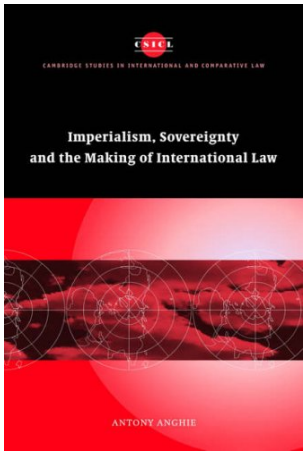
Human Rights & Human Welfare

Volume 6 | Issue 1 Article 29

2006

Beyond Power Politics: International Law and Human Rights Discourse in the Post-9/11 World

J. Peter Pham
James Madison University



Beyond Power Politics: International Law and Human Rights Discourse in the Post-9/11 World

By J. Peter Pham

Imperialism, Sovereignty and the Making of International Law by Antony Anghie. Cambridge, UK: Cambridge University Press, 2005. 356 pp.

Power and Law

In the early 1970s, legal scholars[1] began reexamining the dominant legal paradigms within Western polities with a skeptical view of their underlying doctrines and arguments. While the critique was radical in the context of its time, the critical legal movement itself, both inside and outside academia, has largely become somewhat *passé* as its valid insights have either been absorbed into mainstream juridical scholarship or largely superseded by newer fields of legal inquiry that it had nurtured, including feminist jurisprudence, critical race theory, and postmodern scholarship.[2]

More recently, some of the intellectual heirs of what is essentially a contemporary revival of legal realism have delved deeper into their hermeneutical approach, venturing to expand their critique to encompass the power relations embedded within the narratives and discourses of global human rights and within the very foundations of international law itself.

Makau Mutua, for example, has argued that "the human rights movement is marked by a damning metaphor" and that its grand narrative "contains a subtext that depicts an epochal contest pitting savages, on the one hand, against victims and saviors, on the other" (Mutua 2001: 201). The construct—which according to the author represents the broad institutional and ideational consensus of the United Nations, its Western member states, international non-governmental organizations, and Western academics—views the ensemble of human rights norms, processes and institutions, which trace their origins to the textual foundations of the Universal Declaration of Human Rights, through a three-dimensional prism. The first dimension is that of the "savage," epitomized by non-Western states and cultures "bent on the consumption of humans" (202). The second dimension is that of the "victim," those human beings whose "naturalist attributes have been negated by the primitive and offensive actions of the state or the cultural foundation of the state" (203). Finally, the third dimension is that of "the savior or the redeemer, the good angel who protects, vindicates, civilizes, restrains, and safeguards"—that is, the liberal states of the West and

[1] Many, although by no means all, of whom were identified with the "critical legal studies" movement, which were philosophically influenced by both the student protest movements of the late 1960s and the then fashionable European social theory (especially the Frankfurt school of neo-Marxist social theory and French structuralist thought).
[2] See Posner (2001: 13-14).

those institutions arising there which have taken upon themselves the role of rescuers of a benighted world.

Along similar lines, Obiora Chinedu Okafor and Shedrack Agbakwa identify and elaborate on the characteristics of three "orthodoxies" which are "dominant, orthodox, and constitutive conceptions and practices of international human rights education" (Okafor and Agbakwa 2001: 565-566). According to the two scholars, a dichotomy basically divides the world into "heaven," associated with the West and seen as a model of human rights compliance, and "hell," linked with states in the developing world that "are almost always viewed as hellish places that are virtually constituted by incessant epidemics of the most horrendous sorts of human rights violations" (566). It logically follows from the heaven-hell dichotomy that "the ideas and practices of human rights must flow exclusively from the places and texts that are considered 'human rights heavens' in the direction of the places and texts that are viewed as 'human rights hells'" (576), thus securing the unidirectional flow of human rights teaching from Western states to the rest of the world. Finally, the authors invoke the "abolitionist paradigm"[3] whose goal is the uprooting of local cultural practices judged to contravene the dictates of international human rights law, culture being "constructed as a kind of pathological obstacle to the enjoyment of human rights that must be overcome if the relevant population is to enjoy the good life" (584) .

Another legal scholar, Catherine Powell, has taken the critique further by focusing on how the well-worn tensions between universalism and cultural relativism in human rights discourse are based on a set of false premises, that: "nation-states which are geographically located in the West are culturally neutral" and that "Western states are therefore not susceptible to relativist behavior" (Powell 1999: 202). Nonetheless, she admits that she is challenging entrenched positions:

> *Taken collectively, these assumptions construct Western states as good actors and non-Western states as bad actors vis-à-vis human rights compliance, even while this construction does not necessarily square with the reality on the ground ... For decades, scholars have discredited the construction of non-Western countries as the culturally primitive "other," which allowed the West to define a contrasting identity as rational and civilized—a device used in the service of colonialism and imperialism. Today's selective invocation of "culture" and relativism to describe human rights noncompliance by non-Western countries, while noncompliance by Western countries is rationalized, recreates a West/Rest dichotomy that is preoccupied by an assumed default Western conception of human rights* (203-204).

It is within this intellectual context that Anghie's recent contribution to the Cambridge Studies in International and Comparative Law series, Imperialism, Sovereignty and the Making of International Law, extends the scope of its critique beyond the human rights narrative to examine the overall historical relationship between international law and what he persists in calling the "Third World,"

---

[3] The use of the term "abolitionist paradigm" in the current sense can be traced back to a review essay on Claude E. Welch's Protecting Human Rights in Africa: Strategies and Roles of Non-Governmental Organizations (Philadelphia: University of Pennsylvania Press, 1995) by Makau Mutua. He counsels: "While an abolitionist approach is useful in rallying forces against abuses, it could be a double-edged sword: human rights advocates should not leap with missionary zeal across the treacherous cultural divide. Doing so may be construed as an attempt to impose unwanted alien values on others, a charge that could significantly blunt efforts to construct a universal human rights corpus" (1996: 609).

defined as "those non-European societies and territories which were colonized from the sixteenth century onwards by the European Empires, and which acquired political independence since the 1940s" (3). Broadly, Anghie's thesis is that, far from being an unfortunate peripheral episode in the development of international law with which the latter had to contend, colonialism is of constitutive significance to international law and that many of the basic doctrines of the discipline arose specifically out of the need to create an overarching framework to account for relations between European rivals in the colonial scramble as well as between European and non-European polities.

In fact, by focusing on the *mission civilisatrice*,[4] the grand project that justified the colonial enterprise as means of "saving" the backward, underdeveloped, and oppressed peoples of societies that were targeted for colonization by incorporating them into the "universal" civilization of the West, Anghie argues in terms very similar to those that other scholars have used to understand the dynamics of human rights discourse. "The imperial idea that fundamental cultural differences divided the European and non-European worlds was profoundly important to the civilizing mission in a number of ways," he writes. "The characterization of non-European societies as backward and primitive legitimized European conquest of these societies and justified the measures colonial powers used to control and transformed them" (3-4). While this dichotomy between the "civilized" and the "uncivilized"—one that, rather tellingly if somewhat anachronistically, remains codified *inter alia* in the Statute of the International Court of Justice which still speaks of "general principles of law recognized by civilized nations" (art. 38)—was eminently useful to Western states, it posed a number of problems for their jurists. For example, how could they claim that their civilization, with all its avowed specificities, was nonetheless somehow universal enough to be binding on non-Western states?

In his quest for an answer, Anghie takes issue with the manner in which international lawyers, both Western and non-Western, traditionally view their discipline, that is, as a question of how order is created and maintained between sovereign states. In contrast, Anghie argues correctly that the historical colonial encounter was hardly one between sovereign equals since the non-European polity was usually deemed, at best, to be only partially sovereign. Hence, he posits:

> *[W]hat passes now as the defining dilemma of the discipline, the problem of order among states, is a problem which, from the times of its origins, has been peculiar to the specificities of European history. And, further, that the extension and universalization of this European experience, which is achieved by transmuting it into the major theoretical problem of the discipline, has the effect of suppressing and subordinating other histories of international law and the peoples to whom it has applied. Within the axiomatic framework which decrees that European states are sovereign while non-European states are not, there is only one means of relating the history of the non-European world: it is a history of the incorporation of the peoples of Africa, Asia, the*

[4] It is beyond the scope of this essay to delve into all the ramifications of what the French saw as their "civilizing mission" and the British viewed as the "white man's burden." While academics have largely focused on the political and economic aspects of colonialism—and certainly, over time, it is clear that diplomatic and commercial interests took precedence—it should not be forgotten that there was a significant cultural impetus to the imperial enterprise, especially in France. In fact, the noun "civilization" initially surfaced in 18th century France among philosophers looking for a word to connote the triumph and development of reason, not only in the constitutional, political, and administrative domains, but also in the moral, religious, and intellectual fields. See Conklin (1995), also Burrows (1986).

Americas, and the Pacific into an international law which is explicitly European, and yet, universal (5-6).

Using a methodology that appeals explicitly to work of the late Edward Said, Anghie examines the problems and politics of who was sovereign and why, the relationship between ideas of culture and sovereignty, and the ways in which sovereignty came to be identified with a specific set of cultural practices to the exclusion of others. While he focuses largely on the late 19th century through the end of the 20th century, covering the maximum colonial expansion and the period of decolonization, Anghie brackets his study between an initial chapter to the writings of Francisco de Vitoria, the theologian and jurist of Spain's *siglo de oro* whose treatises *De Indis Noviter Inventis* ("On the Indians Lately Discovered") and *De Jure Bellis Hispanorum in Barbaros* ("On the Law of War of the Spaniards on the Barbarians") together constitute what is arguably the first modern international law text,[5] and an almost tentative closing chapter devoted to the current "global war on terrorism," which he characterizes as "a set of policies and principles that reproduces the structure of the civilizing mission" (309).

Anghie's reliance upon Said is important because, unlike other analyses of the imperial phenomena, which focus on its political or economic dimensions, his approach does not ignore imperialism as a cultural system.[6] Thus he argues that, more than an exploitive political or economic system, imperialism is a cultural framework constituting subjectivities and maintaining the relationships that perpetuate the Western domination of the global system. By fixing his gaze on the construct of the *mission civilisatrice* as indispensable to the imperial enterprise of colonialism, Anghie is consequently able to maintain that the basic dichotomy—whether between Spanish and Indians in the 16th century or between developed and developing nations in the 21st century—combined with the task of bridging this gap provided international law with a dynamic that shaped both the discipline and its institutional manifestations.

For example, in the field of international law, the jurisprudence of "personality" establishes who is or is not a proper subject of the *jus gentium*. However, membership in the *societas* of nations was tied to a civilized-non-civilized conceptualization which identified "civilization" with not just Western political institutions, but also Western culture. Thus, Anghie observes:

Given that the civilized-non-civilized distinction expelled the non-European from the realm of law and society, the question arose: could non-European societies be regarded as sovereign? It was simple enough to assert that the civilized possessed sovereignty while the uncivilized did not. But positivist jurisprudence had to plausibly establish that cultural difference translated into legal difference (56).

Hence, with respect to the doctrine of sovereignty, which is his particular interest, Anghie argues that "it is seriously misleading to think of sovereignty as emerging in Europe and then extending—stable, imperial in its reach and control, unaltered, sovereign—into the colonial world" (312). Rather, he contends that sovereignty was improvised out of colonial encounter, which, in fact, shaped the

[5] Fittingly, these two treatises, collected together as Franciscus de Victoria, De Indis et de Ivre Belli Relectiones, made up the first volume in the acclaimed "Classics of International Law" series.
[6] See Said (1978) and (1993).

underlying structures of the doctrine: "The task involved distinguishing sovereigns proper from other entities…which also seemed to possess the attributes of sovereignty" (57). In point of fact, in the period before the 19th century scramble for colonial possessions in Africa began in earnest, a number of European states had actually entered into diplomatic agreements with some of the more powerful African polities such as Benin and Ethiopia on a sovereign-to-sovereign basis.[7] This dilemma was resolved by elevating the importance of the territorial control among the criteria of statehood that non-Western societies had to satisfy to receive recognition so that when considering two possible bases for the exercise of jurisdiction, it was decided that jurisdiction over territory—the preferred European position—took precedence over jurisdiction over citizens. And when confronted by non-Western societies that did meet the requirement of control over territory, the colonial powers resorted to the concept of society. Thus, while a few non-Western societies—Anghie mentions China, Persia, Siam, and Turkey by way of example—may be recognized as formally sovereign, nonetheless "unless they satisfied the criteria of membership in civilized international society, they lacked the comprehensive range of powers enjoyed by the European sovereigns who constituted international society" (58).

The West's trump card was, in fact, the idea that recognition was what was ultimately the "agency of admission into 'civilized society'—a sort of juristic baptism, entailing the rights and duties of international law" (Crawford 1978: 98), the latter being defined in 1859 by the British law lords as "the law existing between civilized nations…as it has been hitherto recognized and now subsists by the common consent of *Christian* nations" (emphasis added; Smith 1932: 12). The addition of the Christian religion to the criteria for international legal personality, although usually not so explicit, allowed, for example, the Western powers at the Berlin Conference of 1884 to 1885 to ensure that Africa was not the *subject*, but the *object* of their deliberations: while "even European states which had no significant interests in the continent such as Austria-Hungary, Denmark and Sweden were invited, no consideration appears to have been given to the possibility of inviting African states even though [Muslim] Zanzibar's full sovereignty was acknowledged by all the important European states" (Onuma 2000: 41).[8] In short, the facility with which cultural conceptualizations could be manipulated enabled Western states to employ a flexible standard which facilitated their exclusion of non-Western nations from the discourse of international law.

In contrast to the conventional narrative in which the institution arose like Venus from the waves, in a stable, fully mature form, out of the defining moment of the Peace of Westphalia and gradually extended throughout the world, in Anghie's account sovereignty was a flexible instrument that lent itself to the imperatives of the civilizing mission, especially during the late 19th century apogee of colonialism which indexed it to Western notions of social order, political organization, progress, and development and "presented non-European societies with the fundamental contradiction of having to comply with authoritative European standards in order to win recognition and assert themselves" (107). Nor is all of this of mere historical interest, for Anghie ominously warns that today "the essential structure of the civilizing mission may be reconstructed in the very

[7] See Alexandrowicz (1973).

[8] An overseas holding of the Sultan of Oman since 1698, with the division of the deceased Sultan Sayyid Said bin Sultan al-Busaid's realm between his sons on April 6, 1861, Zanzibar and its significant territories on the eastern littoral of Africa became a separate principality under Sultan Sayyid Majid bin Said al-Busaid. Shortly after the Berlin Conference, an Anglo-German accord permitted the British to proclaim a protectorate over the sultanate in 1890. See Bennett (1978).

contemporary vocabulary of human rights, governance and economic liberalization" (114).

The Post-9/11 Discourse on International Order

The question then becomes, in the post-9/11 era, what to make of Anghie's and other critical scholars' insight that the human rights narrative—and, indeed, the entire project of international law—is closely linked to the dynamics of power. It has certainly been the case that American and other political leaders have appropriated the language of law and human rights to legitimate their policy responses to the attacks of September 11, 2001. Addressing a joint session of the U.S. Congress on September 20, 2001 President George W. Bush declared: "On September the 11th, enemies of freedom committed an act of war against our country" (Bush 2001a). Then, delivering an ultimatum to the Taliban regime of Afghanistan to turn over Osama bin Laden and other members of al-Qaeda's leadership, the president described how he saw conditions in that country:

> *Afghanistan's people have been brutalized—many are starving and many have fled. Women are not allowed to attend school. You can be jailed for owning a television. Religion can be practiced only as their leaders dictate. A man can be jailed in Afghanistan if his beard is not long enough. The United States respects the people of Afghanistan—after all, we are currently its largest source of humanitarian aid—but we condemn the Taliban regime. It is not only repressing its own people, it is threatening people everywhere by sponsoring and sheltering and supplying terrorists. By aiding and abetting murder, the Taliban regime is committing murder* (Bush 2001a).

The president then went on to affirm: "This is not, however, just America's fight. And what is at stake is not just America's freedom. This is the world's fight. This is civilization's fight. This is the fight of all who believe in progress and pluralism, tolerance and freedom" (Bush 2001a). Two weeks later, announcing the start of American military action in Afghanistan, Bush assured "the oppressed people of Afghanistan" that the United States would "defend not only our precious freedoms, but also the freedom of people everywhere to live and raise their children free from fear" (Bush 2001b).

Since that time, the U.S. administration and its allies have carefully and consistently framed the conflicts in Afghanistan and Iraq, as well as its larger agenda for the Greater Middle East, in terms of transforming the region and bringing about "the next stage of the world democratic movement" (Bush 2003a). The president's focus was clearly universal in its ambitions, as his address on the twentieth anniversary of the National Endowment for Democracy revealed:

> *In many nations of the Middle East—countries of great strategic importance—democracy has not yet taken root. And the questions arise: Are the peoples of the Middle East somehow beyond the reach of liberty? Are millions of men and women and children condemned by history or culture to live in despotism? Are they alone never to know freedom, and never even to have a choice in the matter? I, for one, do not believe it. I believe every person has the ability and the right to be free* (Bush 2003a).

While acknowledging that "modernization is not the same as Westernization," Bush nonetheless spelled out what he believed were the essential characteristics that "successful" Middle Eastern

governments should evince:

> *Successful societies limit the power of the state and the power of the military—so that governments respond to the will of the people, and not the will of an elite. Successful societies protect freedom with the consistent and impartial rule of law, instead of selecting applying—selectively applying the law to punish political opponents. Successful societies allow room for healthy civic institutions—for political parties and labor unions and independent newspapers and broadcast media. Successful societies guarantee religious liberty—the right to serve and honor God without fear of persecution. Successful societies privatize their economies, and secure the rights of property. They prohibit and punish official corruption, and invest in the health and education of their people. They recognize the rights of women* (Bush 2003a).

At the very least, it has to be said that, by and large, the president and senior members of his administration have remained "on message" concerning America's role in introducing freedom, human rights, and the rule of law to benighted parts of the globe. And the relative success that this discourse has enjoyed confirms the validity of the argument advanced by Anghie and other scholars concerning the universal claims of historically-grounded Western conceptions of law and rights and the implicit judgment that non-Western societies must aspire to achieve these ideals in order to receive recognition as "civilized nations."

In fact, while U.S. government officials have largely tried to avoid even the appearance of assuming imperial prerogatives, scholars and other observers have proven less reluctant to ascribe them to American foreign policy actions—and by no means as a reprobation (interestingly, many of these authors have been citizens of Commonwealth countries when not Britons). Michael Ignatieff, who during the Balkan conflicts of the 1990s once described Medécins Sans Frontières founder Bernard Kouchner as "the young doctor who began as an insurgent against humanitarian complicity [and] is now the proconsul of an imperial exercise in pacification and nation-building" (Ignatieff 2003: 59), has gone on to conclude that "America's entire war on terror is an exercise in imperialism" (79). British diplomat Robert Cooper, who served as a senior advisor to Prime Minister Tony Blair and then the United Kingdom's special representative in Afghanistan before going on to become director-general of external and politico-military affairs at the General Secretariat of the Council of the European Union, has gone even further, adopting the dichotomous vocabulary of civilized-barbarian and order-chaos as well as modern-pre-modern (adding "post-modern" to it for good measure) to describe the contemporary world and to make a somewhat unconventional—to say nothing of rather "politically incorrect"—argument:

> *The very act of decolonization was itself a last imperial imposition since it gave Africans and Asians a system based on a purely European model and alien to their own history. Nor has the nation state functioned brilliantly outside Europe. It first exponent in the Far East, Japan, demonstrated such dynamism compared with its neighbors that it devastated the whole region and ended by devastating itself. Since then Japan and other countries have survived more comfortably under a benign American hegemony. In Africa and the Middle East the nation state has been a manifest failure both for individual countries, their citizens, and for the region as a whole* (Cooper 2003: 69).

While he admits that "there can be no return to imperialism in its traditional form" (Cooper 2003: 69), Cooper contends that "a limited form of voluntary empire" involving financial assistance accompanied by international supervision, some form of negotiated trusteeship, and other versions of "soft" intervention, may be inevitable "in a world where many states suffer breakdowns" (Cooper 2003: 74). This position is supported by historian Niall Ferguson who identifies the bearer of the *imperium*: "The United States today is an empire—but a peculiar kind of empire" (Ferguson 2004: 286). Although he argues that "this American empire shares the same aspirations and ambitions as the last great Anglophone hegemon," Ferguson is concerned that "the United States has been a less effective empire than its British predecessor" for want of economy, man power, and attention:

> *In the space of four years, Americans have intervened militarily against three rogue states in the Balkans, Central Asia, and the Middle East. As I write, American troops patrol the streets of Kosovo, Kabul, and Kirkuk. Whatever the rationale, each U.S. incursion has led to a change of political regime, of military occupation and an attempt at institutional transformation euphemistically described as nation building. But where will the money come from to make these undertakings successful? How many Americans will be willing to go to these places to oversee how that money is spent? And how long will the American public at home be prepared to support a policy that costs not only money but also lives—even if the quantities in both cases are comparatively modest* (Ferguson 2004: 290)?

These three deficits worry Ferguson, who professes to "believe that the world needs an effective liberal empire and that the United States is the best candidate for the job" and without it assuming the burden, "there are parts of the world where legal and political institutions are in a condition of such collapse or corruption that their inhabitants are cut off from any hope of prosperity" (301). Richard Caplan concurs, positing that

> *[A]s the events of 11 September 2001 demonstrate, we live in a world where it is no longer possible to assume that weak and failed states are something the rest of the world can easily ignore.…As a consequence of globalization, these zones of chaos today are fertile ground for the establishment of drug, crime and terrorist syndicates from which no country may be immune* (Caplan 2002: 84).

Peter Lyon, while noting that the term "trusteeship" would best be avoided for political and psychological reasons (he thought that "guardianship" might be "appropriate"), had earlier suggested that "the best spirit of trusteeship needs revising and revitalizing" as "there is much relevant work to do" (Lyon 1993: 108). Perhaps these authors derive some comfort from the best face that Robert Jackson tries to put on this discourse, essentially a retreat from the hitherto sacrosanct norm of national self-determination, by positing that "what was once considered *prima facie* ground for denying membership in international society is now regarded as a claim to additional international support and assistance: sovereignty plus" (Jackson 1990: 31).

Similarly, the September 2002 *National Security Strategy of the United States of America* noted that "weak states…can pose a great danger to our national interests as strong states. Poverty does not make poor people into terrorists and murderers. Yet poverty, weak institutions, and corruption can make weak states vulnerable to terrorist networks and drug cartels within their borders" (*National Security Strategy* 2002: 2). A second edition of the document four years later elaborated that "weak and

impoverished states and ungoverned areas are not only a threat to their people and a burden on regional economies, but are also susceptible to exploitation by terrorists, tyrants, and international criminals" (*National Security Strategy* 2006: 33).

With this intellectual foundation laid, it is not surprising that the American occupation of Iraq was framed in terms very much like those of the lapsed United Nations system of trusteeship with the United States in the tutelary role while sovereignty resided with the Iraqi people as President Bush affirmed in his speech to the U.N. General Assembly in 2003:

> *The primary goal of our coalition in Iraq is self-government for the people of Iraq, reached by orderly and democratic process. This process must unfold according to the needs of Iraqis, neither hurried, nor delayed by the wishes of other parties. And the United Nations can contribute greatly to the cause of Iraq self-government. America is working with friends and allies on a new Security Council resolution, which will expand the U.N.'s role in Iraq. As in the aftermath of other conflicts, the United Nations should assist in developing a constitution, in training civil servants, and conducting free and fair elections* (Bush 2003b).

The "self-government" the president referred to would entail, of course, a monumental shift in the social, cultural, and political axes of Iraq in order to move the country towards a democratic polity as endorsed by Security Council Resolution 1511, which was passed less than a month later recognizing the Coalition Provisional Authority until such time as "an internationally recognized, representative government established by the people of Iraq" can assume its responsibilities and obligations in the international system. Anghie even compares "the project of creating self-government in Iraq might be best compared with the U.S. occupation of the Philippines, a wholly American enterprise whose purpose was to bring about self-government" (280), another episode in which promoting self-government and other principles held to be universally valid "was crucial to the argument that the United States was not an imperial power" (282) even if its actions seemed to belie that assertion.[9]

A Different Sort of Blowback

While the post-9/11 discourse clearly showed the potential for human rights discourse and international law to be exploited by power, this does not tell the whole story. Anghie's volume points to one aspect of the narrative, the inherent contradiction of using force to construct a democratic foundation for a "failed" state. As one of the most respect experts on democratization, Larry Diamond, observed concerning Western interventions after his experience as senior advisor to the Coalition Provisional Authority in Baghdad, "Their goal is democracy—freely elected

[9] Interestingly, one of the architects of the U.S. occupation of the Philippines in the aftermath of Spanish-American War was statesman Elihu Root, who served as President William McKinley's secretary of war from 1899 to 1904. Root later went on to serve as secretary of state (1905-1909), U.S. senator from New York (1909-1915), and president of the Carnegie Endowment for International Peace (1910-1925). In the latter capacity, he helped create the Hague Academy of International Law and won the Nobel Prize for Peace in 1912 for his efforts to create a permanent international court of arbitration. *À propos* the current topic, Root was also the founding president of the American Society for International Law (ASIL). The still definitive biographical account of this extraordinary figure is Philip C. Jessup (1938). For details on his work with the ASIL, see Kirgis (2006).

government in which the people are sovereign. Yet their means are undemocratic—some form of imperial domination, however temporary. How can the circle be squared?" (Diamond 2005: 312).

An answer is proposed by Stuart Chesterman at the end of his study on post-conflict reconstruction when he advises outsiders who find themselves called "to exercise state-like functions, they must not lose sight of their limited mandate to hold sovereign power in trust for the population that will ultimately claim it" (Chesterman 2004: 257). This means that they must recognize that their all-but-in-name *imperium* is nowadays significantly curtailed.

It is, however, the nature of this limitation that represents a radical departure from previous experiences of hegemony. The fact is that while powerful states can still co-opt human rights and international law and despite the rhetorical difficulties contained therein, the spread of the modern human rights movement has not been without its salutary normative influence. While, idealism aside, some hypocrisy may be unavoidable in statecraft—Ferguson even makes the argument that "it is possible to occupy a country for decades while consistently denying that you have any intention of doing so…this is known as hypocrisy, and it is something to which liberal empires must sometimes resort" (Ferguson 2004: 222)—political actors do not adopt stances for solely instrumental or material ends. Scholars, particularly constructivists, have long noted the pervasive influence of social norms on individuals, even in non-punitive settings, and recognized that legitimation plays in shaping even state practice. As Martha Finnemore and Kathryn Sikkink have noted:

> *Certainly there are costs that come with being labeled a "rogue state" in international interactions, since this entails loss of reputation, trust, and credibility, the presence of which have been amply documented to contribute to Pareto-improving effects from interstate interactions. We argue, though, that states also care about international legitimation because it has become an essential contributor to perceptions of domestic legitimacy held by a state's own citizen.…Increasingly, citizens make judgments about whether their government is better than alternatives by looking at those alternatives (in the international and regional arena) and by seeing what other people and countries say about their country.…Thus, international legitimation is important insofar as it reflects back on a government's domestic basis of legitimation and consent and thus ultimately on its ability to stay in power* (Finnemore and Sikkink 1998: 903).

In the wake of ongoing concerns regarding the status of conditions for unlawful combatants detained at Guantánamo, the revelations of prisoner abuse at Abu Ghraib, and other episodes in the "global war on terrorism,"[10] international human rights advocates have repeatedly challenged the U.S. government to live up to its assumed role as promoter of human rights, law, and democracy. In my contribution to a Massachusetts School of Law symposium on torture and political responsibility, I complained:

> *Despite its foreign policy of spreading democracy abroad, the Bush administration has not gone out of its way to pursue a debate that would subject its tactics to public scrutiny, much less the risk the possibility of having*

[10] The International Committee of the Red Cross, which under international law has a special status as the guardian of international humanitarian law, has prepared a number of reports on the treatment of prisoners by the United States, one of which was made public in the wake of the Abu Ghraib revelations. See, *inter alia*, International Committee of the Red Cross (2004).

> *its executive authority in the war on terror circumscribed. In the face of this stance, the elected representatives of the people apparently prefer, like their constituents, to continue their Faustian arrangement of obtaining what they perceive to be security in exchange for ignorance of its costs—legal, diplomatic, moral, or otherwise* (Pham 2006: 14).

Since then, however, a number of legislators—including influential members of the Republican caucus like Senators John McCain, Lindsey Graham, and John Warner—have pushed legislation barring the hiding of prisoners from the International Committee of the Red Cross, prohibiting cruel, inhumane, and degrading treatment of detainees, and requiring interrogators to adhere to techniques authorized in a new field manual. The McCain Anti-Torture Amendment, for example, was attached to the Department of Defense's budget legislation by a vote of 90 to 9 in the U.S. Senate. While some will undoubtedly note the magnitude of the challenges still faced, nonetheless it must be admitted that, as these developments indicate, it can no longer be taken for granted that the human rights and international law discourses run in only one direction from the centers of power.

In fact, the modern human rights corpus has equipped many individuals and organizations in the Middle East and other regions negatively impacted by the certain phenomena linked to the prosecution of the "war on terror" with the knowledge to recognize blatant imperial exploitations of the narrative as well as the instruments with which to respond. While understandably many responded to reports of abuses with renewed cynicism about the West's commitment to international legal and human rights standards, others responded by invoking international norms[11]—itself a significant development in the regional context where they have been usually discredited and discarded as products of imperialism or post-colonial successor, neo-colonialism.[12] In the inaugural issue of a new journal, the *Muslim World Journal of Human Rights*—whose existence is itself a remarkable achievement—Carrie Wickham records the reaction of a number of Islamists who echoed a representative of the Egyptian Islamist party *Wasat*, Esam Sultan, who noted, "U.S. efforts to impose democratic reforms are not good, but they can have positive effects" (Wickham 2004).

Very recently, on the fifth anniversary of the 9/11 attacks, the Center for the Study of Islam and Democracy[13] published an open letter to President Bush signed by Arab and Muslim scholars and activists who stated their belief that "the main problem with U.S. policies in the Middle East (in

---

[11] The Middle East Media and Research Institute (MEMRI), an independent organization with generally pro-Western leanings, provides selective, but nonetheless useful, translations of broadcast and print media in the region in bulletins emailed to subscribers. Among reactions to the Abu Ghraib abuses translated by MEMRI, for example, are Egyptian President Hosni Muburak's characterization of them as "abhorrent and sickening, and against all human values and human rights confirmed and defended by the international community" (2004a) and the Kuwaiti cabinet's statement that they were "against norms, international law, and human rights" (2004b).

[12] The term "neo-colonialism" it should be recalled was first coined by Kwame Nkrumah to describe the control which former colonial rulers and other powerful states continued to exercise over nominally independent states. See Nkrumah (1965).

[13] The Center for the Study of Islam and Democracy (CSID) is an independent institute dedicated to examining Muslim and democratic political thought and merging them into a modern Islamic democratic discourse. Its founders represent a broad spectrum of Muslim and non-Muslim scholars and leaders, including Akbar S. Ahmed (American University), John Entelis (Fordham University), John L. Esposito (Georgetown University), Ali A. Mazrui (State University of New York at Binghamton), and Abdulaziz Sachedina (University of Virginia).

particular in Iraq, Palestine, and elsewhere) is precisely their failure to live up to America's democratic ideals of liberty and justice for all." The signatories affirmed that "despite some initial skepticism," the statements the president had made over the years concerning basic human rights, law, and democracy had "nurtured hope in our region" (CSID 2006). Perhaps it should also be said that, whatever his motivations for invoking that narrative of universalism and whatever successes and tragedies his policies have met, the fact that Bush had nonetheless struck a chord with the letters' authors holds out hope that somehow, over the din of *Machtpolitik* and war, the right pitch might actually be found to harmonize humanity's aspirations for dignity, right, and peace under the rule of law.

References

Alexandrowicz, Charles Henry. 1973. The European-African Confrontation: A Study in Treaty-Making. Leiden: A.W. Sijthoff.

Bennett, Norman R. 1978. A History of the Arab State of Zanzibar. London: Methuen.

Burrows, Mathew. 1986. "'*Mission Civilisatrice*': French Cultural Policy in the Middle East, 1860-1914," *The Historical Journal* 29, no. 1 (March): 109-135.

Bush, George W. 2001a. "Address to a Joint Session of Congress and the American People." September 20. http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html.

_____. 2001b. "Presidential Address to the Nation." October 7. http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html.

_____. 2003a. "Remarks at the 20th Anniversary of the National Endowment for Democracy." November 6: http://www.whitehouse.gov/news/releases/2003/11/20031106-2.html.

_____. 2003b. "Address to the United Nations General Assembly." September 23. http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html.

Caplan, Richard. 2002. A New Trusteeship? The International Administration of War-torn Territories. Adelphi Paper 341. New York: Oxford University Press.

Center for the Study of Islam and Democracy (CSID). 2006. "Open Letter by Arab and Muslim Intellectuals to President Bush." September 11. http://www.csidonline.org/index.php?option=com_content&task=view&id=342&Itemid=1.

Chesterman, Simon. 2004. You the People: The United Nations, Transitional Administration, and State-Building. New York: Oxford University Press.

Conklin, Alice L. 1995. A Mission to Civilize: The Republican Idea of Empire in France and West Africa. Stanford: Stanford University Press.

Cooper, Robert. 2003. The Breaking of Nations: Order and Chaos in the Twenty-first Century. New York: Atlantic Monthly Press.

Crawford, James. 1978. "The Criteria for Statehood in International Law." In R.Y. Jennings and Ian Brownlie, eds. The British Year Book of International Law 1976-1977, vol. 48. Oxford: Clarendon Press.

de Victoria, Franciscus. 1917. De Indis et de Ivre Belli Relectiones, ed. Ernest Nys, trans. John Pawley Bate. Washington: Carnegie Institution of Washington.

Diamond, Larry. 2005. Squandered Victory: The American Occupation of Iraq and the Bungled Effort to Bring Democracy to Iraq. New York: Times Books, Henry Holt.

Ferguson, Niall. 2004. Colossus: The Price of America's Empire. New York: Penguin Press.

Finnemore, Martha, and Kathryn Sikkink. 1998. "International Norm Dynamics and Political Change." *International Organization* 52, no. 4 (Autumn).

Ignatieff, Michael. 2003. Empire Lite: Nation-Building in Bosnia, Kosovo and Afghanistan. London: Vintage.

International Committee of the Red Cross. 2004. Report on the Treatment by Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation (February). Available at http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf

Jackson, Robert H. 1990. Quasi-States: Sovereignty, International Relations, and the Third World. Cambridge: Cambridge University Press

Kirgis, Frederic L. 2006. The American Society of International Law's First Century, 1906-2006. Leiden: Martinus Nijhoff.

Jessup, Philip C. 1938. Elihu Root, 2 vols. New York: Dodd, Mead & Co.

Lyon, Peter. 1993. "The Rise and Fall and Possible Revival of International Trusteeship." *Journal of Commonwealth & Comparative Politics* 31, no. 1 (March): 96-110.

Muburak, Hosni. 2004a. *Al-Quds al-Arabi*. May 14.

_____. 2004b. *Al-Sharq Al-Awsat*. May 9.

Mutua, Makau. 1996. "The Politics of Human Rights: Beyond the Abolitionist Paradigm," *Michigan Journal of International Law* 17, no. 4 (Spring): 591-613.

_____. 2001. "Savages, Victims, and Saviors: The Metaphor of Human Rights." *Harvard International Law Journal* 42, no. 1 (Winter): 201-245.

National Security Strategy of the United States of America (September 17, 2002). http://www.whitehouse.gov/nsc/nss.pdf.

National Security Strategy of the United States of America (March 16, 2006). http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf.

Nkrumah, Kwame. 1965. Neo-Colonialism: The Last Stage of Imperialism. London: Nelson.

Okafor, Obiora Chinedu, and Shedrack C. Agbakwa. 2001. "Re-Imagining International Human Rights Education in Our Time: Beyond Three Constitutive Orthodoxies." *Leiden Journal of International Law* 14, no. 3: 563-590.

Onuma, Yasuaki. 2000. "When was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilizational Perspective." *Journal of the History of International Law* 2, no. 1: 1-66.

Pham, J. Peter. 2006. "Torture, Democracy, and the War on Terrorism." *The Long Term View* 6, no. 4 (Spring): 6-17.

Posner, Richard. 2001. Frontiers of Legal Theory. Cambridge, MA: Harvard University Press.

Powell, Catherine. 1999. "Locating Culture, Identity, and Human Rights." *Columbia Human Rights Law Review* 30, no. 2 (Spring): 201-224.

Said, Edward W. 1978. Orientalism. New York: Pantheon.

_____. 1993. Culture and Imperialism. New York: Alfred A. Knopf.

Smith, Herbert Arthur, ed. 1932. Great Britain and the Law of Nations: A Selection of Documents Illustrating the Views of the Government of the United Kingdom upon Matters of International Law, vol. 1. London: P.S. King.

Wickham, Carrie. 2004. "The Problem with Coercive Democratization: The Islamist Response to the U.S. Democracy Reform Initiative." *Muslim World Journal of Human Rights* 1, no. 1. http://www.bepress.com/mwjhr/vol1/iss1/art6.

J. Peter Pham is Director of the Nelson Institute for International and Public Affairs at James Madison University. His research interest is the intersection of international relations, international law, political theory, and ethics, with particular concentrations on implications for United States foreign policy and African states as well as for religion and global politics. Among other works, Dr. Pham is the author of two recent books on African politics, Liberia: Portrait of a Failed State (Reed Press, 2004) and Child Soldiers, Adult Interests: The Global Dimensions of the Sierra Leonean Tragedy (Nova Science Publishers, 2005), as well as a chapter on "African Constitutionalism: Forging New Models for Multi-ethnic Governance and Self-Determination" in Africa: Mapping New Boundaries in International Law, edited by Jeremy I. Levitt (Hart Publishing, forthcoming 2007).