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Law, Legitimacy and the United Nations

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> The UN Security Council, the World Bank, the IMF and the World Trade Organisation make decisions that affect us all. They do so without our consent. . . . Global governance is a tyranny speaking the language of democracy. . . . The purpose of a world parliament is to hold international bodies to account. It is not a panacea. It will not turn the IMF or the UN Security Council into democratic bodies . . . But it does have the potential to impose a check on them.[1]

In 2007, Zimbabwe was elected as chair of the UN Commission on Sustainable Development. A more grotesque choice is hard to imagine. Founding President Robert Mugabe inherited a beautiful and prosperous country and has systematically ground it to ruins, the unbounded goodwill of the international community attending the euphoria of his country's birth notwithstanding. What then are we to make of the UN's unique legitimacy that Kofi Annan was so fond of invoking while he was Secretary-General (SG)? This came on top of the decades of imbalanced and obsessive focus by the old Human Rights Commission on alleged Israeli violations of human rights while turning a blind eye to so many other regimes. It became morally bankrupt and an embarrassment to the UN system. To reverse growing cynicism about the hypocrisy of existing institutions and practices, and noting that states often seek membership in the commission to shield themselves from scrutiny, Annan recommended the creation of a smaller Human Rights Council to facilitate more focused debate and discussions.[2] That "reform" has been implemented, but progress on substance is not yet obvious. While the Human Rights Commission found it difficult to indict any country other than Israel, the Security Council seems to require compliance from all countries but Israel. It would be interesting to learn which side in the Arab-Israeli conflict holds the organization in greater contempt because of perceived illegitimacy owing to bias.

The report of Annan's High-Level Panel on UN reforms had included an intriguing sentence: "The maintenance of world peace and security depends importantly on there being a common global understanding, and acceptance, of when the application of force is both legal and legitimate."[3] The gulf between law and legitimacy is applicable more generally than the panel suggested. Consider Annan's successor in office. On January 1, 2007, Ban Ki-moon took office as the United Nations SG. The basis of his "election" was a series of straw polls in the UN Security Council (UNSC) in which he received the most votes while escaping a single negative vote from any one of the five permanent members (P5). Shashi Tharoor, who consistently ranked second in the polls, attracted one P5 (US) "discouragement" and withdrew. Ban was then elected unanimously by the UNSC and the election was ratified by acclamation by the General Assembly (GA).

Two conclusions may be drawn from this. First, Ban is the legally elected SG: all proper procedures were followed and he was duly sworn in. Second, the choice between him and Tharoor was made effectively by Washington. While the United States cast an indicative veto against one candidate, 177 of the 192 members of the organization had neither voice nor vote on the ultimately successful candidate. The SG is meant to be the world's top diplomat and the embodiment of the international interest. In an age of democratic legitimacy, why should the bulk of the world's countries and people accept him as "their" representative when they had neither voice nor vote in his selection? That is, the antiquated and opaque selection procedures seriously compromise the legitimacy of the outcome even though it is perfectly legal. Perhaps the point can be grasped by noting that during his tour of the Middle East in April 2007, Ban pointedly did not meet the Palestinian prime minister Ismail Haniya of Hamas, even though he was the legally elected leader in a region rather short of elected leaders.[4] The reason? Israel and the United States regard Hamas as a terrorist organization, and therefore illegitimate.

In this chapter, I shall argue that the gulf between law and legitimacy is a more serious crisis-in-the-making for the United Nations than is commonly realized. The reason for the underestimation of the extent and gravity of the gap may be that separate segments of the international community have problems with disparate elements of the gap and fail to capture the different dimensions in their cumulatively devastating impact on the UN's self-proclaimed legitimacy. I draw attention to the risks of the growing gap with respect to UN sanctions, the challenge of nuclear weapons, the use of force, international criminal justice, the structure and procedures of the UNSC, and accountability deficits among UN officials. Even so, this is an illustrative list, not an exhaustive account. I conclude with a comment on the danger of replacing an objective rule of law with an inherently subjective interpretation of international legitimacy as the primary basis of international action. Because much of the legitimacy-privileging justification is grounded in the vocabulary of humanitarianism, I will pay particular attention to the contentious aspects of the human rights discourse.

1. Authority, Legitimacy, Power

The distinction between law and legitimacy is an old one for political philosophers and intersects with the equally familiar discourse on the grounds of political obedience. Power is the capacity simply to enforce a particular form of behavior. Authority signifies the capacity to create and enforce rights and obligations which are accepted as legitimate and binding by members of an all-inclusive society who are subject to the authority. Ian Hurd distinguishes between coercion, self-interest, and legitimacy as alternative grounds for rule obedience and argues that, precisely because there is no international government to enforce them, states' compliance with international rules is a function of the legitimacy of those rules *as perceived by the norm-conforming states*.[5] That is, they are regarded as proper or appropriate by the actors to whom they are addressed within a socially constructed system of values and beliefs. If the source of legitimacy is institutions (either formal organizations or recurring and stable patterns of behavior), then those institutions indicate the existence of an international authority even in the absence of world government. For "the international system clearly exhibits some kind of order in which patterns repeat, institutions accrete, and practices are stable."[6]

The United Nations is the only truly global institution of a general purpose which approximates universality. The size of UN voting majorities, the forcefulness of the language used, and the frequency with which particular resolutions and language are recited are important because of the political significance attached to its perception as the closest we are able to get to an authentic voice of humanity. The role of custodian of collective legitimacy enables the United Nations, through its resolutions, to articulate authoritative standards of state behavior. The United Nations was meant to be the framework within which members of the international system negotiated agreements on the rules of behavior and the legal norms of proper conduct in order to preserve the society of states. Thus, simultaneously the United Nations was to be the forum for mediating power relationships, accomplishing political change that is held to be just and desirable by the international community, promulgating new norms, and conferring the stamp of collective legitimacy.

The United Nations is the site where power is moderated by lawful authority as law and legitimacy come together; or at least they should, in terms of the core identity on which the international organization was constructed. A community denotes shared values and bonds of affinity. An international community exists to the extent that there is a shared understanding of what constitutes legitimate behavior by the various actors in world affairs. A gulf between lawful and legitimate international behavior at or by the United Nations is prima facie evidence of an erosion of the sense of international community.[7] The United Nations is the symbol of an imagined and constructed community of strangers who have banded together to tackle the world's problems collectively and to work together cooperatively in the pursuit of shared goals. In this sense, the organization is first and foremost the repository of international idealism, the belief that human beings belong to one family, inhabit

the same planet, and have joint custodial responsibility to husband resources and protect the environment for all future generations of life on this planet.

Deriving from this, the core UN mandates are primarily normative: to preserve peace, promote development, and protect human rights. Operational plans are implementation strategies of these essentially normative mandates. This in turn means that ethics, principles, and values are central to the identity of the United Nations and must inform all its activities and operations. This also explains why allegations of financial fraud by UN officials or sexual misconduct by UN peacekeepers are so intensely damaging to the United Nations. This is why hints of South Korea having in part "bought" the post of SG for Ban,[8] strenuously denied by Seoul, were not helpful.

Yet another pertinent example might be the way in which Taiwan has been "banned" and made to disappear from the United Nations, just like undesirables were officially banned under South Africa's apartheid regime and therefore could not be covered by news reports. Taiwan is refused membership, is not granted observer status, and does not figure in the UN's statistical databases. "Yet the irony is that in recent generations Taiwan has been a world leader in embodying the ideals of the U.N.'s own charter"—it is prosperous and free-wheelingly democratic, "the world's first Chinese democracy."[9] Taiwan's exclusion is procedurally legal—but is it constitutional and legitimate, bearing in mind that Taiwan "is indisputably a sovereign state. . . . Free and democratic"?[10] In January 2006, Mukhtar Mai, the Pakistani woman whose defiant response to go public about her pack rape on the orders of a tribal court made her a worldwide symbol of courage in the face of official apathy and discouragement, was denied the opportunity to speak at the United Nations because Pakistan protested that its prime minister was visiting the organization that day.[11] So much for "We the people."

The bases of UN legitimacy include its credentials for representing the international community, agreed procedures for making decisions on behalf of international society and political impartiality.[12] But sometimes this elides into claims of legitimacy based on the technical identity of the Secretariat as an international civil service, which is quite problematic. When Iraq's interim leaders requested UN assistance for training Iraqi judges and prosecutors who would be trying Saddam Hussein and his senior associates, the response from Annan was that the organization would not assist national courts that can impose the death penalty.[13] In his report on transitional justice, Annan reaffirmed that the United Nations would neither establish nor participate "in any tribunal for which capital punishment is included among possible sanctions."[14] But whose preferred political morality is this? What proportion of the world's people live under governments that have capital punishment on their statutes, including China, India, Indonesia, Japan, the United States? Who sets the relevant international standards and benchmarks? Does the United Nations somehow have a state of grace above its member states?

If the UNSC is the geopolitical center of gravity in the UN system, the GA is its normative center of gravity. Thus the legal competence to authorize the international use of force vests in the UNSC, but the legitimacy of a GA resolution is the greater

for being the only authentic voice of the mystical "international community." The GA-UNSC clash of corporate interests intersects with the sometimes bitter North-South divide at the United Nations that has found expression in recent times on such issues as "humanitarian intervention," the relative priority to be accorded to tackling terrorism and global poverty, and internal UN management reform.[15] The new Secretary-General soon encountered a backlash on the last count.[16] But it is broader than that, and goes to the heart of the debate between law versus legitimacy. International law was a product mainly of the European states system and international humanitarian law too has its roots essentially in Europe. In the age of colonialism, most Africans, Asians, and Latin Americans became the victims of Western superiority in the organization and weaponry of warfare. They continue to be the objects but not the authors of norms and laws that are supposedly international.[17]

A world order in which developing countries are norm-takers and law-takers while Westerners are the rule setters, interpreters, and enforcers will not be viable because the division of labor is based neither on comparative advantage nor on equity. The risk is under-appreciated because the international discourse in turn is dominated by Western, in particular Anglo-American, scholarship. The net result of this, in turn, is that the bulk of scholarly analyses and discourse "privilege the experience, interests, and contemporary dilemmas of a certain portion of the society of states at the expense of . . . the large majority of states."[18] That is, the very universality from which the United Nations draws its legitimacy is in some crucial respects more token than real.

2. Sanctions: Legal but Illegitimate?

If Kosovo was an illegal and yet legitimate intervention by NATO, as argued by the independent international commission,[19] the reverse might be said of many sanctions regimes. Attempts to enforce authority can only be made by the legitimate agents of that authority. What distinguishes rule enforcement by criminal thugs from that by police officers is the principle of legitimacy. Legitimacy is thus the conceptual rod connecting the exercise of authority to the recourse to power. Enforcement includes diplomatic and economic coercion. Coercive economic sanctions developed as a conceptual and policy bridge between diplomacy and force for ensuring compliance with UN demands. Recourse to sanctions increased dramatically in the 1990s.[20] Calls for effective sanctions continue to be made sporadically with respect to Iran, Myanmar, Sudan, and Zimbabwe.

The right of the UNSC to impose sanctions in response to "any threat to the peace, breach of the peace or act of aggression" (Article 39) is clearly spelt out in the UN Charter: measures "not involving the use of force" including (but not limited to) "the complete or partial interruption of economic relations" (Article 41). Support for sanctions rests in their image as a humane alternative, and perhaps a necessary prelude, to war, which is increasingly regarded as a tool of the very last

resort. Yet in contrast to wars, sanctions shift the burden of harm solely to civilians, mainly women and children. They cause death and suffering through "structural violence" (starvation, malnutrition and disease) on a scale exceeding the "cleaner" alternative of war. Yet the track record of sanctions in ensuring compliance with UN resolutions is "uneven."[21] They inflict undeniable pain on ordinary citizens while imposing questionable costs on leaders who are often enriched and strengthened on the back of their impoverished and oppressed people by the law of perverse consequences. All too often, sanctions are a poor alternative to, not a sound supplement to, a good foreign policy.

All this has steadily undermined their legitimacy. Once seen as an attractive nonviolent alternative to war, sanctions became increasingly discredited for their harsh humanitarian consequences on the civilian population.[22] Instead of the authority of the United Nations legitimizing sanctions regimes, the baleful effects of sanctions began to erode the legitimacy of the United Nations.[23] This was exacerbated by the paucity of intellectual and institutional foundations for the organization's sanctions policy. In response, the international community has been trying to refine and improve the tool in both design and implementation. Interest shifted to incorporating carefully thought out humanitarian exemptions or looking for "smarter" alternatives to comprehensive sanctions that put pressure on regimes rather than peoples. But even when much improved from a moral, political, and technical point of view and conceptually compelling, smart sanctions remain unproven in actual practice.

3. Nuclear Weapons

One of the countries under threat of increasingly broad-ranging sanctions in 2007–9 was Iran. The reasons for this were concerns about a clandestine pursuit of nuclear weapons. But in this case, there was a real question mark about the nuclear legality of those who would impose sanctions; about the legality of the UNSC in imposing sanctions as a tool of geopolitical dominance rather than lawful enforcement; and about the legitimacy of the nuclear order as presently constituted.[24] That is, it is a good illustration of what Richard Falk in his framing chapter to this volume calls the geopolitical manipulation of normative idealism.[25] The issue of nuclear weapons is useful also in highlighting the behavior-regulating role of legitimacy in international relations. And the arguments over Iran in some respects merely reprised the legal-legitimate dichotomy passionately debated when India and Pakistan tested in 1998,[26] and also over the India-US civilian nuclear cooperation agreement of 2006.[27]

India had argued for decades that the most serious breaches of the anti-nuclear norm were being committed by the five nuclear powers (N5, who coincide with the P5) who simply disregarded their disarmament obligations under Article 6 of the Nuclear Nonproliferation Treaty (NPT). The imbalance of reporting, monitoring, and compliance mechanisms between the nonproliferation and disarmament

clauses of the NPT, India insisted, had in effect created nuclear apartheid. Against this background, the UN response to the 1998 tests posed the question of moral equivalence. The N5 preach nonproliferation while engaged in consenting deterrence. Their nuclear stockpiles are in defiance of the World Court's 1996 advisory opinion of a legal obligation to nuclear disarmament; India and Pakistan breached no international treaty, convention, or law by testing. For the N5—who are also the P5—to impose sanctions on the nuclear gatecrashers was akin (on this issue) to outlaws sitting in judgment, passing sentence and imposing punishment on the law abiding.

The attacks of September 11, 2001, concentrated minds on the prospect of terrorists acquiring weapons of mass destruction (WMD). A conceptual Rubicon was crossed by UNSC Resolution 1540 (April 28, 2004) in directing sovereign states to enact and enforce laws to prohibit nonstate actors from developing, acquiring, transferring, or using WMD; and to take and enforce effective domestic control, physical protection, accounting, and border control measures to prevent proliferation.

The unprecedented intrusion into national law-making authority can be read as the toughened new determination of the international community to take effective action. But it was not without controversy. A former member of the UN/OAU Expert Group on the Denuclearization of Africa noted that "by arrogating to itself wider powers of legislation," the UNSC was departing from its charter-based mandate. Excessive recourse to Chapter 7 could signal a preference for coercion over cooperation, while framing the resolution within the global war against terrorism was meant to silence dissenting voices. And the council's effort to seek global adherence to its resolutions was undermined by its unrepresentative composition and the veto power of the P5.[28] Many nongovernmental organizations (NGOs) too criticized the resolution's silence on the role of disarmament in promoting nonproliferation, as well as the UNSC effort to transform itself into a world legislature.[29]

The biggest tension in the arms-control regimes remains that between nonproliferation and disarmament. Article 6 of the NPT is the only explicit multilateral disarmament commitment undertaken by all the N5. Implementing Article 6 of the NPT instead of dusting it off occasionally as a rhetorical concession would dramatically transform the NPT from a nonproliferation into a prohibition regime. The N5 regard Article 6 as a peripheral obligation. Yet, as argued by the Nobel Prize-winning director-general of the International Atomic Energy Agency (IAEA), "Without this linkage, there would have been no agreement on an NPT in 1968—and it is hard to envision any new international nonproliferation compact that would not inherently contain such a linkage."[30]

If any one country can justify nuclear weapons on grounds of national security, so can others. Tehran portrays its actions as consistent with its NPT right to acquire nuclear technology and materials for peaceful purposes. The NPT requirements reflect the technical and political world of 1968. The series of inflammatory statements and incendiary steps by Mahmoud Ahmadinejad since he became

president may make his pursuit of the nuclear weapons option illegitimate, but they do not by themselves prove Iran's actions to date to be illegal.

The security deficits of Iran's geostrategic environment include three de facto nuclear powers (Israel, Pakistan, and India) in its own region to the west and east; aggression in recent memory by neighbor Iraq, including the use of chemical weapons delivered by Scud missiles, which was at least tolerated if not condoned by the same Western powers that later turned against the author of the aggression; two nuclear powers (China and Russia) in the Central Asian regional context; a history of Anglo-American aggression against Iran; and a circle of US bases and forces around it in the context of having been designated a member of the "axis of evil."

Confronted with such a strategic environment, a prudent national security planner could not reasonably be faulted for recommending an acceleration rather than an abandonment of the nuclear program. Tehran too could cloak its actions in arguments that legitimacy is different from and on a higher plane than legality. American advocates of robust national postures argue that global regimes are unreliable instruments of security, international law is a fiction, and the United Nations is an irrelevant nuisance. Countries have to rely on their own military might to avoid becoming the victims of others. The NPT was negotiated for another time and another world. In the harsh world of today's international jungle, the only reliable route to ensuring national security is through national military might, including nuclear weapons.

All of which might put the ball back in the UN's court. But its authority too has been diminished by the Iraq war.[31] What is to stop other leaders from mimicking the bumper-sticker argument about not needing a permission slip from the United Nations to defend one's country? In other words, repeated US assaults on UN-centered law governing the international use of force have undermined the norm of a world of laws, the efficacy of international law, and the legitimacy of the United Nations as the authoritative validator of international behavior.

A norm cannot control the behavior of those who reject its legitimacy. Norm compliance by those who reject the legitimacy of the existing order will be a function of their incapacity to break out, not of voluntary obedience. The de facto position of "nuclear might equals right" is an inducement to join the club of nuclear enforcers. It is curious, to say the least, that those who worship at the altar of nuclear weapons are the fiercest in denouncing as heretics anyone else wishing to join their sect. In order to enhance their credentials as critics and enforcers of the norm, the N5 need to move more rapidly from deterrence to disarmament. There were early signs that the Obama administration might well take a lead on this. The logic of nonproliferation is inseparable from that of disarmament. Hence the axiom of nonproliferation: as long as any one country has them, others, including terrorist groups, will try their best (or worst) to get them. If they did not exist, nuclear weapons could not proliferate. Because they do, they will. The pursuit of nuclear nonproliferation is doomed without an accompanying duty to disarm.

Paradoxically, counter-proliferation efforts may well be legitimate even if illegal. The reality of contemporary threats means that significant gaps exist in the legal and institutional framework to combat them. Within the constraints of the NPT, a non-nuclear country can build the necessary infrastructure to be but a screwdriver away from acquiring nuclear weapons. Nonstate actors are outside the jurisdiction and control of multilateral agreements. Recognizing this, a US-led group of like-minded countries launched the Proliferation Security Initiative (PSI) to interdict illicit air, sea, and land cargo linked to WMD. Its premise is that the proliferation of such weapons deserves to be criminalized by the civilized community of nations. The PSI signals a new determination to overcome an unsatisfactory state of affairs through a broad partnership of countries that, using their own national laws and resources, will coordinate actions to halt shipments of dangerous technologies and materiel.

4. Atrocity Crimes and International Interventions

The PSI involves a limited use of force by groups of countries acting outside the UN framework. The law-legitimacy distinction arose with particular cogency with respect to the legal system promulgated and enforced by the apartheid regime in South Africa. If the constitutional system itself was essentially a criminal regime, then could not opposition to it be held up as legitimate even if illegal? That debate had barely faded when the same dilemma flared up in the 1990s with the spate of humanitarian atrocities and the role of international indifference, inaction, or intervention with respect to them. Except this time, the roles of the global North and South were reversed. When NATO launched a "humanitarian war" without UN authorization in Kosovo, it raised a triple policy dilemma:

- To respect sovereignty all the time is to be complicit in humanitarian tragedies sometimes;
- To argue that the UNSC must give its consent to international intervention for humanitarian purposes is to risk policy paralysis by handing over the agenda either to the passivity and apathy of the council as a whole, or to the most obstructionist member of the council, including any one of P5 determined to use the veto clause;
- To use force without UN authorization is to violate international law and undermine world order.

The three propositions together highlight a critical law-legitimacy gap between the needs and distress felt in the real world and the codified instruments and modalities for managing world order. Faced with another Holocaust or Rwanda-type genocide, on the one hand, and a Security Council veto, on the other, what would we do? Doing nothing would progressively delegitimize the role and undermine the authority of the UNSC as the cornerstone of the international law-enforcement

system. But action without UN authorization would be illegal and also undermine the lawful authority of the UNSC. The legality-legitimacy distinction was to resurface four years later over Iraq and leave many Westerners rather less comfortable than the Kosovo precedent.[32]

In making up the rules of intervention "on the fly" in Kosovo,[33] NATO countries put at peril the requirement for a lasting system of world order grounded in the rule of international law. The attempt "to limit the reach of the Kosovo precedent did not prevent the advocates of the Iraq war from invoking it to justify toppling Saddam."[34]

The Iraq war's legality and legitimacy will be debated for years to come. The belligerent countries insisted that the war was both legal and legitimate, based on a series of prior UN resolutions and the long and frustrating history of combative-cum-deceitful defiance of the United Nations by Saddam Hussein. Others conceded that it may have been illegal but, like Kosovo in 1999, it was nevertheless legitimate in its largely humanitarian outcome. For a third group, the war was both illegal and illegitimate.[35]

Similarly, there were three views on the significance of the war for the UN-US relationship: that it demonstrated the irrelevance, centrality, or potential complicity of the United Nations.[36] For the neoconservatives, because it exists, the United Nations should be disinvented.[37] The second point of view acknowledged the need to confront Saddam but ruled out acting without UN authorization. The third argument accepted UN authorization as necessary but not sufficient, preferring irrelevance to complicity. In the opinion of some, the United Nations is "now more than ever reduced to the servile function of after-sales service provider for the United States, on permanent call as the mop-up brigade."[38]

Humanitarianism provides us with a vocabulary and institutional machinery of emancipation. But "[f]ar from being a defense of the individual against the state, human rights has become a standard part of the justification for the external use of force by the state against other states and individuals."[39] The use of force may be lawful or unlawful; the decision to use force is a political act; almost the only channel between legal authority and political legitimacy with regard to the international use of force is the United Nations. Conceding to any regional organization the authority to decide when political legitimacy may override legal technicality would make a mockery of the entire basis of strictly limited, and in recent times increasingly constricted, recourse to force for settling international disputes. Conversely, restricting the right solely to NATO is "an open argument for law-making by an elite group of Western powers sitting in judgment over their own actions"[40]—as well as that of all others. In effect, the West's position vis-à-vis the rest is: we shall hold you to account for your use of force domestically while exempting our international use of force from any external accountability.

While the West wants to proscribe the unconstrained use of force to maintain domestic order, developing countries want to proscribe the use of force by outsiders to enforce justice within errant member states. There is also the moral hazard

that outside intervention on behalf of groups resisting state authority by force encourages other recalcitrant groups in other places to resort to ever-more-violent challenges, since that is the trigger to internationalizing their power struggle.

The tension is both powerful and poignant with respect to moving the globally endorsed responsibility to protect from norm to action (or words to deeds, principle to practice). Here we enter the realm both of *normative inconsistency*, selective application and enforcement of global norms against friends and adversaries—downplaying the human rights abuses of Central Asian states and Israel while highlighting those of Iraq and Iran, for example—and *normative incoherence*, when different norms clash with each other, as between human rights requirements and prohibitions against the use of force. Is it permissible—legitimate—to violate some aspects of international law in order to enforce respect for human rights laws? Is it still legitimate if some states are more equal than others in facing international pressure and sanctions, including military intervention as the ultimate sanction? The French foreign minister advocated invoking the responsibility to protect to override the junta's recalcitrance about accepting international assistance after Cyclone Nargis in Myanmar in 2008, but was notably silent about possible Israeli war crimes in Gaza in 2009. Such selectivity will quickly delegitimize the new norm whose path to global endorsement was quite contentious.[41]

In a Security Council debate on the protection of civilians in armed conflict on December 4, 2006, Chinese ambassador Liu Zhemin warned that the 2005 Outcome Document was "a very cautious representation of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity . . . it is not appropriate to expand, willfully to interpret or even abuse this concept."[42] Yet that is precisely what was suggested in 2008 in the context of Cyclone Nargis and more recently by the London-based One World Trust.[43] Ban is surely right in warning that "it would be counterproductive, and possibly even destructive, to try to revisit the negotiations that led to the provisions of paragraphs 138 ad 139 of the Summit Outcome."[44] Nor is this an isolated phenomenon. A major reason for the failure of the 2005 Outcome Document to include a single reference to the nuclear-weapons challenge was the backlash to the unilateral reinterpretation by the five NPT-licit nuclear powers of the NPT that it was solely about nonproliferation obligations by the rest instead of a package bargain between nonproliferation and disarmament obligations.

5. International Criminal Justice

African and Asian countries achieved independence on the back of extensive and protracted nationalist struggles. The anticolonial impulse was instilled in their countries' foreign policies and survives as a powerful sentiment in the corporate memory of the elites. All too often, developing-country views either fail to get a respectful hearing at all in Western policy and scholarly discourse, or are patronizingly

dismissed.[45] There has been something of a revival of the enterprise of liberal imperialism, which rests on nostalgia for the lost world of Western empires that kept the peace among warring natives and provided sustenance to their starving peoples. This is at variance with the developing countries' own memories and narratives of their encounter with the West. Typically, their communities were pillaged, their economies ravaged, and their political development stunted. Whether it was Britain in Kenya or Belgium in the Congo,[46] the colonial powers were brutal in dealing with dissent and rebellion.

The displacement and ethnic cleansing of indigenous populations was carried out with such ruthless efficiency that the place of settler societies like Australia, Canada, and the United States in contemporary international society is accepted as a given because, as Paul Keal notes, the "criteria fixed by the inner circle" of powerful states "articulate rules of legitimacy and norms of behaviour."[47] Presumably the same explanation holds for the failure of even a peep of protest by the United Nations for the alleged atrocities committed by the US military in Fallujah in April 2004, including the use of chemical weapons prohibited under international humanitarian law. As one commentator observed on the eve of the third anniversary of the siege, "The US has overthrown a regime while supposedly searching for phantom weapons of mass destruction, only to use such weapons on the newly 'liberated' civilian population."[48] He offers as explanation for the failure of any lasting international outcry an all-encompassing weariness, "a kind of fatigue, a sense that ethical action is just too troublesome in our complicated and distracted world"—unless, of course, the sense of ethical outrage can be mobilized by the powerful to launch all-out military assaults against troublesome upstarts who do not kowtow to the resplendent ruler of the new middle kingdom.

The actions of the former colonial powers are as free of international criminal accountability today as they ever were. Discarding diplomatic language in favor of some blunt talking, on March 17, 2009, US Secretary of State Hillary Clinton warned Sudan's President Omar Hassan al-Bashir that he and his government "will be held responsible for every single death that occurs" in Darfur's refugee camps.[49] She was speaking in response to the expulsion of thirteen international aid groups, who provided around half of all assistance delivered in Darfur, in retaliation against the arrest warrants for Bashir issued by the International Criminal Court (ICC) in The Hague. Left unsaid was that no American can be held internationally responsible for a single death that occurs anywhere in the world. An initiative of international criminal justice meant to protect vulnerable people from brutal national rulers has been subverted into an instrument of powerful against vulnerable countries.

All four ICC indictments to date have been against Africans: nationals of the Central African Republic, the Democratic Republic of the Congo, Uganda, and Sudan.[50] When a person under ICC indictment is welcomed to Egypt by the president himself and attends an Arab League summit at which even Ban Ki-moon was present, the net result is to bring the system of international criminal justice into disrepute. Unlike Bashir or the other Africans in the dock, whose alleged atrocities

were limited to national jurisdictions, the Bush administration asserted and exercised the right to kidnap suspected enemies in the war on terror anywhere in the world and take them anywhere else, including countries known to torture suspects.[51] Many Western allies colluded in the distasteful practice of rendition. No Westerner has faced criminal trial for it. In a surreal twist worthy of Kafka, we send terror suspects to be tortured to countries which we then brand as human rights abusers.

What of charges of war crimes by Hamas and Israelis in Gaza earlier this year? There was a furor in Israel as some soldiers claimed they shot unarmed civilians, sometimes under orders from their officers.[52] And we are all aware of the Hamas tactic of hiding its fighters and weapons amidst civilians, knowing that that will risk the death of innocents as Israelis return fire. The deaths of fellow Palestinians is less consequential to them than the international censure of Israel for killing innocent civilians.

Which rights that Westerners hold dear would they be prepared to give up in the name of universalism? Or is the concept of universalism just a one-way street—what we Westerners have is ours, what you heathens have is open to negotiation? One hint of the answer lies in the following: "the diffusion of international norms in the human rights area crucially depends on the establishment and the sustainability of networks among domestic and transnational actors who manage to link up with international regimes, to alert Western [*sic*] public opinion and Western [*sic*] governments."[53] The philosophical antecedents of such beliefs lie in the eighteenth–nineteenth-century theory of evolutionary progress through diffusion and acculturation from the West to the rest. The implicit but clear assumption is that when Western and non-Western values diverge, the latter are in the wrong, and it is only a matter of working on them with persuasion and pressure for the problem to be resolved and progress achieved.[54] The cognitive rigidity is shown again in "Pressure by Western states and international organizations can greatly increase the vulnerability of norm-violating governments to external influences."[55] Self-evidently, only non-Western governments can be norm violators; Western governments can only be norm setters and enforcers.

The rejection of the ICC[56] by Washington highlights the irony that the United States "is prepared to bomb in the name of human rights but not to join institutions to enforce them."[57] Even if we agree on universal human rights, they still have to be constructed, articulated, and embedded in international conventions. The question remains of the agency and procedure for determining what they are, how they apply in specific circumstances and cases, what the proper remedies might be to breaches, and who decides, following what rules of procedure and evidence. Under present conditions of world realities, the political calculus—relations based on military might, economic power, and media and NGO dominance—cannot be taken out. The resilience of the opposition to the internationalization of the human conscience lies in the fear that the lofty rhetoric of universal human rights claims merely masks the more mundane and familiar pursuit of national interests by different means.

6. The United Nations Security Council (UNSC)

Almost all the above examples relate to the UNSC as the core of the international law-enforcement system. General Rupert Smith argues that in Bosnia, "The existence and actions of the Security Council negatively affected events . . . The consequence of this failing was the destruction of the credibility of the UN." He concludes that "If the Security Council . . . is to change so as to wield force for good, then structural and organizational changes are necessary."[58] An unreformed UNSC has been experiencing a steady erosion of international legitimacy, which helps to explain the growing willingness of many state and nonstate actors to openly defy its edicts. That is, the increasing divergence of UNSC-sourced law from legitimacy dramatically reduces the efficacy of the United Nations in regulating the international behavior of a growing number of actors. For legality and legitimacy to come together again in the UNSC, its composition and procedures must be changed urgently to reflect today's military and ideational realities.

The legitimacy of the UNSC as the authoritative validator of international security action suffers from a quadruple legitimacy deficit: performance, representational, procedural, and accountability. Its performance legitimacy suffers from two strikes: an uneven and a selective record. It is unrepresentative from almost any point of view.[59] Its procedural legitimacy is suspect on grounds of lack of democratization and transparency in decision making. And it is not answerable to either the General Assembly, the World Court, the nations, or the peoples of the world.

Western countries often fret at the ineffectual performance legitimacy of the Security Council. Their desire to resist the council's role as the sole validator of the international use of force is the product of this dissatisfaction at its perceived sorry record. But the moral authority of collective judgments does depend in part on the moral quality of the *process* of making those judgments.[60] "When democrats disagree on substance, they need to agree on process," writes Michael Ignatieff.[61] The collective nature of the decision-making process of the UNSC is suspect because of the skewed distribution of political power and resources among its members. If the UNSC were to become increasingly activist, interventionist, and effective, the erosion of representational and procedural legitimacy and the absence of any accountability mechanisms would lead many countries to question the authority of the council even more forcefully.

There is a logical slippage between normative idealism and *realpolitik* in picking and choosing which elements of the existing order are to be challenged and which retained. If ethical imperatives and calculations of justice are to inform, underpin, and justify international interventions, then there is a powerful case for reforming the composition of the UNSC and eliminating the veto clause with respect to humanitarian operations. To self-censor such calls for major reform on the grounds that they are unacceptable to the major powers and

therefore unrealistic is to argue in effect that the motive for intervention is humanitarian, not strategic; but the agency and procedure for deciding on intervention must remain locked in the strategic logic of *realpolitik*.

The United Nations is usually attacked for doing too little, too late. Has the UNSC been doing too much and too soon? In recent times, the UNSC has been co-opting functions that belong properly to legislative and judicial spheres. It has taken on a legislative role in resolutions on terrorism and nonproliferation. This is intruding into the realm of state prerogatives as negotiated in international conferences and conventions. The decisions of the UNSC are binding, so 192 legislatures are denied their right of review over international treaties. The Security Council imposed sanctions on Libya for its failure to extradite two citizens accused of being the brains behind the Lockerbie bombing (Resolution 748, March 31, 1992). That is, without a trial and conviction, the council was bent on compelling one sovereign state to hand over its citizens to another sovereign state on the basis of allegations from the latter—which had itself, just a few years earlier, defied the World Court's verdict in a case brought against it by Nicaragua.

In August 2004, the council approved a US-backed resolution demanding the immediate withdrawal of all foreign forces from Lebanon—at a time when more than 100,000 US troops were occupying Iraq. No one held their breath over any possible UN investigation of the tens—or is it hundreds—of thousands killed in Iraq since 2003. On May 31, 2007, a sharply divided UNSC voted 10-0-5 to establish an international criminal tribunal to prosecute the perpetrators of the suicide-assassination of Lebanon's Prime Minister Rafiq Hariri and twenty-two others in February 2005, which put the organization "in the business of stigmatizing and punishing individuals for a political crime."[62] The five abstainers—China, Indonesia, Qatar, Russia, and South Africa—explained that the resolution bypassed the Lebanese Parliament's constitutional role in approving international agreements.[63] Hezbollah issued a statement denouncing the UNSC resolution as "illegal and illegitimate at the national and international level."[64]

It is easy to understand why Iranians might have come to the same conclusion about the UNSC after their bitter war with Iraq. For eight long years, despite clear evidence of aggression by Saddam Hussein (who during this time was the West's useful idiot) and his use of chemical weapons, the council's standard response was to suggest that "both belligerents were equally at fault."[65]

If and when the UN Charter is reformed, one item on the agenda should be curbs on untrammeled authority in the UNSC that is presently subject to no countervailing political check or judicial review.[66] The idea that the P5 should concentrate legislative, executive, and judicial powers to themselves violates elementary notions of due process. Imagine if abuser regimes, and only they, had permanent membership and veto powers in the new Human Rights Council.

Western commentators seem to point routinely to China and Russia as the veto-wielding problem members of the P5. In fact, since the end of the Cold War, the country to have cast the veto most frequently is the United States. Britain and

the United States have been among the most heavily involved in warfare and armed conflict over the last century; if we limit the period to that starting after the Second World War, a third country in the list would be Israel. Not the least because of the veto power in the Security Council, there is no prospect of anyone from any of these three countries being placed in the ICC dock in the foreseeable future. Little wonder that the precedent-setting indictment of the president of Sudan by the ICC in March 2009 drew protests from the majority of the African Union, the Arab League, and the Nonaligned Movement (the world's most representative general-purpose body after the United Nations itself) about the selective justice being meted out by the ICC. Until such time as Washington (and London) are prepared to lead the campaign for the abolition of the veto clause, it is difficult to see how the expectation, threat, or use of veto by others can legitimize any US or British action that circumvents the veto. Those who live by the veto cannot rightfully complain about having to die by the veto.

7. The UN-US Dualism

The push for democratization in the world has been led by the three Western members of the P5 (Britain, France, and the United States). Yet the three have been the most fiercely resistant to bringing democracy and transparency to the workings of the council itself.

In some respects, it is more accurate to speak these days of the P1 rather than the P5. Authority is the right to make policy and rules, while power is the capacity to implement the policy and enforce the rules. The United Nations has global reach and authority but no power. It symbolizes global governance but lacks the attributes of international government. While lawful authority remains vested in the United Nations, power has become increasingly concentrated in the United States, which has global grasp and power but not international authority. The exercise of power is rendered less effective and generates its own resistance if divorced from authority. The latter in turn is corroded when challenges to it go unanswered by the necessary force. Lack of capacity to be the chief enforcer acting under Chapter 7 means that the United Nations remains an incomplete organization, one that practices only parts of its charter. That being the case, Ed Luck asks, "Is it tenable for the UN to say that it only wants to walk on the soft side of the street but nevertheless wants to have some degree of control over what happens on the other side as well?"[67]

Until the First World War, war was an accepted and normal part of the states system, with distinctive rules, norms, and etiquette. In that Hobbesian world, the only protection against aggression was countervailing power, which increased both the cost of victory and the risk of failure. Since 1945, the United Nations has spawned a corpus of law to stigmatize aggression and create a robust norm against it. The United Nations exists to check the predatory instincts of the powerful

toward the weak—one of the most enduring but not endearing lessons of history. Since 9/11, an America that was already over-armed has militarized its foreign policy still more.

The implications of an American empire for law and legality in world affairs are discussed later in this volume by Amy Bartholomew. Might the US irritation at the United Nations owe as much to its effectiveness in constraining imperial US behavior as alleged UN ineffectiveness against others? The Bush administration rejected President Harry Truman's counsel that America must deny itself the license to do as it pleases, ignored President John F. Kennedy's wisdom that America is neither omnipotent nor omniscient, and rode roughshod over four decades of tradition of enlightened self-interest and liberal internationalism as the guiding normative template of US foreign policy.[68] Paul Heinbecker, Canada's former UN ambassador, comments that the distance from hubris to delusion is short; the Bush Administration covered it in a sprint.[69]

At the same time, most Western countries, including the United States, rightly point to the total dysfunctionality of the General Assembly. There is merit to the argument that at least one explanation for the creeping powers of the UNSC is the loss of focus and efficiency by the assembly. It is far more interested in finger pointing and point scoring than problem solving. Its fascination with procedural technicalities and square brackets fails to excite anyone outside. One of its low points surely was the equation of Zionism with racism, a resolution that mercifully has since been rescinded. Thus in many quarters, the chief cause of the steady erosion of UN legitimacy is the GA, not the UNSC.

8. Accountability, Integrity, and Legitimacy Deficit

International organizations that are perceived by their members as legitimate are governmental in the way in which they exercise social control through the promulgation of norms (standards of behavior) and laws (rules of behavior). The United Nations, not unlike national governments, represents a structure of authority that rests on institutionalized state practices and generally accepted norms. But "governmental bodies are expected to be accountable and open to opposition,"[70] otherwise they will suffer an erosion of their legitimacy. The UN's authority to preach the virtues of good governance and accountability to others will be gravely compromised by any departures from these values in its own behavior.

In recent times, the organization has been in turmoil, struggling to cope with a string of allegations of fraud and misconduct by foot soldiers and senior officials. I have remarked on the poisonous North–South divide at the United Nations, which has a corrosive effect on the organization's legitimacy to the extent that it derives from its identity as a universal organization and developing countries comprise the majority of its membership. Sometimes this is turned on its head by Western critics who blame management shortcomings on quota politics imposed

by the third-world majority on UN recruitment and promotion policy and practice. Yet my own research showed the fallacy of such a charge. The senior ranks of the UN system are dominated by nationals of the rich and powerful countries.[71] The point was borne out by the senior appointments made by the new Secretary-General.[72] And in the case of the choice of his deputy, the general consensus is that Ban had available another African woman candidate who would have raised fewer initial questions about management and competence. That is, it is the individual exercise of judgment that may be flawed, not the general principle of equitable geographical and, increasingly, gender representation.

Another canard is about the oil-for-food scandal. Yes, the affair showed up lapses and weaknesses in the internal management culture and practices of the UN Secretariat. But, in the total sweep of the scandal, these were minor. The really important lessons were four. First, the United Nations simply does not have the capacity, in size and technical resources, to manage such a program and should firmly refuse any such task in the future. Besides, even the record of US authorities since 2003 is considerably worse.[73] Second, UN officials did in fact raise queries about potential shenanigans with the appropriate oversight committee of the UNSC, but their concerns were not taken up for serious investigation. The main players in the council had other priorities. If judgments are to be made, they should be about the council members, not UN officials.[74] Third, the real money was changing hands between business firms and executives and ministers and officials of member governments, not UN officials. After a $35 million inquiry, the Volcker committee found a risible $150,000 that one official could not satisfactorily account for: unaccounted, not even prima facie evidence of having received a bribe. By contrast, many non-UN politicians, officials, and business executives were implicated in serious sums of money. The biggest single questionable payment, some AUD300 million, concerned the originally government-owned and later government-backed Australian Wheat Board (and subsequently just AWB) dealings with Saddam Hussein.[75] Finally, for all these flaws, the program actually succeeded in its humanitarian goals, just as the UN inspection teams succeeded in disarming Saddam of WMD.

In a similar vein, who should be held accountable for the flawed judgment and actions of an SG—UN officials or those with the most say in (s)electing him?[76] When America's love affair with Annan soured and the right-wing commentators in particular decided to go after him, the United Nations as a corporate entity was just as liberally smeared, and some of us UN officials too had to bear barbs directed at the United Nations for its supposed lack of institutional ethics. Leaving aside the question of Annan's legacy and whether or not the attacks were merited or ill-intentioned,[77] the facts are fairly straightforward and uncontestable. In 1991, the African candidate with the widest support in the UNSC was Salim Ahmed Salim. He was much too radical for Washington's taste and was vetoed. Instead Boutros Boutros-Ghali was chosen SG. Five years later, he was out of favor in Washington and was replaced by Annan, who was then at American instigation reappointed

unanimously for a second term. So if Annan turned out to be deficient, should critics direct their ire at the United Nations as an institution, at UN officials, or at the US government?

That said, the real UN scandal of the last dozen years or so has been with respect to predatory peacekeepers.[78] Fifteen years ago, Amnesty International argued that the time was overdue for the United Nations to build measures for human rights promotion and protection into its own peacekeeping activities.[79] If the United Nations is to maintain its human rights credibility, soldiers committing abuses in its name must face investigation and prosecution by effective international machinery. (The abuses are not confined to UN peacekeepers. Amnesty concluded that "the international community"—that is, NATO peacekeepers as well as UN civilian personnel—made up around 80 percent of the clientele of women trafficked into prostitution in Kosovo.[80])

Annan admitted to being "especially troubled by instances in which United Nations peacekeepers are alleged to have sexually exploited minors and other vulnerable people," repeated his policy of zero tolerance of such offences, and reaffirmed the UN's commitment "to respect, adhere to and implement international law, fundamental human rights and the basic standards of due process."[81] He appointed Prince Zeid al-Hussein, Jordan's ambassador to the United Nations who had personal civilian peacekeeping experience in Bosnia, to study the abuses and make recommendations on improving the accountability of UN peacekeeping missions. Prince Zeid's report concluded that sexual exploitation of women and girls by UN security and civilian personnel in Congo was significant, widespread, and ongoing.[82] Annan concurred with the analysis and recommendations with respect to the investigative processes; the organizational, managerial, and command responsibility; and individual disciplinary, financial, and criminal accountability. But, when the problem of peacekeepers as sexual predators has been known at least since the Namibia and Cambodia operations, why was no action taken earlier and who has been held accountable for the lapse?[83]

9. Conclusion: Objective Law vs. Subjective Legitimacy

International law, like all law, is an effort to align power to justice. Politics is about power: its location, bases, exercise, effects. Law seeks to tame power and convert it into authority through legitimizing principles (e.g., democracy, separation of powers), structures (e.g., legislature, executive, and judiciary) and procedures (e.g., elections). Law thereby mediates relations between the rich and the poor, the weak and the powerful, by acting as a constraint on capricious behavior and setting limits on the arbitrary exercise of power. Conversely, the greater the gap between power and authority, the closer we are to anarchy, to the law of the jungle where might equals right, and the greater is the legitimacy deficit. Equally, the greater the gap between power and justice in world affairs, the greater is the

international legitimacy deficit. When the powerful subvert the proper relationship to make law subservient to their agenda for keeping others in line, as seems to be happening with the ICC, the many will reject, resist, and rebel against such a perversion of justice.

The *rule of law ideal* has been diffused from the West to become an international norm. It asserts the primacy of law over the arbitrary exercise of political power by using law to tame power; the protection of the citizen from the arbitrary actions of the government by making both, and their relationship to each other, subject to impersonal and impartial law; and the primacy of universalism over particularism through the principle of equal in law, whereby individuals coming before the law are treated as individuals, divorced from their social characteristics.

A normative commitment to the *rule of law* implies a commitment to the principle of relations being governed by law, not power. It also implies a willingness to accept the limitations and constraints of working within the law, in specific instances if necessary against individual notions of just or illegitimate outcome. Fidelity to international regimes, laws, and institutions must be required of and demonstrated by all countries. Trashing global institutions and cherry-picking norms and laws is incompatible with using them to compel compliance by others. To those who uphold the law themselves, and only to them, shall be given the right to enforce it on others.

In apartheid South Africa, in colonial India, and in any situation where conscience dictates that individuals resist laws that they regard as unjust—that is, illegitimate—citizens accept the resulting punishment meted out by the legal process as the necessary price for acting on the basis of their core beliefs. By contrast, in international affairs, the legitimacy–legality distinction is used in the effort to seek *escape* from any penalty for acting outside the law: yes, Kosovo may have been illegal, but because our intervention was legitimate, we deserve praise and reward, not blame and punishment.

The Kosovo and Iraq interventions underlined widespread perceptions that powerful countries can break the rules of the charter regime with impunity. This has widened the gulf between law and legitimacy. Susan Woodward makes the telling point that the Security Council still does not have "a policy on how to address and manage conflicts that threaten the territorial integrity of a country from within." This is a policy dilemma for Serbia that most developing countries could identify with and most Western countries did not. The result was "a cavalier invocation by the Security Council of Chapter VII authority without providing the mandate or resources necessary to stop the war."[84] She goes on to indict the council for bearing "the larger moral responsibility, for never having sought to craft a policy of its own independent of the actions of its members . . . either for the Yugoslav conflicts or for the generic problem which it will continue to face." It "failed to defend the territorial integrity of a member state, and it then failed to establish and enforce rules on the recognition of statehood and borders."[85]

As David Kennedy notes, war has always been with us, and so has humanitarianism: "an endless struggle to contain war in the name of civilization."[86] He argues that, by and large, the humanitarian community has failed to confront the reality of bad consequences flowing from good intentions. The central objective of traditional humanitarian policy making has been to reduce the frequency and violence of war. Now many humanitarians demand the use of violence and war in order to advance the humanitarian agenda.

But how can one "intervene" in Kosovo, East Timor, Iraq, or Darfur and pretend to be detached from and not responsible for the distributional consequences with respect to wealth, resources, power, status, and authority? This dilemma is inherent in the structure of interventions and has nothing to do with the false dichotomy between multilateral interventions in one context and unilateral in another. "The effort to intervene . . . without affecting the background distribution of power and wealth betrays this bizarre belief in the possibility of an international governance which does not govern."[87]

By virtue of their growing influence and power, humanitarian actors have effectively entered the realm of policy making, at the same time as their emancipatory vocabulary has been captured by governments and other power brokers. International humanitarians are participants in global governance as advocates, activists, and policy makers. Their critiques and policy prescriptions have demonstrable consequences in the governmental and intergovernmental allocation of resources and the exercise of political, military, and economic power. With influence over policy should come responsibility for the consequences of policy. When things go wrong or do not happen according to plan, the humanitarians share the responsibility for the suboptimal outcomes.

Human rights has become the universal vocabulary of political legitimacy and humanitarian law of military legitimacy. But rather than necessarily constraining the pursuit of national interests in the international arena by military means, human rights and humanitarian law provide the discourse of justification for the familiar traditional means of statecraft. Much as humanitarians might want to believe that they still hold up the virtue of truth to the vice of power, the truth is that the vocabulary of virtue has been appropriated in the service of power. Far from bridging, that increases the distance between law and legitimacy, particularly at the United Nations.

Endnotes

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1. George Monbiot, "The Best Way to Give the Poor a Real Voice is through a World Parliament," *Guardian* (London), April 24, 2007.

2. Kofi A. Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All*. Report of the Secretary-General (New York: United Nations, document A/59/2005, March 21, 2005), paras. 140, 182, and 183.

3. High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (New York: United Nations, document A/59/565, December 2004), para. 184.

4. Warren Hoge, "UN Chief Starting to Wield Personal Authority in Mideast," *International Herald Tribune*, April 2, 2007. The title of the article notwithstanding, everything that Ban did on the trip as reported in it conformed to Washington's priorities and perceptions.

5. Ian Hurd, "Legitimacy and Authority in International Politics," *International Organization* 53:2 (Spring 1999): 379–408. For example, Hurd notes that many borders are undefended and indefensible, such as Canada's with the United States. Coercion or the fear of retribution is inadequate to explain US restraint in not taking over Canada. Nor does one find a continual calculation and recalculation by states of the costs and benefits of conquest as would be predicted by a rational self-interest model. Instead there is a "taken-for-grantedness" of borders as a whole. Revisionist actors are and are seen as dangerous "rogues" by others precisely because they approximate the self-interested model. Ibid., 395–398.

6. Ibid., 400.

7. Amitai Etzioni argues similarly that the greater threat to the European Union is not the so-called democratic deficit, but a "community deficit, the lack of shared values and bonds"; "The Community Deficit," *Journal of Common Market Studies* 45:1 (2007): 23.

8. Richard Beeston and James Bone, "Seoul Tries to Buy Top UN Job," *Australian*, September 29, 2006; "Ban Denies Influence-Peddling Charge," *Japan Times*, October 29, 2006.

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11. Warren Hoge, "Heeding Pakistani Protest, UN Blocks Talk by Rape Victim," *New York Times*, January 21, 2006.

12. See Robert O. Keohane, "The Contingent Legitimacy of Multilateralism," in *Multilateralism under Challenge? Power, International Order, and Structural Change*, ed. Edward Newman, Ramesh Thakur, and John Tirman (Tokyo: United Nations University Press, 2006), 56–76.

13. "U.N. Won't Train Iraqi Judges," *Daily Yomiuri*, October 24, 2004; Marlise Simons, "Iraqis Not Ready for Trials; UN to Withhold Training," *New York Times*, October 22, 2004.

14. Kofi A. Annan, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*. Report of the Secretary-General. (New York: United Nations, document S/2004/616, August 23, 2004), para. 64(d).

15. "Poor Nations Block Key UN Reform," *BBC News*, April 29, 2006, downloaded from http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/4957140.stm on April 29, 2006.

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17. See Ramesh Thakur, "Global Norms and International Humanitarian Law: An Asian Perspective," *International Review of the Red Cross* 83, no. 841 (March 2001): 19–44.

18. Mohammed Ayoob, "Inequality and Theorizing in International Relations: The Case for Subaltern Realism," *International Studies Review* 4, no. 3 (Fall 2002): 29.

19. *Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford: Oxford University Press for the Independent International Commission on Kosovo, 2000).

20. See David Cortright and George A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Boulder: Lynne Rienner, 2000).

21. Kofi A. Annan, *We the Peoples: The Role of the United Nations in the 21st Century* (The Millennium Report) (New York: UN Department of Public Information, 2000), 49.

22. See David Cortright, George A. Lopez, and Linda Gerber-Stellingwerf, "Sanctions," in *Oxford Handbook on the United Nations*, ed. Thomas G. Weiss and Sam Daws (Oxford: Oxford University Press, 2007), 349–369.

23. The United Nations has a particularly low image among Iraqis in large part because of the UN sanctions regime, which inflicted severe pain on the population without removing Saddam Hussein.

24. See Jane Boulden, Ramesh Thakur, and Thomas G. Weiss, eds., *The United Nations and Nuclear Orders* (Tokyo: United Nations University Press, 2009).

25. See also the chapter by Asli Bali in this volume.

26. See Ramesh Thakur, "The South Asian Nuclear Challenge," in John Baylis and Robert O'Neill, eds., *Alternative Nuclear Futures: The Role of Nuclear Weapons in the Post–Cold War World* (Oxford: Oxford University Press, 2000), 101–124.

27. See Jayantha Dhanapala and Daryl Kimball, "A Nonproliferation Disaster," *Proliferation Analysis* (Washington, D.C.: Carnegie Endowment for International Peace, 2008), downloaded from http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=20292&prog=zgp&proj=znpp,zsa on July 26, 2008; Sumit Ganguly and Dinshaw Mistry, "The Case for the U.S.-India Nuclear Agreement," *World Policy Journal* (Summer 2006): 11–19; William C. Potter, "India and the New Look of U.S. Nonproliferation Policy," *Nonproliferation Review* 12:2 (July 2005): 343–354; and Ramesh Thakur, "U.S.-India Nuclear Accord a Win-Win Outcome for All," *Daily Yomiuri*, November 27, 2005, and "Don't Let the India-US Nuclear Deal Unravel," *Globe and Mail*, April 27, 2007.

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33. Michael J. Glennon, "The New Interventionism: The Search for a Just International Law," *Foreign Affairs* 78, no. 3 (May/June 1999): 6.

34. Robert W. Tucker and David C. Hendrickson, "The Sources of American Legitimacy," *Foreign Affairs* 83, no. 6 (November/December 2004): 31.

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37. See Richard Perle, "Thank God for the Death of the UN," *Guardian*, March 21, 2003.

38. Alexander Cockburn, "It Should Be Late, It Was Never Great," *The Nation*, December 22, 2003, p. 9.

39. David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, N.J.: Princeton University Press, 2004), 25.

40. David Chandler, *From Kosovo to Kabul: Human Rights and International Intervention* (London: Pluto, 2002), 135.

41. That story is told in three books by three people closely associated with it: Gareth Evans (co-chair of the International Commission on Intervention and State Sovereignty), *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington, D.C.: Brookings, 2008); Ramesh Thakur (ICISS commissioner), *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge: Cambridge University Press, 2006); and Thomas G. Weiss (ICISS research director), *Humanitarian Intervention* (Oxford: Polity, 2007).

42. S/PV.5577, "Security Council Open Debate on Protection of Civilians in Armed Conflict," UN Security Council Verbatim Record, December 4, 2006, p. 8; quoted in Sarah Teitt, "Assessing Polemics, Principles and Practices: China and the Responsibility to Protect," *Global Responsibility to Protect* 1, no. 2 (2009): 216.

43. Elodie Aba and Michael Hammer, *Yes We Can? Options and Barriers to Broadening the Scope of the Responsibility to Protect to Include Cases of Economic, Social and Cultural Rights Abuse* (London: One World Trust, Briefing Paper No. 116, March 2009).

44. Ban Ki-moon, *Implementing the Responsibility to Protect: Report of the Secretary-General* (New York: United Nations, document A/63/677, January 12, 2009), para. 67.

45. See Ramesh Thakur, *Towards a Less Imperfect State of the World: The Gulf between North and South* (Berlin: Friedrich Ebert Stiftung, Dialogue on Globalization Briefing Paper, April 4, 2008).

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50. For a troubling account of the arbitrary and corner-cutting basis on which the ICC Prosecutor has operated, including in relation to Sudan's president, see Julie Flint and Alex de Waal, "Case Closed: A Prosecutor without Borders," *World Affairs* (Spring 2009), available at http://www.worldaffairsjournal.org/2009%20–20Spring/full-DeWaalFlint.html, accessed on April 1, 2009.

51. For details of the secret but leaked ICRC report on the Guantanamo detainees, see Mark Danner, "US Torture: Voices from the Dark Sites," *New York Review of Books* 56, no. 6 (April 9, 2009).

52. Ethan Bronner, "Soldiers' Accounts of Gaza Killings Raise Furor in Israel," *New York Times*, March 20, 2009, and Rory McCarthy, "Israeli Troops Describe Shooting Gaza Civilians," *Guardian*, March 20, 2009. The conquerors' arrogance can be seen also in Israeli sharpshooters ordering T-shirts showing a pregnant Arab woman with a bullseye superimposed on her belly, accompanied by the slogan "1 shot 2 kills"; Donald Macintyre, "Israel Military Condemns Soldiers' Shocking T-shirts," *Independent*, March 22, 2009.

53. Thomas Risse and Kathryn Sikkink, "The Socialization of International Human Rights Norms into Domestic Practices: Introduction," in Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Pres, 1999), 5.

54. Many in developing countries watched bemusedly from the sidelines when the same attitudinal divide opened up across the Atlantic in 2003 with respect to the US threat of war on Iraq and the stiff resistance from European citizens. The dominant view in Washington seemed once again to be that the European people could not possibly be right. The task was to show them the error of their ways or, failing that, to make sure that the European governments listened to the US administration rather than to their own people. That the administration could be wrong was a priori beyond the realm of possibility.

55. Thomas Risse and Stephen C. Ropp, "International Human Rights Norms and Domestic Change: Conclusions," in Risse, Ropp and Sikkink, eds., *Power of Human Rights*, 277.

56. The implications of this for law versus legitimacy debate are analyzed later in this volume by Vesselin Popovski.

57. Christine M. Chinkin, "Kosovo: A 'Good' or 'Bad' War?" *American Journal of International Law* 93, no. 4 (October 1999): 846.

58. Rupert Smith, "The Security Council and the Bosnian Conflict: A Practitioner's View," in *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, ed. Vaughan Lowe, Adam Roberts, Jennifer Welsh, and Dominik Zaum (Oxford: Oxford University Press, 2008), 451.

59. See Ramesh Thakur, ed., *What Is Equitable Geographic Representation in the Twenty-first Century?* (Tokyo: United Nations University, 1999).

60. Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, Mass.: Harvard University Press, 1996), 4.

61. Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton, N.J.: Princeton University Press, 2004), viii.

62. Gary J. Bass, "Does the UN Understand What It's Getting Itself Into?" *Washington Post*, October 30, 2005.

63. Colum Lynch, "UN Backs Hariri Murder Tribunal," *New York Times*, June 1, 2007.

64. "Hezbollah Condemns Hariri Court," *BBC News*, May 31, 2007, downloaded from http://news.bbc.co.uk/2/hi/middle_east/6707315.stm on May 31, 2007.

65. Charles Tripp, "The Security Council and the Iran-Iraq War," in Lowe et al., eds., *The United Nations Security Council and War*, 374.

66. In the *Namibia* and *Lockerbie* cases, the International Court of Justice cast doubts on the blanket immunity of the Security Council from judicial scrutiny but did not go so far as to enunciate a doctrine of judicial review. See Jose E. Alvarez, "Judging the Security Council," *American Journal of International Law* 90, no. 1 (January 1996): 1–39; and Thomas M. Franck, "The 'Powers of Appreciation': Who Is the Ultimate Guardian of UN Legality?" *American Journal of International Law* 86, no. 3 (July 1992): 519–523.

67. Edward C. Luck, "Another Reluctant Belligerent: The United Nations and the War on Terrorism," in *The United Nations and Global Security*, ed. Richard M. Price and Mark W. Zacher (New York: Palgrave Macmillan, 2004), 105.

68. See Tucker and Hendrickson, "Sources of American Legitimacy," 18–32.

69. Paul Heinbecker, "The Davey Lecture," Victoria College, University of Toronto, March 29, 2007.

70. Hurd, "Legitimacy and Authority in International Politics," 383.

71. Thakur, *United Nations, Peace and Security*, 310–314.

72. See Richard Beeston and James Bone, "Britain Names Price for UN Vote," *Australian*, October 6, 2006; Evelyn Leopold, "Mexican Biologist, British Diplomat Get UN Posts," *Reuters*, January 4, 2007 downloaded from www.alertnet.org/thenews.newsdesk/116789930341.htm on January 9, 2007; David Nason, "UN Chief 'Hits the Ground Stumbling,'" *Australian*, January 15, 2007; Tunku Abdul Aziz, "Ban Has Lost a Great Opportunity," *New Straits Times* (Kuala Lumpur), February 26, 2007.

73. See, for example, Philip Shenon, "Did Billions Sent by U.S. to Iraq Fund Insurgents?" *International Herald Tribune*, February 8, 2007, and the *New York Times* editorial on the same subject, "The Fog of Accountability," *International Herald Tribune*, February 9, 2007.

74. " . . . the one nation which shoved the inquiry forward from the beginning was most culpable—the United States"; Stephen Schlesinger, "Where Volcker Got It Wrong," *MaximsNews.Com*, downloaded from www.maximsnews.com/2005schlesinger1december.htm on December 2, 2005.

75. See the editorial in *The Australian*, March 29, 2006. See also David Leigh and Rob Evans, "Firms Accused of Bribing Saddam to be Investigated by Fraud Office," *Guardian*, February 14, 2007.

76. The lack of enthusiasm for Ban among UN officials was an open secret in New York; see Ewen MacAskill and Ed Pilkington, "Despair at UN over Selection of 'Faceless' Ban Ki-moon as General Secretary [*sic*]," *Guardian*, October 7, 2006.

77. For my views on his legacy, see Ramesh Thakur, "What Annan Has Contributed to World," *Daily Yomiuri*, December 26, 2006.

78. See Chiyuki Aoi, Cedric deConing and Ramesh Thakur, eds., *Unintended Consequences of Peacekeeping Operations* (Tokyo: United Nations University Press, 2007).

79. Amnesty International, *Peace-Keeping and Human Rights* (London: AI, 1994).

80. *Protecting the Human Rights of Women and Girls Trafficked for Forced Prostitution in Kosovo* (London: AI, document EUR 70/010/2004, 2004).

81. Annan, *In Larger Freedom*, para. 113.

82. Prince Zeid Ra'ad Zeid al-Hussein, *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations* (New York: United Nations, document A/59/710, March 24, 2005).

83. See, for example, Peter Dennis, "The UN, Preying on the Weak," *New York Times*, April 12, 2005.

84. Susan L. Woodward, "The Security Council and the Wars in Former Yugoslavia," in Lowe et al., eds., *United Nations Security Council and War*, 407.

85. Ibid., 440–441.

86. Kennedy, *Dark Sides of Virtue*, 323.

87. Ibid., 130.