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Disquiet on the Eastern Front: Liberal Agendas, Domestic Legal Orders, and the Role of International Law After the Cold War and Amid Resurgent Cultural Identities

Jacques deLisle*

*University of Pennsylvania Law School

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DISQUIET ON THE EASTERN FRONT: LIBERAL AGENDAS, DOMESTIC LEGAL ORDERS, AND THE ROLE OF INTERNATIONAL LAW AFTER THE COLD WAR AND AMID RESURGENT CULTURAL IDENTITIES

*Jacques deLisle**

On the eve of the twenty-first century, a *fin-de-siecle* unease pervades assessments of the future roles of international law. The recent past seems a poor guide to what promises, or threatens, to be an era posing unfamiliar transnational problems and calling for innovative legal solutions.¹ Two developments have struck at the foundations of contemporary international law. These are the collapse of the Soviet Union and consequent global retreat of communist ideology, and the resurgence of ethnicity, religion, and culture as principal bases of identity and foci of conflict with international significance.² They have rendered suspect the underlying premises of much received wisdom on both sides of the debate about whether international law plays, or would come to play, a major or a marginal role in world affairs.³

* Assistant Professor, University of Pennsylvania Law School; J.D., 1990, Harvard Law School; Ph.D. candidate, political science, Government Department, Harvard; A.B., 1982, Princeton University.

1. On the end of the nineteenth century as an era in which an old, coherent order had unraveled, and in which new circumstances demanded a new approach or understanding that had not yet formed, see generally CARL E. SCHORSKE, *FIN-DE-SIECLE VIENNA: POLITICS AND CULTURE* 3-4 (1981); GEOFFREY BARRACLOUGH, *AN INTRODUCTION TO CONTEMPORARY HISTORY* 31-32 (1967).

2. As indicated below, these phenomena jointly produce circumstances that frame the challenges now confronting international law. The two developments are also interrelated in a simpler way. Ethnic tensions and nationalist passions contributed greatly to the disintegration of the Soviet Union and its empire. This collapse, in turn, helped to unleash ethnic, cultural, and religious politics within and beyond the former Union of Soviet Socialist Republics. See, e.g., ZBIGNIEW BRZEZINSKI, *THE GRAND FAILURE* 87-90, 247-50 (1990).

3. See, e.g., INIS L. CLAUDE, JR., *SWORDS INTO PLOWSHARES* 69-80 (1956) (describing some of more expansive notions of international law's prospective role, under United Nations, as constraint on states); EDWARD H. CARR, *THE TWENTY YEARS' CRISIS: 1919-1939* 170-80 (2d ed. 1946) (seeing relatively significant role for international law as law among community of states); HEDLEY BULL, *THE ANARCHICAL SOCIETY* 140-42 (1977)

The result is a crisis in international law, and in thought about the nature and importance of international law. It is a crisis in the Chinese sense — a conjunction of danger and opportunity.⁴ This concept of crisis is apt, for today's dangers and opportunities come in large part from events in the East (not least from the Chinese world) and from the choices the West faces in responding to them. While the crisis is ubiquitous, it is these East Asian developments, and possible reactions to them, that provide the principal examples here.

The present challenges are qualitatively different from seemingly similar past assaults on established notions of international law as part of a "liberal" or "Western" international order. The new challenges are arguably more severe and certainly more complex. The possibility of a coherent and relevant response appears to lie not in a simple defense of familiar ideals but in a new, and selective, emphasis on human rights and liberal values as a fighting faith and as a basis for a transnational consensus among subnational groups.⁵ If this claim is correct, the project and the prospect for international law in the coming years are, perhaps more than is generally recognized, matters of transnational, even domestic, law and politics.

The international legal and political order that is now in deepening crisis can still be characterized and caricatured as a liberal order. It posits autonomous, formally equal, sovereign states as its basic units. States, individually or collectively, are no

(discussing international law's real, if modest, contributions to international order); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 279-82, 297-300 (5th rev. ed. 1978) (describing real but quite circumscribed role for law in international order structured by self-interested pursuits of nation-states seeking power and security); KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 170-76 (1979) (describing international order as defined by distribution of power among states, with little or no role for law, and bipolar structure as conducive to stability); ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 245-47 (1984) (assessing, favorably, prospects for cooperative development by "like-minded countries" of rule-like practices and institutions to govern interactions among states with actually or potentially complementary interests).

4. The Chinese word "*weiji*" is usually translated into English as "crisis." *Weiji* is composed of characters meaning "danger" (*wei*) and "opportunity" (*ji*). See *THE PINYIN CHINESE-ENGLISH DICTIONARY* 307, 713 (1983) (providing English translations for all three Chinese terms).

5. This argument, set forth briefly in this Essay, is explored more fully with respect to U.S. laws and Chinese human rights issues in a forthcoming article, *Beyond Cultural Relativism and 'Evangelical Liberalism': Defining a Role for American and International Law in Addressing Human Rights in China*.

more authorized or justified in examining or forcing changes in the internal practices and preferences of other states (or in destroying other states) than a person would be in his or her dealings with fellow citizens in a liberal society domestically. Such an order creates normative and structural imperatives not to recognize and confront diversity in legal and political behavior, and attitudes within and among states.⁶

Certainly, this order has not been immune from pressures for change. The ideological polarization of the Cold War, the critique of national quests for "modernization" as "Westernization," and the efforts during the last couple of decades to move human rights farther up on international political and legal agendas were all in some tension with a Westphalian, nation-state based order.⁷ Nonetheless, the structure long survived those corrosive forces, as we saw underscored in the renaissance surrounding the Gulf War, of collective security pursued within a framework of venerable international legal rules and conventional international institutions.⁸ Whether such an approach

6. See generally Convention on Rights and Duties of States, Dec. 26, 1933, arts. 4, 8, 9, 49 Stat. 3097, 165 L.N.T.S. 19, 25, 27; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) (recognizing duty of nonintervention in states' domestic choices of political, economic, social, and cultural systems, and inviolability of states' territorial integrity and political independence); Michael Doyle, *Kant, Liberal Legacies and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205 (1983); Stephen D. Krasner, *Regimes and the Limits of Realism: Regimes as Autonomous Variables*, in INTERNATIONAL REGIMES 355, 355-56, 366-67 (Stephen D. Krasner ed., 1983) (discussing consequences of conception of international system as being composed of egoistic sovereign states differentiated only by power capabilities).

7. On the Peace of Westphalia as a defining moment in the emergence of a nation-state-based international order that overcame earlier competing claims founded in purportedly universal norms, see HAROLD K. JACOBSON, NETWORKS OF INTERDEPENDENCE 13 (2d ed. 1984). Communist, liberal democratic, and human rights ideologies obviously entail claims of universal validity that disregard national boundaries. The Westernization-modernization debate is in more subtle tension with a pure nation-state order. While the charge of "Westernization" suggests a cultural relativism that appears to endorse national autonomy and distinctiveness by rejecting the West as a universal model, the charge also labels social, political, and legal phenomena that in practice have frequently accompanied economic development or decolonization as something other than inevitable aspects of modernization. Thus, what might be defended as generically modern or inevitable is denounced as acquiescence in another contingent ideology claiming universal applicability. See generally C. E. BLACK, THE DYNAMICS OF MODERNIZATION 5-13 (1966) (discussing meaning of modernity).

8. See S.C. Res. 674, U.N. SCOR, 2951st mtg., U.N. Doc. S/RES/674 (1990); S.C. Res. 678, U.N. SCOR, 2963d mtg., U.N. Doc. S/RES/678 (1990); S.C. Res. 686, U.N.

can, or should, remain the paradigm, as the consequences of the decline of Soviet power and communist ideology and the eruption of subnational and transnational allegiances further unfold, are much closer questions.

Strong claims, both explicit and implicit, that culture, religion, or ethnicity define the proper boundaries of a sovereign state, and the appropriate content of its legal rules, are rampant. On the battlefields of the former Yugoslavia, in the latter-day Confucian pronouncements of Singapore's Lee Kuan Yew, and in the proliferating struggles over the place of Islam in society and government throughout much of Asia, there emerges a broad challenge to the relevance of an international legal order that does not take as a central concern cultural differences among and within nations, and the substantive and substantial diversity in approaches to domestic and international law and politics that such differences entail.

The challenge is more profound than a cultural relativist or anti-colonialist critique, updated for the 1990's and brought into sharper focus by the removal of the distorting lens of Cold War politics. In its heyday, the cultural relativist view that Western legal values, including human rights and other assertedly universal principles of international law, were inappropriate for much of the world was held primarily by left-leaning Western intellectuals. Such commentators were distrusted as potentially condescending or anti-developmental in much of the recently decolonized world, and nearly disregarded in the practice of international law and politics.⁹

SCOR, 2978th mtg., U.N. Doc. S/RES/686 (1991); H.R.J. Res. 77, 102d Cong., 1st Sess. (1991) (enacted as P.L.102-1); Letter to Congressional Leaders on the Strike on Iraqi Intelligence Headquarters, 29 WEEKLY COMP. PRES. DOC. 1183 (June 28, 1993) (citing international law basis, and compliance with U.N. procedures, for action); Remarks to United States Army Troops Near Dhahran, Saudi Arabia, 26 WEEKLY COMP. PRES. DOC. 1900 (Nov. 22, 1990) (stating U.N. and international law bases for U.S. military presence); cf. DANIEL P. MOYNIHAN, *ON THE LAW OF NATIONS* 120-23 (1990) (describing decline in U.S. government's commitment to international law during 1980's).

9. See, e.g., Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUMAN RIGHTS Q. 400 (1984) (providing general and critical discussion of cultural relativism); Adamantia Pollis & Peter Schwab, *Human Rights: A Western Construct with Limited Application*, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 1 (Pollis & Schwab eds., 1980) (setting forth strong version of cultural relativist perspective); BILL WARREN, *IMPERIALISM: PIONEER OF CAPITALISM* 252-55 (1980) (arguing that leaders of former colonies belatedly recognized growth-destroying effects of embracing theories that blamed underdevelopment on Western-dictated order and rejected progressive colonial legacy

Where kindred notions had greater practical impact, they generally proved compatible with an international legal order of nation-states as juridically equal "black boxes." Thus, anti-colonial and separatist assaults on existing arrangements typically invoked the norms of the existing system¹⁰ — seeking recognition of a new sovereign state within colonial boundaries or coincident with areas inhabited by a particular people. With borders redrawn in the name of self-determination around a more culturally or ethnically homogenous group, the new nation could be absorbed into the fold as just another state with internal affairs of presumptively little international legal import.¹¹

Where the international community could not or would not ignore deviance in domestic legal regimes, excuses and justifications often were available. When illiberal regimes and the consciences of liberal regimes could not find sufficient cover in the principle of sovereignty over domestic affairs or in the necessity of accommodating unpalatable allies in the Cold War, the explanation was likely to be that suspect states merely had, for example, struck a somewhat different balance between civil-political and socioeconomic rights (all of which were highly valued and universally shared). Alternatively, deviant state conduct might be dismissed as being part of a necessary transitional period of progress toward realization of fundamental rights and the rule

of emerging indigenous capitalism). U.S. statutes conditioning aid and trading privileges on the domestic behavior of foreign governments contain little or nothing that suggests any accommodation of cultural relativist arguments. Typical statutory standards are compliance with the requirements of "internationally recognized human rights" (a phrase likely to draw the scorn of cultural relativists), market-oriented economic principles, democratic government, or free emigration. See 22 U.S.C.S. § 2304(d)(1) (1994); 19 U.S.C.S. § 2432 (1994); 22 U.S.C.S. § 2295(a) (1994); 12 U.S.C.S. § 635(b)(2) (1994); 22 U.S.C.S. § 2304(a)(1) (1994) (providing, in security assistance statute, that United States shall "in keeping with the constitutional heritage and traditions of the United States" promote observance of human rights in other countries "without distinction as to race, sex, language, or religion").

10. See, e.g., ROBERT W. TUCKER, *THE INEQUALITY OF NATIONS* 58-60, 67-69 (1977).

11. Although the new nation-states created through decolonization in Asia and Africa often had much less ethnically and culturally homogenous populations within more arbitrarily drawn boundaries than did most of the states that emerged from earlier waves of nationalism in Europe (or are now emerging in the former Soviet and Soviet-dominated areas), the ex-colonial states were more culturally (and geographically) integrated than the vast and European-based empires to which they formerly belonged. See, e.g., CRAWFORD YOUNG, *THE POLITICS OF CULTURAL PLURALISM* 11-12, 23-26, 66-71 (1976) (examining interaction of culture, identity, and politics).

of law.¹²

The culturalist challenge to international law as we enter the twenty-first century is qualitatively different, and more at odds with the principles of the existing order, in two ways. First, such assaults on the integrity of many nation-states and on the character of their internal political and legal orders are not simply balkanizing. Rather, they are often supranational, cutting across international boundaries and binding together dissident or nationalist groups in several states. Pandemonium looms, but the fragments also threaten to coalesce into broader clashes of civilizations.¹³ Thus, Islam not only defines the fault lines between secular central governments and their religious revivalist local opponents in China, Malaysia, and nations much nearer the heart of the Muslim world, and as far west as Bosnia. It also joins some of these groups together in a shared project that numbers among its aims a return to the substantive legal and governmental principles of Islam.¹⁴

12. For an example of both sorts of claims in post-Mao official Chinese pronouncements, see R. Randle Edwards, *Civil and Social Rights: Theory and Practice in Chinese Law Today*, in *HUMAN RIGHTS IN CONTEMPORARY CHINA* 41, 67 (Randle Edwards et al. eds., 1986). For an indication that the post-War U.S. political and legal tradition accords some substantial recognition to economic and social rights, see *KENPŌ* [JAPAN CONST.] arts. X-XL (including, in constitution imposed by U.S.-led post-World War II occupation government, social and economic rights, as well as rights similar to those found in U.S. Bill of Rights, among "human rights" guaranteed to Japanese citizens). For an indication that contemporary U.S. legislation recognizes some form of the claim that shortcomings during a "transition period" must be recognized and accepted, see 22 U.S.C.S. § 2295a (permitting aid to states formerly part of Soviet Union if such states are "acting to . . . make significant progress toward," *inter alia*, democratic government, rule of law, and economic reform based on "market principles"); Exec. Order No. 12,850, 58 Fed. Reg. 31,327 (1993) (conditioning continuation of China's most-favored-nation trade benefits on "significant progress" on, not immediate full compliance with, several specific human rights matters). For the principal statements of international legal standards for human rights, see generally Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. 1/810 (1948); International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

13. See DANIEL P. MOYNIHAN, *PANDEMONIUM: ETHNICITY IN INTERNATIONAL POLITICS* 24-25, 168-70 (1993) (arguing that ethnic strife, principally as centrifugal force within nations, is now greatest threat to international peace and security); Samuel P. Huntington, *The Clash of Civilizations?*, *FOREIGN AFF.*, Summer 1993, at 22, 29-35 (arguing that "fault lines" between civilizational groupings, generally much larger than nation-states, "will be the battle lines of the future").

14. See, e.g., *Malaysian State Approves Muslim Laws to Cut Off Limbs*, Japan Economic News Wire, Nov. 25, 1993, available in LEXIS, News Library, Non-US file (reporting

Second, culturalist challenges to international legal norms, particularly in the area of human rights, have grown more aggressive and self-confident. Thus, there is little tone of excuse, request for temporary indulgence, or even much interest in dialogue to be found in Lee Kuan Yew's exegeses on the superiority of an Eastern way in law and politics that stresses order and community over rights and extreme individualism. The same can be said of China's post-Tiananmen assertion of its own great human rights achievements and criticism of Western nations' shortcomings, and its longer-standing dismissal of human rights as a bourgeois concept and mere pretext for Western interference in China's internal affairs, and of several governments' united insistence upon a valid, distinctively Asian interpretation of human rights in the face of the 1993 Vienna international conference on universal human rights.¹⁵

enactment, in Malaysian province ruled by Islamic opposition party, of punishments including stoning and whipping as part of effort to govern through Koran-based laws; laws apply only to Muslims and would require federal government approval); Philip Shenon, *Sungai Penchala Journal: A Malay Plot? Or Just a Well-Meaning Commune?*, N.Y. TIMES, Oct. 10, 1994, at A4 (reporting that ground for Islamic Al-Arqam sect leader's arrest was plot to replace secular government with Islamic fundamentalist regime); Barbara Sopkin, *Moslem Fundamentalism Worries East Asian Governments*, Agence France Presse, Aug. 8, 1994, available in LEXIS, News Library, Non-US File (reporting that Islamic Al-Arqam and Malaysia's main Islamic opposition party share goal of making Malaysia an Islamic state and that China is cracking down on intervention in secular affairs by religious groups in heavily Muslim Ningxia area); Catherin Sampson, *Bombers Raise Chinese Fears*, N.Y. TIMES, Feb. 22, 1992, available in LEXIS, News Library, Non-US File (reporting that Chinese authorities see bombing incident attributed to separatist Muslims in Xinjiang area in west of country as example of growing cross-border links between Muslims in China and violent fundamentalist groups in Afghanistan and Pakistan).

15. See Philip Shenon, *To Justify Flogging, Singapore Cites 'Chaos' on U.S. Streets*, N.Y. TIMES, Apr. 13, 1994, at A2 (quoting former Prime Minister and current Senior Minister of Singapore, Lee Kuan Yew, as saying that U.S. society is rich, but not safe and peaceful and not type of society Singapore chooses, and dismissing U.S. talk about human rights as convenient sloganeering); Fareed Zakaria, *Order and Liberty, East and West*, N.Y. TIMES, Apr. 11, 1994, at A19 (quoting former Prime Minister and current Senior Minister of Singapore, Lee Kuan Yew as saying that the "expansion of the right of an individual to behave or misbehave as he pleases has come at the expense of orderly society. In the East, the main objective is to have a well-ordered society. . . . The fundamental difference between Western concepts of society and government and East Asian concepts is that Eastern societies believe that the individual exists in the context of his family."); see also GUOWUYUAN XINWEN ZHU, ZHONGGUO DE RENQUAN ZHUANGKUANG [STATE COUNCIL NEWS OFFICE, THE STATE OF HUMAN RIGHTS IN CHINA] (1991) (known widely as the "White Paper"). The White Paper and the Chinese government's subsequent public pronouncements on human rights issues show an increased willingness to accept that international standards are relevant and applicable in China. Nicholas D. Kristof, *China*

Furthermore, the regimes urging alternative concepts of purportedly universal legal norms increasingly meet the formal and procedural requisites of democracy,¹⁶ thereby weakening many potential criticisms that invoke liberal international law principles. At least absent the unlikely and disquieting advent of superstates organized along cultural or civilizational lines,¹⁷ irrelevance or perversity of consequences seems to await any approach to international law that fails to recognize such richly substantive and strikingly transnational developments as something much more than peripheral issues in a game among coherent, unitary actors, essentially undifferentiated except in their levels of power.

The crumbling of Soviet power and the retreat of communist ideology inside and beyond the former Soviet empire are

Issues Rebuttal to Human Rights Critics, N.Y. TIMES, Nov. 3, 1991, § 1, pt. 1, at 12; Philip Shenon, *Want to Sell China's Record on Human Rights? Get Mr. Smooth*, N.Y. TIMES, Aug. 28, 1994, § 4, at 7 (reporting that president of nominally non-governmental Chinese Society for Human Rights criticized Western nations' failures on human rights); cf. Wang Xiujing, *Shehuizhuyi renquan yu zebenzhuyi renquan de genben qubie* [*Basic Distinctions Between Socialist Human Rights and Capitalist Human Rights*] and Li Linmei, *Zhuquan yuanze he renquan de guoji baohu* [*The Principle of Sovereignty and International Protection of Human Rights*] in ZHONGGUO SHEHUI KEXUE YUAN FAXUE YANJIUSUO, DANGDAI RENQUAN [CHINESE ACADEMY OF SOCIAL SCIENCES, LEGAL RESEARCH INSTITUTE, CONTEMPORARY HUMAN RIGHTS] 205-20, 362-74 (1992) (post-White Paper publications reflecting the longer-standing Peoples Republic of China approaches stressing that human rights have different characteristics in different class society contexts, and the status of national sovereignty over domestic matters as a legal principle in no way inferior to human rights claims); see also Susumu Awanohara et al., *Vienna Showdown*, FAR E. ECON. REV., June 17, 1993, at 16 (describing Asian critique of Western attempt to impose "Western traditions" in guise of human rights); Michael Vatikiotis, *Cultural Divide*, FAR E. ECON. REV., June 17, 1993, at 20 (describing emerging East Asian theory of "situational uniqueness" to justify "distinctive positions on human-rights issues"); Gordon Fairclough, *Standing Firm*, FAR E. ECON. REV., Apr. 15, 1993, at 22 (reporting Asian nations' agreement in preparation for Vienna Conference on Bangkok Declaration, which stresses non-interference in internal affairs and "socio-economic, historical and cultural backgrounds" as legitimate sources of human rights variations).

16. See SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 5-9, 21-26, 28-30 (1991) (discussing trend towards democracy since mid-1970's).

17. On the continuing strength and importance of states in an era of "civilizational" cleavages and loyalties, see Fouad Ajami, *The Summoning*, FOREIGN AFF., Sept.-Oct. 1993, at 2, 9 ("[C]ivilizations do not control states, states control civilizations."). The difficulties and dangers of any attempted transition to civilization-states lie, not least, in what would be required to overcome the persisting strength of nation-states, in the near-impossibility (absent massive dislocation of people) of drawing boundaries in mixed areas, and in the potential multiplication of ethnic and nationalist pressures for disintegration that already plague more modestly sized nation-states.

central elements in another challenge to the existing order in international law and politics. Shaken, indeed shattered, are a bipolar structure and a polarizing ideology that together made the nation-state the central institutional focus and marginalized concern with differences in legal and political regimes among and within nations, except for those differences immediately relevant to the Manichean struggle between communism and liberal democracy.

It has become less plausible to conceive of international law and politics in either of two familiar ways: (1) as a global order, anchored by two superpowers, in which two types of states, although very different internally, can interact under shared and neutral, albeit sparse, rules, even as they take sides in other countries' civil conflicts (conceived of as conflicts over which "side" such ultimately unitary states will join); or (2) as a partial order among the nations of the West and some of their ex-colonies in which the United States, as hegemon, provides and enforces more elaborate, more law-like rules of international interaction within a more limited community.¹⁸ Exposed and perhaps encouraged by the decline of such analytical frameworks and the patterns of behavior they explained and endorsed is a world in which states are more seriously fragmented internally, with many groups embracing radically divergent ideas about domestic and international law, and sharing common goals with like-minded groups in other countries.

Such challenges to the received order might appear to be mere extensions of developments recognized for the last twenty years or more. Certainly, "interdependence theory" in international relations scholarship, academic legal arguments for focusing on "transnational law" (and not the narrower, more state-centric field of "international law"), and the practices such arguments reflected and influenced all sought to deal with a world in which legal and political rules could not assume that nation-states were internally cohesive and externally impermeable.¹⁹

18. Such views of international relations run through political scientists' writings on international relations, although their theories make surprisingly little reference to international law. See MORGANTHAU, *supra* note 3, at 282, 363-64 (discussing first view); WALTZ, *supra* note 3, at 193 (discussing first view); see also KEOHANE, *supra* note 3, at 31-39 (discussing second view).

19. ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* 3-8, 23-28, 33-36 (1977); HENRY J. STEINER & DETLEV F. VAGTS,

Nonetheless, the concerns that animated those responses seemed to require, at most, only moderate reform of the established order.

Before the widespread retreat from Marxist-Leninist orthodoxy and before the Soviet implosion, the most visible forces undermining a state-centered international legal order were market-oriented economic exchanges, organizational networks among cosmopolitanly-educated elites in business, government, or citizens' groups, and ties that linked groups in industrial democracies and narrow segments of the rapidly developing world.²⁰ Generally, the political focus of such transnationally linked groups was on relatively narrow issues and on influencing national laws and policies through established, legitimate channels. There was little in this that immediately and fundamentally challenged the political integrity of the relevant sovereign states or that seemed any more seriously in tension with a liberal international order than domestic liberalism always had been.²¹

Although it is hard to demonstrate with certainty, we now seem to face a more volatile combination of deeper and more varied intranational schisms between groups and potentially stronger international links among them. Cold War organizational and ideological structures are no longer available to suppress, channel, or at least mask, primordial or nascent cleavages

TRANSNATIONAL LEGAL PROBLEMS (3d ed. 1986); PHILIP C. JESSUP, *TRANSNATIONAL LAW* 2-3 (1956).

20. Interdependence with the industrial democracies and the rest of the Western-linked world was limited for pre-reform communist states by such states' monistic and totalistic domestic political structures and ideologies that limited the growth of the kind of autonomous groups that established transnational networks elsewhere, and by their autarchic approach to international economic relations rooted in a "siege mentality" reinforced by Western hostility (sometimes reflected in statutes governing international economic relations). See TONY SMITH, *THINKING LIKE A COMMUNIST: STATE AND LEGITIMACY IN THE SOVIET UNION, CHINA, AND CUBA* 182-85, 191-92 (1987) (discussing essential characteristics of communist thought); see also A. DOAK BARNETT, *CHINA IN THE WORLD ECONOMY* 122-32 (1981) (describing struggle between Cultural Revolution radicals and proponents of reform about political significance of opening China to foreign investment and trade). For U.S. statutes denying trade and aid to communist countries, see, e.g., 19 U.S.C.S. § 2432 (1994) (tying countries' most-favored-nation ("MFN") status to emigration freedoms they grant to citizens); 22 U.S.C.S. § 2370 (1994) (prohibiting assistance to present Cuban government).

21. For illustrations of the tensions between some liberal principles (chiefly equality) when applied to states and when applied to individuals without regard to international boundaries, see TUCKER, *supra* note 10, at 61-62; CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 65-66, 182 (1979).

in seemingly countless states, old and new. In Eastern Europe and the former Soviet Union, in reform-era China, and in the rapidly developing nations of East Asia, the network of transnational economic ties has expanded rapidly to encompass, and to penetrate more deeply, areas that are more thoroughly non-Western in their legal and political cultures and less fully market-oriented in their laws, policies, and practices. Moreover, with new legal tolerance and new technology, a diverse transnational flow of ideas has rapidly come to supplement, and sometimes threaten, ties based on business or on narrow issues.

Thus, Chinese leaders determined to rein in perceived excesses of reform face not merely the risk that hard-won, modest advances toward rule by law may wither, but also the prospect of stinging trade sanctions under U.S. law and costly U.S.-backed delays in joining world trade bodies.²² Domestically, they face an unprecedentedly Westernized and outward-looking group of dissidents and critics who are sophisticated about, and insist upon, domestic law reform and adherence to international legal norms.²³

Similarly, a Malaysian political leadership that downgrades Malay-Muslim nationalism and economic planning to reaffirm a secular legal order, the benefits of English education in accessing Western knowledge, and the virtues of pro-market laws and

22. See Exec. Order No. 12,850, *supra* note 12; Lionel Barber & Nancy Dunne, *Fears Grow that Bush Will Back Down on China*, FIN. TIMES, Nov. 21, 1991, § I, at 9 (describing mixture of human rights and trade issues in negotiations between president and Congress over conditions to be imposed on renewal of China's MFN status); cf. Thomas L. Friedman, *China Syndrome*, N.Y. TIMES, Jan. 8, 1995, § 4, at 19 (reporting that U.S. business executives who support United States' imposing trade sanctions against China for intellectual property violations and blocking China's entry into World Trade Organization, see link between Chinese government's human rights abuses and trade abuses, with both reflecting absence of rule of law).

23. See, e.g., Wei Jingsheng, *The Fifth Modernization*, in THE FIFTH MODERNIZATION: CHINA'S HUMAN RIGHTS MOVEMENT, 1978-1979 (James D. Seymour ed., 1980) (presenting argument, by one of leading participants in Democracy Wall movement of 1978-79, that post-Mao regime should and must recognize human rights); William P. Alford, *Double-Edged Swords Cut Both Ways: Law and Legitimacy in the People's Republic of China*, in CHINA IN TRANSFORMATION 45, 45-46, 57-59 (Tu Wei-ming ed., 1994) (detailing attempts to seek judicial redress against Party and state organs and officials, principally for actions taken against plaintiffs in connection with plaintiffs' roles in 1989 protests); Patrick E. Tyler, *In Beijing, Dissidents File New Petitions*, N.Y. TIMES, Feb. 28, 1995, at A8 (reporting that, in order to ensure protection of fundamental human rights, Chinese dissidents petitioned National People's Congress to strengthen rule of law, and to undertake investigations of cases where citizens' legitimate rights have been violated by authorities).

policies confronts newly radical challenges from movements that seek to enact Islamic law as state legislation or that threaten to become a diffuse state within the nation, beyond the reach of sovereign power. The regime, correctly or not, sees conspiracies that cross national boundaries and a rising international tide of Islamic fundamentalism behind its troubles, and feels compelled to prove its own Islamic *bona fides* even as it cracks down on religious radicals.²⁴ In such a world, a perspective that sees a prime virtue in legal rules that are simple, uniform, and international (in the sense of being rules for and among nation-states) does not portend a central and leading role for law in international affairs.

The great danger for those who favor a strong role for national law in the coming years is a failure to adapt to the challenges of internal fragmentation and transnational ties. Several signs of the perils of a failure of imagination are visible. First, an attempt to reanimate some of the hoariest principles of the past seems doomed to frustration. Relying on principles of collective security and the sanctity of sovereign states, and organized in large part through the United Nations, the Gulf War alliance increasingly seems confined to its facts and the stuff of nostalgia — incapable of repetition, yet subject to pervasive review.²⁵ Beset with doubts about the appropriate grounds and practical conse-

24. William Case, *Malaysia in 1993: Accelerating Trends and Mild Resistance*, 34 *ASIAN SURV.* 119, 120-24 (1994) (describing government's policies); *Malaysian State Approves Muslim Laws to Cut Off Limbs*, *supra* note 14; *see generally* WU MIN AUN, *THE MALAYSIAN LEGAL SYSTEM* 38-40 (1990) (describing jurisdiction of Islamic courts in Malaysia); Ahmed Rashid, *March of the Militants*, *FAR E. ECON. REV.*, Mar. 9, 1995, at 19 (reporting Malaysian Prime Minister Datuk Seri Mahathir's banning of fundamentalist Islamic Al-Arqam sect, in part for training death squad in Thailand); Shenon, *supra* note 14, at A4 (noting that Islamic Al-Arqam sect claims numerous sympathizers abroad); Michael Richardson, *Malaysia and Neighbors to Curb Sects*, *INT'L HERALD TRIB.*, Aug. 5, 1994, *available in*, LEXIS, News Library, Non-US File (reporting that Islamic Al-Arqam sect operates some 50 villages in Malaysia with schools, shops, health clinics, and other facilities for members; that sect is banned, or faces banning, in Indonesia and Brunei; that its leader is banned from three neighboring countries; and that 19 Malaysian members of sect were arrested at Cairo fundamentalist demonstration in April, 1994); Sopkin, *supra* note 14 (reporting that Al-Arqam sect leader lived in exile in Jordan after 1988).

25. For analyses of the Gulf War's implications for international law and U.S. foreign relations law, and a recognition that replicability of the Gulf War approach is severely limited, see Paul W. Kahn, *Lessons for International Law from the Gulf War*, 45 *STAN. L. REV.* 425 (1993); Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 *AM. J. INT'L L.* 452 (1991); Burns H. Weston, *The Gulf Crisis in International and Foreign Relations Law, Continued*, 85 *AM. J. INT'L L.* 516 (1991); Michael J. Glennon, *The Gulf War and the Constitution*, *FOREIGN AFF.*, Spring 1991, at 84.

quences of intervention, the tortured and hesitant multilateral efforts to address the Bosnian crisis may better indicate the fate awaiting such conventional approaches under the conditions likely to prevail in the coming years.

Second, the international legal enterprise shows signs of shrinking toward public regulation of international trade and investment. That possibility is illustrated by the Clinton Administration's East Asian diplomacy that has emphasized international legal standards for fair trade, U.S. laws that impose trade sanctions or deny most-favored-nation status, and cabinet-level road shows to promote U.S. business abroad.²⁶ Here, the international legal norms of free trade amid limited economic nationalism are relatively steady beacons, and the recognition of subnational actors with transnational links (and domestic legislative and regulatory agendas) can be relatively frank and open.²⁷ Such an approach, however, threatens to exclude from the central focus of international law much that is of interest and importance in world affairs.

Third, imprecise notions of broad principles of international law or isolated fragments of international law doctrines both may be invoked haphazardly and unsystematically to support particular actions. The United States' humanitarian intervention in Somalia, its delayed intervention by invitation in Haiti, and its decoupling of human rights and trade in China, suggest the ambiguities and limitations of such approaches to the uses and meaning of international law. Without some integrat-

26. See, e.g., Susumu Awanohara & Nayan Chanda, *Uncommon Bonds*, FAR E. ECON. REV., Nov. 18, 1993, at 16-17 (reporting that U.S. goals at Asia-Pacific Economic Cooperation ("APEC") forum are to accelerate global trade liberalization, and to strengthen trade with Asia); David E. Sanger, *President Imposes Sanctions on Chinese Goods*, N.Y. TIMES, Feb. 5, 1995, § I, at 1 (announcing sanctions to be imposed under "super 301" provision of trade statutes, 19 U.S.C.S. § 2420); Exec. Order No. 12,850, *supra* note 12; Patrick E. Tyler, *Ron Brown in China: Trade Gets an Open Door, Human Rights the Closet*, N.Y. TIMES, Sept. 4, 1994, § 4, at 2 (reporting on mission to China by U.S. Commerce Secretary Ron Brown and U.S. executives to promote signing of agreements between U.S. firms and Chinese).

27. See, e.g., Friedman, *supra* note 22, at 19 (reporting pressure and support from U.S. business interests in decisions to de-link MFN and human rights, and to impose sanctions for Chinese violations of intellectual property rights); Sanger, *supra* note 26, at 1 (reporting U.S. Administration's explanation of how sanctions were crafted so as to minimize harm to U.S. industries and consumers); Awanohara & Chanda, *supra* note 26, at 16-17 (quoting U.S. State Department official on importance of domestic job growth in U.S. approach to APEC summit).

ing strategy or guiding norms, it proves exceedingly difficult to articulate determinative criteria, especially ones sounding in international law, for deciding what action to take, what counts as successful action, and why to act in one case and not in another.²⁸

Nevertheless, the crisis confronting international law presents opportunities as well as dangers. For those in the West who seek a vibrant role for international law, there is something potentially liberating in the new cultural challenge's shaking the early post-colonial belief in an elaborate and largely inseparable, if internally contradictory, package of a liberal legal order among nation-states and liberal legal orders within states. The same can be said of the impact of the Soviet collapse and the more widespread softening of communism on the sense of mortal duty to promote and protect that package unquestioningly. With former senses of confidence and urgency gone, proponents of a liberal order and a leading role for law in global affairs may, indeed must, turn to a more critical examination of their goals and a more strategic approach to the roles of international law.

The critical examination entails an inquiry into what on the laundry list of specific human rights, democratic values, sovereignty, self-determination, and the like make the most compelling demands now that it seems impossible, and unnecessary, to pursue simultaneous progress on all fronts. Given the decline in

28. For the variety of international legal principles available, and the flexibility of their connections to a course of action, delayed action or inaction, see Letter to the President, 13 *OP. OFF. LEGAL COUNS.* 6, 7 (1992) (suggesting that "principles of customary international law" justify planned American military intervention in light of "urgent need for humanitarian assistance" and "breakdown of governmental authority," but declining to decide the issue in light of other sources of authority, including Security Council resolution authorizing all necessary means for promoting humanitarian relief, statutory authorization for humanitarian aid, and President's general authority over use of troops); Letter to Congressional Leaders on Haiti, 30 *WEEKLY COMP. PRES. DOC.* 1801 (Sept. 18, 1994) (citing, in support of troop deployment after international accord reached, U.N. resolution authorizing "all necessary means" to restore democratic government, particular national security interests of United States in responding to gross abuses of human rights and in promoting restoration of democratic government); The President's News Conference, 30 *WEEKLY COMP. PRES. DOC.* 1166 (May 26, 1994) (because "best opportunity to lay the basis for long-term sustainable progress in human rights" in China is through continuation of most-favored nation status and promotion of increased contacts, President will extend China's MFN trade status despite China's failure to satisfy standard, mandated as condition of renewal in previous year's China MFN executive order, of "overall significant progress" in specific areas).

the persuasive power of Cold War, cultural relativist, and anti-colonial justifications for an order based upon unitary nation-states, the most appealing and promising move may be to shift emphasis toward the previously subordinate project: international law's contribution to the promotion of liberal values within nations. Thus, minimal dignitary interests — freedom from torture, arbitrary imprisonment, or severe material deprivation — may merit pride of place, possibly on the ground that little else of value can be secured in their absence.²⁹ Alternatively, political process values, such as democratization, might warrant preeminence, perhaps on a theory that such principles best combine the promise of participation, which may be valued for its own sake, and of a mechanism well-suited to the achievement of preferred substantive outcomes.³⁰

If a persuasive lexical ordering of specific values proves elusive or incomplete, a strategic approach becomes all the more essential. A strategic approach requires asking whether it will be successful or efficient to undertake expenditures of concededly limited material and moral resources to advance the realization of particular principles. Promotion of minimal dignitary interests, for example, may score high in expected efficacy, for these interests may well be matters of broad transnational consensus

29. That intuition would also appear to be reflected in the tendency of international human rights organizations to focus much of their energy on questions of arbitrary or politically motivated detention, severe custodial punishments and the like. See, e.g., HUMAN RIGHTS WATCH, *WORLD REPORT 1995* (1994); ASIA WATCH, *ANTHEMS OF DEFEAT: CRACKDOWN IN HUNAN PROVINCE, 1989-92* (1992); AMNESTY INTERNATIONAL, *TORTURE IN THE EIGHTIES 4-5* (1984); AMNESTY INTERNATIONAL, *POLITICAL IMPRISONMENT IN THE PEOPLE'S REPUBLIC OF CHINA* (1978).

30. Compared to the vision evident in some earlier American forays into promotion of democracy abroad, it is likely that such a notion of democratization will have to be relatively sparse in its requirements, and thus relatively broad in its definition of what is to be expected or accepted. See SAMUEL P. HUNTINGTON & JOAN M. NELSON, *NO EASY CHOICE* 42 (1976) (noting that developing countries face trade-offs among increasing political participation, increasing economic growth, and fostering social and economic equality). Compare HUNTINGTON, *supra* note 16, at 164-209, 253-58 (describing considerable variety of methods by which, and contexts in which, recent transitions to democracy have occurred, and have differed from earlier "waves" of democratization) and GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, *TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES* (1986) (noting same) with ROBERT PACKENHAM, *LIBERAL AMERICA AND THE THIRD WORLD* 123-30 (1978) (discussing U.S. conviction in the 1950's and 1960's that U.S. aid could result in economic growth, broadly rising standards of living, stability, and democratic politics all emerging smoothly, mutually reinforcingly, and along essentially U.S. or Western lines in developing countries).

(and of even broader lip-service). Alternatively, democratic values may seem strong candidates because their lack of obvious and immediate substantive content promises flexibility sufficient to accommodate diverse political and legal cultures.

Such ruminations over pragmatism and principle are initially likely to occur primarily in major industrial democracies' domestic debates about foreign affairs laws and policies. Some elements of the approach they might yield are already in place, although those elements are at best fragmentary and subject to much revision. The U.S. Code, for example, includes numerous provisions imposing sanctions or denying aid on the basis of other states' noncompliance with a variety of specific international human rights or liberal economic standards.³¹ Those standards might reflect some of the norms that U.S. citizens most prize or that the United States can most fruitfully promote abroad, or they could be replaced by standards that do incorporate such norms. Common statutory provisions that trigger legal consequences only upon findings of "consistent patterns" of "gross violations" of human rights in target countries, and the partially discretionary character of many statutory sanctions suggest a recognition of the importance of prudential concerns.³² They also suggest room for an approach that addresses them

31. *See, e.g.*, 22 U.S.C.S. § 2304(d)(1) (1994) (representing typical provision defining "gross violation of internationally recognized human rights" — a basis for denying security assistance — as including "torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons"); 19 U.S.C.S. § 2432 (1994) (prohibiting MFN status for "non-market economy country" that denies or financially burdens emigration); 22 U.S.C.S. § 2295(a) (1994) (conditioning aid to former Soviet Union countries on respect for internationally recognized human rights including rights of minorities and freedom of religion and emigration, and on progress toward democratic system, representative government, rule of law and economy based on market principles, and private ownership); 12 U.S.C.S. § 635(b)(2) (1994) (prohibiting Export-Import Bank credits to countries with Marxist-Leninist planned economies).

32. *See, e.g.*, 22 U.S.C.S. § 2151(a) (1994) ("consistent pattern of gross violations" provision in development assistance statute); 19 U.S.C.S. § 2432(c)(2) (1994) (providing that President has authority to waive MFN prohibition upon determination that waiver will promote statute's goals); 22 U.S.C.S. § 2304(a)(2) (1994) (providing that President has authority to waive security assistance ban upon determination that certain "extraordinary circumstances" exist); 22 U.S.C.S. § 2295a(c) (providing that President has authority to extend aid to ineligible countries of former Soviet Union upon determination that providing assistance would be in national interest or would promote statute's substantive goals).

under a more coherent and systematic policy, and less in an *ad hoc* manner.

These prudential concerns also point to the other side of the opportunities presented by the intranational fragmentation and transnational linkages that seem to characterize the era now upon us. Within the nations of the East and the South, significant groups have come to adapt and adopt as their own views quite compatible with many items on an imaginable agenda for promoting liberal domestic legal orders and a robust role for international law.³³ Underscoring the dynamism and indeterminacy of approaches to law and politics outside the West, the presence of such groups undermines simplistic cultural relativist critiques, and offers fertile soil for transnational linkages to foster domestic legal and political changes on a front much broader than that promised by international economic interdependence. By establishing ties with like-minded counterparts in the West and by making appeals to international legal principles, such groups may find material, diplomatic, and intellectual resources with which to strengthen their hands at home. Thus, for important segments of profoundly diverse societies, prudence and principle can coincide both in defining the roles of international law and in shaping domestic law in non-Western nations.

What emerges is a prospective role for international law in which it becomes more closely linked to domestic legal orders and global liberal agendas in a species of transnational law for the twenty-first century. With the notion of international law's project so conceived, advocates of strong roles and liberal content for such law can keep faith with their own core principles (albeit a more eclectic and pragmatic subset of those principles). At the same time, these advocates can keep faith with the future sought by their counterparts outside the West who are engaged in struggles to promote similar values in their nations' domestic legal orders and their states' engagement with the international legal order.

33. See, e.g., Sidney Jones, *The Organic Growth: Asian NGOs Have Come into Their Own*, FAR E. ECON. REV., June 17, 1993, at 23 (noting importance of Asian non-governmental organizations' efforts in forcing Asian governments to heed demands of poor, marginalized, and abused).