7

RESISTANCES TO THE NEOLIBERAL INTERNATIONAL ECONOMIC ORDER

Diagnosis of the Relationship of Hegemonic Capitalism to Democracy, the Rule of Law and Human Rights

Coercive international order, cosmopolitan values, and economic interest

Given a picture of contemporary international society, which is dominated by the US, whose central significance for a philosophy of international law has been presented in the last two chapters, the question arises how to understand the same subject as it is presented by contemporary American scholars, both lawyers and political philosophers. Such authors as Allen Buchanan and David Golove,[1] Fernando Teson,[2] and, of course, John Rawls himself,[3] present a closely reasoned agenda for what they call the democratization of international society, setting out conditions for the legitimacy of states, which are marked by human rights standards that can themselves trigger grounds for forceful intervention by other states. The central point of these reflections on the need for a morality of international law is that a critical reflection is made of the state's claim to legitimacy in international law by virtue of the mere fact of control. As Buchanan and Golove put it, 'according to some normative views, including Rawls's in the *Law of Peoples*, only those states that meet the requirements of transnational justice, understood as respect for individual rights, are entitled to enjoy the rights and privileges of members of good standing of the international community.'[4] There are nuances in these debate as to whether so-called illiberal regimes should be tolerated, or whether pragmatic considerations should weigh against democratic regimes declaring war on authoritarian regimes.[5] There is no doubt that this school of thinking is very pertinent and stimulating for international law. It is probably based upon the single critical charge that it is not enough to assume, as traditional international law does, that officials and regimes of states are representative simply

because they are in effective control.[6] Rawls himself puts it very clearly. He distinguishes international law from a 'law of peoples' which is a family of political concepts, including principles of law, of justice and of the common good, all of which stem from a liberal concept of justice which is to be applied to international law. [7] This is not a blank check to use force against non-democratic, non-liberal, or whatever, states, but it does mean that the only constraint is one of prudence, not law. So Teson says, quite frankly, 'Even in cases where the regime is overtly tyrannical (as in present-day China) waging war would be wrong because of the impossibility or prohibitive cost of victory.'[8] Teson's conclusion is that 'the relationship between liberal and illiberal states can only be a peaceful *modus vivendi* and not a community of shared moral beliefs and political commonalities.'[9]

These Americans' reflections on a need for a morality of international law are impossible for classical international law, with its doctrine of effectiveness, to resist intellectually. Nevertheless, the American views are curiously unearthed and utopian in the sense that its liberal ideology is both unreflective[10] and, at the same time, not politically or socially situated. The next stage of our argument is to show how the coercive rhetoric of universal democracy and the rule of law actually function on the international stage. The language of human rights is essential to the oversimplification of the roots of disorder in international society at present. Problems of disorder are attributable to terrorist regimes that 'kill their own people' and threaten all others. Yet for Western understanding the two essential elements of human rights are unrestrained freedom and the inability or unwillingness to engage in rational debate. These necessitate a violent response to fears of international disorder. The legalization of this language is essential to legitimize the recourse to organized state-level violence on the international plane. The underlying interests that this violence serves, legitimized by human rights rhetoric, are those of Western consumer society, a materialist-hedonist culture that requires a militarized control of the planet to ensure its continued expansion. A rapacious, subjectivist individualism is the anthropological foundation for the consumerist market economy that asserts itself globally through rhetoric about human rights and liberal democracy. Legalized, that is enforceable, human rights furnish the legitimizing rhetoric of an international legal order that resorts increasingly to humanitarian intervention and asserts the right of pre-emptive attack against governments, which threaten others through terrorism 'against their own people' and against their

neighbors. In other words, the legalization of human rights at present is crucial to transferring guilt for the problems of international disorder outside Western societies and legitimizing violence against non-Western societies. The language of human rights is the ultimate form of disempowerment the West uses to address its victims. A critique of the employment of the language of universal human rights, culminating in a right of humanitarian intervention, needs to focus not simply on the details of these concepts but also on the absences that they imply with respect to the rest of international law. Taken together, can they be regarded as constituting a legal system or order? In terms of the analytical approach to law the answer can only be positive, but in terms of a wider 'political teleology' it cannot be.

A Social democratic order is the alternative to civil war whether at a national or an international level. [11] Increasing numbers of the states of the non-Western world are torn by unresolved socio-economic conflict. This expresses itself in essentially class-based ethnic division, reversion from secular nationalist ideology to religious fundamentalism, terrorism, and massive waves of cross-border migration. The privatized Western concept of a legal order offers a monocultural explanation of this state disorder in terms of inefficient, corrupt, and authoritarian state structures in *foreign* countries, with the subtext that it is not the function of the state to resolve internal social tensions through the redistribution of economic resources. The most significant dimension of the Western transformation of the international legal order from the 1960s through the 1980s to the present is to change the focus from the social dimension of international development to the political-military dimension of combating terrorist threats of violence and international crime.

A central focus of Western international law scholarship is now on making human rights law effective, eventually through humanitarian intervention and the forceful spread of the right to democracy. There is an increasing development of so-called rapid reaction military forces that should be able to intervene in countries tom by civil war and plagued by 'vicious dictatorships', etc. This use of force is ostensibly to defend human rights, but in practice it means responding to the consequences of international political and economic chaos exclusively through the use of violence. It is hardly surprising that so-called humanitarian intervention as a principal measure to resolve internal conflict or to spread democracy becomes entangled with informal Western state intervention through the use of mercenaries. The line between formal and informal intervention (state and private) becomes

fuzzy as the line between a 'regular' and 'black' (mafia, terrorist, drug or other crime-driven) economy in Western economic relations with non-Western states.[12] This fuzziness is again an inevitable consequence of the absence of an international public morality.

Non-Western states now find themselves increasingly compelled to assent, through treaties of cooperation, to measures to counter international criminal activity, whether in the export of drugs, dirty money, or population flows. These agreements will frequently include forms of military assistance in terms of Western bases and equipment. The primary and readily applied sanction for non-cooperation is economic boycott and embargo. The ultimate sanction for non-cooperation remains military/humanitarian intervention. However, the distinction between economic and military sanction is not fundamental. The coercive character of this imposed legal acquiescence by non-Western countries comes from its overall objective. It ignores the overall basic function of civil-political society that is to replace civil war (and even criminal violence) with freely agreed measures for overcoming social inequalities and achieving class peace. Instead, the measures of economic and military sanction are defensive, a re-establishment of control over non-Western state territory in the interests of Western security.

Closer attention needs to be paid to the notion of imposed legal acquiescence. It is a concept essential to but not explicitly developed in analytical jurisprudence. Hart explains that for a legal system to exist, it is only necessary for the majority to accept, to acquiesce passively in the system. How the officials, who internalize the rules and the others who acquiesce, are distinguished or identified is left open.[13] The so-called consensus upon which international law rests includes the crucial legal legitimization of economic coercion. This is clearly illustrated by the legislative history of the Vienna Convention on the Law of Treaties. Again, it was the Western countries that managed to repel the argument that economic coercion or pressure could constitute a violence that vitiated consent to an agreement. Only a threat or use of military force against a state was excluded. Overwhelming economic pressure would always be permissible.[14]

Economic hegemony, at the global level, means that the pressure of combined individual Western wishes and desires expresses itself in an overwhelming form on the rest of the world. The background to these wishes and desires is a methodological individualism that insists that each individual's claims and desires have automatic legitimacy and can compel fulfillment through whatever level of pressure

is necessary. This value-subjective, morally anarchic philosophy is the essential anthropological basis for the free market economy. It supposes that human demands are not subject to external criticism and the success of these demands depends entirely on the strength with which they are pressed forward.

These reflections have remained diagnostic. My argument, to be developed, is that human rights discourse has to be seen as embedded in a coercive international legal order, where the idea of law is itself, as a matter of self-understanding of Western culture, violent. This legal culture rests upon a vision of voluntarist individualism that is morally agnostic and makes recourse to violence, i.e. law as sanction, unproblematic. It should be within this wider context that the recourse to the language of human rights enforcement, culminating in humanitarian intervention, is seen and understood.

To find an alternative theory of law and society, one might begin from such ideas as that human beings come before law, as understood by the analytical school; that they have rights is a way of saying that they exist; that human beings can distinguish between what is true and false, what is good and evil. Therefore, they can share these forms of knowledge, dialogue with one another, cooperate and avoid war. Law is, then, the product of freely reached consent in communities and across communities. No one may command if it is not in virtue of a delegation from those who dispose of themselves freely, in order to obey freely, what are reasonably given orders. Political power implies always an interpersonal relationship of recognition and reciprocity, mediated institutionally through a judicial assessment of the quality of these human relations.[15]

Radical individualism of 'Western human rights,' whether Hobbesean or postmodern

The word phagocyte refers to a type of body or cell that engulfs bacteria, etc. In his polemic *The Hidden Face of the United Nations* (in French) 2000 Michel Schooyans borrows this word from Solzhenitsyn's famous Harvard Lecture (1978) to describe the tendency present in our society for law to appropriate morality. This may seem surprising in the face of the liberalization of Western society from traditional, especially Christian values, in the 1960s and the 1970s. The state withdrew from wide areas of personal life no longer regarded as of public interest. However, Schooyans points sharply to a sting in the tail of this liberalization, which he connects with the

concept of an international legal order that takes coercion/sanction as its lynchpin.

The Western (i.e. European-North American) concept of the person, the subject of human rights, is radically voluntarist. It is based upon the unrestrained will of the individual in a radically subjectivist environment. There is no framework of rational discussion that can resolve differences and the tendency is increasingly towards a manipulation of assent through interest groups that reflect economic and military interests. The outcome is a forced consensus. Since human rights cannot be based upon objective understanding of either the value of the person or of reason, the consensus needed to reach decisions in democracies is increasingly the subject of coercive manipulation (popularly known as *spin*) causing alienation and withdrawal from the political process.

The critique of voluntarism is that where each is free to choose his truth and act according to conscience, where all human beings are only individuals and have no common nature, or naturally grounded sociability, the meaning of words such as law, person, morality, family, nation, etc. depends upon consensual definitions which each one of us pleases to give.[16] Since there is no necessary element of reason in assent, it means simply adherence to a decision, without any necessary rapport with the truth of what is agreed. Consensus means acquiescence given to a project, a decision not to oppose it.[17]

Since we do not agree on any absolute values everything in the way of legitimacy, and presumably also the so-called rule of law, rests upon agreement about procedure, the process of consultation that precedes decision. The Habermasian theory of a free communicative space is explicitly based upon a post-metaphysical rejection of natural law, but fairness in communication is not enough to found norms and values. It is politically agnostic about the actual context in which communication takes place.[18] In fact, it is essential to trace exactly the processes whereby individuals reach consensus in self-styled liberal democratic Western states. If there is no acceptance that there can be rationally objective ways of resolving differences of opinion about what is good or bad, it is inevitable that an anarchy of affirmations will, in fact, be resolved through the pressure, if necessary violent, of a preponderance of voices. It is here that voluntarist individualism fits so well with the market economy. Exchange value dominates over nostalgia for use-value to mean that there are no values in common, but instead an individualist competitive struggle in the market as a place of exchange. The ultimate logic here is not a recognition of the

absolute equality in dignity of all human beings, but the elimination of the inefficient, whether the individual or the nation. It is the frequency, density, and intensity of desire that is expressed in the multiplicity of choice that comes to dominate. Whatever holds out is legitimate.[19]

This is still a very elementary account of the relationship between liberalism, whether in its 'modernist' or 'postmodem' variety, the violence of the market, and the rhetoric of human rights as liberal democracy and the rule of law. Baudrillard also argues that the practice of politics and the practice of economics have increasingly converged to become the same type of discourse. The freedom to think is the freedom to consume. At the root of this transformation is the annihilation of all finality in the contents of production.[20] Work reproduces itself and consumes itself like anything else. It exchanges itself with non-work in a complete equivalence of exchanges. There is no eschatology that might found itself on the social.

The roots of political passivity are here. Public opinion is itself a commodity. Opinion polls exist somewhere beyond any social production of opinion. They rebound incessantly in their own images: the representation of the masses is merely a simulation, as the response to a referendum (the father of opinion polls) is always induced by the question. It is not a matter of a single person *producing* an opinion; rather everyone has to *reproduce* public opinion, in the sense that all opinions are swallowed up in a general average, and then reappear at the level of individual choice. For opinion, as for material goods, production is dead, long live reproduction. Let spin be born.[21]

National practices of manipulation and manufacture of consensus *are the democratic process*. Since one opinion can only be as good as another and we must all tolerate one another's difference, it is inevitable that those with less capacity to resist the opinions of the stronger will have to submit to the latter. The weaker parties recognize that they have to behave as the majority of the group have the habit of doing. Law comes in to express the conclusion of this process because the consensus reached can be sustained and effective only if it is subsequently legitimate to enforce it against those who are recalcitrant. The presence of these tendencies in the international community could hardly be clearer at the moment. Human rights rhetoric (liberal democracy/market economy/rule of law) is made into a fundamental law of international society, violation of which places the dissenters outside international society. Undemocratic societies constitute a threat to the security of their own members and to the rest

of 'law-abiding' international society. They warrant the suspension of the law relating to the use of force in relation to them. At least one difficulty of this approach is that the 'legal' analysis of and solution to a supposed problem is, above all, military and only secondarily political, economic, and social.[22]

The crucial legitimating factor for the process of legalization of human rights discourse comes from the analytical school's understanding of a legal order. The latter makes the crucial link between the subjectivity of human values, the irrationality of all value-based decision-making, and the saving of the analytical clarity of the idea of law – in this sense, the objectivity of the legal order – through attaching the epithet legal validity to the concept of coercion. That norm is legal, which is ultimately enforced through a sanction. Enforceability becomes the central point of effectively held values. Nothing has value unless it can be enforced. How a rule is arrived at and what its content might be are meta-juridical matters, of perhaps historical or philosophical interest. What counts for law is the fact that a rule will be regularly enforced. In this framework what matters about human rights is that they should be enforceable.

This is a perspective rooted more generally in analytical jurisprudence. For the sake of discretion certain variants of this approach may not place emphasis on the notion of sanction. Yet it remains in the background and is automatically related to it, precisely because of the function of law in making consensus effective. For instance H. L. A. Hart's *Concept of Law* (1961, 1994) supposes the priority of whatever happens to be the dominant (i.e. general or community) perspective of the chief officials of a legal order as opposed to recalcitrant minorities or dissident members.[23] This rigorous dichotomy is essential: either legal officials or outlaws (or 'bad sports' in more discrete versions of the story). The acquiescence of 'the rest' completes the picture. This curiously defined community (read: coalition) priority is inevitable given the value skepticism that underlies the analytical approach to law. That is, if all values are a matter of subjective preference, the only objectivity possible will come from a formal consensus of a majority, or of dominant key figures representing a majority. In this dominant analytical approach one understands legal obligation from the internal perspective of those applying the law, namely the legal officials, especially the judges. What these officials have internalized as the demands of norms will be eventually enforced.

Hart makes impossible any direct reference to human rights as attaching to a 'person as such.' This would be to treat rights as facts,

as directly derived from a situation, that is the condition and needs of a person. Instead, Hart praises Bentham for realizing that the statement 'You have a right' has to refer to the existence of a law imposing a duty on some other person, 'and, moreover, that it must be a law which provides that the breach of the duty shall be visited with a sanction if you or someone else on your behalf so choose . . .'[24] Such an approach is effectively to eliminate all the elements from the idea of law except the use of force. The subject is dissolved into an addressee of norms, which destroys any possibility of human rights as real. Man exists as an artificial construction of the state. Values incorporated in norms cannot be true or false but only valid or invalid, because they rest on a social power that is capable of compelling the individual to behave in a certain way. This can only be group power, the contagion of custom.[25]

For Hart the problem has been confusing the explanation of the definition of law with the correspondence theory of truth. He praises Bentham for realizing this. 'By refusing to identify the meaning of the word "right" with any psychological or physical fact it correctly leaves open the question whether on any given occasion a person who has a right has in fact any expectation or power . . .' While Bentham puts the emphasis on punishment in a system of rights, Hart sees that many would prefer to speak of remedy: 'But I would prefer to show the special position of one who has a right by mentioning not the remedy but the choice which is open to one who has a right as to whether the corresponding duty shall be performed or not . . .'[26]

This argument represents a slight change of emphasis towards the individual who is the eventual beneficiary of the right conferred by social power. Far from changing the tone of the sanction-based approach to law, it might even be likely to increase the prospect of unilateral action in defense of one's rights if the social power is thought to fail. After all, there cannot be a right if there is not a remedy.

Recently, Tuck has highlighted possible origins of the connection between liberalism and the view of legal order as having sanction as the lynchpin, specifically with reference to the international dimension. Individualism requires an overwhelming social power to confront it, if there is to be any possibility of order. As Tuck puts it, the primary source of conflicts, outside of civil society, are epistemic in character. His interpretation of Hobbes is that while persons are fundamentally self-protective and only secondarily aggressive, it is the differing judgments which people make, arising from the fact that

there is no objective standard of truth, which makes people secondarily aggressive. So, concludes Tuck, 'it is the fear of an attack by a possible enemy which leads us to perform a pre-emptive strike on him and not, strictly speaking, the desire to destroy him.'[27]

Hobbes's metaphor of the *Leviathan* is acutely tied to the necessity of the link between the freedom of the individual and state positivism. The state has to be omnipotent in the making of laws and the final arbiter of any dispute, as there will be no agreement as to how a norm is supposed to be applied. As all laws have need of interpretation, the idea of law must be subordinated to the question of who interprets it. Whether the authority within the state is democratic, aristocratic, or monarchic does not matter. The power it has must be of 'an absolute sovereignty.'[28]

A connection between Hobbes and modern legal thought can be seen clearly in Kant's vision of world peace, which arguably leads to the idea of a coercive international legal order. It is by accepting Hobbes' anthropological vision that Kant is driven to conceive of international peace in terms of a coercive confederation of states that is, to a considerable extent, reproduced in the UN Charter. Some formulation of overwhelming force is the only option from within the Hobbesean vision. Tuck develops this as his central argument about Kant, as the pinnacle of the European Enlightenment tradition. 'As Kant says in his *The Metaphysics of Morals*, 'For a lawful condition to be established . . . it must be subject itself to a public lawful external coercion . . .'[29] Tuck also quotes Kant from the *Critique of Pure Reason*, 'As Hobbes maintains, the state of nature is a state of injustice and violence, and we have no option save to abandon it and submit ourselves to the constraint of law . . .'[30] The explanation for this grim picture of the powerful state is simple. It is the shadow side of the freedom of the individual. Kant believes that 'individual men, peoples and states can never be secure against violence from one another, since each has its own right to do *what seems right and good to it*.'[31]

Whether an international coercive legal order is possible is, and should remain, an open question. However, the perspective being criticized here requires that there must be a pyramidal structure to international society that completes the state legal order with an international legal order that closes off any anarchic autonomy for the state. This is Kelsen's main contribution to contemporary thinking on international law. It should be at most an instrument for a centralizing global order, with clearly delegated juridical functions. The so-called rights of a state are no more or less than those conferred on it

by the international legal order. This is the only analytically conceivable approach to the existence of the state (read, nation).[32]

Therefore the state can itself, and should be, coerced wherever it appears to transgress international legal norms. This is the most essential character of the norms. So the state (nation or collective community/entity) is no more a fact than the human being. It is a reference point for the potential coercive application of norms. The social power of the international community, through the inexorable development of international custom and multilateral treaties, must all weigh down on the individual anarchic state to ensure its conformity to law. This is why the very idea of law has a demobilizing effect, whether directed to individual human beings or collective communities such as nations. [33]

This idea of law is also inherently imperial and hegemonic because it cannot accept a legal vacuum, a failure to institute a complete and efficient coercive order. The structural deficiencies of the legal order that Kelsen has identified as essential simply have to be overcome: the vagueness of legal norms and the lack of automatic enforcement of norms within the framework of the law of the UN Charter mean that an apparently nihilistic vacuum opens up, which has to be closed somehow, even if by unilateral interpretation and enforcement. At the same time, those acting unilaterally also feel compelled to constitute themselves as the substitute for the community they see as failing. They have no other way of thinking about law. The liberal ideal of law has to be institutional, that is, it does require some authority to state what the law is and to enforce what it says. And yet it is not able to provide the institutional framework, at the international level, to qualify as law. It does not automatically interpret actions as legal or illegal or guarantee security. Nor does it impose sanctions automatically. So, it is inevitable that states will not refrain from enforcing their rights individually whenever they consider them violated – if they can.

Philosophical Responses to a Neo-capitalist Human Rights Ethos

In economic and social theory, methodological individualism is an Anglo-American cultural construct. It makes a clearly universal claim which leads the members of this same culture to suppose that the removal of any state structure will cause everywhere the reconstitution of civil society. In his topology of legal cultures Green situates the US (and effectively the neoliberalism of the UK as well) within a metaphysics of a warrior's perspective. As trials of strength become

the means by which an individual can prove his worth, one can triumph only by having more power than another. The law/state as an impartial spectator ensures an even playing field by excluding certain tricks from the game, as force and fraud. Apart from that the ethical climate is Hobbesean.[34]

In her global topology of state–business relations the Australia-based specialist in comparative politics Linda Weiss picks up the same themes as Green in her reflections on English language literature about specifically Taiwan, Korea, and Japan and their government–business relations. This literature considers that either government dominates or business dominates. The state either succeeds in *imposing* a course of action or meets *resistance* in one form or another. She questions whether the changes in these countries in the 1980s and 1990s constitute inter-systemic change (i.e. from a state-guided to a market-led pattern). Instead, she points to intra-systemic change (involving increasing complexity of tasks and modes of fulfilling them). Her general conclusion from her empirical research is that in the 1990s in East Asia 'the state has promoted, strengthened and maintained a social infrastructure (a dense organizational structure of industrial networks, cartels, trade associations, and vertical and horizontal councils) to pursue those very leadership strategies on behalf of a given sector . . .' She concludes that it means nothing to ask who is following whom, and that 'there is much about the East Asian political economies which confounds and eludes conventional Anglo-Saxon categories . . .'[35]

It is this Anglo-American cultural judgment which underlies the whole rationale of the WTO, World Bank, and IMF. The aim is to assure the retreat of the state in the allocation of resources and the advance of the market. Government oppresses, whether efficiently or inefficiently (i.e. in its own terms). Authoritarian behavior, by foreigners, both creates uncertainty and induces a state of infancy. It is assumed that individuals act to increase their own wealth, but only provided they are certain about the consequences of their actions. If the state is acting according to an uncontrolled discretion, this serves to increase uncertainty, and therefore this uncertainty will lead to hesitation, even to indecision and apathy, i.e. to economic stagnation.[36] In practice, Dunkley argues that while it is difficult to distinguish between the effects of globalization and anti-welfarist ideological trends, it is likely that the downward pressure on taxation and welfare will continue worldwide, with cost considerations becoming more important.[37] What this really means is the destruction

of the very idea of the right of economic self-determination of peoples. International economic relations after 1945 were to be regulated upon the belief that economic sovereignty and nationalism must be restrained through international organization, so as to ensure that cross-border transactions are not restricted by discriminatory and predatory practices. However, at the same time it was assumed that national economic sovereignty could be legitimately used for the social democratic purpose of ensuring a minimal of social welfare in national societies. Since the mid-1970s international economic relations have entered a new phase of finance capital-based movement or speculation, which is outside any regulatory control.

Arguably modern economics, viz. capitalism, created and needs the nation-state as a framework for development. The unified market, the control of a currency, and a stable fiscal regime are essential for capital accumulation. The question is how to cope with the plurality of such entities. Free trade has the primary objective of assuring, in the first instance, the coexistence of nation-states as opposed to struggles for existence among them, which could lead to mutual destruction. The principle of comparative advantage, as an ideal, means that each nation has such a thing, and, therefore, exchange among the nations will assure trade without friction, and ensure international peace.

At the same time this happy logic has internal contradictions. The logic of capitalism is perpetual expansion and there is no reason, in economic terms, why one or a small number of states should not successfully absorb all the others, or at least set completely unequal terms of exchange. Resistance to this 'natural tendency' need not confine itself to economic instruments or means. The flourishing of GATT/WTO and regional trade areas (RTAs) since 1945 have been directed against the nationalism which was seen as the cause of the pre-1945 conflicts. The question is how to interpret this development.

The view accepted here is that there was a single, overwhelming, strategic victor in the Second World War: the United States.[38] Even if the Soviet Union played the major part in the defeat of Nazi Germany it was not skillful enough to realize the fruits of its victory. In stages, and without it being a question of implementing a completely preconceived plan, the US has managed to unite the West, including Japan, in an informal political, economic union, first against the Soviet Union and then against those states south of the 'color-line' in a management of the world economy in which the explicit legal rules of the Bretton Woods system were always only a part. In this construction the demonization of nationalism as particularist, divisive,

and, finally, self-destructive, is essential. There is no place in the rhetoric of human rights, the rule of law, and democracy, coming out of international institutions and RTAs such as the EU, for national state autonomy. The latter is not seen as an economically meaningful concept precisely because the aim of 'deep integration' is the elimination of all barriers, at least among the 'Group of Seven (Eight?).' The WTO expresses only a part of this integrative project. The project has entailed the elimination of European colonial empires, the cause of one if not two world wars. It has made 'nationalist' conflict among Western powers appear ridiculous.

Yet it is precisely this disappearance of traditional conflict which needs to be examined closely. It is partially a function of the exhaustion of all of these powers except the US after 1945, so that only the latter has been able to act with the coherent sense of its national interest, which others had separately exercised with apparently disastrous results. However, it is misleading to speak exclusively of a completely separate US national policy. There has arisen a Western/Northern economic identity, which former members of the Soviet bloc wish to join. In other words, this identity is white. Yet its intercontinental character makes it difficult to continue to use comfortably the label *national*, albeit one can continue to think of the political organization of a territorial space to ensure the development of economic activity, a space which may not be global. Indeed, it is argued here that if this space is not truly global, the continued use of the term *national* in its pejorative sense, is justified. 'The West'/North is a concept of national identity.

What does West/North exclude? The so-called third world remains a primary provider of raw materials and low-technology, intensive manufactured products, as well as a source of cheap labor for continued 'fordist' manufacturing production. Apart from this division between North and South the traditional arguments for international trade are largely formal. Exchanges in manufactures and services are merely reproductions of the same (e.g. cars, computers, etc.) wherever in the West. They could be produced 'at home' in a national market, but there is equally no reason, political or economic, why identical products should not be exchanged across borders within the West. The question is whether 'the rest' can be, or need be, integrated into this process. The best answer to this can be seen in observing the attempts of third world elites to attain equal status through the rhetoric of economic self-determination and a new international economic order in the 1960s and the 1970s. They inherited the structures of colonialism, and the question was whether they could break out of

what had become neocolonialism. Even their attempts to change the percentage of rent out of the extraction of natural resources, including cheap labor, was successful only in the one instance of oil production. Although third world states were founded on a rhetoric of nationalism, it has been easy, by means of the rules favoring freedom of trade and investment and the reinforcement of Western intellectual property rights, to assure that third world state nationalism, as an independent political element, is demonized as a source of corruption and economic irrationality. International economic law, as well as the more informal exercise of US-led Western hegemonic economic power, has virtually completely delegitimized the third world state as an independent initiator of a locally coherent or cohesive economic development. All development must be 'outward,' export-oriented towards the West.

Have developments since the 1980s done anything to render the classical colonial and neocolonial divisions more fluid and less confrontational? Again it would appear that the 1990s have seen a more direct reassertion of Western rule over the South.[39] When the rhetoric of the new international economic order was in full swing it appeared that the world system accepted the permanence of new states which would attempt to develop some measure of social cohesion within their boundaries, on the basis of which they might develop complete economies along the lines of Western industrialization since the nineteenth century. On this basis new states could gradually be added as full members of the international order. Economic self-determination might then run parallel to the right to political self-determination, found in the UN Human Rights covenants.

However, new trends in international management and technology diffusion meant that such autonomous industrial-technological development was improbable. It made more sense for Northern-based TNCs to farm out subsidiary activities in terms of a global strategy over which they could retain control. The primary reason for locating in the South would, as usual, be the cost of labor. The ultimate aim would be re-export to the North, which meant that there was no economic need to consider the expansion of consumer demand within local Southern markets. The reinforcement of intellectual property rights through the Uruguay Round would ensure the retention of overall direction. Indeed, even these relatively advanced industrial activities could be confined to a small number of newly industrializing countries, which the North might encourage for strategic reasons – the states on the rim of China, Taiwan, South Korea, and perhaps

Indonesia. Beyond that it was necessary to ensure that possession of natural resources did not provide a basis for the development of indigenous industrial development through processing. Efforts by Ghana and Jamaica to develop bauxite production into aluminum, etc. could be crushed. Gulf oil dollars could be channeled into Western TNCs and rogue nationalist states, such as Iraq, Iran, Libya, China, etc., could be identified as not suitable to be partners in the international system and integrated into its international economic law regime.

None of this is to say there is a complete, consciously worked out strategy of control. However, circumstances favored an ever-tightening grip. The debt crisis of the early 1980s was brought on by a wide variety of factors, including the US arms buildup against the Soviet Union. However, the debt crisis favored buying up potential independent industrial development in countries such as Mexico through debt–equity swaps. It enabled the IMF and World Bank structural adjustment programs (SAPs) to stress the need to orient particularly agricultural developments to cash crop exports, which could pay off debts. Especially in Africa, public funds were directed away from education and training to cash crop exports of vegetables and fruit to Europe. In other words, the economic activity of the individual South countries could be both directed from outside and for the interests of the North. Throughout there was a net transfer of wealth from the South to the North, so that Northern control could continue and the possibility of an expanded socioeconomic base within Southern countries be foreclosed.

Hence has come the argument, introducing this chapter, that the period 1980–2000 has seen such a weakening of the state infrastructure in the South that the North is on the point of having to complement its IGO (WB/IMF/WTO)-led SAPs and its decentralized, subcontracting-led TNC management strategies, with a new, overtly military-political role for the North. Hence the aim now in both the EU and the US is to think of the development of rapid reaction forces of a policing character and the evolution of doctrines of humanitarian intervention to assuage the acute crises and divisions in numerous Southern countries. Explicit doctrines of the export of the rule of law and democracy are on offer, with the threat of economic sanction and even military intervention albeit within a context in which the economic options at a global level have already been set by the TNCs and IGOs. Democracy, the rule of law, globalization of human rights, etc. serve to prevent the Southern countries from deriving any legitimacy from the development of local state structures, which could serve to

ensure the gradual evolution of local socioeconomic solidarity or cohesion. This is reflected in the detail of WTO hostility to policies of subsidization of local agriculture or industry, restrictions on foreign ownership, and, hugely inconsistently in terms of liberal ideology, in the maintenance of intellectual property rights. However, the rhetorical character of this ideology must be underlined. The disapproval of economic nationalism in Western-educated opinion is attributable to the economic imperialism of the pre-1914 years and to the aggressively protectionist nationalism of the 1930s. In both cases the culprit was taken to be Germany, which is the home of List-based theories of economic development through state cultivation of national industry based on the national market as a preliminary to participation as an equal in international commerce. It is believed that such a territorially and probably ethnically-based view of economic development made inevitable German thinking in terms of the size of colonial empires, and encouraged Germany, in the 1930s, to set about constructing an identikit colonial empire in Eastern Europe, which would enable it to remain autarkic in relation to the global system dominated by Anglo-American economic power.[40] Hence, there is perhaps an unconscious Western tendency to see any serious, or apparently serious, opponent to its world economic strategies in terms of new Hitlers, especially in the Arab world. At the same time such an historically-based ideology also serves present political interests of Western countries.

It is well known that many services, such as the media, entertainment, computer software, and the food industry, directly embody cultural values and symbols, or so-called 'cultural baggage,' although certain goods, such as clothing, cars, toys, etc., do likewise.[41] In particular the media and audiovisual sectors swamp world markets. US films now account for 70 per cent of the market in Europe, over 90 per cent in the UK and Ireland, and virtually 100 per cent of the Caribbean market. Supposedly American 'industrial cinema' now 'controls 80 per cent of the world's culture.' This is in spite of the fact that, under the Uruguay Round, there was no agreement for liberalizing the audiovisual sector. Indeed, the free trade argument that a deficit in one sector will be countered by a surplus in another 'is a furphy [i.e. rumor] . . . because the more US culture we are forced to watch on prime-time television the less of our own we see . . .'. American films and TV programs account for 40 per cent of the world market and audiovisuals are the second largest US export sector after aircraft, and yet imports account for barely 2 per cent of the domestic US market.

It has been argued [42] that language has always been about power first, culture and learning second. 'Blue jeans and Hollywood played their part in this, but it was Cruise missiles and Stealth bombers that became crucial to the process . . . ' Eighty per cent of home pages on the Web are in English compared to 4.5 per cent in German and 3.1 per cent in Japanese. While there are many studies to argue the cultural superficiality of globalized English, on the face of it the political passivity of most governments of the world towards Anglo-American hegemony, appears to bear out the success of methodological individualism as a global role model. The positive rhetoric of the neoliberal international economic order is that it spreads to and implants in the non-Western world the legal values of democracy, the rule of law, and, above all, human rights. However, the next section has to endeavor to unpack the senses in which this legal ideology merely brings to a head the absence of human value, which the above international regulatory framework is supposed to serve.

CONCLUSION

The idea of a community giving itself a legal order of human rights has to suppose a minimum consensus on the meaning of the human person and I suppose that this does not exist at an international level. I claim that the language of human rights supposes something evident and beyond contest, while the global moral consciousness is obviously contested and will remain so. Human rights research is also made problematic because the community of legal scholars who discuss the language of human rights is not, in my view, open to debate philosophical foundations for human rights. It consists predominantly of a classical modern or postmodern version of supposedly anti-essentalist libertarianism. Human beings have no essential nature and their identity is a mixture of social convention and personal choice. The post-metaphysical, postmodem discourse theory approach to the subject is no exception. Its equally radical subjectivism is particularly appropriate for the demands of advanced consumer capitalism.

I attempt a number of hypotheses about what I consider to be very likely connections among certain features of Western legal culture. So, I suggest a connection between three legal phenomena. Western language about human rights favors a voluntarist understanding of these rights, i.e. rights are a matter of statements of personal preference. They are not transcendent or objective in any sense. This perspective

accommodates classical liberalism that sees political obligation as contractarian. It also accommodates postmodern theory which sees the world, ideally, as a cacophony of desire. However, most importantly, it accommodates the consumerism of advanced capitalism. The market also means the legitimacy of personal preference and the satisfaction of desire, all confirmed through the institution of contract.

The second legal phenomenon, characteristic of Western legal culture, is to identify law itself in terms of criteria of validity, the primary, and, in my view never absent, criterion being sanctions, ensuring effectiveness. This second phenomenon is clearly related to the first in that the search for verifiable criteria with which to identify law leads to a preference for the apparent objectivity of 'brute' material power over value speculations seen as inevitably inconclusive. What is perhaps not so readily recognized is that voluntarism as a basis for human rights makes inevitable the recourse to sanction as the criterion to identify law. Since there is no objective rationality, or conclusive discursive theory to resolve differences, recourse must be had to the weight of the majority or some overwhelming combination of material interests.

The final legal phenomenon concerns specifically the contemporary character and development of international law. This is marked at present by the crisis of even the pretence of a universal international legal order, as represented by the United Nations and its Charter. The latter is replaced by a coalition of the international community committed to the forceful implementation of the human rights of liberal democracy and the rule of law. While these legal values are represented as cosmopolitan or universal ('Who wants to be tortured by a vicious dictator?' etc.) they are also entirely compatible with the expansion of Western economic interests. What needs the closest scrutiny is the relationship between the two – cosmopolitan values and economic interest. Can the result still be characterized in any sense as a global legal order?

The Necessary Conditions for an International Legal Order or System

It is vital, before one comes to ground and analyze fundamental values for international society, to understand the extent to which it actually enjoys constitutional structures at all. This context is essential to explain the possible place of standards of legitimacy. It is the significant measure of absence of a global constitutional order, which

requires that standards of legitimacy must fulfill, in large part a role of recognizing pluralism of values. That is to say, they will have a defensive character, designed to instill skepticism about common standards. At the same time basic values have a fundamental character precisely in the sense that they ensure that *legal order is the effective alternative to civil war whether at a national or an international level*. These are contradictory aims. The values must have an anti-hegemonic role, but at the same time, they will not co-opt violence, if they do not win the consensus of the main holders of the potential for international violence, the hegemonic liberal democratic, capitalist powers, with their supposed passion for unrestrained personal autonomy.

This dilemma is clear to Keohane and Grant in their study of the possibilities of achieving accountability in international relations. They isolate the different elements of the problem. For them, there is clearly no large and representative global public, people who share a sense of common destiny and are in the habit of communicating with one another. [43] As they put it, 'There is no juridical public on a global level, since no legal institutions define a public with authority to act globally.'[44] Constraining abuse of power of states depends upon whether they are weak, poor, and dependent, independent but not great powers, or great powers, hegemonic states. It is the former who are susceptible to the rules of fiscal accountability.[45] Independent states are very difficult to hold to account, unless they voluntarily engage in multiple relationships of interdependence.[46] The crucial third category of state does not depend on others and can resist legal accountability. Peer accountability and reputational accountability are the only recourse. Transparency is important, but so also are agreed standards of legitimacy and the possibility of sanctions. All three have to play a part, and, one must assume, 'Power wielders certainly cannot be expected to hold themselves to be accountable- they resist accountability because it restricts their autonomy.'[47]

So there is a limited but absolutely vital place for the development of philosophical standards of legitimacy to provide a framework for peer group evaluation of the hegemonic liberal democracies. There is place or space to counter the liberal, market, warrior culture of methodological individualism while not pretending to replace it. It will count especially with the category of so-called weak state, in Grant and Keohane's scheme, but it will set the scene for the final chapter, in which an altogether milder anthropology to ground international legal relations will be outlined.

As much as Bartelson, De Sousa Santos realizes the necessity of returning to early modernity, to the time of Hobbes and Descartes. In his development of an argument about the transition from modern science to postmodem knowledge, he notes the significance of Cartesian rationalism. Cartesians suppose that it is possible to divide elements into precise parts, which it is then possible to observe and measure with accuracy, because the past will repeat itself in the future. The hypothesis of mechanical determinism has to be that the whole of reality can be reducible to the sum of the parts into which we divide it in order to observe and measure it. The assumption that one can formulate laws of nature is based upon the idea that the observed phenomena are independent of all but a small number of conditions – the initial conditions – whose interference is observed and measured. The idea of a cause is, in fact, something that can be acted upon. The possibility of precision is essential to a method, which rests upon the progressive subdivision of the object of knowledge. Once the frontiers of the object of knowledge become unclear, the whole methodology breaks down.

The main argument against mechanical determinism is that human action is radically subjective. Unlike natural phenomena, human behavior cannot be described, let alone explained, on the basis of its external, objective characteristics, since the same external act may have multiple interpretations. De Sousa Santos relies upon Ernest Nagel's *The Structure of Science* for the argument that there are no explanatory theories in the social sciences that would allow them to abstract from reality in such a way as to be able to search for adequate proof in that reality in a methodologically controlled way, because social phenomena are historically and culturally conditioned, and because human beings change their behavior according to how much is known about it.

At the same time in the field of microphysics Heisenberg and Bohr have demonstrated that it is not possible to observe or measure an object without interfering with it. The idea that we know nothing of the real other than what we ourselves bring into it is well expressed in Heisenberg's Uncertainty Principle: we cannot simultaneously reduce the errors of measurement of velocity and of the position of particles; whatever we do to reduce the error of the one will increase the error of the other.

What is quite simply fundamental here is the subject's structural interference in the observed object. The conclusion is that knowledge is always a struggle involving two subjects, rather than a subject and

an object. Each is the other's translation, both are the creators of texts. As de Sousa Santos puts it:

> Once these intertextualities become self-reflective and aware that they constitute 'congealed' social relations and social processes by which some people or social groups are denied the play, the stage, the text, or are silenced by force, then they can become emancipatory local projects of post-modernism, undivided knowledge . . .[48]

This is a principle of radical epistemological equality that serves to insist upon a level playing field against the economic hegemons, which are also always potentially militarily threatening. De Sousa Santos proceeds to apply this *epistemological* critique to the *state civil society* dichotomy to bring out systematically how far these apparently precise concepts are rhetorical aspects of what might be characterized as *raging subjectivities*.[49] The object of the dichotomy is to depoliticize civil society, to take it out of the field of struggle. That is to say, the purpose of the separation is to naturalize capitalist economic exploitation and neutralize the democratic ideal by confining it to the constitutional space. Dichotomies serve to exclude diversity. De Sousa Santos points to at least six dimensions of informal law which can be delineated. The *citizen-place* is the set of the social relations that constitute the 'public sphere' and the relations of production of the vertical political obligations between citizen and state. It is to this place that the problem of law and of political power is now confined. Law is what emanates from the state, and the problem of power is that of controlling the state. This rhetorical device excludes the whole range of hegemonic strategies, which produce unequal social relations and facilitate the unreflective and uncritical power of some over others.

The *marketplace* is the cluster of social relations of distribution and consumption of exchange values whereby the commodification of needs and satisfiers is produced and reproduced. The *household-place* is the cluster of social relations of production and reproduction of domesticity and kinship. The *workplace* is the set of social relations clustered around the production of economic exchange and of labor processes. The *community-place* marks the social relations of production, etc. of physical and symbolic territories. Finally, the *world-place* is the sum total of the internal pertinent effects of the social relations through which a global division of labor is produced, etc.

The difficulty for any so-called causal analysis of law and economic development in terms only of the state and the market is that each

dimension of each structural place is in some way present in any other. One might expect that also in East Asia the state, the family, the community, the market, etc. all intermingle. Obviously, some states are run as extended families, as are many corporations, etc. Equally, gender relations will have a crucial impact on production relations. Race, ethnicity and religion, which make up the *community-place*, also permeate the *marketplace* and the *workplace*. Obviously, with the fetishism of commodities the apparent pragmatism of the *marketplace* becomes entangled in the symbolism of the *community-place*. Yet the two forms of law that are allowed by the *state/civil society* dichotomy are merely the territorial law of the *citizen-place*, and the exchange law of the *marketplace*. The rest is excluded. What this self-imposed limitation on the meaning of law makes inevitable is the sense of an incomplete picture and even of confusion in the description of contemporary economic reality, because all six forms of legal knowledge are partial, local, and contextualized, limited by the clusters of social relations of which they are the epistemological 'consciousness.' The epistemological implications for distortion and exclusion of vital human perspectives from analysis are only to be expected if one confines attention to those who determine the *citizen-place* (whether or not democratic, in whatever sense that means) and the *marketplace* (however far removed from the *workplace)*. Because their perspectives are partial and local, it is not possible to extrapolate from them an overall panorama of developing economic events.

Unger sees the need to conciliate in what is at most a pluralist, level playing field of international relations. It is suggested that field research (the word *empirical* is avoided because of its epistemological implications) into the possible relationship of international economic law to real development needs has to be primarily in the area of *informal law*. In this area one has to disentangle the legitimate concerns, which underlie the *state/civil society* dichotomy and identify how these are actually operating in contemporary world societies. All law, whether or not it is reduced to the law of the state, will be disempowering to the extent that it merely reflects traditional hierarchies and enshrines social constraints, which inhibit individual initiative. Such constraints are just as likely to come from strict adherence to principles of contract and corporate law when these merely ensure the stability of transactions among rigidly established economic groups whose cohesion rests upon closed family, ethnic, or other group identity. Unger warns against the abandonment of civil society to the organizational devices of traditional contract and corporate law,

facilitating the division between the organized and the unorganized and setting the stage on which the big organized interests can make deals among themselves.[50]

The functionalist approach to law is the belief that the merging and diffusion of legal arrangements can be explained by their supposedly unique capacity to fulfill inexorable requirements of practical social life. Unger suggests, as does de Sousa Santos, that functionalism, if it is to appear to succeed in its explanatory function, will have a tendency to oversimplify. He claims that the indeterminacy of such concepts as market economy and the illusory character of a belief in the existence of a single definite system of rights – especially contract and property rights, as well as rights of property against government – are due quite simply to the immense variety of possible institutional arrangements which will favor economic development in specific contexts. These varieties can only be grasped through field research into informal notions of obligation: meaning the sense of individual actors and groups of what they are entitled to require of others and obliged to offer to others.[51] In the East Asian economies, suggests Unger, an elitist and authoritarian partnership between business and government may have proved successful in sustaining economic growth in a world of semi-skilled mass production. It may nevertheless prove insufficient and damaging when industrial evolution calls for higher levels of flexibility, knowledge, and work-team self-direction.[52] One should not lose sight of the fundamental aim, to encourage individual experimentation, through flight into the illusion of an objective law, which enshrines the command of existing socio-economic hierarchies.

At the same time the value of an experimental individualism freed of tradition could be lost if excessively rapid modernization was to introduce such radical uncertainty into social relations that transaction costs would appear insurmountable. Again, the tracing of and building on informal legal practices should be crucial. It is obvious that people engage in economic activity for a variety of reasons, of which a clearly defined determination to maximize individual wealth is only one. The desire for social prestige and distinction is important and this is bound up with class, family, and ethnic loyalties, which provide the corresponding peer-group assessment. Hence, it is usually to be expected that the competitive and the collaborative drives will come together. A question is whether the former suffers at the expense of the latter where the latter takes on a regressive or conformist character. Again, Unger calls for a radical polyarchy, to transform society into a confederation of communities not simply shaped

along ascriptive lines such as race or religion. However, only an illiberal dogmatism would wage war against the community-defining powers of religion and race. Indeed, the most extreme form of dissolution of community may well be the radical indeterminacy of economic behavior, which is anxiety-driven speculation, whether in shares, currencies, or properties. The fear and confusion, which such behavior may stimulate, should not be the occasion for escape into a backward mythologizing of the past to reverse the ills of a supposedly individualistic society. Nonetheless, the essential collaborative dimension of economic, as of any other form of innovation requires self-directing networks of groups, which are able to cooperate.[53]

Where do these deliberations leave the *state/civil society* dichotomy? The basic message of critical legal studies, represented by Unger and de Sousa Santos, is that traditional legal doctrine – and with it, the hopes attaching to an independent rule of law – is presented as natural and inevitable, when it is in fact historically contingent and very much the result of choice. Instead, 'reality' is a cultural and social construction. In other words, there is no escape from Heisenberg's Uncertainty Principle into the rule of law. Indeterminacy and choice are two sides of the same coin. Contradictory claims, typically between communal security and individual freedom, are inevitable. The political vision offered is civic republicanism and decentralized socialism.[54]

If critical legal studies are not themselves to become dogmatic sloganizing, one needs to attempt to locate precisely the type of situation to which they respond. Following Unger, rule of law ideals and administrative efficiency require that law be formulated as a body of rules and doctrines conferring typical, stable claims upon broad groups of role-occupants: citizens, taxpayers, consumers, etc. There may be divisions among the interests producing these laws, but they are not so deep, nor the governing elites so fragmentary and sectarian, that they cannot rely upon a judiciary to complete their agreements. However, if the divisions and alternatives presented in democratic politics sharpen, the devolution of law-completing to an insulated body of experts makes no sense.[55] What is argued here is that no single, closed, and coherent system of rights can be inferred, by any analytical procedure, from the idea of the market economy, and no real version of the market economy can abolish conflict. This is all that is meant by saying that there are unavoidable clashes among supposedly indefeasible rights. What is therefore needed is a strong state, a strong governmental power that is able to formulate and implement

policy at some remove from dominant economic interests. Otherwise entrenched hierarchies and imbalances become naturalized.[56]

Of course, to assert the need for an impartial political authority is to state rather than to resolve the problem of democracy. It is simply being asserted that impartiality is a matter of politics rather than law. However, the goals of democracy in the context of economic development remain clear to the radical emancipatory individualism of this project. They are, in the words of Unger, 'first, to enhance the practical productive capabilities of society, the resources of restless practical experimentation and innovation; and, second, to diminish the extent to which participation in group life pins us down to mechanisms of dependence and depersonalization and thereby undercuts self-assertion, the effort to develop and sustain individual presence in the world . . .'[57]

Notes

1 *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002), Ch. 21, '*Philosophy of International Law*.'
2 *A Philosophy of International Law* (1998).
3 *The Law of Peoples* (1999).
4 *Oxford Handbook*, 887.
5 See Teson, *Philosophy of International Law*, chapter 4, 'The Rawlsian Theory of International Law,' esp. 115 and 120.
6 Ibid., 116.
7 John Rawls, *Le Droit des gens*, intro. Betrand Guillarme (1996), 51.
8 Teson, *Philosophy of International Law*, 120.
9 Ibid.
10 See especially, Susan Marks, *The Riddle of All Consitutions, International Law, Democracy and The Critique of Ideology* (2000).
11 This is the central argument of Alain Joxe, *Empire of Disorder* (2002).
12 Mary Kaldor, *New and Old Wars. Organised Violence in a Global Era* (1999).
13 H. L. A. Hart, *The Concept of Law* (1961), 116–17.
14 Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* 2nd edition (1984) gives an excellent account of the Western Third World confrontation on this issue in the drafting of the Convention. The West threatened to drop the whole idea of the convention if the Third World countries persisted with their proposal to regulate the use of economic pressure or force. The issue is not mentioned by Anthony Aust, *Modem Treaty Law and Practice* (2000), which may now be the standard current work on the subject, based very largely on the Vienna Convention.
15 Michel Schooyans, *La Face cachée de L'·ONU* (2000), at 222–23.

16 Schooyans, *La Face cachée de L'·ONU*, 37.
17 Ibid., 39.
18 Ibid., 41–2. This is in spite of Habermas's early work on the public space of rational debate since the Enlightenment, which I discuss in 'Changing Models of the International System,' in W. Butler (ed.), *Perestroika and International Law* (1990) 13–30. Schooyans is repeating a standard conservative critique of the procedural liberalism of Rawls, Habermas, and others, which may have first been made by Alistair MacIntyre in *After Virtue* (1987). In 'Critical International Law, Recent Trends in the Theory of International Law,' *EJIL* 2 (1991) 66–96 I suggest that critical legal studies, as applied to international law, simply absorbs MacIntyre's critique of liberalism to produce the indeterminacy of legal concepts, without committing itself to explaining the existing structures of international law as hegemonic.
19 Ibid. This is a summary of the whole first section of Schooyan's book, 'L'Empire du consensus'.
20 See further in Anthony Carty (ed.), *Post-modern Law* (1990) 'Postmodernism in the Theory and Sociology of Law,' at 82–5, in the section, 'Baudrillard and the End of the Social.'
21 Ibid.
22 Many international lawyers have recognized for some time that to treat democracy as an international law right to democratic governance had this violent potential. Any notion of a right must imply that it can be enforced, in Western consciousness. See, for instance, Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (2000), especially the contributions by Koskenniemi, Marks, Byers, and Chesterman.
23 Hart, *The Concept of Law*, 116–17.
24 H. L. A. Hart, 'Definition and Theory in Jurisprudence', 70 *LQR* (1954) 37 at 48.
25 Schooyans, 'L' Empire du consensus', 136–41, with reference to Kelsen.
26 Hart, 'Definition and Theory', 48–9.
27 Richard Tuck, *The Rights of War and Peace. Political Thought and the International Order from Grotius to Kant* (1999) 130.
28 Thomas Hobbes, *Leviathan*, ed. C. B. McPhearson (1968) 556–7.
29 Quoted in Tuck, *The Rights of War and Peace*, 202.
30 Ibid., 213.
31 Ibid., 208, quoting from *The Metaphysics of Morals*.
32 A. Carty, 'The Continuing Influence of Kelsen on the General Perception of the Discipline of International Law,' *EJIL* (1998) 344–54.
33 Schooyans, 'L'Empire du consensus', 157–66, esp. 159.
34 M. K. Green, 'Cultural Themes in European Philosophy, Law and Economics', *History of European Ideas* 19 (1994) 805, at 805–6. Green refers to a study of articles in the *Harvard Business Review* from 1940

to 1970, which concludes that the ethical climate of American business is Hobbesean in the sense that the culture is full of conflict and change as individuals attempt to build a place for themselves in a hostile world.

35 Linda Weiss, *The Myth of the Powerless State, Governing in a Global Era* (1998) 69–72.
36 D. North, *Institutions, Institutional Change and Economic Performance* (1990).
37 G. Dunkley, *The Free Trade Adventure* (2000) 162.
38 This follows Robert Biel, *The New Imperialism, Crisis and Contradiction in North/South Relations* (2000) 1–130.
39 Ibid., 154–287.
40 See Hans-Erich Volkmann, 'Die NS-Wirtschaft in Vorbereitung des Krieges,' in Wilhelm Deist et al. (eds), *Ursachen und Voraussetzungen des Zweiten Weltkrieges* (1989), 211–435.
41 Biel, *The New Imperialism*, 183 and what follows, 184–5.
42 Robert McCrum, 'They Are Talking Our Language,' *The Observer* (Review), March 18, 2001.
43 Ruth Grant and Robert Keohane, 'Accountability and Abuses of Power in World Politics,' *American Political Science Review* 99, no. 1 (February 2005) 29, at 33.
44 Ibid., 34.
45 Ibid., 39.
46 Ibid.
47 Ibid., 39–40.
48 Boaventura de Sousa Santos, *Towards a New Common Sense: Law Science and Politics in the Paradigmatic Transition* (1995) 36–7, and generally 11–37.
49 Ibid., chapter 6.
50 Roberto M. Unger, *What Should Legal Analysis Become*? (1996) 96.
51 This definition of informal law is taken from Leon Petrazycki, *Law and Morality* (1954); for further background, see George S. Langrod and Michelina Vaughan, 'The Polish Psychological Theory of Law,' in *Polish Law Through the Ages*, ed. W. J. Wagner (1970) 299–362.
52 Unger, *What Should Legal Analysis Become?* 123–5.
53 Ibid., 148–52.
54 Nicholas Mercuro and Steven G. Medema, *Economics and the Law: From Posner to Post-Modernism* (1997) 165–9.
55 Unger, *What Should Legal Analysis Become*? 109.
56 Ibid., 155–6.
57 Ibid., 181.