes a broad list of commitments. These commitments employed non-binding but exhortatory language, such as “develop,” “formulate,” “promote,” “cooperate,” and “communicate” to encourage individual state and collective actions to mitigate climate change without any hint of sanctions. *Id.* art. 4.

“that change in the Earth’s climate and its adverse effects are a common concern of human kind.”⁵⁷ Its contributions as a document of collective understanding of the problem, an affirmation of the necessity for urgent action, and a source for the best practices in responding to this impending calamity should be appreciated.⁵⁸ Yet, it is not a source of law or binding obligations.⁵⁹ Worse, its efforts to masquerade as such diminish the meaning and value of law. In this manner, it continues a tradition in the modern era that goes back to the UDHR and the International Covenant on Economic, Social and Cultural Rights. Of course, the value of such instruments as vehicles for enterprising academics and activists to squeeze notions of binding obligations useful only in theoretical discourse is not in dispute here. That is not a sufficient reason, however, to mischaracterize the reality of international politics, and the quite limited reach and capacity of international law.

The Kyoto Protocol (the “Protocol”) was developed later to operationalize the UNFCCC.⁶⁰ Although adopted in 1997, it did not enter into force until 2005. The United States signed the Protocol but in the face of broad-based hostility in the United States Senate, it has not been presented for ratification.⁶¹ Many

The document affirms the collective understanding of the problem and catalogues best practices in the service of a global priority. *Id.*

57. *See id.* pmb1.

58. *Id.* art. 2. The UNFCCC explicitly states that:

The ultimate objective of the Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystem to adapt naturally to climate change, to ensure food production is not threatened and economic development to proceed in a sustainable way.

Id.

59. The Convention’s dispute settlement provisions generally leave it to the parties to decide how to settle disputes that may arise among them “concerning the interpretation or application of the convention.” *Id.* art. 14(1). However, parties are given the option of making provisions of the convention binding and to choose the International Court of Justice or international arbitration for resolution. *Id.* art. 14(2).

60. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, UN Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22. The Protocol has 191 parties as of 2013.

61. According to a news report:

US leaders were upset that China and India had been among those countries not required to make commitments.⁶² Further Canada, Japan, and Russia have either withdrawn their support of the Protocol or limited their participation in its targets.⁶³ The Protocol too fell short as a legal document although its contributions as a global call for specific actions to mitigate climate change should not be minimized. The Protocol reaffirmed the ultimate objective contained in article 2 of the UNFCCC, and employed the same weak dispute resolution process contained in the Convention. The Protocol was supposed to go beyond the efforts of the Convention to legally bind developed countries to emission reduction targets within specific time periods. The Protocol, employing the principle of “common but differentiated responsibility,” sets binding emission targets only for thirty-seven industrialized countries and the European community in its first commitment period ending 2012. This principle of common but differentiated responsibility “recognizes that they [industrialized nations] are largely responsible for the current high levels of greenhouse gas emissions in the atmosphere, which are the results of 150 years of industrial activity.”⁶⁴

As the first commitment period of the Protocol came to a close, Parties gathered in Doha, Qatar in December 2012 to assess progress and map future efforts. The Doha meeting was compromised by several factors including the general lack of significant progress toward mitigation even by those parties that

Sen. Larry E. Craig (Idaho), head of the Republican Policy Committee, told reporters here that the treaty is “designed to give some nations a free ride, it is designed to raise energy prices in the United States and it is designed to perpetuate a new U.N. bureaucracy to manage global resource allocation.” It also would undermine the recent reform of farm programs and threaten U.S. agricultural production, warned Sen. Pat Roberts (R-Kan.).

Helen Dewar & Kevin Sullivan, *Senate Republicans Call Kyoto Pact Dead*, WASH. POST, Dec. 11, 1997, <http://www.washingtonpost.com/wp-srv/inatl/longterm/climate/stories/clim121197b.htm>.

62. *See id.*

63. Regan Doherty & Barbara Lewis, *Doha Climate Talks Throw a Lifeline to Kyoto Protocol*, REUTERS (Dec. 8, 2012, 2:44 PM), <http://www.reuters.com/article/2012/12/08/us-climate-talks-idUSBRE8B60QU20121208>.

64. *See Making Those First Steps Count: An Introduction to the Kyoto Protocol*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/essential_background/kyoto_protocol/items/6034txt.php.

had made commitments, the failure of the United States to ratify the agreement, and the withdrawal of commitments by Russia, Japan, New Zealand, and Canada. Added to this was the outstanding dispute over the failure to require commitments from two rapidly industrializing powerhouses, China and India. As one observer put it, “overall, the result is that global emissions have showed no sign of slowing down In that sense, the Kyoto protocol has been a failure. But it was unquestionably an important first step in global climate diplomacy.”⁶⁵

In Doha, Parties to the Protocol decided to push difficult decisions about how to deal with climate change to the future. They agreed to extend the Protocol until 2020. According to one assessment, Kyoto was “sapped by the withdrawal of Russia, Japan, and Canada and its remaining backers, led by the European Union and Australia, now account for just 15 percent of world greenhouse gas emissions.”⁶⁶ Another observer at the talks states that, “there’s a huge disconnect between the urgency on the outside and what happens here.”⁶⁷

The results of the conclaves in Doha and Kyoto, and all the numerous other gatherings and initiatives to deal with the challenges posed by this threat to human survival suggest the foundational weaknesses in international politics focused through a lens of international legality. When it comes to dealing with matters that could require the most powerful nations to sacrifice even a little of their national advantages, no matter how temporary or ephemeral in the long run, law as law finds little support.⁶⁸ The tragedy of our collective impotence is

65. Duncan Clark, *Has the Kyoto Protocol Made Any Difference to Carbon Emissions?*, *Environment*, GUARDIAN (Nov. 26, 2012, 5:39 AM), <http://www.theguardian.com/environment/blog/2012/nov/26/kyoto-protocol-carbon-emissions>.

66. Doherty & Lewis, *supra* note 63.

67. *Id.* (quoting Jennifer Haverkamp, of the Environmental Defense Fund).

68. John Vidal captures the reality of global climate change politics:

Evidence of global warming mounts both on the ground and in science, but in the bubble world of international climate diplomacy, little happens. Countries have become less and less able to collectively address the crisis unfolding around them. When UN talks fell apart in Copenhagen in 2009, world leaders claimed they could cobble together a new binding agreement to cut emissions within six months. That became a year, then two years, and now the rich countries tell a bemused public that it will be 2015 at the earliest before a final agreement will be reached. Trillions of dollars can be found to

compounded when we rush to attach the language of law to even the most modest of accomplishments. Calling it soft law in such instances merely signals uncreative desperation. As we see with regard to Kyoto, the more likely substantive outcome is a breakdown in communication and cooperation as nations devote substantial energy to ensure that they are not giving up their capacities to act consistent with their national interests in the future. Whatever progress one can discern with regard to climate change mitigation, it has had nothing to do with law. If anything legalism has been a hindrance. We cannot escape politics by intoning law, especially when it affects nations with sufficient power and influence. On the other hand, one can credit the international political process with spurring diverse creative domestic and cooperative international efforts to deal with climate change.⁶⁹ These efforts are not occurring because of the threats posed by some sort of international sanctions. The role of international work in this arena has been to develop the science, communicate urgency, and build consensus on the best mitigation practices. It would be ironic if climate change, a global crisis that requires the powerful to give up something and a crisis that could not be solved by simply taking more from the weak, ends up highlighting the overreach of international law on other issues.

2. Nuclear Annihilation

The General Assembly, . . .

1. *Declares* that: . . .

(c) The use of nuclear and thermo-nuclear weapons is a war directed not against an enemy or enemies alone but also against mankind in general . . .

bail out banks in a few months, but the world's most experienced negotiators cannot find a way to get Americans, the British or anyone to just turn down the air conditioning or lag their roofs to reduce the amount of energy they use.

John Vidal, *Time Is Running Out: The Doha Climate Talks Must Put an End to Excuses*, *GUARDIAN*, Nov. 25, 2012, <http://www.theguardian.com/commentisfree/2012/nov/25/doha-climate-talks-end-to-excuses>.

69. The president's 2013 initiatives on climate change focus on what was achievable within domestic United States political structure. *See, e.g.*, Gillis, *supra* note 52.

(d) Any State using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization.⁷⁰

Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with principles and rules of law applicable in armed conflict in any circumstance.⁷¹

Just over a decade ago, US President George W. Bush and his top advisers built a case for war against Iraq by emphasizing the threat of weapons of mass destruction (“WMD”), especially nuclear weapons, under the control of a “rogue” regime or terrorists.⁷² Despite substantial resistance from much of the world, the invasion of Iraq proceeded.⁷³ Eventually, it was conceded that the WMD fears in that particular instance were at best exaggerated or worse, entirely fabricated⁷⁴ This conclusion has hardly impacted US power and prestige in the world. On the contrary, the coalition that prosecuted a war, justified erroneously or maliciously by fears of WMD, is being re-assembled to go to war again over nuclear weapons. President Barack Obama recently stated that Iran was proceeding with the development of nuclear weaponry against the wishes of the international community. He claimed that Iran was just over one year away from developing nuclear weapons capabilities and

70. Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons, G.A. Res. 1653 (XVI), at 5, U.N. Doc. A/RES/1653 (XVI) (Nov. 24, 1961).

71. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, at 262–63 (July 8).

72. President George W. Bush, Address on the Start of the War in Iraq (Mar. 19, 2003), available at <http://www.theguardian.com/world/2003/mar/20/iraq.georgebush> (“Our nation enters this conflict reluctantly, yet our purpose is sure. The people of the United States and our friends and allies will not live at the mercy of an outlaw regime that threatens the peace with weapons of mass murder.”); see also *Top Bush Officials Push Case Against Saddam*, CNN (Sept. 8, 2002, 8:46 PM), <http://edition.cnn.com/2002/ALLPOLITICS/09/08/iraq.debate>.

73. See Ewen MacAskill & Julian Borger, *The Iraq War Was Illegal and Breached UN Charter, Says Annan*, GUARDIAN, (Sept. 15, 2004, 9:28 PM), <http://www.theguardian.com/world/2004/sep/16/iraq.iraq>.

74. See Hans Blix, *Iraq War Was a Terrible Mistake and Violation of U.N. Charter*, CNN (Mar. 19, 2013, 4:36 AM), <http://www.cnn.com/2013/03/18/opinion/iraq-war-hans-blix/index.html>.

reaffirmed the US commitment to using whatever means to deny Iran such capabilities.⁷⁵

Whether or not the United States alone, or in conjunction with other nations, eventually prosecutes war with Iran over Iran's supposed desire or efforts to develop nuclear weapons, the expectations that international law could help discipline the possession or use of nuclear weapons have not been met. Professor Nanda's work on nuclear weapons and human security captures the long and frustrating international efforts to gain control over this clear threat to humanity.⁷⁶ Those efforts began in 1946, not long after the tragic demonstration of the weapon's potential for massive destruction. Since that time, calls for elimination of nuclear weapons have persisted and multiplied.⁷⁷ The "commitment of the international community to the goal of the total elimination of nuclear weapons and the creation of a nuclear-weapon-free world" has been a standard expression of this endeavor.⁷⁸

The heart of international law's contribution to a nuclear-free world has been the 1968 Treaty on the Non-proliferation of Nuclear Weapons ("NPT").⁷⁹ In essence, the NPT proposed a grand bargain between what may be termed the haves and have-nots of the atomic age.⁸⁰ In sum, the haves agreed to retain their weapons until they should agree in the future, after negotiations, to disarm. In the meantime, they promised to share any potential benefits of nuclear technology, except for the deadly aspects, with the have-nots. In turn, the have-nots agree to limit themselves only to peaceful applications of nuclear technology and not to obtain nuclear weapons technology or weaponry. It is important to note that no party in possession of nuclear weapons offered to destroy their cache or put it under international control. Instead, the great hope for

75. See Michael D. Shear & David E. Sanger, *Iran Nuclear Weapons to Take Year or More, Obama Says*, N.Y. TIMES, Mar. 14, 2013, <http://www.nytimes.com/2013/03/15/world/middleeast/iran-nuclear-weapon-to-take-year-or-more-obama-says.html>.

76. See Ved P. Nanda, *Nuclear Weapons, Human Security and International Law*, 37 DENV. J. INT'L L. & POL'Y 331 (2009).

77. See *id.* at 337.

78. See, e.g., G.A. Res. 52/38 L, 1, U.N. Doc. A/RES/52/38 L (Jan. 8, 1998).

79. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

80. See *id.* arts. I–VI.

humanity was contained in Article VI of the NPT under which parties agreed to undertake good faith negotiations on effective measures to halt the arms race and on a future treaty to disarm completely “under strict and effective international control.”⁸¹ Curiously though, the NPT permits any party to exercise their sovereign right to withdraw from the treaty at any time “if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country.”⁸²

The 1996 International Court of Justice (“ICJ”) Advisory Opinion on the “Legality of the Threat or Use of Nuclear Weapons” confirmed the incoherence and functional incompetence of international law in this critical area.⁸³ The opinion was issued at the request of the UN General Assembly pursuant to Article 96 of the UN Charter and Article 65 of the Statute of the International Court of Justice.⁸⁴ The General Assembly asked this question: “Is threat or use of nuclear weapons in any circumstances permitted under international law?” Faced with a fundamental existential question the court, statutorily the most important arbiter of international law replied incoherently and inconsequently. The Court decidedly rejected the view of a minority of judges that the threat or use of nuclear weapons should be unlawful under all circumstances.⁸⁵ The court could not agree on whether international law as it existed at the time made the threat or use of nuclear weapons “lawful or unlawful in the extreme circumstance of self-defence, in which the very survival of a state would be at stake.”⁸⁶ However, the court ruled that the “threat or use of force by

81. *Id.* art. VI.

82. *See id.* art. X (“Each party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country.”).

83. *See generally* Legality of the Threat or Use of Nuclear Weapons, *supra* note 71.

84. *See* U.N. Charter art. 96, para. 1 (“The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.”); Statute of the International Court of Justice, art. 65, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (annexed to U.N. Charter) (authorizing the court to “give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request”).

85. Legality of the Threat or Use of Nuclear Weapons, *supra* note 71.

86. *Id.* at 263.

means of nuclear weapons that is contrary to Article 2(4) of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful” and that the “threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations” under agreements dealing with nuclear weapons.⁸⁷

Essentially the court’s response demonstrated that when it comes to the threat or use of force, states have considerable flexibility under international law unless they have first specifically agreed otherwise. Furthermore, every considered international law constraint on the use of force was subject to one or more equally valid principles permitting the use of such force, especially when it comes to self-preservation of the state.

The prohibition on use of force, for example, is subject to two critical exceptions: individual or collective self-defense and UN Security Council authorization. The concept of self-defense has become increasingly elastic as weaponry and delivery capabilities have become more threatening. Nuclear weapon technology, together with ballistic missile and miniaturization capabilities, has helped to broaden the acceptable range of self-defense measures that states may pursue. Protection or security as such comes today not from international law prohibiting the use of force but from mutual threats or deterrence. Thus, states are incentivised to fill the regulatory vacuum in international relations with lethal capabilities. With regard to Security Council authorization to use force, the practice of the international community has created a flexible interpretation of what constitutes legal authorization. This reality also encourages states not to rely on perceived rules in this area but instead to build up their own capabilities.

87. *See id.* at 266; *see also* INTERNATIONAL LAW AND WORLD ORDER 4TH EDITION, *supra* note 3, at 448. Article 2(4) of the UN Charter obligated UN members to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. Charter art. 2, para. 4. UN Charter Article 51 reaffirmed the “inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.” U.N. Charter art. 51.

The ICJ opinion acknowledged that, “the Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons.”⁸⁸ Moreover, according to the Court, while “international customary and treaty law does not contain any specific prescription authorizing the threat or use of nuclear weapons or any other weapon in general or in certain circumstances, in particular those of the exercise of legitimate self-defense,” there is also no “principle or rule of international law which would make the legality of the threat or use of nuclear weapons or of any other weapons dependent on a specific authorization.”⁸⁹ All that was left to the Court were insinuations of legal standards built on the concept of proportionality. This singularly incoherent concept dissolves into absurdities when the issue is nuclear weapons and the possibility of nuclear conflagration.

More than four decades after the NPT entered into force and nearly seven decades since the earliest efforts to contain the spread of nuclear weapons, international law, so to speak, has reached the level of its incompetence when it comes to preventing nuclear annihilation. Today, international law in this area has been reduced to rationalizing the right of nations that currently possess nuclear weapons to wage war against states without nuclear weapons in the name of preventing those states from having the same. In other words, if you choose now to have nuclear weapons, you may be prevented by force supposedly backed by international law from doing so, even though no mechanism exists under this interpretation of international law to make those who already have nuclear weapons give them up. Meanwhile, the especially odious regime in North Korea employs its alleged nuclear capabilities to demand international attention and more tribute, confirming the perspicacity of countries like India, Pakistan, and Israel that successfully obtained nuclear weapons in disregard of international sentiments masquerading as law. International law’s incoherence and functional incompetence with regard to avoiding catastrophe stand exposed.

88. Legality of the Threat or Use of Nuclear Weapons, *supra* note 71, at 244

89. *See* Legality of the Threat or Use of Nuclear Weapons, *supra* note 71, at 247.

The reason international law has turned out to be of no help in restraining nuclear weapons possession and the inevitable threat of use is buried in its origins and essential characteristics. International law has developed to legitimate power among those who already have power. International law does not discover or confer new powers or rights on those who merely would like to have it or claim to deserve it.⁹⁰ This was true back in its infancy in the period of conquests. It has remained so despite all the Grotian Moments one could conceive up to now. Without some radical re-conception of how humans see their relationships to each other in the world, there is no basis to imagine a change in the offing.

Previously, many international law scholars and activists understood this harsh reality of international law and made no pretense it was otherwise. They limited themselves properly to restrained but creative appeals to morality and the common interest of sovereigns and states. Post war liberal internationalism sought to justify the status quo of the immediate post war era, and market it exuberantly as international law, objective, neutral, and beyond politics or social contestation. Some have chosen not to play along when it does not suit their interests.

Professor Ved Nanda's 2009 article on nuclear weapons, human security, and international law urges a role for international law "to provide a framework for nuclear disarmament, a prerequisite for human security."⁹¹ He argues that, "the end of the Cold War did not remove the threat nuclear weapons pose to human civilization Numerous experts point to a causal relationship between nuclear weapons and international and national insecurity."⁹² The role of

90. See, for example, the film "Unforgiven," in which the Clint Eastwood character, William Munny, informs Sheriff Bill, "Deserve's got nothin to do with it." Sheriff Bill's protest ("I don't deserve this—to die like this. I was building a house") echoes the claims and protests of too many seeking to change the status quo in international relations through the development and application of international law. UNFORGIVEN (Warner Bros. 1992); see also Ruth Buchanan & Rebecca Johnson, *The Unforgiven Sources of International Law: Nation-Building, Violence and Gender in the West(ern)*, in *INTERNATIONAL LAW: MODERN FEMINIST PERSPECTIVES* 131 (Doris Buss & Ambreena Manji eds., 2005).

91. Nanda, *supra* note 76, at 331.

92. *Id.*

international law is to provide a framework for nuclear disarmament, a prerequisite for human security.⁹³

Nanda's call echoes Grotius' appeal to European sovereigns to embrace rules for building peace and managing destructive conflicts. Nanda's work reminds of the horrendous legacy of the use of nuclear weapons even at its infancy and affirms the objective reality of the limited utility of nuclear weapons as instruments of war and domination.⁹⁴ President Obama has called for the United States and Russia to agree to a reduction of each country's nuclear arsenal to just over 1,000.⁹⁵ Many influential parties in both the United States and Russia have objected to this initiative.⁹⁶ Both nations are estimated to still have hundreds of nuclear weapons targeted at each other on "high alert," ready to be launched within minutes of a perceived threat.⁹⁷ The US Senate has also failed to ratify the Comprehensive Nuclear Test Ban Treaty ("CTBT") signed by the United States in 1996.⁹⁸ This treaty is still not in force even though it has been ratified by 156 countries. Under its terms, key possessors of nuclear weapons that participated in the negotiations must first ratify before it can become operative.⁹⁹

Yet, the problem here is that nuclear weapons and other weapons of mass destruction confer the most extraordinary

93. *Id.*

94. *Id.* at 346.

95. See Lawrence M. Krauss, *Letting Go of Our Nukes*, N.Y. TIMES, July 6, 2013, <http://www.nytimes.com/2013/07/07/opinion/sunday/letting-go-of-our-nukes.html>.

96. *Id.*

97. *Id.*

98. The Comprehensive Nuclear Test Ban Treaty ("CTBT") opened for signatures of state parties in 1996. Under the CTBT:

(1) Each State Party undertakes not to carry out any nuclear weapon test explosion or any other nuclear explosion, and to prohibit and prevent any such nuclear explosion at any place under its jurisdiction or control; (2) Each State Party undertakes, furthermore, to refrain from causing, encouraging, or in any way participating in the carrying out of any nuclear weapon test explosion or any other nuclear explosion.

The Comprehensive Nuclear Test Ban Treaty art I, Sept. 24, 1996, UN Doc A50/1027 Annex, 35 I.L.M. 1439. See Lawrence Kraus, *It's Time for the U.S. To Finally Sign the Nuclear-Test-Ban Treaty*, SLATE (Apr. 25, 2012), http://www.slate.com/articles/technology/future_tense/2012/04/comprehensive_nuclear_test_ban_treaty_the_u_s_should_ratify_it_now_.html; see also Jenifer Mackby, *Comprehensive Nuclear Test Ban Treaty*, CTR, FOR STRATEGIC & INT'L STUD. (Jan. 23, 2012), <http://csis.org/publication/comprehensive-nuclear-test-ban-treaty-0>.

99. See Mackby, *supra* note 98.

benefits desired by states since the latter's fitful emergence in the mid 1600s: possession of nuclear weapons provides a hedge against domination by others and non-existence. This is why regimes in countries as diverse as China, India, Pakistan, and Israel have obtained them and continued to perfect their capacities to employ them. Nuclear weapons possession reveals that the true foundational imperative of a state-based international system is the existence of the state. Post Second World War international law offered the bold claim that it could transform such state interests in a world of extremes into the interest of humanity as a whole. The stalemate in disarmament efforts, the embrace of mutual deterrence, and the resort to threats and violence to prevent other states from joining the nuclear club show the limits of that claim and affirm the centrality of national interests, as opposed to the more abstract notion of the interests of humanity, in our global system. Meanwhile, "[t]he barrage of threats from North Korea has sparked talk from within South Korea of the need to develop its own nuclear weapons. A recent poll shows that two-thirds of South Korean citizens surveyed support the idea."¹⁰⁰

C. *Containing Destructive Conflicts*

In new and wild communities where there is violence, an honest man must protect himself; and until other means of securing his safety are devised, it is both foolish and wicked to persuade him to surrender his arms while the men who are dangerous to the community retain theirs. He should not renounce the right to protect himself by his own efforts until the community is so organized that it can effectively relieve the individual of the duty of putting down violence. So it is with nations.¹⁰¹

The 2003 Iraq War and the ongoing Syrian civil war are just two instances in which the post Second World War international

100. K.J. Kwon, *Under Threat, South Koreans Mull Nuclear Weapons*, CNN (Mar. 18, 2013), <http://www.cnn.com/2013/03/18/world/asia/south-korea-nuclear>.

101. Theodore Roosevelt, *Address Before the Nobel Prize Committee: International Peace* (May 5, 1910), *available at* http://www.nobelprize.org/nobel_prizes/peace/laureates/1906/roosevelt-lecture.html.

legal architecture designed to contain destructive international and national conflicts has failed. The Iraq War was a classic international conflict, but the ongoing destruction in Syria, ostensibly a civil war, represents the more common arena in which international law's doctrinal incoherence and functional incompetence with regard to the containment of destructive conflicts have been exposed. Today, the cause of peace is essentially the foundation for interminable conflicts unrestrained, if they ever were, by borders. The cause of peace is also the fuel for an escalating and competitive global weapons trade, whose regulation continues to elude the international community.¹⁰²

Containing warfare and promoting peace and security among sovereign entities are age-old concerns among those who have promoted the development of international law from the earliest period.¹⁰³ Doctrinalists like Vitoria, Ayala, Vazquez, and Grotius affirmatively argued in the interest of peace for rules limiting the unbridled right of sovereigns to declare and wage wars.¹⁰⁴ The Twentieth Century saw significant progress that led to agreements such as the 1907 Hague Convention (No. IV),¹⁰⁵ and the 1928 General Treaty Providing for the Renunciation of War as an Instrument of National Policy.¹⁰⁶ But, it took the Second World War and the ascendance of the United States as the preeminent world power to bring an energized vision of law, with all its contradictions, to the forefront of international

102. See *The 'Big Six' Arms Exporters*, AMNESTY INT'L (June 11, 2012), <http://www.amnesty.org/en/news/big-six-arms-exporters-2012-06-11>. The UN General Assembly adopted the first international agreement regulating the international arms trade in 2013. The treaty, even when it becomes effective, would not have an enforcement agency. See Colum Lynch, *UN Approves Global Arms Treaty*, WASH. POST, Apr. 2, 2013, http://articles.washingtonpost.com/2013-04-02/world/38208395_1_legitimate-arms-trade-treaty-humanity-or-war-crimes; Peter Webber, *Why the U.S. Isn't Signing the U.N.'s Global Arms Treaty*, WEEK (June 3, 2013), <http://theweek.com/article/index/245023/why-the-us-isnt-signing-the-uns-global-arms-treaty>.

103. See, e.g., HUGO GROTIUS, ON THE LAW OF WAR AND PEACE (A.C. Campbell, A.M. trans., Batoche Books 2001) (1625) (translated from the original *De Jure Belli ac Pacis*).

104. See *id.*; see also Anghie, *Colonial Origins*, *supra* note 15; Villa, *supra* note 32.

105. See Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, U.S.T.S. 539.

106. See General Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27 1928, 46 Stat. 234, U.S.T.S. 796 [hereinafter Kellogg-Briand Pact].

relations. The United States created the foundation for this revived vision when it insisted that vanquished leaders in Europe and Asia be tried for crimes under international law, including waging aggressive war, crimes against humanity, and other crimes in their conduct of the war. This novel approach to ending international war raised hopes and deepened faith among those who envisioned international law as an unbiased regulator of the right of states to wage war, *jus ad bellum*,¹⁰⁷ their conduct during war, *jus in bello*,¹⁰⁸ and their relationship with each other during times of peace. The United States also promoted the establishment of international institutions like the United Nations to support the international commitment to build a regime of peace dictated by law.¹⁰⁹ The Preamble of the United Nations Charter expressed the determination of “WE THE PEOPLES OF THE UNITED NATIONS . . . to save succeeding generations from the scourge of war.”¹¹⁰ The Charter executed this determination by making international peace a prime obligation of the institution and its members.¹¹¹ The Charter specifically required nations to “settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”¹¹² Members were also required to “refrain in their international relations from threat or use of force against the territorial

107. Earlier efforts to achieve legally binding limitations on the rights of nations to wage wars can be tracked back to at least Grotius’ *De Jure Belli ac Pacis*, *supra* note 103, and includes the 1928 Pact of Paris (The Kellogg-Briand Pact), *supra* note 106.

108. At the forefront of efforts to regulate conduct during warfare, the foundation of humanitarian law, were the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, *supra* note 105, and the Geneva Conventions, Convention for the Protection of War Victims Concerning Amelioration of the Conditions of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Protection of War Victims Concerning Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention for the Protection of War Victims Concerning Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention for the Protection of War Victims Concerning Protection of Civilians in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. The Nuremberg Principles and judgment enriched this area of international law.

109. *See* U.N. Charter pmbi.

110. *Id.*

111. *See, e.g.*, U.N. Charter pmbi., arts. 1, 2, 4-6, 11, 12.

112. *Id.* art. 2, para. 3.

integrity or political independence of any state.”¹¹³ In addition, the UN Security Council was created as a principal organ of the UN and granted broad powers to supervise this renewed international commitment to contain destructive international conflicts and limit the right of states to use force in international affairs.¹¹⁴ It is instructive that the real power to enforce peace was thus entrusted to the Security Council, an overtly political organ as opposed to the ICJ. A strong and expanding secretariat headed by the UN Secretary-General was also developed to implement these aims. Other global institutions and prescriptions in the areas of human rights and economic development were developed to support this architecture of peace and conflict regulation. Furthermore, regional institutions and prescriptions were fostered to complement and supplement their global counterparts.

However, the post war initiatives to deepen the role of law in international peace and security have not produced impressive results. About 250 major wars have taken place since 1945, with over 50 million people killed as a result, and millions more otherwise affected.¹¹⁵ Arguably, it could have been much worse. For a relatively brief period of time, the Cold War actually constrained the nature and scope of destructive conflicts as it focused our passion on the possibilities of global conflagration. The overwhelming potential of each camp to destroy humanity provided an effective even if temporary disciplining mechanism for violent international conflicts. Fear of nuclear annihilation became the guardian of an ephemeral and morally ambiguous peace.

The end of the Cold War did not yield a peace dividend or a structurally different approach to international security. Instead, it unleashed broader and more complicated destructive forces across a wide swath of the earth, sparing no continent or region. The international peace regime centered at the United

113. *Id.* art. 2, para. 4.

114. *See id.* art. 24 (“In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree in carrying out its duties under this responsibility the Security Council acts on their behalf.”).

115. *See War and Peace*, PEACE PLEDGE UNION, http://www.ppu.org.uk/learn/infodocs/st_war_peace.html (last visited Oct. 13, 2013).

Nations, with its exaggerated focus on legal rules, has not been able to respond in any creditable manner. One could search in vain for either coherence or competence in its responses. The Rwandan genocide, the crimes against humanity that marked the breakup of the former Yugoslavia, and the protracted destruction of Somali civil society and governmental authority, were only some of the earliest tests that the system failed. Some of the wars like those in Sudan or the Democratic Republic of the Congo (“DRC”) have gone on for so long, they have become effectively normalized aspects of our global system.¹¹⁶ Millions have died even as the international bureaucracy and its rhetoric of peacekeeping, peacemaking, peace building, humanitarian intervention, responsibility to protect, and such, have grown in size, volume, and self-importance. In order to accept international law’s relevance to diverse decisions, desires and impulses that result in humanity’s unyielding cavalcade of savagery, one has to reject the history and pattern of violence, suspend our capacity for reason or emotion, and treat each episode of contemporary transnational mass murder brought persistently to our consciousness everyday by modern technology, as if a flaw.

1. Containing War Among Nations: the 2003 Invasion of Iraq

Not perhaps that primitive men were more faithless than their descendants of today, but that they went straighter to their aim, and were more artless in their recognition of success as the only standard of morality.¹¹⁷

Our nation enters this conflict reluctantly, yet our purpose is sure. The people of the United States and our friends and allies will not live at the mercy of an outlaw regime that

116. See Jeffrey Gettleman, *Africa’s Dirty Wars*, N.Y. REV. BOOKS, Mar. 8, 2012, at 33 (reviewing WILLIAM RENO, *WARFARE IN INDEPENDENT AFRICA* (2011)); Alex de Waal, *The Wars of Sudan*, NATION, Mar. 1, 2007, <http://www.thenation.com/article/wars-sudan#>; Randolph Martin, *Sudan’s Perfect War*, FOREIGN AFF., Mar.–Apr. 2002, <http://www.foreignaffairs.com/articles/57818/andolph-martin/sudans-perfect-war>; Simon Robinson & Vivienne Walt, *The Deadliest War in the World*, TIME, May 28, 2006, <http://content.time.com/time/magazine/article/0,9171,1198921,00.html>.

117. JOSEPH CONRAD, *NOSTROMO* 234 (Dover 2002).

threatens the peace with weapons of mass murder
Now that conflict has come, the only way to limit its
duration is to apply decisive force and I assure you this will
not be a campaign of half measures and we will accept no
outcome but victory. My fellow citizens, the dangers to our
country and the world will be overcome¹¹⁸

The 2003 Iraq War stands as the most striking demonstration of the incoherence and functional incompetence of the international law peace enforcement regime. Most observers today agree that the US-led invasion of Iraq was a gross violation of the international prohibition against using war to resolve international disputes absent lawful self-defense justification or approval of the UN Security Council. Kofi Annan, the UN Secretary-General at the time of the invasion, has admitted that the 2003 invasion of Iraq was illegal under international law.¹¹⁹ Yet, the position of officials of the invading countries remains steadfastly that the invasion was legal. Former Secretary of State Colin Powell insisted that the invasion “was totally consistent with international law.”¹²⁰ And it is difficult to disagree with Secretary Powell. International law in general embraces this sort of self-validation of right and wrong through the successful exercise of power. The post Second World War peace regime of international law did not change this reality. It is an inescapable fact, even if banal, that subsequent international criminal law was built upon the prosecution of the vanquished of that conflict. As US Chief Justice Stone observed then, “[s]o far as the Nuremberg trial is an attempt to justify the application of the power of the victor to the vanquished because the vanquished made aggressive war, . . . I dislike extremely to see it dressed up with the false facade of legality. The best that can be said for it is that it is a political act of the victorious States

118. President Bush, Address on the Start of the War in Iraq, *supra* note 72.

119. Tammy Kupperman, *Powell Says U.S.-Led War on Iraq 'Consistent with International Law'*, NBC NEWS (Sept. 17, 2004, 11:34 AM), http://www.nbcnews.com/id/6016893/ns/world_news-mideast_n_africa/t/powell-says-us-led-war-iraq-consistent-international-law/#.UltNo2R4ZDE (“Asked whether the U.S.-led invasion of Iraq broke international law, Annan said, ‘yes, if you wish. I have indicated it was not in conformity with the UN Charter from our point of view, and from the charter point of view it was illegal.’”).

120. *Id.*

which may be morally right.”¹²¹ Who prosecutes the victors? Or, as another observer puts it, “for the Nuremberg and Tokyo courts, it mattered little to the validity of criminal proceedings against Axis leadership that Allied victors had committed vast war crimes of their own.”¹²²

The peace regime of the UN Charter is fully flexible in its interpretive possibilities and quite capable of these sorts of manipulation by the victors. The peace and security maintenance provisions of the UN Charter cannot claim coherence or determinacy. They are always contested and especially subject to the capacity of the powerful. Indeed, that is why five of the most powerful members of the United Nations insisted and were granted veto powers over substantive decisions of the UN Security Council.¹²³ It is unsurprising that these members also possess the largest stockpiles of nuclear weapons. Faith in international law holds only so much promise even for the most powerful.

Reflecting on the ten-year anniversary of the Iraq War, Hans Blix, former head of UN weapons inspection in Iraq, called the war “a terrible mistake and violation of UN Charter.”¹²⁴ Surveys also show that a majority of the American people share that view.¹²⁵ However, the Iraq war was more than a tragic mistake, made by a small group of misguided national leaders. It marked an enormous rejection of one of the core claims of modern international law as the foundation of world peace and highlighted the inherent incoherence of international law pertaining to the use of force. The disciplining of sovereign right to declare war, *jus ad bellum*, was supposed to be one of the prime accomplishments of the regime constructed

121. See HENRY STEINER ET AL., *supra* note 5, at 127 (quoting ALPHEUS THOMAS MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* (1956)).

122. See MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* 122 (1997).

123. U.N. Charter art. 27 (requiring the concurring votes of the permanent members on non-procedural matters); *Id.* art. 23 (giving permanent membership to five nations: Britain, China, France, Russia, and the United States).

124. See Hans Blix, *Hans Blix: Iraq War Was a Terrible Mistake and Violation of U.N. Charter*, CNN (Mar. 19, 2013, 4:36 AM), <http://www.cnn.com/2013/03/18/opinion/iraq-war-hans-blix/index.html?iref=allsearch>.

125. See Andrew Dugan, *On 10th Anniversary, 53% in U.S. See Iraq War as Mistake*, GALLUP POLITICS (Mar. 18, 2013), <http://www.gallup.com/poll/161399/10th-anniversary-iraq-war-mistake.aspx>.

after the Second World War. The discipline clearly failed in the case of Iraq as it has in other conflicts because it was built on a flimsy foundation composed of conflicting interests and hopes. The rhetoric of thinly disguised Pax Americana contained in the UN Charter prescriptions on the use of force suggested faith that the world at that time had experienced a sort of end of history moment. Once it became apparent as more dominated peoples became free and began to define their interests and that many others preferred change to stability, the promises of peace built on law became subordinate to very narrow appreciation of national interest. As it turned out, there were enough gaps in the plain statement of the form and substance of the international law of peace to allow for the illusion of compliance. As one group of defenders of the invasion argued, “[i]n the end, each use of force must find legitimacy in the facts and circumstances that the state believes have made it necessary.”¹²⁶ Well put. The international law of peace, the prohibition against waging aggressive war, and the requirement of self-defense or authorization of the UN Security Council, are reduced to the belief of the aggressor state under the circumstances. Needless to say, not every state would have the capacity to act on their belief or deal with the consequences of such action. Thus, even though it could not get support from the Security Council to invade Iraq and faced widespread opposition around the world, the United States and a few allies proceeded employing a variety of dubious law-sounding rationales to justify its actions and maintain legal fiction.

Thomas Franck, writing shortly after the invasion, bemoaned the death of UN Charter restraints on the use of force.¹²⁷ He lamented:

[W]hile a few government lawyers still go through the motions of asserting that the invasion of Iraq was justified by

126. William H. Taft & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L. L. 557, 557 (2003). Mr. Taft was the legal adviser to the U.S. State Department at the time of the invasion.

127. See Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L. L. 607 (2003) [hereinafter Franck, *What Happens Now?*] (raising similar questions about the efficacy of the UN Charter use of force regime as in another article written decades earlier); see Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L. L. 809 (1970) [hereinafter Franck, *Who Killed Article 2(4)?*].

our inherent right of self-defense, or represented a collective measure authorized by the Security Council under Chapter VII of the Charter, the leaders of America no longer bother with such legal niceties. Instead, they boldly proclaim a new policy that openly repudiates the obligation. Article 2(4). What is remarkable, this time around, is that once obligatory efforts by the aggressor to make a serious effort to stretch the law to legitimate state action have given way to a drive to repeal the law altogether, replacing it with a principle derived from the Athenians at Melos: “the strong do what they can and the weak suffer what they must.”¹²⁸

The Bush administration’s successful bulldozing of international laws’ constraints on international war making confirmed the hollowness and transient nature of these commitments. It is simply not credible to believe that there is much more to these pledges of peaceful behavior than a nation’s assessment of its might or likelihood of success in decisions to wage war. We also see such calculations in play as nations join the feast of murder and mayhem in Syria, and as they march toward violent confrontation over Iran’s nuclear ambitions. The triumph of this vision of international law was captured in a recent New York Times headline for an opinion piece dealing with the Syrian civil war: “Bomb Syria, Even if It Is Illegal.”¹²⁹

As for Iraq, the rest of the international community quickly confirmed the incoherence and functional incompetence of the international legal regime with regard to the invasion of Iraq. Barely six weeks after the UN Security Council had refused to endorse the invasion that many including the UN Secretary-General had called illegal, the Security Council voted without opposition to endorse the occupation and administration of Iraq by the victorious invaders.¹³⁰ The vote was justified as “simply a recognition of the facts on the ground.”¹³¹ Those nations who could, moved on to protecting as much of their national commercial interests in Iraq as they could in light of

128. Franck, *What Happens Now?*, *supra* note 127, at 608.

129. Ian Hurd, *Bomb Syria, Even If It Is Illegal*, N.Y. TIMES, Aug. 28, 2013, http://www.nytimes.com/2013/08/28/opinion/bomb-syria-even-if-it-is-illegal.html?_r=0.

130. See Tony Karon, *Behind The UN Vote on Iraq*, TIME, May 22, 2003, <http://content.time.com/time/world/article/0,8599,454203,00.html>.

131. *Id.*

the new realities created by victory, even if temporary and ultimately illusory. The result confirmed up to a point an earlier conclusion by Professor Franck that “[n]ational self-interest, particularly the national self-interest of the super-Powers, has usually won out over treaty obligations . . . It is as if international law, always something of a cultural myth, has been demythologized.”¹³² This conclusion must now incorporate the fact the United States is now the sole surviving super-power and, at least in the case of Iraq, acted as if that is the way it will always be.

The incoherence and functional incompetence of the international peace regime were further illustrated just a few years later. Many of those countries that were outraged at the Bush administration’s almost singular determination of what constitutes authorization under international law to go to war in Iraq, eagerly sought the war-making capacities of the United States in new conflicts against other “rogues” in the Middle East: First, it was to liberate Libyans from Muammar Gaddafi.¹³³ Then, it was Syrians from Bashar al-Assad.¹³⁴ Some neo-conservatives in the United States had once ridiculed the United Nations as “the tooth fairy of American politics: Few adults believe in it, but it’s generally regarded as a harmless story to amuse the children. Since 9/11, however, the UN has ceased to be harmless . . . The United Nations has emerged at best as irrelevant to the terrorist threat that concerns us, and at worst as an obstacle to our winning the war on terrorism.”¹³⁵ The ease with which the

132. Franck, *Who Killed Article 2 (4)?*, *supra* note 127, at, 836.

133. See Ross Douthat, *Libya’s Unintended Consequences*, N.Y. TIMES, July 8, 2012, http://www.nytimes.com/2012/07/08/opinion/sunday/libyas-unintended-consequences.html?_r=0; Seumas Milne, *If the Libyan War Was About Saving Lives, It Was a Catastrophic Failure*, GUARDIAN (London), Oct. 26, 2011, <http://www.theguardian.com/commentisfree/2011/oct/26/libya-war-saving-lives-catastrophic-failure>; James Risen et al., *Militant Forces Got Arms Meant for Libya Rebels*, N.Y. TIMES, Dec. 6, 2012, <http://www.nytimes.com/2012/12/06/world/africa/weapons-sent-to-libyan-rebels-with-us-approval-fell-into-islamist-hands.html?pagewanted=all>.

134. See Mark Mazzetti et al., *No Quick Impact in U.S. Arms Plan for Syria Rebels*, N.Y. TIMES, July 15, 2013, <http://www.nytimes.com/2013/07/15/world/middleeast/no-quick-impact-in-us-arms-plan-for-syria-rebels.html?pagewanted=all>; *Syrian Rebel Fighters’ Civil War Within a Civil War*, BBC NEWS (July 12, 2013, 9:34 AM), <http://www.bbc.co.uk/news/world-middle-east-23285869>.

135. See David Frum & Richard Perle, *UN Should Change—Or U.S. Should Quit*, L.A. TIMES, Jan. 23, 2004, <http://articles.latimes.com/2004/jan/23/opinion/oe-frum23>.

United States was able to remove international legal obstacles to its unilateral decision to employ force in Iraq should encourage a more benign evaluation from these fervent advocates of unipolarism.¹³⁶

2. Containing Civil Wars: Syria

But make no mistake: President Obama believes there must be accountability for those who would use the world's most heinous weapons against the world's most vulnerable people. Nothing today is more serious, and nothing is receiving more serious scrutiny.¹³⁷

With regard to Syria where an apparently authentic civil war has now attracted a diverse group of international backers, there is little pretense that The UN Charter-based post Second World War regime of peace and security is operational.¹³⁸ With a conservative estimate of over 100,000 people dead,¹³⁹ at this point, a revolt against a dictatorship has morphed into a

136. See, e.g., Charles Krauthammer, *The Unipolar Moment*, FOREIGN AFF. (AM. & WORLD), 1990–1991, at 23. Unipolarists, like Krauthammer, argued at the time that “the gap in power between the leading nation (the United States) and all the others was so unprecedented as to yield an international structure unique to modern history: unipolarity.” *Id.* They pressed for the United States to take advantage of its singular posture in international affairs. See *id.*; see also *Statement of Principles*, PROJECT FOR NEW AM. CENTURY (June 3, 1997), <http://www.newamericancentury.org/statementofprinciples.htm>.

137. John Kerry, U.S. Secretary of State, Statement on Chemical Weapons in Syria (Aug. 26, 2013), available at http://www.nytimes.com/2013/08/27/world/middleeast/text-of-kerrys-statement-on-chemical-weapons-in-syria.html?_r=0.

138. See Steven A. Cook, *After the Arab Spring*, ATLANTIC, Mar. 28, 2011, <http://www.theatlantic.com/international/archive/2011/03/after-the-arab-spring/73086>; Steve Coll, *The Syrian Problem*, NEW YORKER, May 30, 2011, http://www.newyorker.com/talk/comment/2011/05/30/110530taco_talk_coll; Nada Bakri, “United Nations Says Unrest In Syria Amounts To Civil War,” N.Y. TIMES, Dec. 1, 2011, <http://www.nytimes.com/2011/12/02/world/middleeast/united-nations-says-syrian-unrest-amounts-to-civil-war.html>; Anne Barnard, *Misssteps by Rebels Erode their Support Among Syrians*, N.Y. TIMES, Nov. 8, 2012, <http://www.nytimes.com/2012/11/09/world/middleeast/in-syria-missteps-by-rebels-erode-their-support.html?pagewanted=all>.

139. Estimate is as of late July 2013. See Albert Aji & Edith M. Lederer, *U.N.: More than 100,000 Now Dead in Syria's Civil War*, ASSOCIATED PRESS, July 25, 2013, <http://www.usatoday.com/story/news/world/2013/07/25/100000-dead-in-syrias-civil-war/2587521/>.

sectarian conflict with diverse international sponsors. It is difficult to see that the conflict will dissipate when the current regime is ousted.¹⁴⁰ After years of partisan involvement, the international community's best ideas now revolve around arming one side or the other or coming up with a legal pretext to intervene directly.¹⁴¹ At the 2012 UN summit, UN Secretary-General Ban Ki Moon called the Syrian civil war a "serious and growing threat to international peace and security" and urged a stop to "the violence and flows of arms to both sides."¹⁴² At the same gathering, President Obama expressed a different conclusion. He pledged support for the Syrians trying to oust Assad even as Russia, China, and others remained firmly in Assad's camp.¹⁴³

Today, the United States and other western countries have considerable support, even in the Arab world, to arm the Syrian rebels with deadly weapons or to take additional actions against the Assad regime.¹⁴⁴ Evidence that the Syrian government forces have employed chemical weapons has provided additional reasons for international opponents of the regime to express outrage and press for military intervention.¹⁴⁵ The Syrian

140. *Id.*

141. See *Arab League Draft Resolution Declares 'Right' to Arm Syrian Rebels*, RADIO FREE EUR./RADIO LIBERTY (Mar. 26, 2013, 8:29 PM), <http://www.rferl.org/content/syria-arab-league-seat/24939212.html>; see also Yara Bayoumy & Amena Bakr, *Western, Arab States to Step up Syrian Rebel Support*, REUTERS (June 22, 2013, 10:48 PM), <http://uk.reuters.com/article/2013/06/22/uk-syria-crisis-idUKBRE95K17720130622>.

142. See *U.N. Chief Demands Global Action to End War in Syria*, USA TODAY (Sept. 26, 2012, 12:33 PM), <http://usatoday30.usatoday.com/news/world/story/2012/09/26/un-chief-demands-global-action-to-end-war-in-syria/57839628/1>.

143. *Id.*; see also Tabassum Zakaria & Susan Cornwell, *Exclusive: U.S. Congressional Hurdles Lifted on Arming Syrian Rebels*, REUTERS (July 23, 2013, 6:45 PM), <http://www.reuters.com/article/2013/07/22/us-usa-syria-arms-idUSBRE96L0W520130722>.

144. See *Arab League Draft Resolution Declares 'Right' to Arm Syrian Rebels*, *supra* note 141.

145. Rick Gladstone et al., *UK to Bring Resolution to Security Council*, BOSTON GLOBE, Aug. 29, 2013, <http://www.bostonglobe.com/news/world/2013/08/29/syria-asserts-claim-new-strikes-impasse-looms/pZicPVjG6hm3D8mfJzuNBM/story.html>. The Syrian government has apparently caved in to the threat of force by the United States by agreeing to join the Chemical Weapons Convention and to allow internationally supervised destruction of its chemical weapons. See Patrick J. McDonnell, *Syria Meets Chemical Weapons Deadline*, L.A. TIMES, Oct. 27, 2013, www.latimes.com/world/la-fg-syria-chemical-deadline-20131028,0,7141214.story

government has its own group of similarly committed backers.¹⁴⁶ Few objective observers can discern the virtues of one side over the other when it comes to justifying the deployment of additional deadly weapons in an already horrifying environment.

It is a testament to modern international law's incoherence that all sides could easily claim to be on the side of peace while killing each other with such alacrity. The UN Charter curiously did not explicitly extend its use of force restraints, flawed as they have been in practice, to internal or domestic conflicts. This is surprising because one of the prime lessons derived from the Second World War was that how a nation treats its citizens could have important consequences for the rest of the world.¹⁴⁷ This recognition is behind the Charter's linking of human rights promotion to international peace and security. Article 24 "confer[s] on the Security Council primary responsibility for the maintenance of international peace and security."¹⁴⁸ Yet, the Charter's peace regime, including Security Council authority to maintain international peace and security, focused on reducing conflicts among nations ignoring the empirical facts that huge numbers of people perish or suffer in internal conflicts and that such conflicts rarely fail to attract outside intervention or develop external consequences.¹⁴⁹ The formal powers and procedures available to the Security Council to promote peaceful settlement of disputes,¹⁵⁰ and to deal with threats to peace,¹⁵¹ are built upon this nexus of interstate conflicts. Moreover, Article 2 (4) prohibited "the threat or use of force against the territorial integrity or political independence of any state."¹⁵² While UN practice has evolved over time to stretch understanding of what constitutes threats to international peace

146. See Karen De Young & Joby Warrick, *Russia Sends Arms to Syria As It Tries to Reassert Its Role in Region*, WASH. POST, May 29, 2013, http://articles.washingtonpost.com/2013-05-29/world/39597670_1_tartus-foreign-minister-sergei-lavrov-supplying-syria.

147. See President Franklin D. Roosevelt, Annual Message to Congress (Jan. 6, 1941); U.N. Charter, pmbl., art. 1.

148. U.N. Charter art. 24, para. 1.

149. *Id.* art. 1, para. 1 (stating that one of the purposes of the United Nations is "to maintain international peace and security").

150. See *id.* ch. VI.

151. See *id.* ch. VII.

152. *Id.* art. 2, para. 4.

and security, the legal regime fosters incoherence and incompetence. In practice, there are no discernible standards for UN involvement except the level of atrocity. Disputes and travesties are allowed to foster within countries for too long as the world waits, in effect, to see if the state can crush challenges to its power monopoly. The vacuum has encouraged a sort of free-for-all as other states get to determine, based on their own interests, whether and when a particular violent conflict in another state should be understood in international terms.¹⁵³ Thus, we find in Syria, that a popular revolt is fostered supposedly in the name of freedom and democracy against a dictatorship by other repressive regimes like Saudi Arabia, Jordan, and Qatar. The latter states then get support from Western nations in the name of freedom and democracy. Meanwhile, at the United Nations, there is no consensus, agreement or decision, so coalitions of the willing form to act as they see their interests.¹⁵⁴ It would thus be a tragic error to see what has developed in Syria as a successful deployment of international law. That Syria has agreed to respect the Chemical Weapons Convention and to give up its chemical weapons stockpile under the threat of force by a bigger power merely reaffirms the triumph of force over law and the resilience of the status quo. The Assad regime remains in place. The violence continues.¹⁵⁵ It is the same old miserable world.

153. For instance, even though the United States had already called for the removal of the Assad regime in Syria and was facilitating the delivery of weapons and other supplies to the regime's opponents, the charge that the Syrian regime had used chemical weapons appeared to have provided the Obama administration with more reasons for expressing outrage and employing military force. US Secretary of State John Kerry harshly condemned the use of chemical weapons:

What we saw in Syria last week should shock the conscience of the world. It defies any code of morality. Let me be clear: The indiscriminate slaughter of civilians, the killing of women and children and innocent bystanders, by chemical weapons is a moral obscenity. By any standard it is inexcusable . . .

Kerry, Remarks on Syria, *supra* note 137; *see also*, Connor Friedersdorf, *The Washington Post's Frivolous Call for War in Syria*, ATLANTIC, Aug. 22, 2013, <http://www.theatlantic.com/politics/archive/2013/08/the-em-washington-posts-em-frivolous-call-for-war/278939>.

154. *See* Hurd, *supra* note 129; *see also* Gladstone et al., *supra* note 145.

155. *See* Ezra Klein, *Why Do We Even Care About Syria's Chemical Weapons?*, *Bloomberg* (Sept. 4, 2013, 4:13 PM), <http://www.bloomberg.com/news/2013-09-04/why-do-we-even-care-about-syria-s-chemical-weapons-.html>.

However, the global arms trade will not suffer.¹⁵⁶ It has the international law of peace and human rights on its side. Post Second World War international law has not found a formula for maintaining international peace and security despite its pretensions. Its doctrines lack coherence and its institutions are bereft of competence.

D. *Promoting Decency: Ameliorating Misery and Structured Poverty*

International law, which has excelled in the punctilious insistence on the respect owed by one sovereign State to another, henceforth acknowledges the sovereignty of man. For fundamental human rights are rights superior to the law of the sovereign state.¹⁵⁷

This section examines the relationship between the ascendance of human rights discourse and activism on the one hand, and global misery and structured poverty on the other, to support these criticisms. Until recently, various sources placed the number of people who are poor at about forty-seven percent of the world's population, with roughly half of that number classified as abjectly poor.¹⁵⁸ The World Bank and the United

156. See Bruce Kennedy, *U.S. Set to Lose Top-Gun Status in Global Arms Trade*, MSN-Money (Jun 26, 2013, 11:30 AM), <http://money.msn.com/now/us-set-to-lose-top-gun-status-in-global-arms-trade>. According to a recent report:

International weapons sales have proved to be a thriving global business in economically tough times. According to the Congressional Research Service (CRS), such sales reached an impressive \$85 billion in 2011, nearly double the figure for 2010. This surge in military spending reflected efforts by major Middle Eastern powers to bolster their armories with modern jets, tanks, and missiles—a process constantly encouraged by the leading arms manufacturing countries (especially the US and Russia) as it helps keep domestic production lines humming.

Michael Klare, *The Booming Global Arms Trade Is Creating a New Cold War*, MOTHER JONES (May 30, 2013, 2:28 PM), <http://www.motherjones.com/politics/2013/05/global-arms-trade-new-cold-war>.

157. See H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 61 (1950).

158. See *Poverty Overview*, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPA/0,,contentMDK:20040961~menuPK:435040~pagePK:148956~piPK:216618~theSitePK:430367~isCURL:Y,00.html> (last visited Oct. 14, 2013); see generally *Human Development Reports: 1990–2011*, HUM. DEV. RS, <http://hdr.undp.org/en/reports/> (last visited Sept. 17, 2013); WORLD BANK, *WORLD*

Nations Development Program (“UNDP”) have long employed a formula that characterized poverty as subsistence on less than US\$2.00 (sometimes US\$2.50 is used) a day.¹⁵⁹ Those living on less than one dollar (or US\$1.25) are considered abjectly or extremely poor.¹⁶⁰ The World Bank recently calculated that there are about 1.22 billion people in the world living below the extreme poverty line even after, it claims, hundreds of millions have been lifted off the extreme poverty roll in the last three decades.¹⁶¹ Another 2.4 billion people are still considered to be just poor, calculated to be living on less than US\$2.00 a day.¹⁶² According to the UNDP, “the proportion of people living on less than \$1.25 a day fell from 47 per cent in 1990 to 24 per cent in 2008—a reduction from over 2 billion to less than 1.4 billion.”¹⁶³ However, the percentage of poor in South Asia and Africa still averages about seventy percent of the populations.¹⁶⁴ Those who are extremely poor constitute on the average about thirty-one percent of the population in South Asia and nearly fifty percent in Sub-Saharan Africa.¹⁶⁵

The single most important factor in the privileged position of international law after the Second World War has been the explicit assertion that the discipline offered the optimal path toward achieving both international peace and security, and individual freedom and security. US President Franklin D. Roosevelt had opened the way in his famous “Four Freedoms” address in January 1941.¹⁶⁶ Roosevelt’s justifications for American involvement in the war on the side of Great Britain extended his domestic social justice vision to a world in

DEVELOPMENT REPORT 2010: DEVELOPMENT AND CLIMATE CHANGE 392 (2010), *available at* <http://wdronline.worldbank.org/worldbank/bookpdfdownload/33>.

159. *See, e.g., Poverty Overview, supra* note 158.

160. *Id.*

161. *Id.*

162. *Id.*

163. *See* UNITED NATIONS, THE MILLENNIUM DEVELOPMENT GOALS REPORT 2012, at 4 (2012) *available at* <http://www.un.org/millenniumgoals/pdf/MDG%20Report%202012.pdf>.

164. *See Poverty*, WORLD BANK, data.worldbank.org/topic/poverty (last visited Sept. 17 2013).

165. *Id.*

166. *See* Franklin D. Roosevelt, President, Annual Message (Four Freedoms) to Congress (Jan. 6, 1941), *available at* <http://www.ourdocuments.gov/doc.php?flash=true&doc=70&page=transcript>).

turmoil.¹⁶⁷ He offered ordinary people a reason the fight and die beyond the traditional national or imperial imperatives.¹⁶⁸

Post war international efforts to codify this successful mobilization strategy began with the UN Charter.¹⁶⁹ People no longer have to fight just for abstract ideas of statehood or national identity; they now have a personal stake in the fight. The Four Freedoms—freedom of speech, freedom of worship, freedom from want, and freedom from fear—now became part of the structure and purpose of a new international order.¹⁷⁰ The UN Charter extended this stake to all humanity when it tied the reaffirmation of “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,” to the commitment “to save succeeding generations from the scourge of war.”¹⁷¹ Furthermore, the UN Charter highlighted the promotion of human rights as a key purpose of the renewed international scheme.¹⁷² The UDHR¹⁷³ and the Twin Covenants¹⁷⁴, elaborating an assortment of rights ranging from civil and political, to economic, social, and cultural, added to what has become today an impressively comprehensive, almost hegemonic scheme of rights identification, definition, and implementation.¹⁷⁵ Despite early efforts to privilege one category

167. *Id.* at 8 (“We look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression—everywhere in the world. The second is freedom of every person to worship God in his own way— everywhere in the world. The third is freedom from want . . . everywhere in the world. The fourth is freedom from fear . . . anywhere in the world.”).

168. *See generally id.*

169. *See* U.N. Charter art. 1.

170. *See id.*

171. *See id.* pmb1.

172. *See id.* art. 1, para. 3.

173. Universal Declaration of Human Rights, GA Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). The Universal Declaration of Human Rights (“UDHR”), together with the twin covenants—the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic Social and Cultural Rights (“ICESCR”)—are considered the International Bill of Rights.

174. *See* International Covenant on Civil and Political Rights, G.A. Res. 14668, 999 U.N.T.S. 171 (Dec 16, 1966); *see* International Covenant on Economic, Social and Cultural Rights, G.A. Res 14531, 993 U.N.T.S. 3 (Dec. 16, 1966).

175. *See* Office of the High Comm’r for Human Rights, *What are Human Rights?*, U.N. HUM. RIGHTS, <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (last visited Sept. 17, 2013) (“Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general

of rights over others, the human rights community insists that rights as such are indivisible, equal, and interdependent.¹⁷⁶ Yet economic and social rights in discourse and practice have struggled to obtain the degree of respect and fulfillment accorded to civil and political rights.

Critical analyses of rights discourse and activism have highlighted the same types of deficiencies raised about the broader field of international law. Charges of doctrinal incoherence and functional incompetence are amply supported by examples within all categories of the human rights corpus.¹⁷⁷ However, while the deficiencies of international law might appear more dramatic when issues of annihilation or wars are discussed, they are just as critical when structured poverty and endemic misery are considered.

1. Misery, Law, and the Millennium Development Goals

Developing countries are on track to meet, ahead of time, the United Nations' Millennium Development Goal to reduce by half the world's extreme poverty rate by 2015. Over the past few decades, hundreds of millions of people have benefited from a greater access to education and better-paying jobs – two of the most important tickets to a better life. Yet, nearly 1.3 billion people remain below the extreme poverty line with an income of US \$1.25 or less a day. Another 2.6 billion live on less than US \$2 a day, another common measurement of deep deprivation.¹⁷⁸

principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.”).

176. *See id.* As the UN Office of the High Commissioner for Human Rights puts it: “Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.” *Id.*

177. *See, e.g.,* KENNEDY, *supra* note 18; Hillary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63 (1993); Makau Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (1996).

178. United Nations Millennium Campaign, FACEBOOK (Feb. 8 2013, 6:29 AM) <https://www.facebook.com/mcampaign/posts/602694636423410>.

The world is replete with misery made an acceptable part of the human experience despite routine pronouncements, plans, conferences, agendas, agreements and assorted schemes to combat it. Most today would not argue that for a large number of human beings, survival is an everyday imperative in their short time on this earth. The most crass among us might argue that things are much better today than in the past. And global efforts today often revolve around how clear the path to reducing global misery would be if we could only do this small thing, adopt this plan, or impose this tax, or plan for another grand initiative sprinkled liberally with the language of law.

When it comes to ameliorating misery on a global scale, international law and systems have supported two basic approaches: charity, and commerce. The former approach is riddled with the corruption, paternalism, and infantilism generated by bilateral aid agreements, security assistance, and international non-governmental organizational intervention. Adherents of the latter approach have perfected international law, international institutions, and legal process as instruments to maintain inherited advantages and global inequality. For example, the WTO presides over a global trade hegemony that ignores billions of dollars in subsidies developed nations provide to their domestic agricultural industries in violation of international trade law and to the severe detriment of the capacities of many of the least developed countries to export their produce.¹⁷⁹ Meanwhile, the World Bank and the IMF insist on standards of economic conduct by developing nations that are not generally applied against more developed nations.¹⁸⁰

179. According to the World Bank:

Agriculture is often the economic driving force in developing countries. WTO statistics show that agriculture accounts for over one-third of export earnings for almost 50 developing countries, and for about 40 of them this sector accounts for over half of export earnings. However, significant agricultural subsidies provided by OECD country governments to their farmers compromises the ability of developing country farmers to participate in global agricultural trade reducing their income and profit streams and their ability to escape poverty.

Agricultural Trade, WORLD BANK, <http://go.worldbank.org/O6R2M27TN0>.

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

After decades of fighting over national and international legal obligations to help the world's poorest escape poverty and to assist the less developed states improve their lot, discourses on the right to development have been replaced by faith in the market.¹⁸¹ International law has conceded its inconsequence. In September 2000, world leaders gathered in New York to announce, with great press coverage, the latest international agenda to fight misery and other indicia of structured poverty in the world—The MDGs.¹⁸² The official story was that leaders of 189 countries came together and promised to “free people from extreme poverty and multiple deprivations.”¹⁸³ The promise was structured in the form of eight non-binding Millennium goals to be achieved by 2015. Goal One, the commitment to halve the proportion of the world's poorest by 2015 has received the most attention.¹⁸⁴ World leaders and international bureaucrats insist that there is definite connection between the MDGs and human rights, and there are of course rear guard action being waged by die-hard international law activists and scholars to make the same point.¹⁸⁵ Yet, the adoption of the MDGs represented the exhaustion of the movement to give the global struggle against misery and structured poverty an international legal foundation. Neo-liberalism won at least with respect to those states that cannot fight back with other resources. The right to development movement was crushed long ago and proponents

181. See, e.g., Declaration on the Right to Development, G.A. Res. 41/28, U.N. Doc. A/41/28 (1986); see also Bedjaoui, *supra* note 16, at 178–83; Mohammed Bedjaoui, *The Right to Development*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 1177 (Mohammed Bedjaoui ed., 1991); U.N. Human Rights Council, Report of the Working Group on the Right to Development on its Eighth Session, U.N. Doc. A/HRC/4/47 (2007).

182. See United Nations Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 18, 2000). The Millennium Development Goals were: (1) Eradicate extreme poverty and hunger; (2) Achieve universal primary education; (3) Promote gender equality and empower women; (4) Reduce child mortality; (5) Improve maternal health; (6) Combat HIV/AIDS, malaria and other diseases; (7) Ensure environmental sustainability; and (8) Develop a global partnership for development. See *The Millennium Development Goals: Eight Goals for 2015*, U.N. DEV. PROGRAMME, <http://www.undp.org/content/undp/en/home/mdgoverview/> (last visited Oct. 14, 2013).

183. *The Millennium Development Goals*, *supra* note 182.

184. *Id.*

185. See *Human Rights Are the Basis for Achieving the MDGs*, U.N. HUM. RTS., <http://www.ohchr.org/EN/Issues/MDG/Pages/FoundationforEngagement.aspx> (last visited Oct. 14, 2013).

of economic and social rights have been well confined to academia and assorted bands of non-governmental organizations.¹⁸⁶ The earnest but often insufficiently critical study in Western legal academies, of limited judicial opinions such as *Olga Tellis v. Bombay Municipal Corp.*,¹⁸⁷ *Soobramoney v Minister of Health (Kwa-Zulu Natal)*,¹⁸⁸ and *Government of South Africa v. Grootboom*,¹⁸⁹ from Third World legal outposts, sustains hope that is the one true thing international law retains today.¹⁹⁰

The turn to MDGs replaced whatever that was left of the international commitment to human rights in the social and economic sphere with deeply political methods and goals, disentangled from any notion of obligation on the part of the privileged toward those for whom an escape to mere poverty would be a substantial advance. The MDG's gratuitous promises were a raw demonstration of how little the more developed countries were willing to concede in the global struggle for economic and social benefits.

The most recent UNDP report, which touts the "Rise of the South," captured the reality that international law has been abandoned or at least diminished in the struggle against global misery.¹⁹¹ According to the report, there has been a "profound shift in global dynamics driven by the fast-rising new powers of

186. Though the UN declaration did mention the commitment "to making the right to development a reality for everyone and to freeing the entire human race from want." United Nations Millennium Declaration, *supra* noted 182.

187. *Olga Tellis v. Bombay Mun. Corp.*, (1985) 2 Supp. S.C.R. 51, A.I.R. 1986 S.C. 180 (India).

188. *Soobramoney v. Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) (S. Afr.).

189. *Gov't of the Republic of South Africa v. Grootboom* 2000 (11) BCLR 1169 (CC) (S. Afr.).

190. These cases are sometimes held up as evidence of the progressive realization of social rights through litigation and legal decisions in countries like India and South Africa, founded in substantial part on internationally guaranteed rights. Unfortunately, in practice, the law does not deliver the benefits often ascribed to it. Governments plead that they lack sufficient resources and that judicial power is generally impotent to contradict them. For a balanced analysis of the judicial record in South Africa, see Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321 (2007).

191. See U.N. DEVELOPMENT PROGRAMME, THE 2013 HUMAN DEVELOPMENT REPORT—THE RISE OF THE SOUTH: HUMAN PROGRESS IN A DIVERSE WORLD (2013), available at http://hdr.undp.org/en/media/HDR_2013_EN_complete.pdf.

the developing world.”¹⁹² Indeed, the report identifies that much of the poverty reduction that has taken place in the world, allowing the MDG campaign to claim success meeting its poverty-reduction, has come from a few nations in the South, primarily the Peoples Republic of China, where about 500 million people have been lifted from poverty.¹⁹³ Even if one accepts fully the triumphalism in the report and discounts the likelihood that economic success in these fast rising countries might be temporary or was purchased to some substantial degree at considerable cost to lower-tier workers in the older developed economies, the implications for the place of international law in the struggle against global misery are profound. Put bluntly, if China, Brazil, India, and others among the fast risers could succeed by engaging the current economic model, why not the economic stragglers? The perceived success or capacity to succeed of these relatively few countries may stand as formidable barriers to those who would want to challenge current economic orthodoxy on behalf of those unable or prevented from competing.

The BRICS¹⁹⁴ and wannabe-BRICS have seemingly validated the legitimacy of the current international economic order. The international economic rules of this order are stated in the abstract. However, in international practice, the rules, rooted in neo-liberal ideology, are enforced against those who require the most support while those who control substantial economic capacity have considerable freedom to experiment with their economic policies consistent with their interests.¹⁹⁵

192. *Id.* (stated on back cover of report).

193. *Id.*

194. BRICS began as BRIC, an acronym coined in 2001 by officials of the investment bank, Goldman Sachs, to identify fast-growing countries—Brazil, Russia, India, and China. South Africa was recently added to the group, hence BRICS. See J.P.P., *Why Is South Africa Included in the BRICS?*, *ECONOMIST*, Mar. 29, 2013, <http://www.economist.com/blogs/economist-explains/2013/03/economist-explains-why-south-africa-brics>. It seems that lately the BRICS have been demonstrating the exaggerated piety associated with recent converts. They are now planning for their own development bank. See Carol Matlack, *Can the BRICS Have Their Own World Bank?*, *BLOOMBERG BUSINESSWEEK*, Mar. 27, 2013, <http://www.businessweek.com/articles/2013-03-27/can-the-brics-have-their-own-world-bank>; Gabriel Elizondo, *BRICS Summit: A Perspective from Brazil*, *ALJAZEERA* (Mar. 29, 2013, 10:49 PM), <http://blogs.aljazeera.com/blog/americas/brics-summit-perspective-brazil>.

195. See generally STIGLITZ, *supra* note 180.

Internationally determined structural adjustment formulae, for example, do not apply to the United States or the other major economies in the world regardless of their circumstances. The United States and a few privileged others can print money and deficit fund economic growth even if the rules say otherwise. The least among us have to conform and seek charity. Post Second World War international human rights law's potential for economic emancipation at this point is severely compromised.

CONCLUSION: BEYOND INTERNATIONAL LAW

To turn a phrase, law is legitimized politics—a Hydra-headed process of social decision, involving persons at all levels and from all walks of public and private life who, with authority derived both explicitly and implicitly from community consensus or expectation, and supported by formal and informal sanction, effect those codes or standards of everyday conduct by which we plan and go about our lives.¹⁹⁶

Richard Falk criticized international law and wrote of a movement from inter-state law to a law of humanity. He conceded that the “law of humanity is mainly in the dreaming (or purely aspirational) phase.”¹⁹⁷ Perhaps we should ask why presume that the movement away from international law is toward a law of some kind at all? What motivates the continuing search for such certitude? What is behind this quest for enduring solutions, in the face of horrendous realities and irreconcilable interests? Are not human politics with its myriad unfinished issues and conflicts good enough? Or does cloaking politics with sprinklings of legal folderol make the precariousness of the human condition more tolerable to victims, victors, and activists? The Obama administration and Secretary Kerry may decry the “moral obscenity” of using chemical weapons and insist that the international community must respond with force. But the “moral obscenity” of the

196. Weston, *supra* note 21, at 17.

197. Falk, *World Order*, *supra* note 14, at x.

100,000 plus dead in the civil war and the millions more that die every year from preventable conflicts, diseases, and hunger, stand as an illuminating reminder of the incoherence and incompetence of the order they are defending.

Over a century ago, the writer and great chronicler of imperialism and its pretensions, Joseph Conrad, warned about “the cruel futility of lives and of deaths thrown away in the vain endeavor to attain an enduring solution of the problem.”¹⁹⁸ Anyone who continues to inhabit a world where they must depend on international law to feed them, to save them from genocidal intent or nuclear holocaust, or to prevent the next Syria, Bosnia, or is it Sierra Leone, from happening, has had a privileged existence. The inadequacies of the post Second World War international law regime in critical areas of human existence are not too difficult to discern. Yet the regime of international law still finds potency in the hearts and minds of many. It is in the idea, the romance, a source of hope and a spur to action for many, even as evidence of its incoherence and functional incompetence abounds. H.L. Mencken said this much about Mr. Kurtz, one of Conrad’s most arresting creations: “Kurtz is at once the most abominable of rogues and the most fantastic of dreamers. It is impossible to differentiate between his vision and his crimes, though all that we look upon as order in the universe stands between them.”¹⁹⁹ Matched against such dialectic, a call for deep re-examination or even abandonment of faith coupled with resolute antipathy toward all enduring solutions faces a difficult trajectory. But then one must keep asking:

What happens to a dream deferred?

Does it dry up
like a raisin in the sun?

Or fester like a sore—
And then run?

Does it stink like rotten meat?

198. CONRAD, *supra* note 117, at 221.

199. See H.L. MENCKEN, A BOOK OF PREFACES 39–40 (1917).

Or crust and sugar over—
like a syrupy sweet?

Maybe it just sags
like a heavy load.

Or does it explode?²⁰⁰

Perhaps it is the explosion we are seeing around us everyday as a long-suffering and fretful world grows tired of waiting for law and other such solutions, long touted by experts, to free them from the vagaries and horrors of everyday life. Ordinary people experience an existence that comes down to chance, greed, fear, and all the other emotions and desires that have ineluctably driven diverse quotidian human actions. But, these are what give us the great changes that had been wished for generations before they occur every now and then. Albert Camus, in his seminal work, *The Plague*, reminds us that the most revolutionary act one can take in the midst of unrelenting tragedy or horror is solidarity.²⁰¹ Not grand theories, nor great speeches, and not even the most detailed of plans.

There is no light lit by some exaggerated vision of international law at the end of the tunnel of constant human struggle. There is no certitude to be found in the law, especially not one with the pedigree and experience of international law. Grotian Moments do not resolve the fundamental absurdities of life that unequal power and human desires have generated. There are no final victories to be eternally policed by universal law in our future. One may do just as well by embracing a life of unrelenting struggles against pestilences of all sorts; struggles in which individuals, like the protagonists of *The Plague*, will be distinguished primarily by their capacities for empathy and grace.

200. LANGSTON HUGHES, *A DREAM DEFERRED* (1951).

201. CAMUS, *supra* note 1, at 253–54.