

ARTICLES

POWER AND JUSTICE: THIRD WORLD RESISTANCE IN INTERNATIONAL LAW

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The new wave of neo-conservative views on international law seems reminiscent of the past of international law when it was used to justify colonialism and the exploitation of resources of the areas subject to colonialism. One may observe that there is a greater astuteness in the use of international law to secure the interests of the powerful than in the past when suppression through force was considered legitimate. In the modern world, international law has become the tool by which the objectives of the powerful can be realised. But opposition to such use has quickly set in and the rules made through power have come to be challenged. Such challenges are mounted not only by the less powerful states but increasingly by transnationally organised groups which seek to counter the norms supported by the powerful through the articulation of norms supported by justice. This tussle is what will shape the future course of international law. This article surveys areas of international law which have been affected by the tussle and indicates how outcomes are to be assessed.

I. INTRODUCTION

The end of the Cold War made the Third World seemingly irrelevant in terms of international relations and international law. During the Cold War, the contest for the Third World between the superpowers enabled the collective exertion of the power of the states which had been created through the ending of colonialism, to have an influence in the shaping of international norms. China, though not a state created through the processes of self-determination, played a leading role through solidarity with the newly independent states of Africa and Asia in advancing the causes espoused by these states which, together with the developing states of Latin America, collectively came to be described as the Third World. In the heyday of the unity of the Third World, the impact of this cohesion was felt in the shaping of international norms. These included the principle of self-determination which ended colonialism,¹ the doctrine of permanent sovereignty over natural resources² and a package of norms referred to as the New International Economic Order.³ Structural inequities in the international economic system were identified and there was a clamour for their correction. In the area of international trade, just prices for commodities and preferential access to

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¹ The literature is vast. See, e.g., Antonio Cassese, *Self Determination of Peoples: A Legal Appraisal* (Oxford: Oxford University Press, 1995); Christian Tomuschat, ed., *Modern Law of Self-Determination* (The Hague: Martinus Nijhoff, 1993).

² Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997); M. S. Rajan, *Sovereignty over Natural Resources* (New Jersey: Humanities Press, 1978).

³ Jagdish Bhagwati, ed., *The New International Economic Order: The North South Dialogue* (Cambridge, Mass.: MIT Press, 1977); Mohamed Bedjaoui, *Towards a New International Economic Order* (New York: Holmes & Meier, 1979).

developed country markets were addressed as claims that should have normative force. Foreign aid was regarded as a right to redress past wrongs rather than as charity to be given to the poorer states. Strong norms of non-intervention and the prohibition of the use of force, maintained through the United Nations Charter, were also hallmarks of an international law advanced by these nations as such norms ensured that their newly won independence was not subjected to external pressures.

Unlike existing norms of international law which were ascribed to the conduct of states and as constituting customary principles, most of the new norms were articulated by Third World states on behalf of peoples and were asserted on the basis of justice. A core sense of justice animated the norms that were proposed. The equality of people and the ending of domination of one people by another was the basis of the principle of self-determination. The notion that a people should have prior rights of enjoyment over natural resources and that the exploitation of such resources should not be the preserve of corporations of other states motivated the doctrine of permanent sovereignty over natural resources. The payment of just prices for primary products and the correction of distributive and other structural imbalances were the underlying reasons for the claim for a New International Economic Order. The eradication of poverty, the economic development of underdeveloped states, the granting of aid to the poorer communities, the elimination of hunger and disease became the aims on which the Third World based its alternative order. In later times, the foundations of a world order on norms of justice, somewhat differently identified, became the hallmark of literature generated in the West.⁴ The call for ethical foundations of international law may have existed in earlier times but, since the states of the Third World were presumed not to have personality in international law, the interests of these states did not have a role to play in shaping the norms of the earlier order.

The early periods of international law demonstrated how notions of justice could be subverted in order to ensure the enslavement of the larger part of humanity. Thus, the mandate system, described as “the sacred trust of humanity”⁵ is now seen as a technique for justifying the continuation of European rule over other people. Earlier, colonialism and the expansion of trade had been justified in terms of the brotherhood of man. Until the Third World became free, it was not able to collectively articulate its own views on justice-related norms so that changes to the existing international legal order could be made.

As indicated, changes came about in the field both with regard to the actors advocating the norms as well as the philosophical bases on which the norms were being advocated. Though developing states articulated these norms, they were articulated on behalf of peoples. They were also articulated as based on conceptions of justice and fairness shared by the peoples who had emerged from colonial rule and were still suffering its effects. This is consistent with the fact that developing states were created by political movements which articulated self-determination of peoples.⁶ These primary norms became new organising principles of

⁴ The writings, however, were dominated by philosophers and political scientists. It is difficult to understand why these writings did not cause responses among international lawyers in Europe or the United States. It is difficult to suggest that they were purposefully ignored. John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999); Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity Press, 2002); Jon Mandle, *Globalization and the Poor* (Cambridge: Cambridge University Press, 2003). See Thomas Pogge, “Recognized and Violated By International Law: The Human Rights of the Global Poor” (2005) 18 *Leiden J. Int'l L.* 717 for a powerful argument that rules of international law obstruct the aspirations of the poor. These works are representative of the writings of philosophers on the subject. The concept of justice that Third World international lawyers advocate is constructed on the basis of texts and movements that are inherent to their part of the world. They are derived from freedom movements, economic development, collective human rights, removal of structural economic inequalities, the recognition of transnational responsibility for harm and the subjection of the use of force to multilateral restraint.

⁵ Lord McNair in the *South West Africa Opinion* [1950] I.C.J. Rep. 1.

⁶ The movement of the Indian National Congress for Indian independence snowballed into ending the British Empire. Dutch rule in Indonesia ended after a protracted war. By the 1960s, the period of colonialism had ended. There was a need for new strategies of domination.

international law.⁷ A consequence was that power had to find new forms of expression through the assertions of new philosophies and the adoption of new stratagems.

In addition to these norms which sought structural adjustments in the political and economic order, there were other norms asserted which were seen as necessary for the creation of a just order.⁸ Fidelity to the United Nations Charter, particularly its objectives on securing the prohibition of war, was seen as the best means of securing the protection of the weak. The law of the sea was changed to reflect the interests of developing states through recognition of the exclusive economic zone of coastal states in which they had rights to fishery and other resources. The deep sea-bed was subjected to common ownership.⁹ In the area of international trade, notions such as preferential access to developed country markets for goods manufactured in the least developed countries came to be accepted. Some of the norms, like the one on the deep sea-bed were soon to be dismantled. Some only enjoyed lip service. Yet, collective action through the Group of 77, the Association of Non-Aligned Nations and other groupings of developing states enabled influence to be maintained in the United Nations and for a competing set of norms to be articulated. The need to court influence in the Third World kept both super powers in the Cold War era from attacking the space in which the Third World could articulate international norms that were favourable to its collective interests. There have been many studies of the impact of the Third World on international law.¹⁰

⁷ Mainstream international law was wary of recognising group rights. In the literature generated by philosophers, references to people's rights have gained common currency. John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999). For perspectives of Western international lawyers and a perceptible shift towards recognition of rights of peoples and group rights, compare Philip Alston, ed., *Peoples' Rights* (Oxford: Oxford University Press, 2002) with James Crawford, ed., *The Rights of Peoples* (Oxford: Oxford University Press, 1988). The antagonistic view taken to peoples' rights and collective rights is not accepted though it still appears to be vigorously argued.

⁸ An example is India not seeking to justify her intervention in Bangladesh on the basis of humanitarian intervention though it remains the clearest possible situation of such an intervention. Likewise, Vietnam showed similar reticence in its intervention in Cambodia. The doctrine has since been used in Kosovo and elsewhere by the European states without inhibition.

⁹ Though we see in the episode relating to the setting up of the International Sea Bed Authority, how the challenge of power quickly occurs and the advances are dismantled.

¹⁰ Notably by the Indian scholar, Ram Prakash Anand. The leadership of Professor Anand in this area must be noted by all those who come later to this subject. See, e.g., Ram Prakash Anand, ed., *Asian States and the Development of Universal International Law* (New Delhi: Vikas Publications, 1972); Ram Prakash Anand, *International Law and Developing Countries: Confrontation or Cooperation* (Dordrecht: Kluwer, 1987). Other Asian and African scholars have dealt with the theme of the European dominance of international law. Yasuaki Onuma, ed., *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (Oxford: Oxford University Press, 1993), in particular the appendix on Eurocentrism by Professor Onuma at page 371. Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004); Anthony Anghie, Bhupinder Chimni, Karin Mickelson & Obiora Okafor, eds., *The Third World and International Order* (The Hague: Martinus Nijhoff, 2003). Taking the themes worked on by R.P. Anand and other scholars, a younger group of Asian and African scholars have argued that there was a re-explanation of international law in order to justify the hierarchical structure which the colonial powers had succeeded in imposing. Tony Anghie, "Colonialism, Environmental Damage and the Nauru Case" (1993) 34 *Harv. Int'l L.J.* 447; James Gathii J, "International Law and Eurocentricity" (1998) 9 *E.J.I.L.* 184; Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003). Bhupinder Chimni has built up an extensive list of writings. Eg. B.S. Chimni, "Outline of a Marxist Course on Public International Law" (2004) 17 *Leiden J. Int'l L.* 1; B.S. Chimni, "International Institutions Today: An Imperial Global State in the Making" (2004) 15 *E.J.I.L.* 1. There were writings of Western scholars receptive to these trends. See, e.g., Bernard Roling, *International Law in an Expanded World* (Amsterdam: Djambatan, 1960). Charles Alexandrowicz did much to explore the legal context in which the early interaction between European states and their counterparts in Africa and Asia took place; see Charles Alexandrowicz, *The European-African Confrontation* (Leiden: A. W. Sijthoff, 1973) and Charles Alexandrowicz, *An Introduction to the History of the Law of nations in the East Indies* (Oxford: Oxford University Press, 1967). Also see Marti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of Modern International Law* (Cambridge: Cambridge University Press, 2002) at 127-143. The early writings of Richard Falk showed an appreciation of the need to accommodate the emergence of the Afro-Asian states.

There were, in this period, norms of justice counterpoised against norms of power that had earlier shaped international law. There was great support for the norms based on justice given that the world, waking up after a cruel world war with a feeling that inhumanity in any form should be abolished, was inclined to be partial to the viewpoints coming from the part of the world which had suffered the indignity of colonialism. The norms, claimed by the developing world on the basis of justice, were successful. Though attacked, they remain powerful forces within the international system to this day. Their success was also drawn in no little measure from the fact that there was a strong articulation of standards of human rights and humanitarian law during this same period.

However, these attempts at changing the world order became weaker with the ending of the Cold War and the dissolution of the Soviet Union. The last decade of the twentieth century set in motion trends that promoted the use of international law as a unilateral instrument to achieve the objectives of the single super-power, to the detriment particularly of the developing world. International law could previously have been seen as balancing the competing interests of different blocs of nations, the Third World itself being a neutral bloc. Now, the interests of the developing world came to be discarded. Theory was formulated so as to revive the realist notion that power was the determinant of international rules.¹¹ There was an effort to play down the significance of international law. Divisions within the Third World and a non-coincidence in their interests facilitated the process of decline in justice based norms.

The end of the Cold War was accompanied by other circumstances which resulted in undermining the unity of the Third World. The triumph of capitalism set off a chain of events which had the impact of undermining many of the norms that were fashioned by the Third World as well as bringing into dominance a set of new norms that favoured the hegemonic dominance of the United States and to a lesser extent, Europe. This was also a period in which commanding advances in computer and information technology triggered off a new phase of globalisation. This phase of globalisation was led by the United States as the most technologically advanced economy. Large multinational firms headquartered in the United States actively sought markets and production centres in the developing world. Their trading interests also expanded significantly as a result of the processes of globalisation. Consequently, international law came to be used as an instrument to ensure the dominance of the solitary hegemonic power and its interests.

Within the United States itself, new groupings became prominent. The role of private corporate power became pronounced. The ability of big business to dictate the policies of the state increased significantly. This dominance of corporate power within the United States seeped out to dictate world events in a manner that was favourable to the interests of multinational business, which was dominated by the large American corporations.¹² The decline of aid and the non-availability of capital resulting from defaults on sovereign lending made developing countries dependent on multinational corporations to fuel economic development. Developing countries began to court foreign investment. Competition for such investment further ruined any possibility of cohesion among these states. In this context, it was possible for the multinational corporations in conjunction with the power of

¹¹ See, in particular, Jack Goldsmith & Eric Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005). The revival of neo-realism in international law was coterminous with the so-called war on terror. In the process of justifying the war in a climate that made such justifications acceptable, there was a dismantling of the international law built on principles, justice and fairness. An important facet of this trend was for domestic systems to look inwards to determine the human rights standards in accordance with which they should conduct their affairs. This was so particularly in the case of the United States. Goldsmith and Posner's work is a demonstration of this trend. For a survey, see Michael Ignatieff, ed., *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005).

¹² The role of these corporations in securing intellectual property protection through international law norms is detailed in Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003).

their home state to control the business world and bring about norms that were favourable to their interests. The ability of private power to shape norms of international law became visible.¹³ The phenomenon of private power creating international law is seldom addressed by international lawyers. It is carefully hidden from view by the myth that international law concerns states. But it is a phenomenon that has been addressed by those in the field of international relations. As those who study the international political economy would have it, it is difficult to distinguish between international politics and international economics. They mesh into each other. In this case, transnational corporations became dominant actors in the markets of the globalising world and shaped the law through the exertion of the power of the single hegemonic state left on the international scene.

Coincident with these developments signalling a change of focus, a new theoretical paradigm came to drive international politics. This paradigm was given vigour by the writings of international relations experts, international financial institutions like the World Bank and the International Monetary Fund and politicians in power. It was received into international law by a group of influential American academics. The foundations of this paradigm rested on five basic ideas. First, that democracies did not go to war with each other and if that be so, then international law, one of the functions of which was preserving peace, should seek to promote democratic governance globally.¹⁴ Second, that market forces should be universalised as free markets ensure that economic development would reach every nook of the world. Free markets were the economic counterparts of democracy. Third, that there should be liberalisation of the flows of investment and other assets, leaving multinational corporations, seen as purveyors of technology and capital, the freedom to traverse the world under the protection of internationally accepted norms. Again, the global spread of the free market philosophy will ensure the achievement of such liberalisation. Fourth, that international trade should be organised on the basis of free movement of goods and services and that a near-constitutional framework established to supervise the regime through the creation of the World Trade Organisation. Finally, that there should be emphasis on individual rights and not on group rights, thus displacing notions of group rights such as the right to development, the right to an environment, the right to food or the right to secession in minorities. Welfare rights of groups were an anathema to those who supported this paradigm. This attack on group rights was furthered by the so-called war on terrorism. It became possible to associate violent dissent of large groups with terrorism and suppress such dissent. The economic aspects of this collectivity of ideas are associated with what has been described as neo-liberalism and as constituting the “Washington consensus”.¹⁵ Neo-liberalism has been used to denote largely the economic aspects of the

¹³ Private power had always shaped norms of international law. But in this period, there were more visible instances that were identified, not by international lawyers, but by scholars in other disciplines. International law cloaked the role of private power through the denial of personality of transnational corporations. Claire Cutler, “Globalization, Law and Transnational Corporations: A Deepening of Market Discipline” in Theodore Cohn, ed., *Power in the Global Era*, (New York: St Martin’s Press, 2000).

¹⁴ This idea has been borrowed by modern writers on the liberal theory in international relations from Immanuel Kant. M.W. Doyle, “Kant, Liberal Legacies and Foreign Affairs” (1983) 12 *Phil. and Public Affairs* 205 and 323. The ideas of economic and political liberalism were transported into international law by many American writers. See F. Teson & A.M. Slaughter “Liberal International Relations Theory and International Economic Law” (1995) 10 *Am. U. Int’l L. Rev.* 717. For Slaughter’s other influential articles on the same theme, see “The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations” (1994) 4 *Transnat’l L. & Contemp. Probs.* 377; “International law and international relations theory: a dual agenda” (1993) 87 *A.J.I.L.* 205.

¹⁵ The term “Washington consensus” connotes ideas on which the White House, the World Bank and the IMF, all present in Washington, agree. Joseph Stiglitz, a Nobel prizewinner and long-time employee of the World Bank has described the Washington consensus as involving the promotion of economic liberalism. Joseph Stiglitz & Andrew Charlton, *Fair Trade for All* (Oxford: Oxford University Press, 2005). The term neo-conservatism as including neo-liberalism is defined in Francis Fukuyama, *After the Neocons: America at the Crossroads* (New York: Profile Books, 2006).

paradigm. Since the paradigm involves political aspects, such as the spread of democracy, the collective paradigm will be referred to as neo-conservatism in this paper.

The paradigm was set in motion before the attack on the twin towers on 11th September, 2001 which sparked off the “war on terror”. It was given an impetus and a cloak by the events associated with the unleashing of the “war on terror”. In the climate of fear,¹⁶ it was possible to slip through the paradigm with greater ease and conviction. The paradigm, particularly the accent on democracy, the need to use force to spread it and its importance in the war against terrorism received a boost from the events on 11th September, 2001. It also helped to squash liberal opposition which was silenced by taunts of unpatriotism and the creation of fear of the possibilities inherent in the spread of terrorism around the world. In the US and Europe, liberal views were muted by being presented as signs of weakness in the face of terror. In this context, given the war on Iraq on the pretext of the still to be found weapons of mass destruction, a sixth assumption came to be made of the paradigm.

The unarticulated sixth assumption is that force could be used by the single super-power in order to achieve this model as it would benefit the world uniformly by eradicating terrorism and lifting the world from under-development. With the invasion of Iraq no longer justifiable on the existence of weapons of mass destruction, the need for an alternative justification became urgent. The premise came to be more clearly articulated. The overthrow of a dictator and the bringing of democracy were now given as the justifications for the invasion. The notion that force could be used to achieve any other aspect of the paradigm remains a distinct prospect. It would appear that the use of force to promote democratic governance has now received sufficient affirmation in the practice of the powerful states that constitute the Coalition of the Willing. The principal areas of international law in which the paradigm operates are the areas of international trade, international investment, human rights and the use of force. These four areas are marked out for further study in this paper.

The paradigm promotes a unilateralist vision and the imposition of that vision through the use of power. Unilateralism is demonstrable outside the areas selected for study. But outside these areas, unilateralism does not appear to be driven by a coherent thesis. It is driven solely by national interests. The refusal of the United States to accept the Kyoto Protocol¹⁷ is attributable to the view that it would affect the United States more than other states like China or India which emit similar levels of greenhouse gases but are not compelled to limit their emission levels. The American non-acceptance of the International Criminal Court is due to the possibility that its political and military officers may have to stand trial before an international court. It may be connected to the suggested paradigm in that the manner in which the hegemonic power conducts warfare will have to conform to standards determined by international conventions and administered by an international criminal court. No doubt, linkages with neo-conservatism can be found in these stances as well but they are not as clear as the linkages that exist in the identified areas. The areas referred to involve more than national interests. They are based on the preference for a certain philosophy on which the single hegemon and its allies desire that the world should be organised. They are driven by a definite paradigm that contains the six principles identified above.

The last decade of the twentieth century has witnessed the rapid emergence of an international legal system supporting norms driven by this paradigm.¹⁸ With the rhetoric on the war against terror after September 11, 2001, the drive towards the paradigm was intensified. Theoretical writings which sought to establish the paradigm as the basis of modern international law began to appear.¹⁹ Even before the intervention in Iraq, arguments were made about the right of intervention to promote democracy as an established right in international

¹⁶ Benjamin Barber, *Fears' Empire: War, Terrorism and Democracy* (New York: W.W. Norton & Co., 2003).

¹⁷ Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997).

¹⁸ In the economic sphere, it was isolated by Joseph Stiglitz as the “roaring nineties”; Joseph Stiglitz, *The Roaring Nineties: Paying the Price for the Greediest Decade in History* (London: Penguin, 2003).

¹⁹ Jack Goldsmith & Eric Posner, *The Limits of International Law* (New York: Oxford University Press, 2005).

law. Some American international lawyers openly declared the dawn of the new millennium as a constitutional moment for reformulating international law to suit the paradigms which favoured the United States. Theories that international law should be formulated to favour the interests of the United States acquired currency in academic circles within the United States.²⁰

But when dramatic swings of such a sort occur, there is an equally forceful swing in the opposite direction. Towards the end of the last century, disillusionment with the economic aspects of the paradigm set in. The Asian economic crisis, brought about by the rapid capital flight from the Southeast Asian region and the growing disparity in wealth that the neo-liberal model had brought about within the developed world, led many to doubt the validity of the assumptions on which the paradigm was based. Massive demonstrations against meetings of the institutions of the Washington Consensus occurred, starting with the Ministerial Conference of the World Trade Organisation in Seattle in 1999. One writer observed that the workings of the paradigm had led to a divide between the rich and the poor in the developed world, so much so that it had brought the Third World into the First World. It was argued that the disparities in wealth that had been created within the developed world had led to such resentment that violence was aimed at the institutions.²¹ Increasing and continuing demonstrations against the institutions espousing the neo-conservative paradigm in the capitals of the Western world served as possible evidence in support of this argument. It is now evident that resistance to the neo-conservative paradigm will come not only from the people of the developing world but from people within the developed world as well.²² It could well be that a state-centric international law is now being opposed by a people-centred international law, which globalisation has made possible through the provision of cheap and easy means of international communication and coordination.²³ Whether justice should once again be established as the foundation of international law is an issue that has begun to agitate the thinking of international lawyers of the West as well. The present situation must be considered as one in which the rise of power in international law is being met with sufficient resistance on the basis of ethical and justice-related notions through other bases of power by non-state actors which are gathering significant countervailing strength to affect international relations. Though the elite institutions of international law remove themselves from these trends by organising seminars and conferences asserting neo-conservatism, the reality on the ground as manifested in the streets of Paris or Bangkok seems to be different. An alternative international law is in formation. The rising power of strong hitherto developing state economies like China, India and Brazil may contribute to the creation of this new alternative international law in opposition to the law created by the hegemonic power and its pliant allies. It could well be that the old cohesion that existed among these states is about to be revived and that its revival would be accomplished, as in the earlier period, through the articulation of norms of international law.

As much as the hegemonic paradigm has received theoretical support, there is now a visible emergence of theoretical frameworks which seek to explain the resistance to the use of international law to secure the paradigms favoured by the powerful states. These alternative explanations either counterpoise justice related notions to power as the determinant of law or seek to explain that the nature of the resistance indicates that there are alternative sources of power within the international community that organised resistance could bring to bear

²⁰ These theories are largely associated with those who supported the war on terror and the invasion of Iraq, *e.g.*, see Goldsmith & Posner, *ibid.*

²¹ Caroline Thomas, "Where is the Third World Now?" in Michael Cox, Ken Booth & Tim Dunne, eds., *The Interregnum: Controversies in World Politics 1989-1999* (New York: Cambridge University Press, 1999).

²² Robert O'Brien, Anne Goetz, Jan Scholte & Marc Williams, eds., *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements* (Cambridge: Cambridge University Press, 2000).

²³ Balakrishnan Rajagopal, "From Resistance to Renewal: The Third World, Social Movements and the Expansion of International Institutions" (2000) 41 Harv. Int'l L.J. 529.

on norm creation. The use of justice-based arguments to coalesce such alternative bases of power has been resorted to in the past and will be revived. The states with less power as well as people and other groups are resisting the creation of international law on the basis of hegemonic power. The nature of this resistance needs study and direction. But, first, a quick look at the role of power in the shaping of international law in the past will be useful for understanding the forces at work in modern international law. This is important as the same states were at the receiving end of power in the previous episode as well. There were few redeeming features in the international law of the colonial age. Its history is important as it seems capable of repeating itself. International law of the colonial period did not have gentle civilizers of mankind. If there had been, arguments against the subjection of the vast amount of mankind to domination and exploitation would have been developed much earlier.

II. THE WORM'S VIEW OF HISTORY

The vision of the world order of the less powerful is conditioned by the historical evolution of international norms in the world order. Old ideas have a capacity for revival in new guises. The historical vision of the different players in international relations remains of vital significance. To the extent that norms give identity to entities in the world order, the developing states have a scarred identity that resulted from a denial of personality to shape world events in the formative and later stages of international law. It is the general thinking espoused by most international lawyers in Africa and Asia that the international order was formed by the statesmen and thinkers of the past, in order to facilitate the suppression of the people of the non-European world. The extent to which plain racism characterised the views of these "gentle civilizers of mankind" remains to be fathomed. The highly qualified publicists who are credited with fashioning international law on liberal principles could well be viewed as hired guns who simply furthered the interests of their paymasters.²⁴ The use of the standard of civilisation in international law to exclude the non-European world is a well-studied instance of the formulation of doctrines of exclusion of the states that harboured the most ancient of mankind's civilisations.²⁵ Modern views in international relations regarding rogue states, post modern states and failing states, are reminiscent of the use of the standard of civilization in the past.²⁶ The tenor of the arguments is that such states must be regarded as beyond the protection of the rules of the international system.

The Grotian vision of a world order that embraced all humanity is as suspect as that of the many modern Grotians who purport to hold it. There are studies that argue that the Grotian vision was motivated by purely mercenary considerations of enhancing the emergence of Dutch power in the Indies and of the personal career of the rising diplomat. The freedom of the high seas Grotius enunciated in early works may have been to assist

²⁴ For interesting analysis of Grotius both as the disinterested scholar who still enjoys a reputation as the father of international law and as a faithful employee of the Dutch East Indies Company who promoted its interests through the formulation of doctrines, see Yasuaki Onuma, ed., *A Normative approach to War: Peace, War, and Justice in Hugo Grotius* (Oxford: Oxford University Press, 1993); my colleague in the history department of the National University of Singapore has done much work on the impact of Grotius in South East Asia; see Peter Borschberg, "The Seizure of the Santa Catarina Revisited. The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch-Johor Alliance" (2002) 12 *Journal of Southeast Asian Studies* 102. Interesting work also has been done recently by Martine Julia van Ittersum. See her *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies 1595-1615* (Leiden: Brill Academic, 2006) and also her introduction to her edition of Grotius, *Commentary on The Law of Prize* (Indianapolis: Liberty Fund, 2006).

²⁵ Gerritt Gong, *The Standard of Civilization in International Society* (Oxford: Oxford University Press, 1984).

²⁶ There are many examples. The description of some states as rogue states puts them possibly beyond the pale of international law. The division of states into post-modern, modern and pre-modern, is also intended to have the consequence in international law of the application of different standards of treatment.

claims that were being made by the Dutch to traverse the seas for trade in the Indies. The Kantian vision of perpetual peace, a vision that some influential writers in the United States are seeking to revive in the post-Cold War order, is afflicted, in the view of non-European scholars, with racism. Kant's view that Europeans were more intelligent than some other races condemns his vision as not applicable to an order that should be based on equality of man, an articulated premise of the modern human rights movement. A democratic peace achieved in contempt of the vast amount of humanity may not be worth having.

There were rules made that facilitated the spread of European power and enslavement of non-European people and the dispossession of their lands. The rule that a nomadic people cannot possess land and that such land that they live on is terra nullius was fashioned to plant colonies in Australia, America and elsewhere. Rejected now as "a convenient falsehood",²⁷ the inequities that were committed in the name of international law to indigenous peoples still remain to be remedied. The International Court has rejected the view that a nomadic people are incapable of holding land.²⁸ The rules relating to extraterritoriality were imposed in non-conquered areas to ensure that the treatment of European traders conformed to external standards. In enclaves created by unequal treaties imposed on powerless states, European law was administered to European aliens living in them for purposes of trade,²⁹ and which an unequal trade facilitated. European concepts of individual property were imposed on peoples more accustomed to collective ownership of property so that their natural resources could be exploited under the guise of legality. Gun-boat diplomacy was common. It was not prohibited by international law. The use of force to impose unequal treaties under which trade and other relations could be carried out was equally common. These past experiences dictate wariness on the part of weaker states of today towards the emergence of modern doctrines in international law. The need for such wariness is enhanced by the fact that the techniques for the imposition of norms have changed but little. The new doctrines such as trade liberalisation and the preventive use of force are in the same areas and come dressed up with the same moral rhetoric as that which accompanied the past imposition of an unequal international law. Suarez, Vittoria and Grotius also justified open and liberal international trade on the basis of high sounding notions of the brotherhood of man soon to be followed by colossal massacres, extermination of whole civilisations and the advent of colonialism.³⁰

Historically, international law has functioned as the instrument which condoned enslavement of the vast majority of the peoples of the world. The potential for the continuation of this instrumental use of international law remains, predisposing international lawyers of the Third World to view the discipline with suspicion, while recognising that it also has an immense potential for achieving good for humanity. The creation of new identities by leaders of the developed world by branding certain states as rogue states or failing states entrenches old visions of standards of civilization. Academic writings provide further justification for such strategies. The alienation of whole regions as being based on fundamentalist irredentism promotes a fear which enables the easy introduction of rules favourable to the

²⁷ Justice Murphy of the Australian High Court in *Coe v The Commonwealth* (1979) 53 A.L.J.R. 403; 24 A.L.R. 118.

²⁸ *The Western Sahara Case* [1975] I.C.J. Rep. 12. Judge Dillard, in his separate opinion, observed that the movement in the law has been that "it is for the people to determine the destiny of the territory and not the territory the destiny of the people".

²⁹ The most spectacular of them were the treaties such as the Treaty of Nanking imposed on China after the Opium Wars. Extraterritoriality was also practiced in other areas which were not colonies, like Thailand and some areas of the Middle East.

³⁰ A powerful indictment of the Western origins of international law and its instrumental usage is made in Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law*, *supra* note 10.

will of the powerful.³¹ So do writings which describe some states as quasi-states or as failed states. The division of the world into pre-modern, modern and post-modern states raises similar problems. Whereas previously, the “standard of civilisation” was used by powerful states which were new to civilisation against states with ancient civilisations like India and China, the modern technique is for the powerful states to exclude states which do not toe the lines they draw from the protection of international law.

The parallels between what is happening in modern times with what happened in the past is striking. A parallel can be drawn between the justification used for control of the Philippines by the United States and the modern events in Iraq. It has been pointed out that the justification of bringing about a standard of democratic governance has played a role in both.³² Anthony Anghie has pointed out that Vittoria and other early jurists focused on property protection as a central norm in international relations- a phenomenon that is now taking place particularly in the law relating to investment protection.³³ The thesis that property protection is central to the achievement of progress is promoted.

The rhetoric that accompanied the mandate system of leading former colonies into better status accompanies the present occupation of Iraq. The invasion is justified on grounds such as deposing a cruel dictator and introducing standards of democracy, though the situation in Iraq unleashed by the hegemonic invaders has produced greater mayhem, abuse of rights and torture. Such parallels between the past and the present are many. The early instrumental use of international law is making its appearance in a garb that is recognisably tattered.

Periods of globalisation also have lent themselves to hegemonistic international law. The imposition of legal patterns by strong powers during globalisation is a visible factor in the history of law.

The main paradigm that drives the modern instrumentalist thrust has already been tagged as neo-conservatism. The paradigm is not dissimilar to that which drove international law in its earlier phases. In the past, trade too was followed by force and conquest with the justification that the less civilised had to be led into civilisation (now, called democratic governance). The only difference may lie in the fact that the paradigm is now driven by a single hegemonic state whereas, previously, the European states competed in carving out empires. Though the indicia of this paradigm have already been identified, it is necessary to look at it in greater detail. The areas in which the influence of the paradigm is most seen are sketched in the following sections. It is recognised that the same analysis could be applied to other areas of international law but the areas identified show the clearest evidence of the creation of power- based norms of international law.

The Third World will, once again, gather importance again in international politics. Its role as the neutral, intermediate force made it important in the Cold War era. Its importance in modern international relations is that the developing states are becoming the targets of the policies of the developed world. Several factors underlie this attention that is being paid to the developing world.³⁴ The first is terrorism. Parts of the Third World are seen as the source of such terrorism and are targeted as such. While the tendency may be to use force to eradicate terrorism, the wiser approach may well be to address the cause of terrorism which lie in a sense of unfairness of treatment. The indications are that this sense of unfairness is coming to be entrenched as a result of the indiscriminate targeting of civilians

³¹ Mark Salter, *Barbarians and Civilization in International Relations* (London: Pluto Press, 2002). The clash of civilizations that contemplates, is also an exclusionary device that advocates the triumph of the powerful or the real civilization.

³² See, e.g., the comparison between modern views that standards of governance could be promoted through the use of force and the same idea in American control of the Philippines; Sienho Yee, “The Potential Impact of the Possible US Response to the 9-11 Atrocities on the Law Regarding the Use of Force and Self Defence” (2002) 1 *Chinese Journal of International Law* 281.

³³ Anthony Anghie, *supra* note 10.

³⁴ Richard Young, *International Democracy and the West: The Role of Governments, Civil Society and Multinational Business* (Oxford: Oxford University Press, 2004)

and human rights abuses in pursuing the so called war on terrorism. The sensitivity with which Asian states address the issue of terrorism is in marked contrast to the manner in which it is approached by the Coalition of the Willing, which is to use maximum force to root it out. The second is the fact that terrorism is not confined to religious fundamentalism. It is also seen as the means of separatist struggles in different parts of the developing world. This again attracts concern. Secessionist wars and violent dissent against un-representative regimes are coming to be classified as terrorism. The third is that multinational capital flows, particularly in the resource sectors, have concentrated in the Third World where the resources are most abundant. The interconnection between the second and the third factor is also evident as resource politics are a main reason for separatist tendencies.³⁵ They also cause environmental and human rights concerns bringing non-governmental entities in the field into the picture. The fourth factor is that significant changes to the law have to be made for the hegemonic power to maintain order through force in the Third World. For these reasons, the developing countries have once more become the focus of the instrumental use of international law. Such use of the law has always been kept hidden by those who work in the field. Problems of legitimacy will clearly arise if the nature of the power shaping the norms can be identified. The ability of power to provide legitimacy to norms would be subjected to severe doubt. Legitimacy may be provided by norms of fairness or justice but the idea that naked power should be the basis of law sits uneasily with the notions of democracy which lie at the very basis of the new paradigm.

The linkages between the areas isolated for study must be stressed again. Multinational business, now conducted through multinational corporations, is crucial to the maintenance of economic power, as it was in the times of colonialism. The protection of foreign investment through the formulation of binding and enforceable norms becomes crucial to the exercise. Such business must also be able to traverse the world taking trade again under conditions of protection. Internal secessionist movements and articulation of group rights strike at the ability of such business to be conducted in terms of market competition. Order must be maintained in the market, particularly when it comes to providing natural resources that are vital and for the quelling of secessionist movements that seek to break up existing order. Order must be imposed by force if necessary so that free market forces could function within democracies. There is a chain which links the four areas. There was such a chain in the past of international law as well. The four areas identified may now be examined.

The days of imperial international law will never be replicated. The difficulty that the United States has in controlling events in Iraq demonstrate the difficulties involved in imposing hegemonic power on other states. Nevertheless, in many other areas of international life, the instrumental use of international law in order to fashion rules that will ensure respect for the will of the powerful will be attempted and may succeed. But it is inevitable that resistance to such rules will set in. Such resistance took longer to appear in imperial times. It would appear that in the present period, resistance will develop more rapidly because of the existence of faster means of mobilizing such resistance. Such resistance will come not only from the weaker states but also from transnationally organised non-governmental states. The picture that emerges from the study of the areas described below indicates that such resistance would be strong enough to prevent the emergence of any strong norms in the areas, leaving the law in the area as a set of heavily contested norms. Unlike in the imperial period, the efforts to use international law in an instrumental fashion will not go unchallenged. They will be met with resistance in those areas where interests of developing

³⁵ Aceh in Indonesia, Bougainville in Papua New Guinea, the River Province of Nigeria, Darfur in Sudan, the Xianming Province in China, Kashmir in India and Baluchistan in Pakistan and Chechnya in Russia are areas of secessionist movements as well as areas that are rich in resources. There has long been involvement of external forces in these movements. As secessionist problems in Canada and in Spain indicate, secession movements are by no means confined to the developing world. This is reflected in the increasing attention being paid in international law to the problem of secession.

states and other global interests in the areas of environmental protection, human rights and economic development collide with those of the hegemonic power and its complicit allies. These areas of conflict may now be looked at.

III. NEO-CONSERVATISM AND THE INTERNATIONAL LAW ON FOREIGN INVESTMENT

Foreign investment protection played a central role in the formulation of the principles of state responsibility in international law. Despite the effort of the International Law Commission to shift attention away from this contentious area, interference with alien investment remains the most fertile area for the discussion of state responsibility. Expropriation of property of aliens was the context in which much of the law on state responsibility was devised.³⁶ The principles developed in the context of relations between the United States and Latin American states, with the United States relying on external minimum standards recognised in international law. There was no need for such rules in the rest of the world as flows of foreign investment took place in the context of colonialism. After decolonisation, the conflict between the United States and Latin America became universalised, with the newly independent states espousing the Calvo doctrine³⁷ through the resolutions on the New International Economic Order and the Charter of Rights and Duties of States. While the developed states resisted the universalisation of the Calvo doctrine, the multinational corporations exerted their private power in formulating a system of investment protection through international law by employing the low-order sources of international law. The phenomenon of the use of private power in the creation of international law is clearly visible in the theory of the internationalised contract, the breach of which creates state responsibility.³⁸ One facet of Western international law has been to slur over the fact that private power, in conjunction with state power, has been capable of creating rules of international law. This was done largely through the fiction that states alone had personality in international law thus cloaking the fact that multinational corporations, which had financial power far in excess of nation states, were shielded from liability.³⁹ A paradoxical situation resulted. These corporations enjoyed rights but were not subjected to obligations or liabilities in terms of international law. Further, they in fact made international law without having personality in terms of that law.

The low order sources of international law permitted such private making of public international law. Using private international law concepts of party autonomy and choice of law,⁴⁰ the argument was made that multinational corporations could choose neutral systems such as general principles of law as the applicable law in the foreign investment contract

³⁶ The final reports of the International Law Commission on State Responsibility diverted attention from this fact and sought to formulate the principles circumventing this contentious area. But, a glance at any textbook would show the extent to which principles of state responsibility are dominated by issues of expropriation and foreign investment. It is an early instance of a clash between developing and developed states. The final reports of the Commission patch over this fact and articulate rules that do not reflect the controversy. The Commission Report diverges from the textbook treatment of state responsibility and, as a result, is increasingly relegated to play a secondary role in the treatment of state responsibility in the texts.

³⁷ The Calvo doctrine was formulated by the Argentinian Foreign minister, Carlos Calvo to assert that foreign investment was always subject to the domestic laws of host states and disputes involving it had to be resolved by domestic courts. It animated subsequent foreign investment policies adopted by the developing states such as those in the New International Economic Order.

³⁸ A Maniruzzaman, "State Contracts in Contemporary International Law: Monist versus Dualist Controversies" (2001) 12 E.J.I.L. 309.

³⁹ Again, the role of the law on state responsibility has been to hide the fact that the real actors are multinational corporations and individuals. The fiction in international law of not recognising the real actors enables the impunity of these corporations for their misconduct and of individual leaders from direct liability. The situation is slowly being remedied.

⁴⁰ On the extent of party autonomy which was circumscribed by notions of mandatory laws that could not be excluded, see Peter Nygh, *Autonomy in International Contracts* (Oxford: Oxford University Press, 1999).

between the host state and the foreign corporations. The arbitration clause ensured that an external tribunal will settle disputes arising from the contract. The introduction of a stabilisation clause into the contract ensured that the laws of the host state would be frozen for the purposes of the contract as at the time of the entry of the foreign investor. A series of arbitral awards, followed by confirmatory writings of the so called “highly qualified publicists”, all of them coming from the so called “civilised legal systems”, held that such a contract was akin to a treaty in that responsibility of the state followed the event of the breach of the contract and failure to amend the breach. The use of awards of tribunals and the writings of “highly qualified publicists”, often mercenary participants in the litigation writing up their opinions or briefs as articles in “learned” journals, resulted in the creation of an international law in the area.⁴¹ The practice still continues. The members of the so called “arbitration fraternity” elevate each other in status, cite each other’s views and create law on the basis that they are “highly qualified publicists”. It is hypocritical that no text on international law adverts to this practice of lawmaking for so many states and peoples by so few in an age in which there is much talk of democratic legitimacy. These trends were kept in check by the vigorous assertion of competing principles by the developing states in General Assembly resolutions. Yet, such alternative sources were dismissed by members of the “arbitration fraternity”⁴² as unable to create international law or as expressing *lex ferenda*.⁴³ It is strange that the collective wishes of the states of the world solemnly expressed through resolutions of international institutions could not create international law but often uncontested arbitral awards and writings of a few “scholars” could create international law.

With the rise of neo-conservatism in the 1990s and the dissolution of the unity of the Third World, this resistance to the preferred norms of private power crumbled, leaving it possible for the preferred norms of neo-conservatism to be articulated in tandem by developed states and their business groups. Beguiled by theories of free market-led development or compelled into submission by the International Monetary Fund and the World Bank, developing states participated in many bilateral and regional investment treaties. These were asymmetric treaties between a developed state and a developing state, stating an initial lie that its aim was to protect reciprocal flows of foreign investment but in effect protecting only the one-way flow that takes place from the developed state to the developing state. Liberalisation of entry of foreign investment became a tenet of the Washington consensus. Though many states willingly accepted such liberalisation, others were forced to do so by denial of loans and refusal of insurance in the absence of treaty participation.⁴⁴

Investment treaties also included provisions on protection of investments and standards of treatment. Several international lawyers of developed countries have argued that the prolific making of such treaties had resulted in customary international law norms. This has been shown to be fallacious for though the form of the treaties was similar, they contained variations which showed that they were outcomes of different negotiation stances resulting in a balance of interests of the two negotiating states. It is again a strange phenomenon that such a simple fact could not be discerned by the many international lawyers who sought to convert these treaty notions into customary international law. It is legitimate for developing country international lawyers to seek an answer for such a phenomenon from their counterparts in the developed world. Unless a credible answer is forthcoming, the

⁴¹ The practice continues to this day. The so called “academic journals” of the discipline are replete with articles which seek to bolster positions taken in litigation and are favourable to the interests of multinational corporations. Many of these journals are edited by practitioners themselves and funded by multinational corporations.

⁴² The members of this fraternity are largely male and Anglo-Saxon with an occasional Latin American, African or Asian. The non-Anglo Saxon aspirants for membership are the more interesting ones to watch for they outdo others in their zealotry to belong to the fraternity.

⁴³ See Professor Dupuy, the arbitrator in the *Texaco Arbitration* [1977] 53 I.L.R. 389.

⁴⁴ Overseas Private Investment Corporation (OPIC), a body attached to the US Department of State, will not insure investments in developing countries which do not have a bilateral investment treaty with the US.

charge that there was a desire to participate in the neo-conservative effort to bolster these treaties as creating universal customary international law is inevitable. The issue is whether these international lawyers show sufficient academic fidelity to their discipline or whether they are engaged in an enterprise of promoting rules that are favourable to the interests of private and public power, thereby sacrificing the integrity of the discipline.

A more important outcome is that many of these treaties contained arbitration provisions giving multinational corporations the right to unilaterally invoke arbitration. This resulted in a profusion of arbitral awards, especially through the International Centre for Settlement of Investment Disputes (ICSID), resulting in an opportunity to articulate further principles of investment protection and standards of treatment of investment that accorded with the interests of multinational corporations. ICSID, consistent with the neo-conservative vision of its parent body, the World Bank, promotes notions of investment protection and liberalisation that accentuate free flows of assets and maximum protection of the property of multinational corporations on the untested assumption that such flows of foreign investment bring about economic development.⁴⁵ There has been no credible evidence to show that investment treaties or arbitration promote foreign investment flows. World Bank studies, as well as other studies, show that there is no credible evidence to show a correlation between investment treaties and foreign investment flows. It is an instance when developing states are compelled to lose sovereignty without gaining anything in return for doing so. Foreign investment is largely made by multinational corporations, entities which are supposed to be without personality in positivist international law. Yet, in the sphere of investment law, they are given rights and standing without any responsibilities. As much as companies such as Enron and Parmalat bring about economic crisis within their domestic economies, so too could multinational corporations affect their host economies. The Bhopal incident provides a classic instance of a multinational corporation causing colossal destruction and an absence of remedy for the loss. International law is fashioned on the hypothesis that all investment that is brought to developing countries must be protected because they are uniformly beneficial to economic development. The rationale does not admit that multinational corporations must also bear responsibility for their actions. That is the premise on which investment treaties work. It is a premise that lacks any empirical basis. The loss of regulatory control that the treaties entail is not justified by the unprovable hypothesis that such treaties lead to foreign investment flows.

Efforts to bring about norms that would create responsibilities on the part of multinational corporations have been resisted on the ground of absence of personality. The classic ploy has been to recognise that there is a problem as far as accountability is concerned but that the only method by which the matter can be dealt with is through the formulation of non-binding codes containing exhortations to multinational corporations to conform to its prescriptions. The emergence of strong norms has been stunted through countermanding of such efforts by the home states of multinational corporations. The phenomenon that results is that while treaties protecting multinational corporations are increasing, the rules that seek to impose duties on these corporations are aborted. This situation leads to scholars arguing that existing principles of fair and equitable treatment which were devised to protect multinational corporations, permit the misconduct of the corporations to be pleaded as a defence to interference with the investment.

Despite such arguments that seek to redress the visible inequity involved in a system that enables the multinational corporation to assert rights but denies that there could be affirmative duties on the part of the corporation due to its lack of personality, the major thrust of the law contained in investment treaties is to confer protection on multinational corporations. Not only do the treaties contain norms that emphasise protection, but, the scope

⁴⁵ There is growing economic literature which questions the view that investment treaties lead to increasing flows of foreign investment.

of their protection is enhanced by the expansive interpretations given to them by arbitral tribunals. The fashioning of norms favourable to the objectives of investment protection has been a consistent pattern in arbitral awards made within the ICSID system. Though neutrality is the ideal subscribed to in international arbitration, the pattern of appointing arbitrators favourable to the articulation of norms that protect the interests of international business has existed for a long time. It is alleged that this pattern is inherent within the system of international arbitration itself, so that only persons known to be favourable to definite outcomes are chosen as arbitrators.⁴⁶

Expansive interpretations of expropriation have taken the law on the subject beyond what existed previously. The unbundling of rights to property had been achieved in the earlier awards of the Iran-US Tribunal, the exact precedential value of which in terms of international law is doubtful. But, such unbundling has been carried into the ICSID and other foreign investment arbitration by the personnel who sat on the Iran-US Tribunal or by those willing to regard the awards as precedent. As a result, any violation of the right to property or any depreciation in value of the property as a result of the actions of any person associated with the host state government has been held to be expropriation. The concept of the right to property in investment protection law has been made so absolute that it is, according to some American constitutional lawyers, beyond even the scope of the right to property as recognised in the American constitution.⁴⁷ This is in a world in which the right to property is so diverse that some systems are loath to recognise individual property rights without subjecting them to heavy qualifications in the public interest.

A state's regulatory powers are so marginalised that measures taken to protect the environment or those taken in response to financial crises are construed to be compensable expropriation making the protection of foreign investment trump even vital interests of the state. This is evident in a multiplicity of cases arising from the Argentinian financial crisis.⁴⁸ The old international law provided against such a course by ensuring that the exercise of police powers did not amount to expropriation which was compensable. But with the reinterpretation of expropriation to include any depreciation in the value of the property resulting from governmental action, this rule had been diminished.⁴⁹ However, there has been a return to the old position in some of the investment treaties concluded by the United States where regulatory takings are exempted from the scope of the expropriation clause. Consequent upon the Methanex litigation and award, the trend will continue. One has to wait until the rich states are affected before there can be change. It is still left to be seen whether the change is uniform.

One feature of the recent arbitral awards is that they emphasise the standards of treatment in the treaties rather than the claims based on expropriation. These treatment standards are couched in amorphous terms that refer not only to the older international minimum standard but also to the fair and equitable standard of treatment. The attempt to create a higher standard through the use of a "fair and equitable standard" provision has been beaten

⁴⁶ Yves Dezaley & Bruce Garth, *Dealing in Virtue: International Commercial Arbitration and Transnational Legal Order* (Chicago: University of Chicago Press, 1996).

⁴⁷ Vicki Bean & John Beauvais, "Global Fifth Amendment? NAFTA's Investment Protection and the Misguided Quest for an International Regulatory Takings Doctrine" (2003) 78 N.Y.L. Rev. 30.

⁴⁸ About thirty cases have arisen from the Argentinian financial crisis. *CMS v Argentina* [2002] 32 I.L.M. 395 is representative of the cases. Here, though the tribunal did not consider the exchange controls instituted by Argentina in response to the crisis as amounting to expropriation, it held that they violated fair and equitable standards under the US-Argentina treaty. There are annulment proceedings pending. The argument raised is whether in times of economic crises, the state should not be permitted to take measures that affect property and contractual rights without paying compensation, which it can hardly afford at the time. Issues of necessity and self-help arise. The basic doctrine of sanctity of contracts comes under stress in such situations.

⁴⁹ In *Ethyl Case* [1999] 38 I.L.M. 707, a ministerial statement regarding the contemplated ban of a substance thought to be carcinogenic was considered expropriation. Canada settled the litigation by paying compensation.

back as a result of the NAFTA Commission interpreting the provision as no more than the statement of the old customary international law standard of minimum treatment. When the birds come home to roost, they have to be shooed away. The likelihood of developed states facing the treatment that they meted out to developing countries in the past may curb such expansionary trends of interpreting treatment standards as newer treaties concluded by developed states may contain appropriate restrictions on otherwise expansionary strategies that litigators may seek to adopt. Yet, the treatment standards afford a virtual *carte blanche* for the development of the law through the uncontrolled discretion of arbitration tribunals.⁵⁰

The most ambitious neo-conservative project was the bringing about of a Multilateral Agreement on Investment (MAI). It was a project the Organisation for Economic Co-operation and Development (OECD) had begun in 1996 and had given up in 1998 due to the internal discord that arose among the developed countries themselves. It failed largely due to internal dissension within the developed states⁵¹ as well as global protests organised by non-governmental organisations. The first organised resistance to the neo-conservative agenda proved to be remarkably successful and movements organised without recourse to state power succeeded in ending a project that sought to serve the interests of elite groups within states. A people-oriented resistance to the neo-conservative agenda stalled the possibility of universalising the market principles of liberal entry and protection through a single instrument. This demonstrated that, as much as private power can make law, the power of people united across the world can also stop rules that are based on power alone. This power of resistance will assume an increasing role as the effort to make international law an instrument of power accelerates. People will reach towards each other to prevent such a course taking hold.

The project for the formulation of multilateral investment rules moved into the WTO where there was again opposition to the bringing about of provisions on foreign investment under the auspices of the WTO. The projected WTO instrument, judging by the studies of the Working Groups on the subject, would largely have tracked investment treaties without reference to the investor-state remedy that such treaties provide. There were disagreements between states as indicated by the various reports of the working group established to study the subject. A coalition of developing states led by India, China and Brazil put paid to this venture which has now largely been relinquished. The last paper presented by this coalition indicated that they will not accept an instrument on investment which did not mention the issue of corporate responsibility. It is unlikely that an instrument which addresses the issue of corporate responsibility will prove acceptable to multinational corporations or the capital-exporting states.

The possibility of uncontrolled discretion by the arbitration tribunals, invoked unilaterally by the investor, thereby creating law that favours the neo-conservative agenda still remains. Signs of this are ominous. Arbitrators must subscribe to the tenets of the powerful if they are to remain in business. Hence, they adopt an attitude that does not buck the system. ICSID arbitration is a system founded upon the neo-conservative tenet that foreign investment arbitration is uniformly beneficial. The long forgotten "umbrella clause" in investment treaties are dusted up and given new meanings to favour investors. In extending

⁵⁰ This has been seized upon by arbitrators and academic commentators who have attempted to create new rules of protection. For academic views approving such expansions, see Christopher Schruer, "Fair and Equitable Standard in Arbitral Practice" (2005) 6 (3) *Journal of World Investment and Trade* 357; Rudolf Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties" (2005) 39 *International Lawyer* 87. For criticisms of these developments, see M. Sornarajah, "Expansionary Trends in International Investment Arbitration" in Karl Sauvant, ed., *Developments in International Arbitration* (New York: Columbia University, 2006 (forthcoming)).

⁵¹ The French and the Canadians were reportedly concerned about their cultural industries being swamped by the United States if freedom of establishment was permitted. Environmental interests swayed the Dutch government against the M.A.I.

the law on this subject, the positions adopted by arbitrators are visibly of a particular inclination. Thus, tribunals have held that violation of a foreign investor's legitimate expectations are wrongs for which compensation would be provided, an idea that is nowhere to be found in the rules of state responsibility but only in the administrative law systems of some states in a more attenuated form than is stated in these awards.. The import of such domestic principles into international law seems to flow so easily in this area. But such attempts will invite a reaction. There are already visible signs that states will renegotiate investment treaties once their initial period of validity is over. Arbitration tribunals are increasingly being met with anti-suit injunctions brought by states. The trend may well indicate that if the awards are made, they are likely to be less acceptable and enforceable. The relentless pursuit of a neo-conservative agenda may have done the system more harm than good.

There is a beating back of the neo-conservative views on foreign investment which have stressed only the protection of multinational investment. This is evident in the failure to create multilateral rules as well as the fact that investment treaties are being drafted with greater sensitivity for the need of states to perform regulatory functions. Exceptions are being made for interferences for environmental, health or safety reasons. The inroads that the corporate accountability movement have made will bring about international norms as to how multinational corporations should behave in host states. The responsibility of the home states of multinational corporations, which profit from their activity without hitherto bearing responsibility for any harm that such activity causes, is also an issue that has been raised. There is progress away from the norms preferred by the neo-conservative vision to bring about a balance that allows host states to pursue their development objectives.

But what is central to the developments in this field is that a handful of the so called "arbitration fraternity" has arrogated for itself the power to make law in this field without any democratic mandate or a basis of acceptance within the international community. It is a shotgun approach to the purported making of law, with international institutions giving loans, multinational corporations and developed states acting in tandem to ensure that awards are made on the basis of norms that suit property protection. It would now appear, however, that as developed states are also becoming targets of this law, a significant backtracking is taking place. The need for investment protection does exist but so does the need to protect the regulatory space of the developing country so that it can determine its own course of development. The restoration of a balance between these interests is a matter of urgent concern.

IV. NEO-CONSERVATISM AND INTERNATIONAL TRADE

The strides that market-oriented neo-conservatism took in the area of international trade in the 1990s was striking. The foundation of the World Trade Organisation with an expanded agenda beyond international trade under the old GATT system to include intellectual property,⁵² services,⁵³ investment⁵⁴ and other areas entrenched the influence of neo-conservatist thinking in the international law relating to trade.⁵⁵ Its expansion through linkages with environmental and labour issues has also been mooted. Efforts were also made to extend its competence into areas known as the "Singapore issues" -competition, investment, government procurement and trade facilitation. Thus, a system that was intended to deal solely

⁵² Through the Trade Related Intellectual Property Rights (TRIPS), Annex 1C of the Marrakesh Agreement Establishing the World Trade Organisation.

⁵³ Through the General Agreement on Trade in Services (GATS), Annex 1B of the Marrakesh Agreement Establishing the World Trade Organisation.

⁵⁴ Through Trade Related Investment Measures (TRIMS), Annex 1A (Multilateral Agreements on Trade in Goods) of the Marrakesh Agreement Establishing the World Trade Organisation.

⁵⁵ Michael Trebilcock & Robert Howse, *The Regulation of International Trade*, 3rd ed. (New York: Routledge, 2005).

with cross-border trade in goods has assumed a role that covers a range of activities that take place within the territory of states and impinge heavily on the activities of states. The WTO was founded at the height of the triumph of neo-conservative philosophy. The triumph of capitalism was signified by the establishment of an organisation based on the tenets of global free-market competition. States, both developed and developing, were enthralled with the idea that free market philosophies would drive the age of globalisation towards greater prosperity. States were soon to recover from this attitude as successive financial crises set in, triggered by capital flight out of states as a result of the liberalisation of financial flows. Economists also began pointing out that the developed states themselves had achieved development not through free trade but through the existence of protectionist barriers to free trade.⁵⁶ But before states sought to undo the damage of rapid liberalisation, the protests on the streets of Western capitals against the onward march of neo-conservatism were by far more vigorous such that the real challenge to trade liberalisation without safeguards was initially mounted by these non-state movements. The non-governmental organizations challenged these developments on the premise that agencies not rooted in democratic legitimacy were making rules that affected people. This had a significant impact on developments.⁵⁷ Again, one could say that it was a people-centred international law creation process that challenged the law created by states in this area and expressed concerns that governments had not considered. The euphoria for globalisation that early studies showed⁵⁸ was soon dampened by studies that expressed discontent with globalisation and the rapid cleavages that it brought about within societies as well as on the international plane.⁵⁹ These changes made some scholars talk in terms of a new multilateralism, consisting of peoples movements that would “reconstitute civil societies and political authorities on a global scale, building a system of global governance from bottom up”.⁶⁰ Whether this happens or not, there has no doubt been a realignment of forces that has brought about change as a result of states as well as new actors like non-governmental organisations confronting the positions taken on the basis of neo-conservatism.

The WTO was soon to become the symbol of the excesses of neo-conservatism and the target of anti-globalisation protesters. The WTO began to represent the market philosophy that was the essence of neo-conservatism, seen as driving the process of globalisation towards capitalism, the assertion of the rights of the rich and a disregard of values associated with the welfare state. The WTO was sold to lawyers and others as an institution that brought the rule of law to international trade.⁶¹ It was suggested that it displaced the earlier rule of power that had prevailed in the area. But the issue became one of who had designed the law that was to be enforced by the new WTO dispute resolution mechanism. It increasingly appeared

⁵⁶ Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (London: Anthem Press, 2005). Joseph Stiglitz & Andrew Charlton, *supra* note 15. There is a group of economists who have pointed out that each state should gear its economic policies to suit its own stage of development and circumstances. They do not accept the view that the single notion of economic liberalism will result in development.

⁵⁷ Robert O'Brien *et al*, ed., *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements* (Cambridge: Cambridge University Press, 2000).

⁵⁸ There exist a mixture of populist works and academic ones. The literature is vast. Among the many populist works in favour of globalisation are: Thomas Friedman, *Lexus and the Olive Tree* (London: Harper Collins, 2000); Thomas Friedman, *The World is Flat: The Globalized World in the Twentieth Century* (London: Penguin, 2006).

⁵⁹ Again, there is a mixture of populist and academic works against globalisation. The list is long, as in the case of works in favour of globalisation. See, e.g., John Gray, *The False Dawn: Delusions of Global Capitalism* (London: Granta, 1998); Joseph Stiglitz, *Globalization and its Discontents* (London: Penguin, 2000).

⁶⁰ Robert Cox, *The New Realism: Perspectives on Multilateralism and World Order* (London: Macmillan, 1997) at xxvii.

⁶¹ John H Jackson, “Sovereignty, Subsidiarity and Separation of Powers: The high-wire balancing act of globalization” in Daniel L.M. Kennedy & James D. Southwick, eds., *The Political Economy of International Trade Law* (Cambridge: Cambridge University Press, 2002) 13.

that the laws were already designed to serve the interests of the powerful and enforce the neo-conservative ideology. There was rule of law based on principles designed by power and not a rule of law based on justice. The most visible example of this is the instrument on intellectual property, the Trade-Related Aspects of Intellectual Property Rights (TRIPS).

TRIPS embodied the desired intellectual property laws of the United States. Some would argue that TRIPS ensured that the principal bases of American intellectual property laws became the standard for the world by being embodied in TRIPS and became enforceable through the WTO Dispute Settlement Mechanism. Previously, the United States had used sanctions under Section 301 of the Omnibus Trade Law to ensure that there was conformity with the basic standards of intellectual property in countries in which its trade operated. The aim of TRIPS was to transfer the responsibility of policing the enforcement of what were in essence the principles of intellectual property preferred by the United States to the WTO so that the task would be performed by a multilateral entity that had legitimacy. Intellectual property laws are the very epitome of capitalist ideology. The extent to which private power of the major business interests in the world and public law worked in tandem to bring about a globally applicable set of rules has been documented in several studies.⁶² The rules are premised on the notion that innovation requires investment of capital and that the innovator must be rewarded for his discoveries. The market must reward him for his efforts and encourage further innovation by him and others through the grant of a monopoly over the innovation so that the innovator could reap monopoly profits for a period of time. The fencing of property so that others may be excluded except on exaction of rent was extended to the fencing of knowledge so that use would not be in common but would be on payment of a monopoly rent. The idea is entirely Western. The notion that innovation, which is but a quarrying from the existing world of knowledge should be shut out to others is foreign to many cultures. Progress in the history of mankind had been made possible only because knowledge found in one part of the world was freely made available to the other. Yet, business interests have deemed otherwise and the universalisation of the American rules on intellectual property protection was achieved through TRIPS. It has been passed off on the economic basis that such protection will enhance the welfare of the poor by increasing access to technology. This is despite the fact that states like Japan and Canada, now champions of intellectual property, imitated and adapted technology discovered elsewhere in their rise to economic prosperity.⁶³

There was vigorous opposition to the application of TRIPS particularly in the pharmaceutical sector. The opposition took hold particularly when it came to the issue of the urgency to provide drugs to treat AIDS in Africa where it had reached epidemic proportions. Parallel imports were readily available from India and elsewhere. Faced with threats that the African states would permit parallel imports, TRIPS was hastily amended to permit the exclusion of much needed pharmaceutical drugs. TRIPS is popularly attributed to the political power of American pharmaceutical companies that wanted to ensure the protection of their drug innovations. The United States ensured that this was done through TRIPS. But the AIDS episode must be seen as a defeat of the policy. The United States itself was to defeat the policy when the anthrax scare took hold after the September 11, 2001 bombing of the World Trade Centre. The antidote was protected by patent but the United States ordered that the patent be waived so that the drug could be manufactured and made ready for dispersal in the event of an anthrax attack.

The obvious and comic use of the patent laws generated by TRIPS are the efforts to patent products made from the extract of the neem tree (used for centuries by Indians as

⁶² Susan Sell, "Structures, Agents and Institutions: Private Corporate Power and the Globalisation of Intellectual Property Rights" in Richard A. Higgott, Geoffrey Underhill & Andreas Bieler, eds., *Non-state Actors and Authority in the Global System* (London: Routledge, 1999) 91.

⁶³ F. Rushing & C Brown, eds., *Intellectual Property Rights in Science, Technology and Economic Performance: International Comparisons* (Washington: US Chamber of Commerce, 1990).

an antibiotic), basmati rice, curry (the staple diet of Asians for centuries) and chickpeas. Such incidents of bio-piracy may be dismissed as comic attempts at greed deserving derision. But what is more serious is the patenting of plant varieties and the implications this would have on world hunger.⁶⁴ Here, again the law is being fashioned not by need but by greed. The concentration of plant breeding rights in the hands of a small number of biotechnology companies around the world will have an impact on world hunger. The UN Sub-Commission on Human Rights has already noted the human rights implications of these trends and called attention to the conflicts between intellectual property rights and human rights. Its resolution raised the concern that “the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food and the right to self-determination”. It reminded “all Governments of the primacy of human rights obligations over economic policies and agreements”.⁶⁵ Neo-conservatism has generally ensured the primacy of economic factors over social and political considerations.

Another issue that has been attacked vigorously is the protection of aboriginal and native knowledge. There was widespread piracy of such knowledge by multinational corporations which sought to market them by packaging the products and giving them trade names. In many instances, the knowledge that was unique to tropical forest areas was protected by the Biodiversity Convention. The United States disregarded this Convention as it did not help its commercial interests. The clash between these two interests demonstrated that the interests of the powerless groups such as native peoples did not have representation in international law. Again, the absence of power was to some extent supplied by the support given to these issues by non-governmental organisations.

Other instruments have equally been regarded as objectionable after they had come into force. This indicates that such instruments may be readily accepted in climates of euphoria for certain ideological standpoints, but upon mature reflection, earlier stances are reconsidered. The beating back of the “Singapore issues” through the concerted action of the developing states indicated that a dent had been made in the thrust of the neo-conservative agenda in international trade. It also signified that a coalition of states was being formed to prevent the agenda from being fully implemented.

The manner of the demise of the effort to introduce WTO competence over the area of investment is instructive. After the OECD attempts to bring about the MAI were defeated within the OECD itself,⁶⁶ the effort was transferred to the WTO. The WTO Singapore ministerial conference decided on studying investment as an area for future extension of WTO competence. But the developing countries did not want such expansion of competence. China, India, Brazil and other developing countries submitted a working paper which indicated that they would not support a WTO instrument that was devoted to the protection of investment as the MAI was designed to accomplish unless it provided for the control of misconduct by transnational corporations as well. This effort shows how the developing world’s concerted action can prevent the neo-conservative trends from taking root.

⁶⁴ Michael Blakeney, “Intellectual Property Rights and Global Good Security” in David Vader, *Intellectual Property Rights: Critical Concepts in Law*, Volume 3 (London: Routledge, 2006) 315 which details instances of such bio-piracy and indicates efforts at resistance.

⁶⁵ As cited in Blakeney, note 59 at 333. See further Peter Drahos, “The Right to Food, Health and Intellectual Property in the Era of Biogopolies” and Sam Ricketson, “Intellectual Property and Human Rights”. Both papers can be found in Stephen Bottomley & David Kinley, eds., *Commercial Law and Human Rights* (Aldershot: Ashgate, 2002).

⁶⁶ The MAI met with widespread protests within the OECD states once its existence came to be known. The secrecy in which it was negotiated is itself striking. But, once revealed, the MAI met with protests and had to be withdrawn when France, Holland and Canada expressed dissent. There is much literature on the MAI. For a Chinese view, see Chen Huiping, *OECD’s Multilateral Agreement on Investment: A Chinese Perspective* (The Hague: Kluwer, 2002).

The awards of the Dispute Settlement Board have also caused concern to developing states as well as to those having interests that did not coincide with the neo-conservative agenda. Though many cases have been decided against the interests of the United States, the expansionist tendencies in the area of investment arbitration also characterise the area of dispute settlement in trade because the Dispute Settlement Board has tended to significantly expand the principles in the constituent documents so as to promote the objectives of free trade. The democratic legitimacy of such a process has often been questioned. Strong efforts have been made to address the world order through making the WTO akin to a constitutional order that has competence over even issues such as human rights. The effort would be to make an order conducive for the triumph of normative structures that facilitate trade and investment. There will no doubt be heavy resistance to such developments.

The neo-conservative trends in the area of international trade are diminishing. The resistance to them is evidenced by the fact that institutions that support these trends hold their meetings in safe places like Doha, Hong Kong or Singapore under controlled circumstances that stifle open dissent. This itself indicates a fear to face up to democratic criticism, ironically one of the basic tenets on which neo-conservatism seems to be based. The unquestioning dominance that these tenets had during the 1990s will come to be increasingly challenged. The institutions of neo-conservatism will either have to change or will be resisted to such an extent that their agendas will become increasingly suspect.

V. NEO-CONSERVATISM AND HUMAN RIGHTS

There is no visible evidence of a neo-conservative effort on human rights. But the hegemonic attitudes to human rights have been evident from the end of the cold war. An early division had arisen as to whether international law should promote civil and political rights or the so-called second generation rights which were largely economic and social. The fashioning of separate documents to deal with the different groups of rights indicated the effect the Cold War between the capitalist and socialist states had on the ongoing debate. Into this debate was injected the so-called third generation rights largely created by the developing states to address poverty and development issues through the medium of human rights. Their structural approach was that the ending of poverty and progress in economic development required changes in the existing economic structures. They articulated group rights such as the right to development and the right to food in order to achieve these objectives. The primacy that groups of states placed on these different groups of rights had already politicised the area of human rights. It was into this already politicised area that neo-conservative ideas were introduced.

The third generation rights championed by the developing states had a strong economic flavour. The right to development and associated rights such as the right to food were based on perceived structural economic deficiencies in the world economic order. The New International Economic Order, from which the ideas of the right to development are largely derived, concentrated on changing the structure of the existing economy. To that extent, there was an economic orientation that had already been given to human rights and the neo-conservative effort may be seen as seeking to establish a counter to displace this strategy of the developing world. Another related development, though not supported by the whole of the developing world is the now dormant Asian human rights debate that Asians prefer to emphasise the rights that favour the solidarity of the family and the society over the rights of the individual. This attitude was favoured by some Asian political leaders but there was no uniform support for it.⁶⁷

⁶⁷ For a work rehearsing the debate, see Daniel Bell, *East meets West: Human Rights and Democracy in East Asia* (Princeton: Princeton University Press, 2000). With the decline in the influence of the leaders who advocated this communitarian approach as a defence to authoritarianism, interest in the debate has faded.

In recent times, the field of human right has been most insidiously affected by the purveyance of neo-conservative models.⁶⁸ It has had three major impacts on human rights. Firstly, consistent with earlier tendencies in the capitalist world, neo-conservatism tends towards the emphasis of individual rights over collective rights. Second, consistent with neo-conservative philosophy, the right to property assumed a central feature in the human rights discourse. The third is the emphasis of public security over individual rights. The latter is a group rights argument, in that the primacy of security can only be stated to be a solidarity right in the people of a state, and sticks out like a sore thumb. The third emphasis of neo-conservatism is on security. Interest in the emphasis was generated by the events of 11 September 2001, the attack on Afghanistan and the invasion of Iraq. These incidents were seen as associated with terrorism which struck at the root of society and justified a series of actions which curtailed the rights of those suspected of associations with terrorism. Each of these three aspects of the neo-conservative impact on human rights deserves closer examination.

The first is the denial of group rights. Group rights are central to the thinking of international lawyers of the developing world. All group rights associated with the developing world have been asserted as the rights of peoples not as rights of individuals or states. Most of them flow from the right to be free from colonial domination, which was secured from Western colonial powers through the freedom struggles of the peoples of Africa and Asia. The context itself marks them as people's rights. The liberation of the Third World was achieved on the basis of the right to self-determination.⁶⁹ Ending domination of control over natural resources was achieved through the assertion of the people's sovereignty over natural resources. The thrust of the New International Economic Order was to create rights associated with economic development which are encapsulated in the general right to development.⁷⁰ The neo-conservative counter has been to deny such collective rights arguing that the recognition of individual rights is a pre-condition to the achievement of social progress of any kind. Most of the arguments that are used in the debate are political ones as to whether the articulation of group rights cloaks authoritarian regimes which are bent on the preservation of elite interests.⁷¹ The neo-conservative need to resist collective rights arises from the fact that their recognition would deter the objectives of liberalisation of movement of assets that they advocate. The IMF, the World Bank and the WTO, the institutions of neo-liberalism which proclaim that they are devoted to economic development, have generally resisted the recognition of the right to development. The assertion of regulatory control by each state as an agent of its people over its own economic policies sat uneasily with the objective of liberalisation. The espousal of economic liberalism by the World Bank, the IMF and the WTO ensure that these institutions will not favour collective rights such as the right to development.

⁶⁸ Roberts, "Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11" (2004) 15 E.J.I.L. 721. There is also an inherent tendency in these attitudes to exclude parts of humanity from the protection of the law. In Vietnam, the tendency was to condone "oriental" civilian casualties. The same tendency appears in Iraq, where civilian casualties are virtually ignored. The renewal of the standard of civilization argument as a basis of exclusion is evident. Allain, "Orientalism and International Law: The Middle East as the Underclass of the International Legal Order" (2004) 17 Leiden J. Int'l L. 391.

⁶⁹ Antonio Casesse, *Self Determination of Peoples: A Legal Appraisal* (Oxford: Oxford University Press, 1995).

⁷⁰ Declaration on the Right to Development (4 December 1986), GA Res. 41/128. The US was the only state which voted against this resolution (146 to 1 with 8 abstentions).

⁷¹ On Western reactions to the right to development, see Philip Alston, "The Shortcomings of Garfield the Cat Approach to the Right to Development" (1985) 15 Cal.W. Int'l L.J. 510. A then consistent opponent was a political scientist, Jack Donnelly. See Jack Donnelly, "In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development" (1985) 15 Cal.W. Int'l L.J. 473. The view that there was an effort to promote economic development as a prior right so as to cloak authoritarian states was given credibility by Yash Ghai, an African scholar teaching in Asia. Yash Ghai, "Human Rights and Governance: The Asian Debate" (1994) Australian Y.B.I.L. 1.

A. *The Right to Property*

These collective rights also stand opposed to individual rights that are promoted by the global financial and trade institutions as essential to economic development. The adherents of economic liberalism promote the centrality of the right to property as essential to economic development.⁷² The premise is false. Unlike in the US, or perhaps even in the US, an absolute right to property that is not subject to social interests does not exist in any legal system. Yet, the construction of such an absolute right founded in Lockean philosophy⁷³ is an articulated premise of the neo-conservative model.⁷⁴ Such a right to property would promote WTO instruments such as TRIMS and assure absolute recognition of intellectual property whereas the right to development will erode the possibility of the recognition of intellectual property that violates indigenous rights or the patenting of medicines derived from native knowledge.⁷⁵ As pointed out, it violates the right to food, which is a group right.

B. *The Rights of Ethnic Minorities*

The aversion to group rights also stems from the fact that they are seen as constituting attacks on the dominant or unitary culture of the state and as bringing the “clash of civilisation” into the state.⁷⁶ The single culture that provides the gel of identity becomes diffused if the rights of pockets of persons with different cultures come to be accepted. The drive of uniform norms and uniform patters of behaviour that is dominated by the hegemonic power will be whittled if the rights of separate existence of different groups of people come to be accepted. The aim of globalisation as a unifying force itself will be thwarted. The motive of a single unifying culture has led to the denial of the need for minority rights on the basis that the recognition of individual political rights protects the interests of all equally and the need for separate protection of the rights of minorities becomes superfluous as a result. The denial of the rights of indigenous peoples in occupied lands also becomes convenient if such an approach is entrenched. The centrality of the culture of the founding settlers has to be acknowledged. Since minority rights are based on the recognition of the separate cultural, religious and linguistic identity of different groups within the state, such rights are denied by neo-conservatives who assert the primacy of a uniform culture as the basis of the state. Economic efficiency is also promoted by such a perception of rights as the market does not depend on the existence of such distinctions between groups. The cosmopolitan vision of the world is one in which a single market philosophy unifies the world irrespective of the multitude of cultures, religion and languages. The vision, in crude terms, envisages uniformity that prevails in the hegemonic culture of the world.⁷⁷ It is a vision that has met with increased resistance.

⁷² The leading writer who is often quoted in this respect is Hernando de Soto. See Hernando de Soto, “The Missing Ingredient: What Poor Countries Will Need to Make Their Markets Work” in Terry Anderson, ed., *The Privatization Process* (Maryland: Rowman and Littlefield, 1996) at 26.

⁷³ Locke, “Fragment on Property” in *Second Treatise on Government* (1698). See further on this, Laura Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford: Oxford University Press, 2003) who states (at page 138) that Locke has been misunderstood and does not provide support for an absolute right of property.

⁷⁴ M. Sornarajah, “The Clash of Globalisation and International Investment Law” (2004) 12 *Canadian Foreign Policy* 1.

⁷⁵ For similar arguments on the basis of the *Meat Hormones Case*, See Anne Orford, “Globalization and the Right to Development” in Philip Alston, ed., *People’s Rights* (Oxford: Oxford University Press, 2001) at 157.

⁷⁶ Samuel Huntington, *Clash of Civilisations and the Remaking of the World Order* (New York: Simon and Schuster, 2004); Samuel Huntington, *Who are We? Challenges to American National Identity* (London: Free Press, 2005).

⁷⁷ The opposing visions are stated in popular literature, Barber, *Jihad vs. McWorld* (New York: Ballantine Books, 1996) and Thomas Friedman, *supra* note 58.

In the international sphere, this denial of minority rights deflects discussion of the associated rights of ethnic groups, the most extreme of which is the assertion of their right to secession in the face of persistent discrimination and state-inspired ethnic violence. Secessionist wars are frequent in modern times. They subvert the neo-conservative vision of the world and its aims. They prevent associations being made with the elite of resource-rich states to ensure a steady supply of resources. Virtually every state which has a violent secessionist war- Bougainville in Papua New Guinea, Aceh in Indonesia, River Valley Province in Nigeria- are resource-rich regions peopled by ethnic minorities.⁷⁸ The ethnic minorities resent that the benefits of resource exploitation are sucked up by the elite groups in power while they are not only denied the benefits of the resources of their own lands but have to bear the environmental costs. Yet, these groups which resist cannot do so in terms of a right to secession which is denied them by dominant ideas in international law. The contest in the area for the recognition of the right to secession and the right to resist the domination of elite and majority groups within states is a contest between neo-conservative ideology which sees in the recognition of individual rights the solution to ethnic problems and minority groups which seek to have the right to secession recognised as a sanctioning right against the gross abuses of a state.

C. *Terrorism and Human Rights*

If, the right to development cloaked authoritarianism as alleged, the neo-conservative argument relating to terrorism and the protection of the state from its effects as a justification for the interference with the liberty of individuals is even more of a cloak for human rights abuses. The notion of security as a primary right is evidenced in modern times by the priority given to the so-called war on terror. Cutting through the rhetoric and the fear that has been unleashed, the fundamental idea is that the safety of the state is the supreme law. It is a slogan that has justified repression through the ages. The argument is that individual liberties can be sacrificed to achieve the greater good of the state. Obviously, the rest of the world is added into the bargain. The excesses at Guantanamo Bay and the huge civilian casualties in Baghdad are conveniently subsumed under this argument. The argument provides a good cloak for dealing with dissent against the neo-conservatist agenda. The retreat of human rights may occur if these trends are left unchecked.

Fortunately, the traditions of human rights inherent in the common law are being kept alive by the American and English courts. The inherent decency of the American legal traditions- its assertion of equality and its assertion of independence- has been vigorously asserted by the courts. Justice as a universal concept owes much to American jurisprudence built during nobler times in American history. The US has moral traditions which run deep and they have been asserted in the judgments of its courts. The American courts have ruled that the reclassification of the foreign detainees suspected of terrorism as unlawful combatants and their detention at Guantanamo Bay in Cuba does not put them outside the jurisdiction or beyond the protection of the American courts. They have condemned the use of torture against the detainees as a universal crime.⁷⁹ The assertion of liberty by the American courts, faced with its own executive's abuses, has been truly impressive. Similarly, the House of Lords has condemned legislation on terrorism and refused to accept evidence obtained through torture.⁸⁰ But, in both states, the executive has resorted to legislation to

⁷⁸ For a study of Asian ethnic strife in the context of the right to secession, see the work of my colleague, Professor Thio Li-Ann; Thio Li-Ann, "Secession in Southeast Asia" in Marcello Cohen, ed., *Secession* (Cambridge: Cambridge University Press, 2005).

⁷⁹ See *Hamdi v Rumsfeld* 542 U.S. 507 (2004) and *Rasul v Bush* 542 U.S. 466 (2004).

⁸⁰ *A v Secretary of State for Home Affairs* [2004] U.K.H.L. 256; *Al Skeini v Secretary of State for Defence* [2004] E.W.H.C. 2981.

undo what the courts have sought to construct.⁸¹ This internal struggle demonstrates that justice based norms constitute restraints on power and that in the domestic sphere, they work because they are supported by international norms of human rights.⁸²

D. *Secessionist Wars as Terrorism*

The abuses that the coalition of the willing has caused in its fight against terrorism diverts attention from the fact that pursuit of equality and dignity by ethnic groups is being regarded as terrorism.. All dissent and protest may come to be suppressed in the cause of this universal fight against terrorism. Wars that have existed in the past as civil wars, caused as a result of ethnic suppression within states, are now reclassified as wars against terrorism so that they could be suppressed with ruthless vigour and the underlying causes for this violent dissent not be explored for resolution through wiser methods. The world will be left a suppurating mess kept in order through superior violence so that a sufficient peace prevails for the neo-conservative agenda to be achieved.⁸³

One serious problem for human rights and for world peace generally is the great explosion of ethnic wars within states. They have resulted from ethnic suppression within states controlled by majority groups bent on a chauvinist path. The Western conservative paradigm is averse to the dissolution of states. Its solution is that the guaranteeing of the individual right to equality of all citizens will cure such situations in the course of time. Primacy is attached to the maintenance of the established state system.⁸⁴ The elites of the developing world would agree to this as they could continue to dominate the existing state system. This is the position that the market would favour as well for the atomising of markets cannot be a desired outcome. Besides, in the case of resources, it is best that there be a large central government apparatus to deal with than several states with control over resources. Resource-rich areas are also the areas in which secession takes place as resource exploitation affects the lives of the people of the area.⁸⁵ They are subjected to environmental hazards and their habitual cultural heritages are affected, while the profits of the exploitation are siphoned off for use by the elites in the capital cities. This entrenched global pattern of exploitation of weaker groups has been a fertile source of secessionist movements which are more usually seen as based on ethnicity or religion alone. The pattern of repression to maintain the model of capitalist exploitation is a visible trend in most of the ethnic wars that are going on around the world. That repression gets added justification on the basis of the war against terrorism, despite the fact that most of the secessionist movements existed long before the events of September 11, 2001. The struggle of unconnected people for their

⁸¹ In the UK, after intensive debate following the House of Lords decision which characterised the Anti-Terrorism Act as disproportionate, the legislature enacted a new Prevention of Terrorism Act in 2005.

⁸² Further see the excellent collection of papers edited by my colleagues: Michael Hor & Victor Ramraj, eds., *Terrorism, Law and Policy* (Cambridge: Cambridge University Press, 2005).

⁸³ Helen Duffy, *The War on Terror and the Framework of International Law* (Cambridge University Press, Cambridge, 2005).

⁸⁴ The discussion by the Canadian Supreme Court of the Quebec Secession is classic evidence of this trend. The writings of American and European political scientists indicate the Western predisposition towards notions of equality rights to address the issue of minority rights. The model is that if individual rights are recognised, group rights will take care of themselves as groups are but collectivities of individuals. This may be good theory for immigrant societies such as those in the US, Canada and Australia, which seek to base themselves on uniform Anglo-Saxon culture with notions of multiculturalism thrown in to assuage contrary sentiments but may cause problems in societies with deeply entrenched ethnic and religious differences. The assertion of the uniformity of the Anglo-Saxon basis of the US can be found in the writings of Huntington and others.

⁸⁵ Virtually every area in which there are secessionist problems, are rich in resources. Aceh in Indonesia, the Eastern province of Nigeria, and Darfur in Sudan are oil rich areas. Bougainville in Papua-New Guinea is rich in copper. There is clear evidence of the interests of transnational corporations in these areas. They have a role to play in the outcome of the secessionary wars.

salvation is now subsumed in the war against terror and their human rights repressed on the basis of an appeal to a seemingly higher cause of eliminating terrorism.

Examples of this can be multiplied. The freedom movement of Aceh in Indonesia, as with Timor before it became an independent state, is characterised as a terrorist movement justifying its repression through indiscriminate violence against civilians and combatants alike. The list can go on. The Mindanao rebellion in the Philippines, the Chechen struggle in Russia, the Kashmir struggle in India and the Tamil struggle of Sri Lanka existed prior to the so-called war on terror but are now reclassified as wars of terrorism to be fought on that basis without regard to the human rights of the people involved in the same manner that the hegemonic power and its coalition of the willing pursue the war against Iraq. This happens despite the fact that all the wars of these minority people preceded the war on terror initiated by the incident of September 11, 2001.

The Tamil struggle in Sri Lanka epitomises these struggles of minorities. The imposition of the language of the majority, Sinhalese, as the only state language and the religion of the majority, Buddhism, as the state religion led to non-violent, Gandhian movements of protest by the Tamils. These were brutally suppressed. Pogroms were aimed at the Tamil population by armed mobs with the support of the government forces. The Tamil youths then took to arms with the objective of creating a state for themselves in the areas that had been their traditional homelands. Their efforts have been suppressed with brutality by the government forces. Carpet bombings of several Tamil towns resulted in large civilian casualties. Evidence of widespread torture practised against Tamil youth, disappearances of these youth and other brutalities mounted. In the face of this repression, the major Tamil groups engaged in ruthlessness of their own. Sadly, as in all such violent occasions, the brutalities that took place were enormous. The government forces rivalled and often exceeded the Tamil groups in the degree of their violence. Churches were bombed by the government forces with the congregation at prayer inside. Schools were bombed while in session. Each act of government terrorism was replied in kind. It is easy to describe the minority group in these circumstances as terrorist when the capacity for terrorism in the state is huge. On every account, the scale of the terrorism of the state exceeded that of the Tamil groups.

The same could be said of all similar movements in Chechnya, Palestine, Kashmir, Aceh and elsewhere. Yet, the dominant trend has been to characterize the minority groups as terrorist simply because the dominant forces are state-centric and are allied in the so-called war on terror. The United States maintains a list of terrorist organisations. The prominent groups that fight for the rights of minorities are represented on this list of organisations. Sanctions against operation in the United States and elsewhere are imposed on the basis of the list.

Ethnic wars are a facet of present and future international relations. Their solution is in no way facilitated by the ready characterisation of these acts of violence as terrorism when they could as easily be regarded as violence in pursuance of claims to self-determination. One reason that seems to militate against a contrary view is that all these areas in which secessionist movements take place are resource-rich or are of strategic significance. It does not sit easily with resource diplomacy or strategic considerations to favour secession or autonomy even if human rights concerns are thereby advanced. Human rights considerations must take into account the past historical circumstances of independent existence prior to unity brought about to promote colonial interests, the domination of the region of the minority by the majority, the denial of cultural and political pursuits and the absence of equality in access to education and employment. The violence may be indicative of the extent of the deprivation and not of terrorism for its own sake. Violence may be the only means out of a situation of persistent denial of human rights.

What the situation calls for in terms of human rights is a graduated response to the situation by the international community and not a condemnation on the basis of the nature

of the violence employed by the minority. Lower order solutions like insistence on the right to equality should be attempted through constitutional means through existing political processes. Where these efforts are suppressed by the states by violence, there must then be a right in the minority to resist such suppression through violent means. At this stage, the concern of the international community should be recognised for the matter ceases to be purely internal and becomes one of international concern. The flight of refugees, cross-border movement of arms and the concern of coreligionists or ethnic compatriots in other neighbouring states no longer permits the matter to be regarded as purely within the domestic sphere of the host state. The international community should intervene and seek solutions initially through measures such as the creation of autonomous regions for the minority, federalism, consociational arrangements, interim self-governing arrangements and failing all these, secession as an ultimate solution. Factors that should be taken into account would include the nature of the solutions which had been previously attempted, the nature of the violence that has been employed by the state itself for the greater the violence, the lesser are the chances of settlement through less stringent means than secession.

The rhetoric of terrorism that neo-conservatism has unleashed enables human rights to be flouted with impunity. It is evident in the internal laws of the states that are engaged in the war on terrorism, which particularly in the United Kingdom, has sparked off a vigorous debate on human rights. Externally, these states which emphasise the war on terror are increasingly insensitive to the fact that repression of ethnic and religious minorities has caused much violence, generated as a result of such a response being a last resort to entrenched violence and discrimination by the state. Instead of adopting a nuanced approach to the problem, there has been a predisposition towards the fashioning of a human rights law that emphasises the right of a state to be free of terrorism and, in that guise, permit repression of human rights on a global scale and maintain a state-centric system.

The Asian response to the issues has been different. It is recognised that, outside the context of religious fanaticism, the acts of violence are the result of the marginalisation of large sections of the community on the basis of religion or ethnicity. The solution that the Indonesian government reached on the issue of Aceh by granting autonomy to the province is reflective of the trends that these states may initiate to deal with such issues rather than the singular branding of all violent responses as involving terrorism. Asian political philosophies have recognised violent dissent as legitimate in the face of tyrannical regimes. The promotion of sensitivity to the causes of the violent dissent and their removal is what they would consider to be a prudent approach to the problem of violence rather than the catch-all cry of a war on terrorism that tramples advances in the field of human rights.

E. Neo-Conservatism, Transnational Corporations and Human Rights

Another area in which the partiality of the dominant law towards neo-conservative models is evident, is the treatment of the liability of multinational corporations for human rights abuses. The record of such abuses has been mounting over the years. The phenomenon cannot be new. The recent interest in it lies simply in the fact that mechanisms for redress are coming to be discussed in a meaningful manner, largely as a result of the efforts of non-governmental human rights groups which have tried out several avenues of obtaining redress against human rights abuses in which multinational corporations have participated. These efforts have increased the visibility of the number of incidents in which multinational corporations have been associated in human rights violations, particularly of the poor or the indigenous people living in areas where resource exploitation has been carried out or where large infrastructure projects have been constructed.

Though the courts of the developed world have routinely held that they have jurisdiction over the multinational corporations which have committed human rights violations and the parent company could be sued in respect of such violations, there is yet an instance of liability imposed for such violations.⁸⁶ The existence of legislation like the Alien Torts Act has facilitated the bringing of such suits in the United States. Such litigation has increased the visibility of the human rights violations which occur with the active or tacit participation of multinational corporations.⁸⁷ But American courts have not gone to the extent of finding responsibility though accepting that there is jurisdiction over such violations. In other states, there are judgments which indicate the existence of such jurisdiction. It is evident that this is an evolving area in which the private power of multinational corporations will be used to resist the emergence of norms of liability. The tussle between these power-based norms, which seek to evade responsibility, and the justice-oriented norms, which attribute responsibility on the ground that there was at least tacit participation but for which the violations would not have occurred, will continue. The lines have been drawn in this particular battle. It is not likely to be lost by those who argue for responsibility. It is made easier in situations where the violations amount to transgressions of *ius cogens* norms against torture and genocide. The mere exposure of such human rights violations acts as a deterrence against similar future conduct by other multinational corporations such that there is some form of progress. The establishment of accountability norms is a definite mark of progress. The role of non-governmental organisations in this area has been influential. The existence of so many cases of human rights abuses of the grossest type puts paid to the neo-conservative argument that multinational corporations uniformly are harbingers of benefits to the people of the developing world.

But the battle to have UN competence established over the issue of accountability of multinational corporations for human rights violations has been a more arduous one.⁸⁸ The enthusiastic efforts of the early committees that have examined the issue and made proposals based on the acceptance of accountability have been stymied through the revival of archaic notions relating to the personality of multinational corporations. It is rather strange that when multinational corporations already have personality to assert rights against states, there is this hoary revival of an outdated doctrine to impede efforts to establish accountability mechanisms under an international regime.

VI. NEO-CONSERVATISM AND THE USE OF FORCE

The most important factor in the neo-conservative agenda is the ability to use force if all other techniques fail to bring about favourable solutions or to achieve the aims of the neo-conservative agenda. Such an aim clashes with the objectives of peace in which the whole of humanity has an interest. Justice related norms will seek to advance the cause of peace as economic development, eradication of poverty, the independence of peoples, the preservation of the environment and the promotion of human security are associated with

⁸⁶ The United States employs wide extraterritorial powers in the areas of antitrust, export controls and the sanctioning of its enemy states through withdrawal of trade by its national corporations. It also has legislation preventing foreign corrupt practices and racketeering. But there is a reluctance to reach out and prevent corporate malpractice in other states. Mattei & Lena, "US Jurisdiction over Conflicts arising Outside the United States: Some Hegemonic Implications" (2002) 24 *Hastings Int'l & Comp. LR* 381.

⁸⁷ Stephen Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111 *Yale L.J.* 443. David Kinley & Juno Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" (2004) 44 *Va. J. Int'l L.* 931.

⁸⁸ David Wissbrodt & Maria Kruger, "Norms and Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (2003) 97 *A.J.I.L.* 901. Larry Backer, "Multinational Corporations, Transnational Law: United national Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Social Responsibility in International Law (2006) 37 *Colum. H.R.L. Rev.* 287.

peace. Any doctrine that asserts the prior rights of a particular state would be destructive of these values. The unilateral neo-conservative agenda promoted through the use of violence must be resisted if the interests of peace are to be promoted through multilateral action. The agenda ensures that the present age of globalisation is dominated by the interests of a single state than those of mankind generally. The preference of mankind for a norm based on the prohibition against the use of force has already been stated in the United Nations Charter.

In the past ages of globalisation, similar trends of the domination of the world through the use of force operated. What is politely spoken of as gun-boat diplomacy was the use of force to secure objectives when persuasion and diplomacy failed. The extensive use of gun-boat diplomacy to secure advantages in the areas of trade and investment and the establishment of treaty regimes to conserve the advantages so secured is well documented.⁸⁹ In the modern age too, despite the existence of the United Nations Charter and its prohibition on the use of force, it is not fanciful to argue that force would be used by the hegemonic power if its objectives are thwarted and too many impediments are placed in the way of its achieving its interests which are today intertwined with the neo-conservative agenda. Historically, powerful states have resisted restraints on the use of force imposed by international law.⁹⁰ The issue must also be looked at from the point of view of the theory that excess capital must seek markets overseas and markets may have to be opened through the use of force.⁹¹ So too, the search for scarce resources may require the use of force. It is interesting to note that there is considerable political opinion and weighty literature that argues that the present war in Iraq is about oil and that the justifications that are provided merely seek to cover this truth. This may be too facile an explanation.⁹² It is not necessary to deal with such views in detail in this short paper. If true, then they would mean that a hegemonic power will seek to dismantle any restraints on the use of force if such restraints hinder the achievement of its economic and political objectives. The realist view of power is that it is necessary for the hegemonic power to loosen the restraints on its use of force to achieve what it perceives to be in its national interest. Where law provides such restraints, then, that law needs to be rewritten. It is a visible fact that the United States has progressively dismantled the prohibition on the use of force and arrived at a doctrine of preventive war which gives it the license to use force almost without limit. The so-called "Bush doctrine" seeks to confront the existing international law on the use of force by asserting the right to use force to forestall emerging threats to American interests.⁹³ This situation has been arrived at with the support of new doctrines that have been formulated to bring about an acceptance of such a result. There had been a gradual erosion of the Charter principles which prohibits the use of force culminating in the formulation of the Bush doctrine which

⁸⁹ Cable, *Gun-boat Diplomacy 1919-1991* (London: St Martin's Press, 1981).

⁹⁰ Nico Kirsch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order" (2005) 16 E.J.I.L. 369. The role of hegemonic power in international law has been the focus of many recent studies. Michael Byers & Georg Nolte, eds., *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003); Nico Kirsch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order" (2005) 16 E.J.I.L. 369; John F Murphy, *The United States and the Rule of Law in International Affairs* (Cambridge: Cambridge University Press, 2004).

⁹¹ David Harvey, *The New Imperialism* (New York: Oxford University Press, 2003) explores the link between markets and the use of force in American foreign policy.

⁹² See Neil Smith, *The Endgame of Globalization* (New York: Routledge, 2005) for the suggestion that it was not oil but the loss of influence in the Middle East and the possibility of new forces emerging within it to challenge American dominance that provided the reasons for the ouster of Saddam Hussein and the invasion of Iraq.

⁹³ On the Bush doctrine, generally see Mary Buckley & Robert Singh, eds., *The Bush Doctrine and the War on Terrorism: Global Responses, Global Consequences* (London: Routledge, 2006). The four elements of the Bush Doctrine identified in the lead article in the above work are the notion of preventive war, confronting and removing weapons of mass destruction and terrorism, regime change for rogue states and the promotion of democracy.

amounts to a unilateral affirmation of the right of the United States to use force in order to secure its interests in identified areas.

Developing countries have uniformly supported the norm of the prohibition on the use of force. They would largely align with the Charter purists who would argue for an absolute prohibition on the use of force except under the circumstances provided for in the Charter itself. This is to be expected. Powerless states would find protection in the norm that supports the prohibition of force as it guarantees them their unrestricted sovereignty. The only departure that appears in their practice is the support they have given to the use of violence to end colonial dominance and racial discrimination. But one may argue that this exception does create a chink in the armour that would enable the exception to be expanded. The developing states, created to a large extent, the principle of self-determination. The violent assertion of the doctrine also subverts the absolute prohibition of the use of force which the Charter purists prefer. The dilemma is that once exceptions are permitted, there arises the danger that the exceptions could become larger than the rule. They could erode its very foundations. This appears from the later history of the Charter.

Charter purists have noted that the United Nations Charter had arrived at the prohibition of the use of force in Article 2(4) subject to two principal exceptions.⁹⁴ The first is self defence. "If an armed attack occurs", the state that is attacked may use force to repel that attack, until the Security Council is able to deal with the situation (Article 51 of the UN Charter). The second is the right of the Security Council itself to deal with situations that pose a threat to peace under Chapter VII of the Charter. The progressive whittling down of this carefully built structure against the use of force has been evident in the practice of the United States. During the Cold War, since a balance of power was maintained, the prohibition proved effective except in situations of intervention in civil wars, particularly in the spheres of influence of each of the two Super-powers. Such intervention was usually justified on the basis of intervention at the invitation of the government of the state though invariably the invitation was proffered by a puppet regime that had been installed by the Super-power. Competition for influence in the Third World led to many such interventions by both super powers but on the basis of confined theories that gave some overt legitimacy to the interventions. There were at least efforts to ensure that the invitation was at the behest of the existing regime, though that regime was often a puppet regime that was set up just prior to the invitation.⁹⁵ Consistency with international norms was considered relevant for otherwise such elaborate charades would not have been played out. At least efforts were made to legitimize the interventions. These interventions, contained within state boundaries, were usually ideological struggles to ensure the primacy of one camp or the other. Their threat to international peace was not great as direct confrontation was carefully avoided by the two Super-powers, which engaged in proxy wars.

Yet, the period illustrated what Neff has referred to as the "metamorphic power of war".⁹⁶ Inter-state wars had become infrequent, not because of the Charter prohibition,

⁹⁴ For general works on the use of force, see Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2001); Yoram Dinstein, *War, Aggression and Self Defence* (Cambridge: Cambridge University Press, 2001) and Thomas Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2003).

⁹⁵ There was a succession of such puppet regimes behind interventions. Imre Nagy in Hungary was used to justify Soviet intervention against the Dubcek regime. Din Diem was set up in order to justify the American intervention in Vietnam. The Governor-General of Grenada, a ceremonial official, gave the invitation to topple the elected regime of Grenada. But, in all these episodes, the intervening states sought legal cover for their conduct. The need to set up even flimsy legal cover indicated that the practice was not to deviate from the accepted norm relating to the prohibition of the use of force. This sets the pre-Cold War interventions apart from the modern instances of the use of force. Even though flimsy, effort was made to cloak interventions with some legitimacy through assertion of their conformity with existing legal principles.

⁹⁶ Stephen Neff, *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2005).

but because of the balance of power that existed between the Soviet Union and the United States during the Cold War. The balance was such that direct confrontation was avoided between the super-powers or their allies. The avenue for the expansion of their power in the newly independent parts of the world was through the promotion of ideological conflicts among the people of the developing world. Interventions in such insurrections occurring on the basis of ideological rifts provided opportunities for the two super-powers to expand their influence. Major conflicts of the period, like the war in Vietnam, are explicable on the basis of this contest for influence in Asia and Africa. New doctrines were formulated to justify interventions in civil wars that were promoted on ideological grounds by the two super-powers. Doctrines relating to “wars of national liberation” were formulated by the Soviet Union to justify intervention in civil wars resulting from revolutionary movements within states. Equally, efforts were made by the United States to justify intervention in struggles to achieve democracy on the ground that a dictatorship did not possess sovereignty which could only reside in the people.⁹⁷

But even in these efforts at extension, the primacy of the norm against the prohibition of force in inter-state relations was maintained. In the Middle East, the presence of Israel, a state whose existence has been contested for some time by its Arab neighbours, led to the debate on how extensive the right of self-defence under the Charter was. Israel claimed that the right included the pre-Charter right to strike before an attack actually occurred and that the maintenance of such a right to pre-emptive self-defence was essential to its survival as a state. There was much debate on the validity of the extension that was claimed.⁹⁸ With this exception, one could say that the Charter norms held firm during the Cold War. The frequent interventions in civil wars were explained in a manner so as not to affect the centrality of this prohibition.

The end of the Cold War changed the pattern. Though the first Iraqi war resulted in the optimism among many that the United Nations could now carry out the mandate it had of keeping force in the face of violence, the optimism soon vanished as it was realised that the Security Council could become a pliant tool in the hands of the newly emerged single hegemonic power. But it also showed that the war against the Iraqi invasion of Kuwait, a clear violation of international law, could not be accomplished without the support of the United States. The United Nations showed, from the outset of the emergence of the United States as a single hegemon, that it was inclined to rubber-stamp the process by leaving the decision of the ouster of Iraq to the United States. This rubber-stamping process, once initiated, could not be stopped. The United States expected the United Nations to be its rubber stamp to legitimise whatever it chose to do. The resolutions that were passed by the Security Council were so broad and not time-specific such that the solitary super powers and its allies could use them later on without having to seek further authorisation by the Security Council. The Security Council had become a “law laundering service” for the single hegemonic power.⁹⁹ International lawyers, alarmed at the possibility of abuse of the function of the Security Council, began debating the possibility of judicial control of the Security Council.

The later Iraqi war leading to the ouster of Saddam Hussein, was justified by the United States and the United Kingdom, among other grounds, on the widely permissive provisions that were used in the resolutions that permitted the use of force in the first Iraqi war to end the invasion of Kuwait. Subsequent Security Council resolutions were equally expansive and provided virtual *carte blanches* for American action in other situations. Thus, the action against Afghanistan following the terrorist attack on the twin towers was justified on the

⁹⁷ A strange argument as it supports the people-centred international law that the developing states argue for.

⁹⁸ There has always been a strong pro-Israeli lobby within international law. This lobby was profuse in producing justifications for the Israeli stance.

⁹⁹ Richard Falk as cited in Simon Chesterman, “Humanitarian Intervention in Afghanistan” in Jennifer Welsh, ed., *Humanitarian Intervention and International Relations* (Oxford: Oxford University Press, 2004) 143.

ground that the Security Council had authorised action against those responsible for aiding, supporting or harbouring the perpetrators of the terrorism.¹⁰⁰

The second phenomenon was the delegation of power to military agencies which the United States controlled. Thus, in the Kosovo episode, when the Serbian armies were threatening the elimination of the Kosovars, the United Nations silently stood by when the NATO forces intervened. There was little that the United Nations could have done as a veto would have been used against any decision it made. Yet, the impression that ensued was that military action by a group of states organised within a security alliance would be permissible. NATO was taking action outside its original area of competence. The widening of its area of competence was implied in the action. Anything occurring outside the region for whose defence the treaty association came into existence could, on the basis of the theory applied, fall within the competence of the regional organisation as long as its security interests were affected. Without doubt, Kosovo was within the immediate periphery of the NATO region but the precedent could be extended to cover situations beyond that periphery if the defence interests are deemed to so justify such an extension. Again, there is potential for unrestricted power by the most powerful military organisation in the world. Looser formulations, such as the need to enter failed states to restructure them, began to appear indicating that humanitarian intervention was a category that was capable of expansion.¹⁰¹

But, more than these two extensions, the extension that was made on the basis of humanitarian intervention was the most expansive. In British practice, unilateral humanitarian intervention has always been regarded as unlawful on various grounds. Chief among them was the view that there could be no control over the manner of its exercise as each state can interpret for itself the exigencies requiring the intervention. This would result in chaos. It would weaken the basis of the Charter prohibition on the use of force. The use of humanitarian intervention in the past had always been suspicious. Its use against the Ottoman Empire was ostensibly to protect the Christian minority. Its hidden purpose was widely thought to be to hasten the dissolution of the Empire and assert the interests of the European powers. For this reason, humanitarian intervention has been widely frowned upon in post-Charter practice. British practice adopted this view from the inception of the Charter and denied the existence of a unilateral right of humanitarian intervention.¹⁰²

States which could have explained their interventions on the basis of humanitarian intervention had refused to do so despite having credible bases for such justification. India invaded East Pakistan when the uprising of the Bengalis for Bangladesh was brutally crushed by the Pakistani army. It pleaded self-defence as a justification and carefully avoided raising the ground of humanitarian intervention. In Cambodia, despite the massacres of Pol Pot, Vietnam did not offer humanitarian intervention as a justification when it intervened to put an end to that barbarous government. Similarly, the Tanzanian intervention in Uganda to oust Idi Amin was not justified on the basis of humanitarian intervention. Despite clear evidence of widespread brutality in these three instances, humanitarian intervention was not offered as a justification by any of the intervening states as the ramification of such a justification would have been to create a doctrine capable of uncontrollable abuse. It is not a doctrine that responsible states would want to espouse. The view that these countries took was that if there was a humanitarian concern, it should be addressed collectively through the United Nations.

¹⁰⁰ Simon Chesterman, *ibid.*

¹⁰¹ Further see J.L. Holzgrefe & Robert Keohane, eds., *Humanitarian Intervention* (Cambridge: Cambridge University Press, 2003).

¹⁰² The British view was based on the need to prevent dilution of the norm against the use of force. The major British writers opposed humanitarian intervention on the ground that historically, the doctrine had been a cover for big power politics seeking to explain self-interested uses of power on the basis of moral rectitude. Its recognition, they feared, would open an avenue for abuse and whittle the prohibition on the use of force. But this salutary caution was to be thrown to the winds.

Yet, Britain, under Blair, taking on the role of a puppet of the hegemonic power, did a volte face on its traditional position on humanitarian intervention when it came to Kosovo. It threw its previous caution to the winds and announced a new policy that intervention to protect the lives of a minority that was being threatened with disaster was permissible. Mr Blair, noted for being lachrymose whenever necessary, regretted not intervening in Rwanda, forgetting that there were several bloody massacres in the British cupboard for which no tears had been shed. The duplicitous change of policy was provided the lofty justification that the urgent need to save lives justified quick and massive intervention. This resulted in the bombing of areas of Yugoslavia from the skies, resulting in massive civilian casualties and low casualties on the part of the intervening states. The stage was being set for further loosening of the prohibition on the use of force.

A group of influential persons, including the present Vice President of the United States and the brother of the President, had conducted a study about the changes necessary to bring about new foreign policy stances. The study, long before the events of September 11, 2001, had advocated the policy that preventive force should be used by the United States to advance its interests. Later events merely provided a justification for the institution of this policy. The rhetoric on terrorism and the advancement of democracy were smokescreens behind which other objectives could be achieved. Much earlier, there had been justifications advanced for the use of force to promote democracy in terms of international law. These justifications go well beyond the notion of preventive force as the latter is at least dependent on the unilateral appreciation that force was to be used and goes well beyond the notion of anticipatory self-defence which Israel used to justify the many instances it had used force in the Middle East.

Post 9-11 events rapidly eroded the rule on the prohibition on the use of force. The climate of fear justified much of the action. The invasion of Afghanistan by the United States and its allies in October 2001 was justified as self-defence, the view being taken that Afghanistan was the source of the terrorism. This interpretation of self-defence went uncontested because prevailing sentiments did not favour dissent.¹⁰³ The magnitude of the terrorist attack on the US provoked responses that were hostile to states that harboured persons who could commit such atrocities. The widely held view was that forcible responses to such attacks could be justified as self-defence.¹⁰⁴ This view was tenable as Article 51 of the UN Charter did not require an attack by a state. Consistent with the Charter provision, the Security Council was informed of the action taken by the United States and its allies in Afghanistan. The action of the United States must be broadly taken to be consistent with the Charter, though the criticism could be made that the expansive language used could justify similar action against other states and was a forerunner to the justifications that came to be used in the later invasion of Iraq. The Security Council and General Assembly acceptance of the action of the United States was premised on the clear evidence that the Taliban regime in Afghanistan supported the Al-Qaeda group that organised the attack on the United States and the enormity of the event.¹⁰⁵ But the rhetoric used in providing justification presaged justifications for later events.

The notion that force could be used to ward off future threats of force such as the stock-piling of weapons of mass destruction, and the presence of terrorists or to ensure democratic governance undermines restraints on the use of force to such an extent as to make the Charter

¹⁰³ Said Mahmoudi, "Self-Defence and International Terrorism" in Peter Wahlgren, *Scandinavian Studies in Law*, Volume 48 (Sweden: Stockholm University, 2005) 203.

¹⁰⁴ The Organization of Islamic States as well as many states which spoke at the debates at the General Assembly supported a right of self defence.

¹⁰⁵ *Supra* note 103. Professor Mahmoudi's view that the incident does not justify such a response to a terrorist attack unless it is of similar magnitude is well made.

prohibitions otiose.¹⁰⁶ In a display of arrogance, a leading neo-conservative thinker suggested that the liberation of Iraq will preserve the “intellectual wreckage of the liberal conceit of safety through international law administered by international institutions”.¹⁰⁷ Events soon demonstrated the limits of absolute power in settling international problems as subsequent events in Iraq showed that the unilateral intervention to unseat Saddam released forces that the United States and its allies could not control.¹⁰⁸

The invasion of Iraq was initially justified on the basis of the threat posed by the existence of weapons of mass destruction. When such weapons could not be shown to exist, the justification had to be changed. The absence of such weapons in Iraq proved to be an embarrassment to the United States and the United Kingdom. New reasons had to be found to justify the initial error. Rhetorical justifications that democracy was furthered, a cruel dictator was ousted and general humanitarian objectives were achieved were doled out without much coherence. The plain fact was that the United States was discarding the established rules of international law on the use of force.¹⁰⁹ But, inconsistently, efforts were also made, principally by the British,¹¹⁰ but also by the United States to rationalise the

¹⁰⁶ For a discussion of the extent to which force can be used to promote democracy, see Gregory Fox & Brad Roth, eds., *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000) 239-388. Most of the arguments are based on the interventions in Haiti and Sierra Leone in support of the democratically elected government but there, action was taken under the auspices of the United Nations or the regional association. Even though the United States played a leading role in some of these interventions, United Nations approval renders these interventions legitimate instances of the use of military force. They are also distinguishable on the basis that the elected governments invited the intervention. The doctrine has been in existence for a long time that governments can issue the invitation, though most invitations were sought from puppet regimes set up by the intervening state. In Haiti and Sierra Leone, there was objective evidence of the governments being legitimately elected.

¹⁰⁷ Richard Perle, “United They Fall” *The Spectator* (23 March 2003) 22.

¹⁰⁸ Franck (in “Preemption, Prevention and Self-Defence” (2004) 27 *Hastings Int’l & Comp. L. Rev.* 425) appropriately cites the poem on Ozymandias by Shelley, though not in full. The poem justifies being quoted in full. It may be that Shelley was predicting the folly in Iraq:

“I met a traveller from an antique land
Who said: Two vast trunkless legs of stone
Stand in the desert. Near them, on the sand,
Half sunk, a shattered visage lies, whose frown,
And wrinkled lip, and sneer of cold command,
Tell that its sculptor well those passions read
Which survive (stamped on these lifeless things),
The hand that mocked them, and the heart that fed;
And on the pedestal these words appear:
‘My name is Ozymandias, king of kings:
Look on my works, ye Mighty, and despair!’
Nothing beside remains. Round the decay
Of that colossal wreck, boundless and bare
The lone and level sands stretch far away”.

Franck concluded, drawing parallels to the imperialists of the past: “To sustain the perpetual rule of unipolar power, quite aside from any consideration of its ethical probity, requires, at a minimum, a sound, profitable organization of one’s imperium. Compared with Britain and France, which benefited mightily in the nineteenth century from their far-flung empires and the Netherlands, which profited hugely from its overseas dominions in the eighteenth, America is rapidly becoming the Enron of imperialism”

¹⁰⁹ As Thomas Franck pointed out, the United States struck a vital blow once more at the roots of Article 2 (4); Thomas Franck, “What Happens Now? The United Nations after Iraq” (2003) 97 *A.J.I.L.* 608. Also, see Thomas Franck, “The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium” (2006) 100 *A.J.I.L.* 88.

¹¹⁰ Though the British Government attempted this, British international lawyers roundly rejected these attempts and pronounced that the Iraqi intervention was illegal under international law. The dissent within Britain towards the Blair government’s position was strong. Some British materials can be found in George Farebrother & Nicholas Kollerstrom, eds., *The Case Against the War: The Essential Legal Inquiries, Opinions and Judgments concerning the War in Iraq* (London: Institute for Law and Peace, 2003).

situation with the existing rules evolved in the context of the United Nations.¹¹¹ The view that the older Security Council resolutions ending the first Iraqi war gave a continuous right to intervene in Iraq where necessary was put forward.

These expansive justifications were objected to by all the non-aligned states and the smaller states.¹¹² These states had traditionally viewed the restraint on the use of force under the Charter as providing the best protection against big power intervention in their states. They insisted on strict adherence to the Charter prescriptions on the use of force and took the view that the United States and the so-called coalition of the willing had violated international law in intervening in Iraq to unseat Saddam Hussein. The consistent stances that these states have taken in the Security Council debates following the Iraqi invasion indicate that they regard the justifications advanced by the United States and its allies as unacceptable. They constitute an affirmation by the majority of the states of the world that the Charter prohibition on the use of force should be retained.

One consequence of the ouster of the regime of Saddam Hussein and the imposition of a “democratic regime” in Iraq has been the assertion of rules that ensure the dominance of American transnational corporations over the Iraqi economy, giving credibility to the view that as in the days of colonialism, the use of force furthered the objectives of trade. The laws on foreign investment that were left behind by the US proconsul, Paul Bremer, ensured that the “reconstruction” of the economy amounted to privatisation of the economy under the aegis of American multinationals. As an article in the *London Times* put it, this is “little short of economic colonisation”.¹¹³ A credible case can be made for the seemingly far-fetched view that force was used to enhance the economic dominance of multinational corporations and access to oil. Certainly, the advancement of trade and investment interests would appear to be a reason for taking an expansive view of the right to use force. The link between the international law of the colonial period and the efforts that are being made today is made evident. As much as it can be argued that changing circumstances such as the rise of terrorism and the proliferation of weapons of mass destruction justified the change in

¹¹¹ For the view of the United States that the invasion was justified by the material breach of the old Iraqi resolutions, see William Taft & Todd Buchwald, “Preemption, Iraq and International Law” (2003) 97 A.J.I.L. 557. Both authors were senior legal officials of the US administration. The texts of the old resolutions are widely regarded as not supportive of the conclusions reached by Taft and Buchwald. Franck points out that it is the Security Council which is party to the ceasefire with Iraq and not the individual members; “What Happens Now? The United Nations after Iraq”, *supra* note 109 at 612. Also see Andreas Paulus, “The War Against Iraq and the Future of International Law” (2004) 25 Mich. J. Int’l L. 691 at 700. Paulus views the United Nations alone as the party to the ceasefire with Iraq. As such, it is not for individual states to enforce breaches of the ceasefire. Other scholars support this view. See Venkateswara Subramanian Mani, “Humanitarian Intervention Today” (2005) 131 Hague Recueil 1 at 260 for the view that the US-UK action in Iraq was “premature and illegal” as “the constitutional prerogative to enforce the obligations imposed on a State by its previous resolutions remains exclusively with the Council”. Vaughan Lowe suggested that the failure of the resolution moved by UK and Spain indicated illegality of the Iraqi invasion. Vaughan Lowe, “The Iraqi Crisis: What Next?” (2003) 52 I.C.L.Q. 859. Also see Dominic McGoldrick, *From 9-11 to the Iraq War 2003: International Law in an Age of Complexity* (Oxford: Hart Publishers, 2004) at 80–86.

¹¹² Many European states, led by France, also resisted the efforts to rationalise the invasion of Iraq on the basis of the old Iraqi resolutions.

¹¹³ Michael Meacher, “My Sadness at the Privatisation of Iraq” *London Times* (12 August 2005). On relinquishing office, Bremer, the US-appointed administrator in Iraq, listed as his achievements the liberalisation of the tax, trade and investment laws of Iraq. It is a requirement under the Geneva Conventions that an occupying power not change the laws of an occupied state. The previous Iraqi constitution prevented privatisation of vital sectors of the economy. It was a hindrance to American aims and had to be changed. The change was effected through a pliant government in Iraq. Further see Neil Smith, *The Endgame of Globalization* (New York: Routledge, 2005) at 178-180. Smith points out that the pursuit of geo-economic power was as important in the US strategy in Iraq as the pursuit of geo-political power.

the law on the use of force,¹¹⁴ it can also be argued that the hidden reasons for the change are the quest for oil and the push for control of markets.

The expansive notions on the use of force undermine the Charter to the extent that smaller states are without protection from the dictates of the hegemonic power. The fear is that the world will descend into the situation that existed before the Charter where disputes, including trade disputes, are settled by force. Such an anarchic situation, after the progress that has been made towards the prohibition of the use of force must be avoided. For this purpose, it is clear that the coalition of the non-aligned should join together to resist the instrumental use of international norms, particularly in the area of the use of force. They will also receive the support of those states, including European states, which have preferred multilateral diplomacy to the doctrines that permit the unilateral use of force. The fact that the war has not gone well in Iraq for the United States, the widespread dissent among the people in the states of the coalition of the willing, the fact that there is greater destruction of civilian life caused both by the coalition forces as well as the factions in the near-civil war situation that has resulted and the stances that the rest of the world has taken to the position adopted by the United States and its allies indicate the limits of American hegemonic power and signal that unilateral adventures can backfire into uncontrollable situations. The United States is mired in the adventurous policy it had created and finds no possible way out of the morass. It will take multilateral diplomacy to sort the mess that the United States has created. This presages the eventual restoration of the legitimacy of the Charter principles. There are signs that within the United States itself, there will be resistance to the manner in which the Bush administration has manipulated both national and international law. This movement within the United States will ensure the restoration of multilaterally accepted norms of international law. The incident may well demonstrate the folly of unilateralist ventures such as the one that the United States embarked on under the Bush Administration. The world will be a safer place if the United States, which fashioned the notions of liberty in its Declaration of Independence, of equality of man at the conclusion of its civil war and civil rights in its Bill of Rights, were to march once more to the tunes of its great moral traditions and not embark on courses that advance the interests of segments of its society. Its march would then coincide with the march towards norms of justice. This aberration has to end. The American people could end this departure from the accepted norms of the law.

The aberration has already led to the use of pre-emptive force as a justification for the Israeli invasion of Lebanon. Earlier, Israel had sought to justify other incidents in a similar fashion. This included the bombing of an alleged terrorist ground in Syria in October 2003.¹¹⁵ The unlimited right the doctrine will provide Israel for incursions into its neighbours will add to the instability in the Middle East. Australia asserted a doctrine of pre-emptive force after the bombing in Bali in October 2002 which was aimed at its nationals. It was met with loud protests and derision from its neighbouring states.

¹¹⁴ Michael Reisman, "Assessing Claims to Revise the Laws of War" (2003) 97 A.J.I.L. 82; John Yoo, "International Law and the War in Iraq" (2003) 97 A.J.I.L. 563. These are official justifications advanced by the US in its National Security Strategy to argue that preemptive force is necessary "because of the capabilities and objectives of today's adversaries"; "The National Security Strategy of the United States of America" (Washington: The White House, September 2002), online: The White House: <<http://www.whitehouse.gov/nsc/nss.html>>. See, for a statement and defence by a former US Legal Advisor, Abraham Sofaer, "On the Necessity of Pre-emption" (2003) 14 E.J.I.L. 209. There is nothing to show that the concerns of the United States about the changing conditions of terrorism, new types of enemies and weapons of mass destruction could not have been accommodated within the existing structure. In fact, the United Nations did deal with the situation when it sanctioned operations in Afghanistan. The effort to widen the notion of imminence through a revival of the customary law on self defence is evident in the new notion of preemption. Andreas Laursen, "The Use of Force and the State of Necessity" (2004) 37 Vand. J. Trans'n'l L. 485.

¹¹⁵ The Security Council condemned the attack; Security Council, 4836th meeting (5 October 2003) (UN Doc. S/PV/ 4836), online: United Nations Information System on the Question of Palestine <<http://domino.un.org/UNISPAL.nsf/3822b5e39951876a85256b6e0058a478/57b65178624842ee85256db800521-3c9!OpenDocument>>.

Japan has claimed the pre-emptive right to strike at North Korea. With the acquisition of nuclear power by North Korea, the possibility for disaster the doctrine raises is immense.

The doctrine will provide Israel a limitless right to interfere forcibly in the affairs of its neighbours and promote instability in the region. It will lead to the festering of a problem that keeps terrorism alive in the world and leads to indiscriminate violence against the weak. Its potential to create instability in the world order is evident in that it can be used by other states faced with terrorist violence from neighbouring states and domestically. Similarly, the Sri Lankan government would have a limitless right to deal with the struggle for self-determination of the Tamils in the island or the Russian government to deal brutally with the problem in Chechnya. State terrorism will proceed unchecked. Human rights will become history. Worse still, states facing problems with neighbours could use the doctrine to attack them at will. The possibility of India attacking Pakistan on the ground that it is the source of terrorism is often cited as an example. The undermining of the norm against the use of force will have unintended consequences for world order.

Resistance to power and the movement towards justice requires that the use of force be confined to the restoration of peace by centralised institutions. This will ensure the retreat of unilateral doctrines such as pre-emptive use of force. The expansionary trends may also prove counterproductive as vulnerable states are forced to stockpile dangerous weapons so as to forestall threats of attack based on amorphous doctrines. The increasing urgency on the part of Iran and North Korea to become nuclear powers can be seen as a reaction to the doctrine of pre-emptive force and the absence of any credible effort on the part of the international community to create a restraint on the use of such a doctrine by the hegemonic power and its allies. The wisdom of the expansionary trend is to be doubted. It may assuage sentiments of fear drummed up during times of threat but it is inconsistent with the long-term goals of safety and peace for the international community. If there are indeed barbarians at the gate as the rhetoric requires the world to believe, the Charter doctrines relating to self-defence will adequately address the situation. The notion that there are rogue states against which there should be an unlimited right to strike militarily introduces a dangerous doctrine the consequences of which could destroy world order. The spin that has been put on events by political leaders who rely on spin to keep themselves in power will undermine the legitimacy that is necessary for legal norms that restrain the use of force.

The less powerful states of the world have watched the events with anxiety. Some of them, particularly the Islamic states, have felt a sense of alienation and humiliation by the assertion of the doctrine of pre-emptive force against terrorism and the seemingly unlimited right it gives powerful states. The reasons given for the formulation of the doctrine are in tatters. The invasion of Iraq did not bring democracy or peace to that country. It brought destruction. Among developing countries, particularly of Asia, it is recognised that the war on terror is not to be won by force alone but through addressing problems of poverty and inequality which breed resentment. The restoration of a law that limits the use of force is a matter of urgency. Movements within the United States recognise this as well. The ardour for neo-conservatism will end and, with it, the view that international law is a mere instrument of power to be used for justifying the pursuit of national interests of the powerful states.

The crude realism that characterises sections of international law scholarship in the United States will cease to exercise any significant hold when the failure of the adventures that have been embarked upon prove to be of limited use to the national interests of the powerful in the long run. Justice based norms which reduce violence in the world are an investment which promotes the interest of all states and peoples and it would be in the long term interests of powerful states to join in promoting such norms.

VII. CONCLUSION

It is demonstrable that in the last decade and a half, after the emergence of a single hegemonic power, international law has been set upon a course that has resulted in it being perceived as an instrument of power rather than as a neutral body of rules that applies to the international community through processes of law making in which the whole world shares. This divisive view of international law was driven by an ideological commitment to neo-conservative principles which sought to bring about an order based on political goals of democratic governance and economic goals of international trade and investment based on free market principles.

It has been shown that, in its initial phases, the move to establish principles of international law guided by those ideological preferences favoured by the single hegemonic power enjoyed a large measure of success in the major fields of international law. Though power has been a determinant in the shaping of international law in the past, the fact that it was diffuse, and not concentrated in the hands of a single state, made it less visible as the determinant of rules. It appears to be different in the present age. The clear dominance of a single power in world affairs has made its use of power to shape rules more visible. The nature of that single power has also not been too discreet in such matters unlike the European tendency towards quieter diplomacy in the past.

But, progressively, the smaller states, as well as people of the world, have taken stances against such uses of power to the detriment of what they perceive to be a more just world. These developments will ensure that alternative norms are raised in resistance to the norms based on power. As such resistance is not confined to states but are organised by peoples around the world through non-governmental groups or other means, the locus of law-making within the international community will shift to include such groups within the traditionally recognised group that includes states and international organizations. As a result of the resistance to the norms advanced by the hegemonic power and its allies, international law in the principal areas of conflict will remain in a state of continuous flux.

The five areas identified in this paper demonstrate this situation of constant clash of the different norms espoused by those with power and those without such power. The clash is not entirely between states, as the situation relating to the law on foreign investment and international trade show. The preferences of private power located in multinational corporations and trade groups have a role to play in the shaping of the norms. In the area of human rights, groups fighting for secession and ethnic minorities need to have their preferences taken into account. All these areas demonstrate intense conflicts brought about by the single hegemonic power taking up the cause of one side over the other in a vision that is guided by a neo-conservative philosophy.

The conflict is most evident in the area of the use of force which is at the heart of international law. It is evident that a schism has been opened up with the hegemonic power and its allies supporting expansive unilateral notions of uses of force and some European states, the non-aligned states and the smaller states being committed to the vision of the United Nations Charter. It is not unlikely that the hegemonic power will deviate from the expansionist course as it perceives its national interests as being tied up with the assertion of such a course. This is a course that both Republican and Democratic administrations have committed themselves to as the administration of President Clinton had justified its uses of force along similar expansionist lines.

With the eagle soaring high above without any bounds, the worms' vision of the world order looks rather bleak. But, it could well be that they would exert enough power through collective action, remembering that the muscular worms like China, India and Brazil have some weight to exert in redressing the balance. There are indications that such coalitions are taking shape. The defeat of the effort to extend competence of the WTO over the Singapore issues including investment was accomplished through the united efforts of the developing

states. The Doha development round of the WTO and its sequel again demonstrates a sense that unity provides strength to ensure that the goals of development are kept in the forefront. The strong expression of views on the Iraqi war also indicates that there is an emergence of cohesion among the powerless states. Given that public opinion within the United States has a role to play and that the world opinion may also coalesce against trends based against power being the sole determinant of the course of world politics, the picture may yet turn out to be an optimistic one. In the constant struggle between norms based on power and norms based on justice in which the weak find solace, it could well be that the norms based on justice will come out stronger. This would be so because well-meaning people the world over can unite under the banner of justice whereas power cannot by itself have such a coalescing effect. The visible evidence is that the formation of a people-centred international law will ensure that the dictates of power are kept in check despite its ephemeral success in isolated instances. Besides, the people of the powerful states may well come to see that there are limits to power and that its constant exercise enfeebles them. They may want to rid themselves of the responsibility that power brings as all imperial states of the past had done at the point of their exhaustion. The states may come to accept the fact that ultimate benefit for all depends on the emergence of justice based norms.

The decline of power, which saw its apogee in the first few years of this millennium, seems already to have set in. It will usher in a period in which justice related norms can once more be asserted. Though the conflict will continue, there is comfort in the fact that in the cycle of events it is now possible for an emergence of an international law that is based on justice. In the alternative, one could also see that the single hegemon may have to accommodate the emergence of other centres of power. In this case, the world will have to go back to the days of a regime maintained by a balance of power, in which case too, the scope for the existence of a justice based international law will be greater.

