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INTERNATIONAL LAW IN THE "NEW WORLD ORDER": SOME PRELIMINARY REFLECTIONS

RICHARD B. BILDER*

I.

THERE is broad agreement that we are at a time of dramatic international change and opportunity. With the expulsion of Saddam Hussein from Kuwait, the collapse of Soviet and East European Communism, and the end of the "cold war," the rhetoric of international cooperation has rarely been so upbeat. In President Bush's address to the U.S. Congress during the early days of the Gulf crisis, he proclaimed "a new partnership of nations" and predicted the emergence of "a new world order" in which "the rule of law supplants the rule of the jungle," "nations recognize the shared responsibility for freedom and justice," and "the strong respect the rights of the weak."[1] In his State of the Union message this January, the President noted further that we were at:

> "A dramatic and deeply promising time in our history, and in the history of man on earth. For in the past 12 months, the world has known changes of almost biblical proportions."[2]

And only a few weeks ago, the leaders of the fifteen nations that sit on the United Nations (U.N.) Security Council, describing this as a time of "momentous change" in which the world has "the best chance of achieving international peace and security since the foundation of the United Nations," pledged to further strengthen the U.N. and to take a variety of far-reaching collective measures to stop global aggression.[3]

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1. Andrew Rosenthal, *Bush Vows to Thwart Iraq Despite Fear for Hostages; U.S. Won't be 'Blackmailed,'* N.Y. TIMES, Sept. 12, 1990, at A1, A21. *See also Transcript of President's Address to Joint Session of Congress, id.* at A20.

2. *Transcript of President Bush's Address on the State of the Union,* N.Y. TIMES, Jan. 29, 1992, at A16.

3. *Security Council Summit Declaration: 'New Risks for Stability and Security,'* N.Y. TIMES, Feb. 1, 1992, at A4.

In view of these developments, it seems timely to reflect on whether and how our world has in fact changed in the last few years and what this might mean in terms of the kinds of international legal problems that are likely to arise. More particularly, I thought that it might be interesting to you young men and women now in law school to speculate about the fresh approaches and ideas that might be called for by the coming generation of international lawyers—where "the action" for those of you who may soon be entering our profession is likely to be.

II.

At the threshold, it may be useful to try to characterize how, if at all, our world is changing and what any "new world order" might look like. This has recently become something of a cottage industry[4] and one approaches this task with trepidation. Indeed, some question whether any such changes are in fact as dramatic or permanent as claimed, or whether any "new world order" will be for the better rather than the worse. However, let me briefly suggest at least a few ways in which our international society *does* seem to be changing.

First, there is certainly some change in the structure or morphology of the international system. On the one hand, the number of states or political units has grown dramatically. If the Soviet Union, Yugoslavia and other states continue to fragment, the U.N.'s membership, now 175 nations, could soon approach 200 states, almost four times its original membership in 1945. Whether this trend will continue—how far existing states will be prepared to recognize or accommodate further demands by ethnic and other minorities for independence or autonomy—remains to be seen. But the number of official players in the "game of nations" has clearly increased, and, perhaps with it, the difficulty of coordinating, refereeing, and predicting that game as well.

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4. *See, e.g.*, the series of six articles on the theme "After the Cold War" carried by the N.Y. TIMES, Feb. 2-7, 1992, entitled: Joel Brinkley, *U.S. Looking for New Course as Superpower Conflict Ends*, N.Y. TIMES, Feb. 2, 1992, at A1; Patrick E. Tyler, *While Fear of Big War Fades, Military Plans for Little Ones*, *id.*, Feb. 3, 1992, at A1; Elaine Sciolino, *C.I.A. Casting About for New Missions*, *id.*, Feb 4, 1992, at A1; William J. Broad, *Defining the New Plowshares Those Old Swords Will Make*, *id.*, Feb. 5, 1992, at A1; R. W. Apple, Jr., *White House Race Is Recast: No Kremlin to Run Against*, *id.*, Feb. 6, 1992, at A1; Thomas L. Friedman, *Rethinking Foreign Affairs: Are They Still a U.S. Affair?*, *id.*, Feb. 7, 1992, at A1. *E.g.*, Richard J. Barnet, *Reflections (The Disorder of Peace)*, NEW YORKER, Jan. 20, 1992, at 62; ROBIN WRIGHT & DOYLE MCMANUS, FLASHPOINTS: PROMISE AND PERIL IN A NEW WORLD (1992); and the recently published five volumes of essays: CHANGE: THREAT OR OPPORTUNITY FOR HUMAN PROGRESS? (Uner Kirdar ed., 1992) (U.N. Development Program).

Moreover, a variety of non-state actors—global and regional international organizations such as the U.N. and European Community, transnational corporations, nongovernmental organizations, and even individuals—are increasingly perceived as independent actors in the international game. For example, nongovernmental human rights organizations such as the International Committee of the Red Cross, Amnesty, the International Commission of Jurists, and various "Helsinki Watch" groups are playing an important role in the working of the international human rights system. And private environmental groups are having a significant impact on the development of international environmental law. Only last year, a global coalition of environmental and conservation groups played a crucial role in the recent conclusion of the Environmental Protocol to the Antarctic Treaty, closing the continent to mineral exploitation for at least the next fifty years.

However, on the other hand, a strong trend towards economic integration—further development of the European Economic Community and Free Trade Area, the U.S.-Canadian and proposed North American Free Trade Area, the Association of South East Asian Nations (ASEAN) countries of South East Asia, other trading blocs in Central and South America and elsewhere—is reducing the number of significant economic actors comprising the world trading community. Arguably, this could also produce more, rather than less, difficult problems of international coordination and regulation, particularly if these giant trading blocs turn inward rather than outward in their quest for economic stability and security. The rise of protectionist sentiment in the U.S. and current difficulties in successfully concluding GATT's long-drawn-out Uruguay round of negotiation may be a portent of growing problems to come.

Second, the constellation of global power relationships, and the way we think about them, has changed. On the face of it, the collapse of the Soviet Union has seemingly left us with a unipolar world in which U.S. military power is unchallenged. But it is not clear that the U.S. is particularly eager to serve as world policeman.[5] And, in any event, U.S. military power may prove increasingly impotent, perhaps irrelevant, to deal with many of the major challenges which confront us. For example, one year after the Gulf war, Saddam Hussein remains in power, his nuclear program apparently still a threat. Moreover, with current difficulties in predicting what the particular national interests of different states in one or another kind of "new world or-

5. *See* text *infra* note 9.

der" may turn out to be, political alignments everywhere have become more fragile and uncertain. Thus, it seems likely that, with the collapse of the Soviet threat and their need for reliance on a U.S. nuclear umbrella, former U.S. allies may grow increasingly restive with American "leadership."

Nor is it yet clear which states will turn out to be the "great powers" in the coming century. The eventual fate and influence of the former Soviet Union and new Commonwealth of Independent States remain a question mark. Germany and Japan increasingly flex their economic muscle, and their eventual rearmament cannot be ruled out. And, as the world's close call with Saddam Hussein showed—and particularly with thousands of Soviet nuclear scientists and warheads potentially on the loose—a new generation of mini-nuclear powers, or worse, may be in the making. According to one recent report, at least nine developing nations may soon have nuclear weapons, twenty will be able to make chemical weapons, and fifteen will be able to produce intercontinental ballistic missiles (ICBMs).[6] Indeed, it is not yet clear whether, without the mutual deterrent and constraints of the "cold war" political order, we are not likely to find ourselves with more conflict rather than less, or whether the threat posed by many small wars may not ultimately prove more uncontrollable and dangerous than the long-successfully-managed threat of U.S.-Soviet conflict.

Third, there is clearly a profound change in the extent and character of transnational interactions and interdependence. The nature of these globalizing influences has often been noted:

> — The technological revolution in transportation, communication, and information technology, including jet travel, computers, and communication satellites;
> — The growing freedom of world trade and capital movements from the traditional constraints of national boundaries, as reflected in the growth of transnational corporations, global sourcing of manufacturing, offshore banking, and even the international narcotics and arms traffic;
> — The resurgence of fundamentalist religious movements and other ideological, political, economic, and ethnic groups, whose interests and commitments transcend national borders;
> — Massive transnational flows of refugees and immigrants, often without regard to national boundaries;

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6. *See, e.g.*, Joseph S. Nye, Jr., *Create a U.N. Fire Brigade*, N.Y. TIMES, Feb. 1, 1992, at A21 (Op Ed). *See also* Thomas L. Friedman, *Rethinking Foreign Affairs: Are They Still a U.S. Affair?*, *id.*, Feb. 7, 1992, at A1.

— Increasing popular awareness of a variety of transcendent environmental and other global threats, such as widespread pollution, destruction of rain forests, atmospheric warming, depletion of the ozone layer, and AIDS, which affect all human beings alike without regard to nationality or boundaries;
— Through the transnational reach of television, movies, and other information technology, the globalization of ideas, language, aspirations, and many other aspects of our lives.

Indeed, we are arguably seeing the gradual emergence of a common global or cosmopolitan culture, to which national boundaries and allegiances could conceivably become increasingly irrelevant.[7]

Fourth, with the collapse of Soviet communism, the ideology of East-West struggle will presumably cease to play its long-dominant role in setting the dominant pattern and themes of global politics. Again, whether, as so often in history, some other clash of ideologies will fill the vacuum remains to be seen. Of course, some have suggested that we are at "the end of history," in which liberal democratic values and free-market capitalism have now achieved recognition as the "final" and only appropriate or legitimate forms of political and economic organization.[8] But it seems too hopeful to assume that authoritarian ideologies have suddenly lost their historic power or appeal. Nor is it likely—nor should we wish to believe—that, despite the failure of Communism as a viable solution to problems of social injustice, humanity will cease from striving to devise ever fairer and more humane systems of social and economic organization. In any event, the continued strength of communism in China, and the current resurgence of Islamic fundamentalism, suggest that the future role of ideology in world affairs cannot be discounted.

Fifth, as the opening quotations indicate, with the end of the cold war and relative success of the U.N.'s recent actions in the Gulf crisis, proponents of international organization have proclaimed a sea-change in prospects for broader and more effective peacekeeping and other collective international action by the U.N. and other global and regional organizations. Certainly, some euphoria is warranted. As this is written, eight U.N. peacekeeping initiatives are already in place, and three more—in Cambodia, Western Sahara and Yugoslavia—are now being formed or expanded. In South Africa, Namibia, El Salva-

7. I have drawn for this point on a draft essay by Professor Boaventura de Sousa Santos, Professor of Economics, University of Coimbra, Portugal, entitled *Law in the World System: From Legal Diaspora to Legal Ecumene*, Address at the Institute for Legal Studies, Univ. of Wisc. Law School (Nov. 8, 1991) (transcript on file with author).

8. Francis Fukuyama, *The End of History?*, 16 THE NAT'L INTEREST 3, 4 (1989).

dor, and elsewhere, international pressure in support of human rights appears to be meeting with at least partial success. The U.N. has asserted unprecedented and far-reaching claims to control armaments and exact reparations in Iraq, and to compel the extradition of alleged terrorists by Libya. Dramatic proposals are currently being advanced for the establishment of permanent U.N. peacekeeping forces, the reform of Security Council membership and procedures, recognition of a right of U.N. humanitarian intervention, and broad commitments to compulsory dispute settlement. And the European Community continues to move rapidly towards an even more complete and irreversible integration.

But in this respect the horizon is not cloudless. At this moment, at least, the U.S. alone continues to be some three-quarters of a billion dollars in arrears on its U.N. regular and peacekeeping budget debt. And it seems clear that, despite recent rhetoric, many nations, including the U.S., remain resistant to making substantial and open-ended financial commitments to further U.N. or other peacekeeping operations or to relinquishing significant aspects of their sovereignty to the U.N. or other international organizations. Indeed, some skeptics have suggested that the success of the U.N.'s collective action against Iraqi aggression was a unique occurrence, offering no real precedent and unlikely to be repeated.

Finally, it is certainly true that our worst global nightmare—the possibility of massive East-West nuclear conflict leading to virtual global annihilation—seems to have at least temporarily disappeared. And many developments, such as the U.N.'s forthcoming "Earth Summit '92" Conference, the recently concluded Environmental Protocol to the Antarctic Treaty, and a variety of other national and international actions directed against nuclear and other weapons proliferation indicate an increased willingness and commitment to deal meaningfully with urgent global problems.

But it is equally obvious that many urgent global problems persist or have even grown more acute. Certainly, it is not easy to be optimistic about a "new world order" when every day the global media shows us hundreds of millions of people living in extreme poverty, with a widening of the gap between rich and poor nations; unchecked population increase in many of the most impoverished regions of the world; widespread hunger and disease, particularly among children in developing nations; massive and continuing racial, ethnic, and religious discrimination and violations of human rights, as well as widespread discrimination against women; continuing internal conflict and violence in many countries; the unchecked proliferation of nuclear and other megaweapons; continuing pollution, desertification, de-

struction of tropical forests, and a growing threat of global warming and destruction of the earth's ozone layer; the recurrent spectacle of tens of millions of refugees fleeing from their homes in a desperate attempt to find refuge from oppression or poverty; a lurking long-range threat of energy shortage; and the seemingly remorseless spread of AIDS. These things, at least, have not changed!

III.

Let me now turn briefly to suggesting some of the possible implications of these developments for international law—the new problems, possibilities and approaches, some of them interrelated, that the young men and women constituting the next generation of international lawyers may wish to explore.

First, with the growing volume, importance, and diversity of transnational interactions, regulatory efforts at all levels—supranational, international, national, local, and private—have also multiplied and become more complex. As a consequence, nations, companies, and individuals involved in such dealings, and of course their lawyers, often find themselves enmeshed in a maze of diverse, overlapping, obscure, difficult to find, or even conflicting regulatory regimes. Certainly, important reforms in this respect have been achieved through such means as commercial, investment, double taxation, and other agreements; multilateral "private law" conventions and uniform legislation developed under the auspices of the Hague Conference on the Unification of Private International Law and other institutions; the New York and International Centre for Settlement of Investment Disputes (ICSID) Arbitration Conventions; and a variety of other cooperative arrangements and approaches. But despite these advances, simply discovering relevant jurisdictions and legal rules amidst various potentially applicable systems may still create significant costs and result in troublesome and costly uncertainty and disputes. We need to get a better sense of the impact of this complex pattern of regulatory arrangements on transnational dealings. And we need to continue to try to design more rational ways of combining, coordinating, and harmonizing our different regulatory systems so that, while preserving legitimate national and other interests, the potential gains to the international community of transnational dealings can be more effectively protected and promoted.

Second, while the present international system based on sovereign states is likely to be with us for a long time to come, the way we think about the national state and national sovereignty may be gradually changing. As we have seen, commerce, culture, and ideas are becoming globalized, international institutions are acquiring increased au-

thority, and borders are becoming more transparent and irrelevant. Indeed, we are currently seeing states appear, disappear, or fragment at a rather bewildering rate. In this context, it may be time for international theorists to reexamine the nature and appropriate function of the "state" in the modern international legal order. We need to recognize that there are a variety of sensible and efficient ways of politically, socially, and economically organizing human groups in the present world, of which the traditional nation-state is only one. And we might find different types of organization best for different purposes. We need to remember that the concept of the national state is a relatively new idea in human history. Perhaps it is time to be more challenging of its mystique.

Third, in view of growing recognition of the need for multilateral solutions to global and transnational problems, the next generation of international lawyers is certainly likely to be heavily involved in developing the structure and capabilities of the U.N. and other global and regional international organizations. Clearly, the U.N. needs some revamping to better reflect the changed realities of global influence and power. One recurrent suggestion is that major global actors such as Japan, Germany, India, Brazil, Nigeria, and Indonesia be given permanent seats on an expanded Security Council, or that the present separate United Kingdom and French seats on the Council be replaced by a single European Community seat. Another sensible proposal is that the Secretary General be given broader authority to initiate investigations of situations likely to imperil international peace and security and bring them to the attention of the U.N. Security Council. We also need to find more equitable and assured ways of financing vital international cooperative efforts; as indicated, the U.N. is currently attempting to mount important and expensive peacekeeping operations in Cambodia, Yugoslavia, and elsewhere, while the U.S. and other countries remain hundreds of millions of dollars in arrears on their U.N. dues. And we need to make further efforts to support and develop an impartial, efficient, and dedicated staff of professional international civil servants, and to better streamline and coordinate the work of the U.N. and its increasingly diverse family of U.N. specialized agencies and other organs.

While abolition of the great-power veto seems at the moment unlikely, there is need for innovation with respect to U.N. and other international organization voting procedures. Indeed, the more powerful states may well be unwilling to allow international organizations to deal with more important and substantive matters unless they are given adequate protection against a potential "tyranny of the majority"—a problem inherent in any organization numerically dominated

by a majority of poorer nations and "mini-states" when it operates under a "one nation-one vote" decision-making procedure. An imaginative use of other decision-making techniques—such as weighted-voting, conciliation, consensus, or "opting-in" or "opting-out" procedures—might meet some of these concerns and persuade states to be willing to make broader and more substantive concessions to international organization authority.

Creative lawyering is also needed to develop more specialized international organization structures and procedures to manage those emerging environmental and other global problems where we are still uncertain as to the nature, causes, or extent of the risks and dangers involved, and as to what we will ultimately need to do. In particular, we need to devise more flexible monitoring and assessment procedures and management arrangements, capable of integrating scientific and technical considerations into policy decisions, and of mounting more rapid and effective international programmatic responses.

Most dramatically, of course, only time will show whether the successful international collaboration reached during the Gulf War was really a sea-change in the international community's traditionally conservative attitudes toward collective peacekeeping and intervention, or rather simply a temporary aberration, unlikely to persist or recur. For the moment at least, the U.S. claims to take this change seriously; President Bush, in his September 1991 address to the U.N. General Assembly, said that "the United States has no intention of striving for a pax Americana . . . we seek a pax universalis, built upon shared responsibilities and aspirations."[9] And, as we have seen, the great powers have recently proclaimed their firm intent to act collectively and decisively not only against aggression but also against terrorism, nuclear or other megaweapon proliferation and intimidation, and other grave threats to the international community.

If the great powers and other members of the U.N. stick to this resolve, international lawyers will have exciting work to do in developing and implementing effective collective security agreements; fashion-

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9. Andrew Rosenthal, *Bush Asks General Assembly to Repeal Resolution Equating Zionism with Racism*, N.Y. TIMES, Sept. 24, 1991, at A14. But see the recent article by Patrick E. Tyler, *U.S. Strategy Plan Calls for Insuring No Rivals Develop*, N.Y. TIMES (Nat'l), Mar. 8, 1992, at A1, reporting that the U.S. Department of Defense (DOD) was developing a plan for a "one-superpower world" which "[w]ith its focus on . . . [the] benevolent domination by one power . . . articulates the clearest rejection to date of collective internationalism." The article reports that "[t]he document is conspicuously devoid of references to collective action through the United Nations . . . ." *Id.* at A4. And, in response to the DOD draft plan, see, e.g., Patrick E. Tyler, *Lone Superpower Plan: Ammunition for Critics*, *id.*, Mar. 10, 1992, at A10, and Patrick E. Tyler, *Senior U.S. Officials Assail a 'One Superpower' Goal*, *id.*, March 11, 1992, at A1.

ing standby or even permanent U.N. "Blue-helmet" peacekeeping forces, either within or outside the framework of Article 43 of the U.N. Charter; providing better mechanisms for controlling and financing large-scale operations; and perhaps refining the humanitarian rules which should apply to situations of collective peacekeeping. Diplomats, military experts, and lawyers should also seek ways for a more effective and discriminating application of economic and military sanctions so that any coercive measures impact principally upon the rulers and governing elites actually responsible for aggression or other violations of international law, rather than the ordinary people who are so often simply pawns or victims.

We are also likely to see a continuing pressure for the development of regional, as contrasted with global, approaches to international regulation and problem-solving. Consequently, we need to think more about the comparative advantages and disadvantages of regional as compared with global approaches, and the growing problem of integrating, coordinating, and reconciling diverse and sometimes conflicting global or regional arrangements.

Fourth, the international agenda must turn more seriously to issues of global economic fairness and the equitable sharing of resources. As is true within nations, peace and human rights cannot be readily maintained in a world in which a large proportion of humanity lives in abject poverty—particularly when a privileged few live at levels of extreme and wasteful affluence. Demands for a "New International Economic Order" will certainly persist and international lawyers, and others concerned with international order and justice, have few tasks more important than to continue to search for more effective ways of achieving a more equitable international society. For one thing, we need to strengthen the principle that more wealthy and fortunate nations should provide reasonable levels of development assistance to those which are not, as a matter of duty rather than grace. We should also make sure that the growing trend towards the formation of powerful regional trading blocs does not result in the further exclusion and impoverishment of the world's poor.

More radically, there may come a time when we will wish to question the fairness of at least certain traditional assumptions concerning the international allocation of resources, including even the hallowed principle of exclusive national sovereignty over natural resources. For example, some have challenged whether it is just or makes sense that a few, small, sparsely populated, and sometimes autocratically-controlled nations should be entitled to deny or charge excessive prices for resources of crucial importance to the survival or well-being of billions of people throughout the world. Or, again, should a nation

such as the U.S., simply because it is blessed with vast food-producing ability on which hundreds of millions of people in other countries are dependent, be entitled to deny this food to others simply because they fail to support its policies? Or, as already is the case with respect to transnational pollution and other environmentally injurious conduct, perhaps international law should impose international responsibility on states which knowingly produce and export harmful drugs, weapons, or other commodities which they know are likely to impose grave damage on other nations or peoples. Perhaps a "new world order" should establish at least some international constraints to prevent a state from abusing its control of its resources in such cases.[10]

Moreover, we need to reach some better consensus concerning the regulation and protection of our shared common spaces, such as the oceans, the atmosphere, Antarctica, and outer space. The present situation regarding the 1982 U.N. Law of the Sea Convention—which many states have ratified, but the U.S. and some other leading states still refuse to accept—is clearly untenable; some compromise is urgently required to ensure that we have a single legal code for the oceans, which comprise some two-thirds of the surface of our planet. We also need to agree on what the "common heritage of mankind" means and how this concept applies to the exploitation not only of seabed resources, but also those we might find on the moon or planets. For the time may not be so distant when we have both the ability and need to turn to outer space to meet our growing energy and other requirements.[11] Whether the current ascendancy of free-market ideology will lead the more radical developing countries to moderate their demands for international control over the exploitation of common-spaces resources—a demand reflected in Part XI of the U.N. Law of the Sea Convention—remains to be seen. But diplomats and international lawyers should surely find it possible to craft some bargain capable of permitting efficient private as well as collective development of these resources, while assuring a fair sharing of benefits by all.

Fifth, with the current at least partial acknowledgement of democratic and human rights principles in the Soviet Union, Eastern Europe, and Southern Africa, and the recent apparent willingness of many countries to take the idea of the international protection of human rights seriously, exciting new opportunities for international hu-

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10. *See, e.g.,* Richard B. Bilder, *International Law and Natural Resources Policies,* 20 NAT'L RESOURCES J. 451 (1980).

11. *See, e.g.,* Richard B. Bilder, E.N. Cameron, G.L. Kulcinski, and H.H. Schmitt, *Legal Regimes for the Mining of Helium-3 From the Moon* (Technical Report WCSAR-TR-AR3-8901-1 (Jan. 1989)) (prepared for the National Aeronautics and Space Administration).

man rights law are likely to emerge. For example, individual states, the U.N., and regional human rights organizations, freed of cold-war political constraints, may now be willing to take a more activist role in confronting situations of massive human rights denials. There is simply no longer any excuse for the international community's tolerance of another Holocaust, another "killing fields" as occurred in Cambodia, or a recurrence of anything like Apartheid! Again, we should now be able to bring stronger international pressures to broaden ratification of the principal global and regional human rights conventions so as to establish a truly comprehensive and legally binding international human rights regime.

Certainly, it is time to establish an impartial U.N. High Commissioner for Human Rights with authority to investigate serious violations of human rights and to publish a comprehensive report on the state of human rights throughout the world. We should also broaden direct access to and participation in the international human rights system by the individuals and groups who are affected as well as by the nongovernmental organizations often in the best position to represent them. The important human rights developments within the framework of the Conference on Security and Cooperation in Europe (CSCE), including the Copenhagen[12] and Moscow[13] Documents, should be strengthened and built upon, and additional regional initiatives ventured in Asia and the Near East. We should pay more attention to better defining, measuring, and developing ways to promote economic and social rights, such as the right to adequate nutrition, housing, health care, and education. And, finally, we need to find better ways of understanding and dealing with the deeper economic, social, and psychological influences which lead some human beings to discriminate against or otherwise deny the human rights of others. Lawyers will inevitably have to play a crucial role in all of these developments.

As indicated, recent events in Iraq and Haiti suggest that states may also be prepared to be more receptive to the use of collective sanctions or intervention to protect human rights. If this is to be the case, we need to develop clearer and more credible standards for such interventionary actions, to protect against their discriminatory use or other abuse. And we must, as previously noted, refine our techniques to

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12. Conference on Security and Co-operation in Europe, *Document of the Copenhagen Meeting of the Conference on the Human Dimension*, June 29, 1990, *reprinted in* 29 I.L.M. 1305, 1306 (1990) [hereinafter *Copenhagen Document*].

13. Conference on Security and Co-operation in Europe, *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE*, Oct. 3, 1991, *reprinted in* 30 I.L.M. 1670 (1991) [hereinafter *Moscow Document*].

ensure that our sanctions are directed against the oppressors rather than the oppressed—a problem we are currently facing in both Iraq and Haiti. Some have suggested that one way in which the international community might more effectively place pressure on oppressive rulers or governments to cease their human rights violations would be to collectively mandate a freeze on the external movements, transactions, and assets of the individual officials or members of the elite involved.

One of the most interesting recent human rights developments is the idea that democracy is itself a norm of international law, which the international community is bound to protect and promote. This idea is reflected, for example, at least with respect to Europe, in the recent CSCE Copenhagen Document,[14] and is implicit in recent U.S. and OAS actions to restore democracy in Haiti and other nations. Thus, former U.N. Secretary General Javier Perez de Cuellar has suggested:

> The time has come for the international community to undertake a contemporary reassessment of the implications of the world system of sovereignty. . . . International security will be enhanced only when human security is enhanced. Both require democracy and popular participation, the rule of law and respect for human rights and fundamental freedoms.[15]

But, if this is to be the case, we may have to develop better ways of defining what we mean by "democracy" and how we will collectively determine and decide whether a society is in fact democratic. Will "fair elections," perhaps as determined by international election observers, be enough? Or should we look for some deeper evidence of meaningful popular participation in the political process and that a particular government is really accountable to the people? And how will we deal with situations in which majoritarian control arguably poses an imminent threat to minority or other fundamental human rights—a situation which some believe is posed by the possibility of fundamentalist religious control in the Middle East and Africa, and by the possibility of resurgent authoritarianism in Eastern Europe and the former Soviet Union? Where a nation lacks a democratic legal order or tradition, how does it "get there" and what can the international community do to help?

Finally, while the idea of collective or "third generation human rights" remains controversial and raises many conceptual problems,

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14. *Copenhagen Document, supra* note 12.

15. Deborah Scroggins, *Former Chief: U.N. Should Have Power to Intervene in Civil Wars*, ATLANTA CONSTITUTION, Jan. 30, 1992, at A4.

perhaps we ought to give more thought to at least one such claim—the so-called "right to peace." For example, it seems apparent that Saddam Hussein and his principal aides, through their aggressions against Iran and Kuwait, as well as against their own ethnic and religious minorities, have been responsible for the death and suffering not only of hundreds of thousands of Kuwaitis, Iranians, and other people, but also of a great many Iraqis themselves. Many of these Iraqis, suffering under a brutal dictatorship, were probably powerless to prevent Saddam's acts; indeed, there were indications during the Gulf War that many of the Iraqi dead, particularly from the air war, were conscripts, placed in the front lines as "cannon fodder," while Saddam's elite and politically-loyal troops remained in reserve. President Bush well said, near the start of the Gulf War that: ". . . [our] quarrel [has never been] with the Iraqi people. Our quarrel [was and] is with Iraq's dictator, and with his aggression."[16] Perhaps it is time that we broadened our concept of international crimes and of humanitarian law to embrace individual international responsibility for the terrible crimes which a dictator and ruling elite may inflict, not only on other nations and peoples, but also on their own citizens, by drawing them helplessly into such a tragic and destructive conflict.

Sixth, we need to find better ways to deal more effectively and imaginatively with the tragic and pervasive problem of divided societies and ethnic, racial, and religious conflict. There are few regions in the world where such ethnic differences and strife are not endemic—South Africa, the Sudan, the Middle East, Northern Ireland, Azerbaijan, Iraq, Quebec, India, Sri Lanka, Timor, and elsewhere. One major issue is whether the international community, through international law, should seek to place some limits on the right to self-determination—for example, in terms of the numbers of the group seeking independence or autonomy, their historic occupancy of a distinct territory, or the impact of independence or autonomy on a pre-existing state or other groups. It is interesting in this connection that the European Community has recently decided that, as a condition of its recognition of self-determination movements in the former Soviet Union and Eastern Europe, new states must pledge to respect international law, guarantee ethnic and minority rights, honor borders, accept commitment to disarmament and regional stability, and resolve such disputes peacefully. Another question is under what conditions a group can legitimately claim independence, as opposed to autonomy or simply protection as a minority? And who is ultimately to decide

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16. *Transcript of President's Address to Joint Session of Congress*, N.Y. TIMES, Sept. 12, 1990, at A20.

on the legitimacy of such claims—other states individually, the U.N., or some regional group—and by what criteria and procedures?

No task is more urgent for us as international lawyers than to devise political, social, and legal institutions capable of accommodating and managing such intrasocietal claims and conflicts and helping the parties involved to construct viable pluralistic societies. This will demand constitutional engineering of the most innovative sort, involving our crafting of a variety of possible models of autonomy and consociation, and our finding ways effectively to select and deploy those best adapted to the unique situation involved. The currently-meeting Conference for a Democratic South Africa (CODESA) and Israel-Palestine negotiations are important experiments in this respect. While the League of Nations minorities treaties have traditionally been considered a failure, we can nevertheless learn much from that experience; the concept of international guarantees, in particular, might play a useful role overcoming distrust among the groups concerned and making accommodations possible.[17] The special problems of indigenous groups have recently and properly received increased recognition, particularly in Canada, and offer another area for innovative political and legal arrangements.

Seventh, as indicated, the problem of nuclear and other weapons proliferation will loom large on the international agenda for the foreseeable future; the recent Declaration by the members of the Security Council proposes increased international action to meet these threats. However, it remains uncertain whether such efforts will prove effective. A combination of the competitive passion of many governments for power, prestige, and security; the widespread availability and affordability of relevant know-how, equipment, and materials; and arms suppliers' greed may make this problem simply unmanageable. Consequently, we may face a future in which many nations, poor as well as rich, small as well as large, control terrible weapons of mass destruction. One possible solution, probably too late, is to try to return to the early, long-abandoned, but eminently sensible Lillienthal Plan for U.N. control of all nuclear material. Failing such effective control, we may have to consider whether our future international law will have to permit the U.N., or even particularly threatened states, to take far-reaching actions to prevent nuclear or other megaweapon blackmail. Conceivably, such permissible actions of "anticipatory self-defense" might even include "Osirak-type" preventive destruction of weapons-production facilities or the threat of a mandatory col-

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17. *See, e.g.*, Richard B. Bilder, *Can Minorities Treaties Work?* 20 ISRAEL YEARBOOK ON HUMAN RIGHTS 71 (1990).

lective retaliation by U.N. or regional organizations against the illegal first-use by a state of nuclear or other megaweapons.

Eighth, as international lawyers, we will certainly wish to continue to emphasize and develop international dispute settlement facilities and processes, including compulsory dispute settlement through the International Court of Justice (ICJ); indeed the recent Security Council Declaration assigns a "key role" in dispute-settlement to the ICJ. However, we should also remember that judicial settlement is only one way—and often not the best way—of resolving problems and that we should continue to improve and develop other alternative ways of avoiding or managing our differences.[18] These include clearer rules, more effective negotiating fora and techniques, arrangements for advance notice and consultation, the use of joint commissions, and a variety of mediatory fact-finding and conciliation arrangements, tailored to particular situations. These could well include regional dispute-settlement mechanisms, as illustrated, for example, in the flexible and innovative Valletta dispute-settlement principles agreed to last year by the CSCE countries of Europe.

While the ICJ is unlikely to play the primary role in managing international disputes, it can clearly make a useful and significant contribution in certain areas, such as the adjustment of boundary or maritime delimitation disputes, as well as serving an important symbolic function. Consequently, it is important to strengthen the Court; make it more readily accessible, particularly to developing countries; and broaden both its contentious and advisory jurisdiction. Perhaps, as the ABA is reportedly now considering, it may be useful to try once more to gain broad acceptance of a comprehensive new General Act for Pacific Settlement of Disputes updating the sparsely-ratified 1957 Convention. We should also think more creatively about expanding the use of regional or specialized international courts, such as the European Court, the European and American Human Rights Courts, and the proposed Law of the Sea Tribunal, as well as possible new trade or environmental tribunals, and of how such courts of more special jurisdiction might usefully supplement rather than overlap and conflict with the work of the ICJ itself.

One interesting issue in this connection concerns long-standing proposals for an international criminal court, an idea which has recently

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18. *See generally* Richard B. Bilder, *International Third Party Dispute Settlement,* 17 DENV. J. INT'L L. & POL'Y 471 (1989) (also in W.S. THOMPSON & K.M. JOHNSON, APPROACHES TO PEACE: AN INTELLECTUAL MAP, at 191 (1991)); Richard B. Bilder, *International Dispute Settlement and the Role of International Adjudication,* 1 EMORY J. INT'L DISPUTE RESOLUTION 131 (1987); (also in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 155 (Lori Fisler Damrosch ed., 1987)).

received renewed attention. Indeed, the question of establishing such a court is currently on the U.N. General Assembly's agenda, the International Law Commission has issued several recent reports in this connection, the U.S. Congress has mandated a study of this matter, and an ABA Blue-Ribbon Committee is currently completing a report on this subject. There are obviously complex and controversial issues concerning the jurisdiction, makeup, and procedure of such a court. However, in my view, there is much to be said for the idea of establishing some kind of international criminal tribunal. Even if such a Court was initially only experimental, endowed with only limited jurisdiction and convened on an *ad hoc* basis, it could furnish useful experience and at least reflect a symbolic commitment by the world community to the prevention and punishment of international crimes.

Ninth, the future presents a rich array or "grab bag" of other innovative techniques and procedures which might increase the usefulness and effectiveness of our international legal order. Let me mention just a few of these possibilities which seem especially worthy of consideration and experiment.

For one thing, in the area of state responsibility for injury to aliens or a state's own citizens, we can move more rapidly towards simplifying, eliminating, or "piercing" traditional requirements of espousal, and perhaps even exhaustion of remedies, by giving individuals, corporations, and nongovernmental organizations (NGOs), more prompt and direct access to international procedures for the adjudication of their international claims—whether these be based on traditional concepts of state responsibility for mistreatment of aliens or their property, or on newer concepts of state responsibility for violation of human rights. The U.S.-Iran Algiers Accords established an important precedent in this respect by permitting large claimants to present their claims directly to the U.S.-Iran Hague Claims Tribunal. Similarly, a number of human rights agreements permit individuals or NGOs to present complaints directly to relevant international bodies, at least so long as the state whose conduct is complained of consents to such a right of individual petition. Since individual human beings are those who ultimately have the real stake in the effective working of any social and legal order, it is past time that they be given a more direct and meaningful right to participate in our international legal system.

Again, we can be more daring and innovative in our approach to the making and structuring of international agreements. For example, we ought to make more use of nonbinding agreements such as the Helsinki Accords, and of nonbinding but widely-accepted human rights or other standards, such as the Standard Minimum Rules for

the Treatment of Prisoners. States may be more willing to agree to international cooperative arrangements if they know that they are not legally bound and can escape if need arises; yet in practice they are likely to keep such commitments, despite the fact that they are political rather than legal. I have already mentioned the usefulness, particularly for dealing with emerging and not-yet-fully-understood environmental or other problems, of more flexible types of agreements, which can be rapidly changed and adapted as new information, approaches, or solutions develop. The new Environmental Protocol to the Antarctic Treaty, which is essentially an "umbrella" or framework agreement, complemented by a number of technical annexes subject to easy amendment, suggests the direction in which we might usefully move.

Another useful initiative might be more explicit consultation and coordination among the foreign office attorneys from each state who are specifically charged with managing their nation's participation in the international legal system and making it work. In view of the importance of the international legal order to the international community, it would seem to deserve more careful and thoughtful collective attention. The Legal Adviser of the Swedish Foreign Office has recently taken an important initiative in this respect by organizing annual meetings of national legal advisers to address and coordinate their policies with respect to common professional problems relating to the effective operation of the international legal system.

At some point, we will have to confront some of the difficult ethical and practical issues raised by intertemporal claims and conflicts. Much attention is currently focused on the hypothetical claims of future generations, as against the present generation, for responsible maintenance of the environment and an equitable share of the earth's resources. But the future may bring new and even more complex claims for "the righting of old wrongs." For example, Nauru is currently pursuing a claim in the International Court against Australia for Australia's allegedly irresponsible role as administrator under a joint trusteeship agreement in permitting excessive depletion of the island's phosphate resources. And even more dramatically, we may have to consider whether the descendants of dispossessed indigenous or other formerly oppressed peoples—Native Americans, Inuit, slaves brought to the New World from Africa, or others—might arguably have legitimate and cognizable claims against the descendants of their dispossessors or oppressors for restitution, indemnity, or at least apology.[19]

19. *See, e.g.*, Marc Galanter, *Righting Old Wrongs*, (a paper prepared for the Conference

In a broader context, let me also suggest that it is time to close the long-standing gulf between international lawyers and international relations specialists, and to encourage the two disciplines to talk more to each other. Certainly, both disciplines are equally concerned with understanding and better ordering international behavior, and each has much to teach the other. For example, international lawyers clearly have much to learn from international relations theorists' studies of the role of power, game theory, and the social traps implicit in certain types of collective behavior. And, on their part, diplomats and international relations theorists might profit from a better awareness, not only of the more technical legal aspects of international treaty-making and dispute resolution, but also of the broader significance of norms and concepts of legitimacy in making the international—or any other society—work. Indeed, both disciplines might learn much from the work of other social scientists, such as social psychologists, concerning the broader nature and conditions of cooperation, and the role of trust, as well as of more explicit risk-management techniques, in facilitating interpersonal and international collaboration.[20] Hopefully, the next generation of international lawyers will find ways to bridge these gaps.

Finally, the new generation of American international lawyers, as has the old, will have to confront the recurrent issue of the role of international law in U.S. foreign policy. Will a "new world order" lead to greater U.S. dependence on and deference to the concept of collective action and international legal order? Or will it lead instead to unilateralism, neo-isolationism and indifference, or even contempt for the idea of international law? If it is to be the former, we need, as international lawyers, to find ways to help policy-makers, the public, and the media better understand what international law is, and of why it is of vital importance to our "selfish" national interest that our government respect its international obligations and support an effective international legal system. For clearly, if the U.S. fails to support and respect international law, it cannot expect others to do so! Moreover, we need to better understand how international law considerations actually enter into our foreign policy process, and of how we can ensure that policy-makers give these considerations appropriate weight.[21]

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on Historic Memory and Morals: The 1492 Spanish Expulsion of the Jews and the Inquisition, University of Miami, Oct. 3-5, 1991) (on file with author).

20. *See, e.g.*, RICHARD B. BILDER, MANAGING THE RISKS OF INTERNATIONAL AGREEMENT (1981).

21. *See, e.g.*, the recent Report of the Joint Committee Established by the American Soci-

In this connection, the new generation of international lawyers will have many interesting possibilities to explore. For example, it seems time for the U.S. to put the *Nicaragua*[22] case behind us and to demonstrate our commitment to a "new world order" by resubmitting ourselves to the compulsory jurisdiction of the International Court, even if with reasonable reservations. It is long past time for our nation to reaffirm our belief in our own fundamental values by finally ratifying the U.N. Human Rights Covenants and other basic and widely-accepted human rights treaties. And, perhaps, in a more distant future, in which the U.S. might find itself more deeply involved in and committed to the international legal order, we may even wish to reexamine our strongly dualist tradition regarding the incorporation of international law into our own domestic law. For example, if customary international law, as the *Paquete Habana*[23] case teaches, is in fact "the law of the land," why shouldn't it displace as internal law or "trump" at least earlier Congressional legislation?[24] Or, why shouldn't at least our U.N. Charter obligations, which reflect our basic commitment to the international legal order, not "trump" a later inconsistent statute?[25]

IV.

What, then, does this add up to? Certainly, the "new world order" will bring some changes in the way the international system and international law and institutions operate. Hopefully, these will, for the most part, be for the good, so we have reason for considerable optimism. And, as we work to adapt our legal tools to new realities, there will clearly be more than enough important, innovative, and exciting work for the new generation of international lawyers to do. However, despite current rhetoric, there seems to me at the moment little prospect for any radical transformation in the structure of the present state system or the nature of its legal order. In brief, I believe that the "new world order" is unlikely to differ that much from the old!

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ety of International Law and American Branch of the International Law Association on *The Role of the Legal Adviser of the Department of State, reprinted in* 85 AM. J. INT'L L. 358 (1991). And *see generally, e.g.,* Symposium, *The United States Commitment to International Law,* 1 TRANSNAT'L L. & CONTEMP. PROBS. 1 (1991).

22. 1984 I.C.J. 392 (Judgement of Nov. 26, 1984 on Jurisdiction and Admissibility); 23 I.L.M. 468 (1984); 1986 I.C.J. 14 (Judgement of June 27, 1986 on Merits); 25 I.L.M. 1023 (1986).

23. 175 U.S. 677 (1900).

24. *See, e.g.,* Louis Henkin, *International Law as Law in the United States,* 82 MICH. L. REV. 1555 (1984). And *see,* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. d. and reporters' note 4 (1987).

25. *See, e.g.,* Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States,* 32 AMER. U. L. REV. 1, at 13-14 (1982); and *cf.* Diggs v. Schultz, 470 F.2d 461, 465 n.10 (D.C. Cir. 1972).

What *could* change dramatically is the way in which the American people and government think about the international system and international law. With the end of the "cold war," which has for so long shaped—and perhaps distorted—both our domestic and foreign attitudes and policies, we are searching for a new sense of national identity and purpose. We could do worse than to return to those ideals of the Rule of Law and respect for human rights and justice which have traditionally provided the moral thrust and meaning of our national existence.