law that decentres the 'Euro-American opposition between liberal internationalism and neo-conservative realism'.[73] This same approach is exemplified, in a somewhat different context, by Celestine Nyamu's proposal of a system of 'critical pragmatism' that seeks to use both Kenyan custom *and* international human rights for the protection of the property rights of women in Kenya.[74]

In attempting to demonstrate the imperial dimensions of these initiatives, then, I am not arguing that we should dispense with the ideals that inform them – the ideals of 'good governance', the 'rule of law' and 'democracy'. Rather, the attempt here is to contest imperial versions of these ideals, and to seek their extension to all areas of the international system. It is remarkable, for example, that the Bank and the IMF are not subject to any 'rule of law', in a context when the Bank has continuously extolled the virtues of the rule of law and when serious questions have arisen as to whether these institutions are adhering to their constituent documents, their Articles of Agreement.[75] As Susan Marks puts it, in her own searching attempt to develop a meaningful, substantive idea of 'democratic governance', 'When ideals begin to seem like illusions, we can jettison and replace them. Or we can reassert and reclaim them.[76]

[73] James Thuo Gathii, 'Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy', (2000) 98 *Michigan Law Review* 1996–2054 at 1997.

[74] Celestine Nyamu, 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?', (2000) 41(2) *Harvard International Law Journal* 383–418.

[75] Anghie, 'Time Present and Time Past', 263–272.

[76] Susan Marks, *The Riddle of All Constitutions*, p. 119.

6 On making war on the terrorist: imperialism as self-defence

According to Buddhism there is nothing that can be called a 'just war' – which is only a false term coined and put into circulation to justify and excuse hatred, cruelty, violence and massacre. Who decides what is just and unjust? The mighty and victorious are 'just' and the weak and defeated are 'unjust'. Our war is always 'just' and your war is always 'unjust'. Buddhism does not accept this position.[1]

Introduction

Imperialism has once again become the focus of analysis in international relations, initially, as a consequence of the victorious emergence of the United States as the single global superpower intent on exercising its unprecedented influence to ensure its own security and further its own interests and, following 9/11, the commencement of a 'war against terrorism' (WAT) animated by principles and policies that, when taken together, closely resemble, if not reproduce, imperialism.[2] For many scholars who have focused on the history of the non-European world – and, I suspect, for many people in the Third World – imperialism has never ceased to be a major governing principle of the international system, and the only novelty of current developments lies in the fact that it has re-asserted itself in such an explicit form that it has become

[1] See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226 at p. 481 (Dissenting Opinion of Judge Weeramantry, citing Walpola Rahula, 'What the Budhha Taught').

[2] In broad terms, classical 'colonialism' denotes the actual conquest, occupation and settlement of a country, whereas 'imperialism' suggests a broader set of practices, including those by which a great power in essence governs the world according to its own vision, using a variety of means that may or may not include actual conquest or settlement.

unavoidably central to any analysis of contemporary international relations.

Third World sovereignty suffers from a number of deficiencies that can be attributed to the operation of colonialism within international law. At the very least, however, international law facilitated the transformation of colonial territories into sovereign states whose formal sovereignty was protected by a number of fundamental norms, including those prohibiting intervention in the internal affairs of the state and the use of force except in extremely limited circumstances. Significantly, then, recent examples of humanitarian intervention, and the new imperialism, challenge and undermine those doctrines. International law is now being subjected to various pressures that might ultimately result in the emergence of an international system that permits, if not endorses and adopts, quite explicitly imperial practices. The purpose of this chapter, then, is not to examine an ostensibly neutral set of practices – such as those associated with globalization – and reveal their imperial character. Rather, it is to examine the particular character of contemporary imperialism, to sketch out ways in which it both resembles and departs from the imperialism of the past, and to identify the particular strategies and doctrines used to further it and alter the existing framework of international law. These contemporary developments exemplify in many ways the themes I have been exploring in this book: international law is created in part through its confrontation with the violent and barbaric non-European 'other'; and the construction of the 'other' and the initiatives to locate, sanction and transform it disrupt existing legal categories and generate new doctrines regarding, very significantly, sovereignty and the use of force. In short, the WAT reproduces what I have sketched as the 'dynamic of difference'.

The war against terrorism

The terrorist attacks of 9/11 have now generated a 'war on terrorism' (WAT), the character of which will profoundly shape both international law and relations. The recourse to the language of 'war' to characterize the attacks and the response to them, was not, however, self-evident or inevitable. Thus, several scholars argued that the 9/11 atrocities should be thought of as criminal acts that would be addressed by policing actions directed at bringing the perpetrators to justice,[3] rather than

[3] Michael Howard, 'What's in a Name? How to Fight Terrorism', (2002) 81 No.1 *Foreign Affairs* 8-13; Mark Drumbl, 'Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order', (2002) 8 *North Carolina Law Review* 1–113.

as an 'armed attack' that could justify war in self-defence.[4] The differences between these characterizations are significant because, as Tawia Ansah argues, 'the resort to the language of war as "natural" and "starkly simple" as it is, nevertheless has a profound impact on how the law's intervention is shaped, or how the laws governing the transnational use of force are interpreted to accommodate a "war" on terrorism'.[5]

Notwithstanding these doubts and issues, the debate has now entered a phase where the United States has emphatically asserted the language of war to justify its actions following 9/11. The WAT is now firmly and irrevocably in place, raising important questions as to how this WAT relates to the rich and old tradition of 'just war' theory. The sense that we are now moving back, in some curious fashion, to pre-modern times is also suggested by the fact that the terrorist bears important resemblances to the peoples of the Muslim world that have, for centuries, been the enemy against whom this theory has been applied. President Bush himself made this clear shortly after the attacks of 9/11, when he referred to the emerging battle against terrorism as a 'crusade'.[6] And it is precisely in the Middle East that the war is being waged in its most extreme form.

The WAT might be crudely understood in terms of three concepts: the doctrine of pre-emptive self-defence (PESD); the concept of 'rogue states' the most prominent of which constitute an 'Axis of Evil'; and the idea of democracy promotion in order to transform these violent and threatening entities.

First, and importantly, this war, in all its magnitude and reach, is being characterized as a war of self-defence; and self-defence is permitted under Article 51 of the UN Charter. Controversially, however,

[4] See Antonio Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law', (2001) 12 *European Journal of International Law* 993–1001; Alain Pellet, 'No, This is Not War!', http://www.ejil.org/forum_WTC/ny-pellet.html; Georges Abi-Saab, 'The Proper Role of International Law in Combating Terrorism', (2002) 1 *Chinese Journal of International Law* 305–314 at 307–308.

[5] Tawia Ansah, 'War: Rhetoric & Norm-Creation in Response to Terror', (2003) 43 *Virginia Journal of International Law* 797–860 at 799. See also Frederic Megret, 'War? Legal Semantics and the Move to Violence', (2002) 13 *European Journal of International Law* 361–399.

[6] That this religious perception was not peculiar to President Bush but was, rather, shared more widely within the administration was suggested by the divine character of the mission to be undertaken, as suggested by the name of the campaign, 'Operation Infinite Justice'. Elizabeth Becker, 'A Nation Challenged: Renaming an Operation to Fit the Mood', *The New York Times*, September 26, 2001, 3.

the United States has declared its intention to act in pre-emptive self-defence where necessary. The basic character of pre-emptive self-defence has been outlined in the National Security Strategy (NSS) of the White House. President Bush has declared that:

> For centuries international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often condition the legitimacy of preemption on the existence of an imminent threat – most often a visible mobilization of armies, navies and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.
>
> The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.
>
> The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext of aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.[7]

The doctrine of pre-emptive self-defence as articulated in what might be termed the 'Bush doctrine' appears to extend the concept of self-defence well beyond traditionally understood boundaries of Article 51 of the UN Charter. The commonly accepted view of self-defence is that if preemptive self-defence is permitted at all, it is permitted only if an attack by an adversary is imminent.[8] President Bush, however, suggests that the concept of an 'imminent threat' should be expanded to correspond with modern realities and, in addition, that 'emerging threats' could also be subjected to pre-emptive self-defence. This extends the scope of self-defence considerably, particularly given that this 'emerging threat' is presumably to be assessed by the state seeking to use force.

[7] President George W. Bush, 'The National Security Strategy of the United States of America', September 17, 2002, Part V, www.whitehouse.gov/nsc/nssall.html.

[8] The famous words of Daniel Webster are often cited in this context; Webster argued that self-defence should be confined to cases in which there was 'a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation'. Letter from Daniel Webster, US Secretary of State, to Henry Fox, British Minister in Washington (April 24, 1841). 29 *British and Foreign State Papers 1840–1841* (London: James Ridgway & Sons, 1857), pp. 1129–1139 at p. 1138. The issue of whether anticipatory self-defence is permitted remains controversial. For discussion of this doctrine, see, e.g., Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002).

The second major element of the war against terrorism was made clear in President Bush's speech regarding the Axis of Evil, where he referred to North Korea, Iran and Iraq in the following terms:

> States like these, and their terrorist allies, constitute an Axis of Evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States. In any of these cases, the price of indifference would be catastrophic.[9]

This speech seemed to suggest that certain 'rogue nations' that possessed weapons of mass destruction (WMD) – or were suspected of possessing weapons of mass destruction, or were even intent on developing or acquiring WMD – could be the subject of legitimate attack by the United States.[10] Finally, the WAT, as it unfolds in Iraq, suggests that these rogue nations, once defeated, must be transformed into democratic states.[11] Democracy plays a crucial dual role in this process: it liberates the oppressed people of Islamic states and it creates law-abiding societies that would be allies rather than threats to the United States. The NSS seeks to promote 'moderate and modern government, especially in the Muslim world to ensure that the conditions and ideologies that promote terrorism do not find fertile ground in any nation'.[12] Terrorism is thus closely associated with the primitive and the Muslim world. Further, on 6 November President Bush made a speech in which he argued that the absence of democracy turned Arabs towards Islamic extremism. This argument, however, is complicated by the fact that America is widely seen as the supporter of repressive regimes in the Middle East.[13]

[9] President George W. Bush, 'State of the Union Speech: The Axis of Evil', in Micah L. Sifry and Christopher Cerf (eds.), *The Iraq War Reader: History, Documents, Opinions* (New York: Touchstone Books, 2003), p. 251.

[10] This, of course, leaves open the question of how such 'rogue nations' are to be defined. Scholars have attempted, subsequent to the attack on Iraq, to glean from those events a set of principles that might be applied to international law generally.

[11] This transformation is consistent with Ileana Porras' argument that 'terrorism has come to be the thing against which liberal Western democracies define themselves'. Ileana Porras, 'On Terrorism: Reflections on Violence and the Outlaw', in Dan Danielsen and Karen Engle (eds.), *After Identity: A Reader in Law and Culture* (New York: Routledge, 1995), pp. 294–313 at p. 295.

[12] Bush, 'The National Security Strategy', Part III.

[13] 'They Say We're Getting a Democracy', *The Economist*, 15 November 2003, 9.

In short, the current US position appears to be that PESD against any rogue regime is legal and that, furthermore, the transformation of the offending society into a democracy is the most effective way of ensuring that it will pose no future threat. The WAT has been given concrete form in the wars conducted against Afghanistan and Iraq. Each of these actions raises troubling legal issues under the law of the UN Charter which have already been the subject of extensive analysis. For instance, the war against Afghanistan raised the question of whether the US action could be regarded as self-defence, which is legal, or reprisal, which is not; and further problems arise from the fact that Afghanistan was attacked for actions committed by Al Qaeda. In the case of Iraq, questions arise as to whether US action was authorised by the Security Council or whether, rather, the United States was exercising a right to PESD, on the basis that Iraq possessed 'weapons of mass destruction'.[14]

It is clear then, that the WAT is challenging and extending, if not violating, the existing laws of war.[15] For the purposes of my argument, what is significant now is that this 'other', the terrorist, is constructed, not only in terms of the discourse of race (the nineteenth century) or the discourse of economics (the Mandate System) but the discourse of war, characterized as self-defence compelled by emerging threats. It is principally through the language of war-as-self-defence that the 'other' is constructed, excluded from the realm of law, attacked, liberated, defeated and transformed. In enacting these manoeuvres, however, the language of self-defence is not only transformed into PESD but, rather, it collects together and deploys a series of other doctrines and principles – relating, for example, to human rights, humanitarian intervention and democracy – to complete this structure of preemptive war. The additional and major complication, of course, is that the war is waged against a nebulous entity, the terrorist. Terrorism is notoriously difficult to define, as indicated by the absence of a clear legal definition of the term (which is partly why the attempts of Sri Lanka, Turkey and India to include terrorist acts as offences punishable by the International Criminal Court (ICC) were defeated).[16] Further, the war against terrorism seeks to neutralise

[14] See for example, Lori Fisler Damrosch and Bernard H. Oxman, 'Agora: Future Implications of the Iraq Conflict: Editors' Introduction', (July 2003) 97 *American Journal of International Law* 533–557.

[15] Sienho Yee, 'The Potential Impact of the Possible US Response to the 9–11 Atrocities on the Law Regarding the Use of Force and Self-Defence', (2002) 1 *Chinese Journal of International Law* 280–287.

[16] Antonio Cassese, 'Terrorism', 993–1001 at 994.

states that are seen to support or harbour terrorists – and, indeed, Arab states that promote certain forms of Islam.

The United States and imperial democracy

The unfolding events in Afghanistan have led Michael Ignatieff to conclude that 'In fact, America's entire war on terror is an exercise in imperialism'.[17] Further, the logic of the doctrine of preemption, and the actual example of Iraq, seem to exemplify and correspond with the arguments made by a number of scholars that the threat of terrorism can be addressed only by the reconstruction of a new, imperial order. Thus Robert Cooper argues that if rogue 'pre-modern states' became 'too dangerous for established states to tolerate', it will become necessary to inaugurate a 'defensive imperialism'.[18] This furthermore, is 'a new kind of imperialism, one acceptable to a world of human rights and cosmopolitan values'.[19] Niall Ferguson has reiterated this position, arguing that the United States should take on this imperial role: 'The hypothesis, in other words, is a step in the direction of political globalization, with the United States shifting from informal to formal empire much as late Victorian Britain once did.'[20] Ferguson's concern is that the United States may not have the staying power of the British. Colonial rule became necessary, because, a state – such as Iraq – will be particularly dangerous if left in a state of civil war and chaos, as it is precisely in these circumstances that terrorists will flourish. A 'failed state' could pose far more difficulties to the WAT than a dictatorial state.

US imperialism, as it is being practised through the WAT, will, then, have a significant if not decisive impact on international law and relations. Notably, however, whatever the other divisions separating the different members of the Bush administration, the one position on which they have united is that America is not an imperial power and has no imperial ambitions. My attempt then, is to understand the particular character of American policies and their relationship to imperialism – indeed, their denial of imperialism – as these are the

[17] Michael Ignatieff, 'Nation-Building Lite', *New York Times Magazine*, July 28, 2002, 28.

[18] Robert Cooper, 'The New Liberal Imperialism', *The Observer*, 7 April 2002, http://observer.guardian.co.uk/comment/story/0,6903,680093,00.html.

[19] *Ibid.*

[20] Niall Ferguson, *Empire: The Rise and Demise of the British World Order and the Lessons for Global Power* (New York: Basic Books, 2003), p. 368.

policies that are, in important ways, driving the new conceptualizations of preemptive self-defence and which are giving concrete form to the WAT.

The United States denies imperial ambitions because, it claims, it is not intent on colonizing the Iraqi people but rather, on restoring their sovereignty by guiding them towards self-government. In his presentation to the UN General Assembly, in September 2003, President Bush used the language of self-government and forcefully opposed any attempts on the part of the UN to quickly transfer power to the Iraqi people:

> The primary goal of our coalition in Iraq is self-government for the people of Iraq, reached by orderly and democratic process. This process must unfold according to the needs of Iraqis, neither hurried, nor delayed by the wishes of other parties. And the United Nations can contribute greatly to the cause of Iraq self-government.[21]

'Self-government' here stands for the massive transformations entailed in turning Iraq into a democratic state. This is, of course, the familiar language of trusteeship, according to which the United States acts simply as a trustee; sovereignty in Iraq resides with the Iraqi people;[22] and the US occupation of Iraq is directed towards furthering the well being of the Iraqi people until such time as they become sovereign.

While the goals of the US administration are comparable to the goals of the Mandate System and the UN Trusteeship system, the United States apparently intends to unilaterally manage the Iraqi progress towards sovereignty and self-government rather than hand it over to international control, although this position, like so much else with Iraq, in terms of both policy and academic analysis, is very likely to change. As such, the project of creating self-government in Iraq might be best compared with the US occupation of the Philippines, a wholly American enterprise whose precise purpose was to bring about self-government. The United States took control over the Philippines after defeating the

[21] President George W. Bush, 'Speech to the United Nations General Assembly, September 23, 2003', www.whitehouse.gov/news/releases/2003/09/20030923-4.html. The escalating violence in Iraq subsequently persuaded the US administration to establish a programme for a swifter transfer of power.

[22] See Security Council Resolution 1511 (2003). It reads in part: '*Underscoring* that the sovereignty of Iraq resides in the State of Iraq, *reaffirming* the right of the Iraqi people freely to determine their own political future and control their own natural resources.' Thus, the debate that took place as to who had sovereignty over the mandate territories will not arise in the case of Iraq.

Spanish in 1898: while this war proclaimed that it was directed at liberating the Filipinos from the iniquities of Spanish imperial rule, it eventually and peculiarly metamorphosed into a war waged against the Filipino nationalists who had initially welcomed the arrival of the United States. The war resulted in approximately 200,000 deaths, the enormous majority of them Filipino civilians.[23] The US Secretary of War, who pursued the campaign against the Filipinos with ruthless efficiency, despite the growing concerns within the United States generated by the atrocities committed by US forces, and the great unease among many Americans about engaging in war that seemed colonial in character, was Elihu Root.[24] Root, who was later to become the first President of the American Society of International Law,[25] was given the task of formulating American policy towards the Philippines after the defeat of the Filipino nationalist forces. Root's policies took the form of a set of instructions that he authored, and which were issued by President McKinley to William Howard Taft – who was himself to become President – the head of the commission appointed in effect to inquire into American governance of the Philippines.[26]

Root had exhaustively studied English colonial policy, particularly British rule in India,[27] and he was emphatic in asserting that the US approach to the Philippines that he was authoring was distinctive:

> It has differed from all other colonial experiments that I know anything about in following consistently as one of its fundamental rules of conduct the purpose to fit the Filipinos themselves for self-government.[28]

[23] The history of the war is told in Stanley Karnow, *In Our Image: America's Empire in the Philippines* (New York: Random House, 1989).

[24] Root's remarkable life is the subject of a two-volume biography by Philip Jessup. Philip C. Jessup, *Elihu Root* (New York: Dodd, Mead & Co., 1938). Root was awarded the Nobel Peace Prize for his efforts to create a permanent court to settle international disputes. See Jessup, *Root*, II, p. 504.

[25] For the argument that American interest in international law which led to the creation of the American Society of International Law was powerfully shaped by its emergence as a colonial power following the war against Spain in 1898, see Francis Anthony Boyle, *Foundations of World Order: The Legalist Approach to International Relations, 1898–1922* (Durham, NC: Duke University Press, 1999), pp. 18–19.

[26] Elihu Root, 'President McKinley's Instructions to the Commission to the Philippine Islands', in W. Cameron Forbes, *The Philippine Islands* (Boston: Houghton Mifflin Co., 1928), II, appendix VII. Taft himself, heavily influenced by his reading of Tocqueville's *Democracy in America*, regarded the New England town as central to the democratic project and sought to create a similar system in the Philippines. See Karnow, *In Our Image*, p. 228.

[27] *Ibid.*, p. 345. [28] *Ibid.*, p. 371.

Given the history of the United States, and its own anti-colonial struggles against the British, it was inevitable that the US approach to colonialism would differ markedly from that of the European colonial states. Indeed, the US occupation of the Philippines was extremely controversial precisely because it appeared to violate sacrosanct principles of American identity.[29] Simply, how could the United States, which was born out of a war of independence against colonialism, itself become an imperial power?[30] This anti-colonial sentiment might explain in part why the United States was never intent on formal political control of colonial territories. Rather, as its position at the Berlin Conference of 1884–5, for example, made clear, the United States was intent on trading with colonial territories and furthering its economic power.[31]

The argument that the United States was intent on promoting self-government in the Philippines was crucial to the argument that the United States was not an imperial power, and Root set about the task of making self-government a reality. Crucially, this task was understood as reconstructing the Philippines along the lines suggested by the history of the United States itself; self-government meant government that operated according to the principles established in the US Constitution. Indeed, the question of whether the US government was legally required to provide the people of the Philippines with the rights guaranteed by the Constitution, on the basis that 'the Constitution followed the flag', was an issue considered by the Supreme Court,[32] whose decision led Root to conclude that 'as near as I can make out the Constitution follows the flag – but doesn't quite catch up with it'.[33]

Quite apart from the strictly legal issues, however, Root recognized that his policy raised an even more far-reaching issue. Was the model of the US Constitution an appropriate one for the people of the Philippines?

[29] See Karnow, *In Our Image*, pp. 78–138.

[30] For a classic examination of this broad theme, see Ernest R. May, *Imperial Democracy* (New York: Harcourt, Brace & World, 1961).

[31] See Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', (1999) 40 (1) *Harvard International Law Journal* 1–80 at 60–61 for the US position at Berlin.

[32] The series of cases which focused on the question of the applicability of the US Constitution to the various territories the United States acquired following the Spanish War of 1898 has been given the term the 'insular cases'. For a detailed discussion of these cases, see Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001); and Efren Rivera Ramos, 'The Legal Construction of American Colonialism: The Insular Cases', (1996) 65 *Revista Juridica Universidad de Puerto Rico* 225–328.

[33] Jessup, *Root*, I, p. 348.

On the one hand, Root was of the view that rights enjoyed within the United States could not be extended to the Philippines because

> the provision of the Constitution prescribing uniformity of duties throughout the United States was not made for them, but was a provision of expediency solely adapted to the conditions existing in the United States upon the continent of North America.[34]

Here, Root understood the Constitution to be a peculiar and unique product of the history and conditions existing in North America. On the other hand, Root could not ignore the universalist claims embodied in the Constitution, that articulated rights that were proclaimed to be rights belonging to all men.[35] The Constitution, while being the peculiar product of US history, prescribed limits to what *any* government could do. Root studied these issues in considerable detail and attempted to resolve them by providing the Philippines with all the rights contained in the Bill of Rights, with the exception of the right to trial by jury in criminal cases and the right to bear arms.[36]

Further, Root proposed a number of concrete measures to promote self-government: locals were to manage their own affairs 'to the fullest extent of which they are capable';[37] municipal authorities were to be selected by the people; government was to take place with proper regard for Filipino customs, habits and prejudices 'to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government'.[38] The administration was to be directed, not towards US well being, but to 'the happiness, peace and prosperity of the Philippine Islands'.[39] Seen in this way, colonialism, for Root, was a relationship of trusteeship, and was therefore a burden.[40] Further, Filipino traditions were to be accommodated within this system to the extent that they were consistent with the universal principles embodied by American structures of government. Nevertheless, this munificence was not entirely disinterested. While locals were to be incorporated into the administration, they had to demonstrate, as Root implacably ordained, 'an absolute and unconditional loyalty to

[34] Jessup, *Root*, I, p. 347. [35] Jessup, *Root*, I, p. 347.

[36] See Karnow, *In Our Image*, p. 170; Root, 'President McKinley's Instructions', p. 443.

[37] Root, 'President McKinley's Instructions', p. 440. [38] *Ibid.*, p. 442. [39] *Ibid.*, p. 442.

[40] Moreover, it was through the concept of trusteeship that the United States could seek to resolve a fundamental contradiction: how could the United States, born out of a war of independence against colonialism, itself become a colonial power? The American occupation of the Philippines generated enormous controversy precisely for this reason. See Karnow, *In Our Image*, chapters 4–5.

the United States'.[41] Filipino self-government and independence, then, meant complete affinity with the United States at all these different levels.

The US commitment to self-government was such that Congress had declared that the Philippines would receive independence 'as soon as stable government can be established'.[42] The Philippines became an independent nation on 4 July 1946,[43] the date, of course, further reinforcing the narrative that appeared to sustain the whole American enterprise in the Philippines – that all societies to achieve true independence must replicate, however problematically and partially, the defining experience of the United States which represents the universal model that all societies are destined to follow. Within this scheme, it is the US Constitution that provides the blueprint.

Philip Jessup termed Root's instructions to the commission as 'the most important document in American colonial history',[44] and while this statement may initially appear extravagant, US policies in Iraq suggest that it is a valid assessment. Further, as William Alford has noted, the United States has a long history of attempting to 'enlighten, if not save, our foreign brethren by exporting ideas and institutions that we believe we have realized more fully'.[45] It is perhaps in the writings of Root that we see the first comprehensive articulation of this project, manifested today in various projects of good governance and democracy promotion that have been initiated by the United States and which play such a large role in contemporary international affairs.

Root's position is marked by ambivalences arising from simultaneous repudiation of colonialism and his insistence that a particular model of government and society is valid universally, and that less enlightened peoples whose systems of government do not comply with the American model must be transformed accordingly. A similar ambivalence afflicts the US position on Iraq, which attempts to repudiate the claim that it is in any way 'imperial' by repeatedly proclaiming that it is intent simply on promoting self-government, thus eliding the fact that the whole campaign of using massive force to conquer a territory as a prelude to attempting to civilize and liberate its people by recreating them in the

[41] Root, 'President McKinley's Instructions', p. 442.
[42] Quincy Wright, *Mandates Under the League of Nations* (New York: Greenwood Press, 1968), p. 14, n.4.
[43] Karnow, *In Our Image*, p. 323. [44] Jessup, *Root*, I, p. 354.
[45] William P. Alford, 'Exporting "The Pursuit of Happiness"', (2000) 113 *Harvard Law Review* 1677–1715 at 1678.

image of the conqueror is one of the defining aspects of colonialism over many centuries.

Root's belief that American principles of government represent 'the immutable laws of justice and humanity'[46] is a fundamental premise of current American policies. Similarly, in referring to the core principles of the American Constitution, President Bush argues that 'Many other nations, with different histories and cultures, facing different circumstances, have successfully incorporated these core principles into their own systems of governance';[47] this incorporation suggests the universal validity of these principles and might even justify their imposition when that becomes necessary.

The character of US-created self-government, however, is problematic, and not only because its exercise must, as Root stipulated, be allied to the United States. Whereas, in chapter 5, democracy was seen as essential to development, it now presents a solution to terrorism. The concept of 'democracy', however, remains extremely controversial, given that it can take many different forms, and its implementation is very problematic. Further, and more basically, US understanding of self-government must surely be brought into question by the fact that even as Mr Bush was committing himself to furthering self-government, crucial decisions were already being made about the Iraqi economy. As *The Economist* notes in an article blithely entitled 'Let's All Go to the Yard Sale', all Iraqi industries, except for the oil industry, have been privatised;[48] all this well prior to any official democratically elected Iraqi government being in place, and while the Security Council continues to affirm that the resources of Iraq 'belong to the Iraqi people'. Thus, as in the Mandate System, while 'self-government' in Iraq is presented as a mechanism by which the sovereign people of Iraq finally liberate themselves from the tyranny of Saddam Hussein, it is being shaped, in important ways, by various external economic imperatives that undermine the interests of the Iraqi people and which will make them subject to foreign control for the foreseeable future. A comparison between the ideas of colonial rule expressed by Root, on the one hand, and his contemporary, Lugard, on the other, suggests the distinctiveness of the US approach. Both men formulated types of colonial rule that sought to transform colonial societies. Root's ideas, however, were in many respects more intrusive as they aspired to transform all the political institutions of the colonial territory to bring

[46] Jessup, *Root*, I, p. 332. [47] Bush, 'The National Security Strategy', Part II.
[48] 'Let's All Go to the Yard Sale', *The Economist*, 27 September 2003, p. 44.

them into accordance with the universal principles laid down by the US Constitution. Lugard's model of 'indirect rule', by contrast, attempted to integrate existing native political institutions, albeit in a modified form, in the system of colonial governance. Lugard saw little prospect of English systems of government working in Africa whereas Root believed that the American system of governance was applicable to all societies.

But Root's private view might be more complex than his official positions might suggest. It is interesting then, that Root himself privately concluded, on the one hand, that the Filipinos were not capable of self-government as he defined it and, on the other, that American expertise and technologies were inadequate for the purposes of devising an appropriate system of government for foreign peoples. Thus, he declared – when Congress was discussing the question of what system of government would be appropriate for the people of Samoa – 'I should think that an exchange of professors of governmental science between Tutuila and Boston would be particularly advantageous to the people of the last mentioned city'.[49]

While the American governance of the Philippines might suggest these parallels, however, the situation now confronting the United States in Iraq is, of course, very different in vital respects. The task of promoting self-government in Iraq has an urgency that was hardly present in the Philippines, the occupation of which provided the United States with all the pleasures of being a colonizer even while asserting its moral superiority as against the squalid behaviour of European imperial powers. This project of promoting self-government in Iraq is now no longer seen merely in terms of effecting the salvation of backward peoples – although that idea, of course, continues to be of great importance – but, rather, of ensuring the safety and security of the American people. Backwardness is now associated not merely with economic deprivation, but terror. It is imperative to support and promote 'moderate and modern government, especially in the Muslim world, to ensure that conditions and ideologies that promote terrorism do not find fertile ground in any nation'.[50] Somewhat lacking in this analysis is any sense of US actions that could generate resentment in the Middle East.

Within this structure of ideas, of course, certain forms of Islam are seen as dangerously and radically different, and it is for this reason

[49] Jessup, *Root*, I, p. 349. [50] Bush, 'The National Security Strategy', Part III.

that the transformation of these societies becomes so important. At the same time, it is suggested that democracy is compatible with Islam – and, indeed, more specifically, with American forms of government. This notion is based on the powerful idea that the particular form of universalism espoused by democracy and the American system can accommodate difference. Thus, 'America's experience as a great multi-ethnic democracy affirms our conviction that people of many heritages and faiths can live and prosper in peace'.[51]

Ultimately, of course, the character of the 'self-government' established in Iraq will be determined far more by political exigencies than the lofty visions of a Middle East transformed by democracy. The transfer of sovereignty to the Iraqi people is not in itself incompatible with US control of the country. Both the nineteenth century and the League period illustrate the many technologies and techniques that can be deployed to effectively control what were ostensibly sovereign states. Quite apart from any measure taken to ensure that the people who govern Iraq are sympathetic to the United States, treaty arrangements based on the principles, if not the explicit form, of the nineteenth-century colonial protectorate can create a 'sovereign' Iraq over which the United States can retain significant control. Indeed, the experience of Iraq itself, once a mandate territory, suggests the character of such a treaty. Under the 1922 treaty between Iraq and His Britannic Majesty, the basic provisions of the Constitution of Iraq were provided for, and Britain undertook to 'support and assist' the 'armed forces' of the King of Irak, when this was necessary, and to provide guidance and advice to the King of Irak – who agreed to 'fully consult' with Britain – on how to manage the economy and finances of the country.[52]

If the history of the United States is to establish the terms by which other societies are to be assessed, and the US Constitution is the system of governance to which they should all aspire, then an examination is required of the complex and contradictory character of that history and system of government, rather than an idealized and selective version of it. The view that America was in important respects anti-colonial, overlooks the violence of the colonization of North America, the wars against the Native Americans, their dispossession – in violation of the

[51] Bush, 'The National Security Strategy', Part II.

[52] Treaty Between His Britannic Majesty and His Majesty the King of Irak, Signed at Bagdad, 10 October 1922, in Wright, *Mandates*, p. 595.

treaties that had been made with them – marginalization and disempowerment.[53] Further, of course, the history of racism and slavery raises the important question of how a set of principles that were defined to be the rights of all men did not apply to blacks, for many years. The encounter between American principles of government and the foreign Islamic world might be illuminated by an examination of the encounter between American principles of government and the foreign Native Americans and African Americans who were incorporated into that system.

One of the main arguments I have been advancing in this book is that certain structures of thought regarding the 'foreign' or the 'uncivilized', which arise from particular and identifiable historical circumstances, have an enduring presence. As a consequence, these patterns are often reproduced, albeit in somewhat modified form, in later encounters with people deemed to be uncivilized and violent. It is in this way that the Native American is connected with the Iraqi. Both have been seen as threats to the security of the United States. Both challenge an American system of government that is extended to incorporate them, even while ostensibly enabling them to retain important aspects of their own identity. American approaches to 'the other' have been importantly shaped by its own historical encounters with the Native American. Thus, Wilson's idea of international trusteeship on which the Mandate System was based, derived in part on Root's model of colonialism as trusteeship for the Philippines, that in turn was heavily influenced by the trust relationship between the US government and the Native Americans. The connections between the US actions in Iraq and these earlier histories are suggested at a number of levels:

> To wondering Puerto Ricans, the American troops who brazenly seized their island in 1898 advertised themselves not as an army of occupation but as angels of deliverance – fairy godmothers with leggings and Springfield rifles, benignly bestowing all the virtues of utopian democracy . . .
>
> This was not conquest, [General] Miles insisted, but liberation. The vanquishers marched in 'bearing the banner of freedom'. They extended to Puerto Ricans 'the fostering arm of a nation of free people, whose greatest power is in justice and humanity to all those living within [its] fold'. These beneficent new rulers, he vowed, with a euphoric flourish, would confer 'the immunities and blessings of the liberal institutions of our Government . . . [and] the advantages and blessings of enlightened civilization'.[54]

[53] The literature on this subject is enormous. For an examination of the relationship between America's emergence as a colonial power and its policy towards the Indians, see, for example, Robert N. Clinton, 'There is no Federal Supremacy Clause for Indian Tribes', (2002) 34(1) *Arizona State Law Journal* 113–260 at 164.

The resemblances between the earlier attitudes towards Puerto Rico and the occupation of Iraq are hard to ignore. Even more intimately, many of the American troops who fought against the Spanish in 1898 were veterans of wars against the Native Americans.[55] It is not coincidental that current debates occurring in the *American Journal of International Law* regarding the applicability of international humanitarian law to alleged terrorists resemble a similar debate that appeared in the same journal in 1927 on the broad topic of 'How to Fight Savage Tribes', when the tribes discussed included the Indian tribes which, like the terrorists, were savage, barbarous and backward and therefore disqualified from the protections offered by international law.[56]

The projection of American democracy as a universal solution to the problems of governance depends crucially on the assumption that America has overcome the histories of slavery and conquest that are such an integral part of the American experience. Seen in this way, whatever the problems affecting American democracy, they are relatively minor, and the greater and more urgent task is that of expanding outwards and liberating other peoples. These are precisely the assumptions that have been searchingly questioned, among others, by Critical Race scholars and Lat-Crit scholars, who point out the different ways in which exclusion and subordination are reproduced in a situation where equality, tolerance and accommodation are proclaimed to have been decisively achieved. Critical Race Theory, for instance, attempts to uncover 'the ongoing dynamics of racialised power and its embeddedness in practices and values which have been shorn of any explicit, formal manifestations of race'.[57] It is for this reason that the work of Critical Race Theory

[54] Peter C. Stuart, *Isles of Empire: The United States and its Overseas Possessions* (Boston: University Press of America, 1999), p. 329.

[55] See generally, Stuart, *Isles of Empire*.

[56] Elbridge Colby, 'How to Fight Savage Tribes', (1927) 21 *American Journal of International Law* 279–288. Colby was responding to Quincy Wright's contrary argument. In addition, of course, it could be argued that the circle is now complete: Western approaches to the American Indian were shaped by Christian approaches to the pagans of the Middle East, as Robert Williams has shown. Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990). Now, through the US intervention in Iraq, the descendants of those same peoples of the Middle East are being thought of in terms developed in relation to the American Indians.

[57] Kimberle Crenshaw (ed.), *Critical Race Theory: The Key Writings That Formed the Movement* (New York: New Press, 1995), p. xxix. For different aspects of this rich body of work,

scholars, who have focused precisely on the consequences of American Empire as it has manifested itself within what is now the United States itself, is important to an understanding of these current projects of Iraq and beyond. As Henry Richardson has argued,

> Intersecting racial narratives, both global and national, are integral to U.S. hegemonic claims, as well as to community responses about them, including the racial implications of the new U.S. Preemption and Supremacy doctrine toward Southern Tier governments and their peoples.[58]

And if the parallel between the Indian and the Muslim holds, then the words of Chief Justice John Marshall – who had accumulated an enormous wisdom on the complex relationship between American systems of government and the Native Americans – might be illuminating. The enemy poses a dilemma that Marshall identifies as follows:

> But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.[59]

Similarly, Iraq cannot be left to its own devices, but nor can the US colonize it. Creating a form of self-government that is still subordinate to the larger powers of the United States might be one solution to the

see also Natsu T. Saito, 'Crossing the Border: The Interdependence of Foreign Policy and Racial Justice in the United States', (1998) 1 *Yale Human Rights and Development Law Journal* 53–84; Henry J. Richardson, III, 'Gulf Crisis and African-American Interests Under International Law', (1993) 87 *American Journal of International Law* 42–82; Isabelle R. Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights', (1991) 31 *Virginia Journal of International Law* 211–247; Elizabeth M. Iglesias, 'Global Markets, Racial Spaces and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis', (2000) 45 *Villanova Law Review* 1037–1073; and Adrien Katherine Wing, 'A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women', (1997) 60 *Albany Law Review* 943–976. For important collections of work in these traditions which also provide guidance to the literatures, see, on Critical race theory and international law, 'Symposium, Critical Race Theory and International Law: Convergence and Divergence'; (2000) 45 *Villanova Law Review* 827–970; on Lat crit theory, see 'Colloquium, International Law, Human Rights and LatCrit Theory', (1997) 28 *University of Miami Inter-American Law Review* 177–302.

[58] Henry J. Richardson, III, 'US Hegemony, Race and Oil in Deciding United Nations Security Council Resolution 1441 on Iraq', (2003) 17(1) *Temple International and Comparative Law Journal* 101–157 at 103 (footnote omitted).

[59] *Johnson v. McIntosh*, 21 US (8 Wheat) 543 (1823) at 590.

problem, and it remains to be seen how Iraqi self-government succeeds in this respect. The projection of American values and systems of government to other parts of the world cannot be seen in isolation, I argue, from the complex factors, the densely interwoven histories, that I can only sketch here, that are inextricably linked with those values and systems. These are the factors that might shape in part, the US approach to Iraq and the WAT in general, a war in which America is projecting not only democracy, but its entire history of encounters with the 'other', within the United States and also in its previous imperial ventures.

Historical origins: war, conquest and self-defence

The WAT includes several unilateral initiatives that the United States is intent on taking regardless of international support. Inevitably however, the United States seeks to legitimize its claims within a broader international environment. It is almost compelled to do so, however unwillingly, because it requires international support for the WAT. Further, as Detlev Vagts notes, in relation to hegemonic powers 'the historical record shows that it can be convenient for the hegemon to have a body of law to work with, provided that it is suitably adapted'.[60] The United States, then, can work most effectively if it transforms the international legal and institutional order in such a manner as to enable the furtherance of its policies. Despite its criticisms of the UN, then, the United States relies on it for the condemnation of 'rogue states' such as Iran and Security Council resolutions directed against terrorism. How then, does the United States, with its own unique vision of the WAT and the civilizing mission it embodies, seek to alter the international system to further its war against terrorism? More particularly, how is this new imperialism, 'imperialism as self-defence', to be accommodated within an international law that is posited as being firmly anti-colonial? What is the conjunction, the relationship, between imperialism and international law in these circumstances, at the beginning of the third millennium?

The crisis of 9/11 has led to claims that this event is entirely unprecedented, that it is a 'constitutional moment' or a 'transitional moment' that will require an entirely new approach to international law and international law making. This issue of what this new international system will be is the subject of discussion and analysis now, not only by

[60] Detlev F. Vagts, 'Hegemonic International Law', (2001) 95 *American Journal of International Law* 843–848 at 845.

legal scholars, but by the United Nations itself, where Secretary-General Annan has inaugurated a series of initiatives designed to bring about the institutional changes that may be necessary for this new system.

Many aspects of 9/11 are unprecedented. Nevertheless, to the extent that the outlines of a new international order designed to respond to 9/11 are clear, they resemble in many ways a very old structure. The civilizing mission whose basic character I have previously attempted to identify is now being reproduced in the mode of self-defence which is all the more powerful because it has been combined with a series of other doctrines to establish the new legal framework for the WAT. This framework combines the doctrines of human rights and humanitarian intervention, democratic governance and trusteeship, to create a new and formidable system of management – that of 'defensive imperialism' – that, far from being new, derives its power and resonance in part through its invocation of a very old set of ideas, those of the 'civilizing mission', thus affirming the enduring hold of these formations on the structure and imagination of international law. As David Kennedy has argued, then, the attempts to renew international law often repeat similar patterns.[61]

Classically, the sovereign state precedes international law, and international law is constructed through the will of sovereign states. Self-defence is the foundational right of states, a basic attribute of sovereignty, as no state can be truly sovereign unless it has the right to preserve itself through self-defence if necessary. The concept of self-defence in this sense precedes the law – and, indeed, significantly shapes the legal universe. Thus Vitoria argues that 'In war everything is lawful which the defence of the common weal requires. This is notorious, for the end and aim of war is the defence and preservation of the State'.[62] Seen in this way, not only is self-defence fundamental but whatever self-defence requires is legal. The defining significance of self-defence in any system of order is reiterated by Grotius, who argues that:

> In the first principles of nature there is nothing which is opposed to war; rather, all points are in its favour. The end and aim of war being the preservation of life and limb, and the keeping or acquiring of things useful to life, war is in perfect accord with those first principles. If in order to achieve these ends it is necessary to use force, no inconsistency with the first principles of nature is involved.[63]

[61] David Kennedy, 'When Renewal Repeats: Thinking Against the Box', (2000) 32 *New York University Journal of International Law and Politics* 335–500.

[62] Franciscus de Victoria, *De Indis et de Ivre Belli Relectiones* (Ernest Nys ed., John Pawley Bate trans., Washington, DC: Carnegie Institution of Washington, 1917), p. 171.

The primordial importance of self-defence is emphasized, then, not only in the nineteenth-century positivist system with its exaltation of sovereignty but, as Vitoria and Grotius suggests, within natural law itself. Understandably then, the UN Charter itself terms the right of self-defence an 'inherent right'. The foundational character of self-defence has also been suggested in recent case law through the argument that it prevails against every consideration and competing international norm.[64] Thus Judge Higgins, in her dissenting opinion in the *Nuclear Weapons* Case, arguing that the threat or the use of nuclear weapons was legal under international law, seemed to suggest that self-defence would take primacy even in the event of a conflict between the use of such weapons and international humanitarian law, in order to prevent an 'unimaginable threat'.[65] If the right of self-defence has such power, of course, it becomes imperative for any system of legal order to carefully define what is meant by 'self-defence'.[66]

The doctrine of preemption, which extends the concept of self-defence by asserting that war against an imminent wrongdoing is legitimate, has been the subject of extensive analysis since at least the time of the Roman Empire, as Richard Tuck points out in his valuable and prescient analysis of this issue.[67] The precise contours of the doctrine of preemptive self-defence remain unclear and problematic.[68] As Tuck points out,

[63] Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, Francis W. Kelsey, ed. (Oxford: Clarendon Press, 1925), p. 52. The consequences of this position are explored in illuminating detail in Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order From Grotius to Kant* (New York: Oxford University Press, 1999).

[64] But compare Judge Weeramantry's dissenting opinion in the *Nuclear Weapons* Case, who argues that international humanitarian law applies even in the case of self-defence. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226 at pp. 429–555.

[65] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226 at p. 529 (Dissenting Opinion of Judge Higgins). The majority decision was more equivocal.

[66] Franck, *Recourse to Force*; Christine Gray, *International Law and the Use of Force* (New York: Oxford University Press, 2000).

[67] Tuck, *The Rights of War and Peace*, pp. 18–31. Tuck argues that a distinction may be made between two different traditions which adopted very different approaches to war, the 'theological' or 'scholastic' tradition which forbade preemption, and the 'humanist' or 'oratorical' tradition which permitted it. *Ibid.*, p. 16.

[68] The legal adviser to the Department of State has offered a relatively restrained version of the character of PESD as stated in the National Security Strategy, asserting that the right arises:

however, even in its more restrained versions the doctrine of preemption is 'clearly a morally fraught matter, as by definition the aggressor has not been harmed, and his judgment about the necessity of his action might well be called into question both by the victim and the neutral observer'.[69] And if Iraq is regarded as an example of PESD,[70] then the implications are especially far-reaching, however qualified the character of that doctrine may be by the particular factual elements surrounding the Iraqi action.[71] For example, the International Court of Justice (ICJ) has held that the use of nuclear weapons may be permissible for the purposes of self-defence, and the question then arises whether nuclear weapons may be used also for the purposes of PESD.

War, waged in the PESD mode may now become the vehicle for a new form of imperialism, defensive imperialism. As Pagden argues, 'as all European empires in America were empires of expansion, all at one stage or another, had been based on conquest and had been conceived and legitimized using the language of warfare'.[72] Inevitably then, it is through the law of war that conquest has been most readily justified. As Vitoria observes, 'the seizure and occupation of those lands of the barbarians whom we style Indians can best, it seems, be defended under the law of war'.[73] Equally importantly, however, Vitoria emphatically asserts that 'Extension of empire is not a just cause of war'.[74] Rather, Vitoria, argues, it is through waging a defensive war that Spanish imperial rule could be legitimized. The attacks by the Indians on the Spanish who entered their territory, ostensibly for peaceful and legitimate purposes, would justify the Spanish in defending themselves – and this action could necessitate the complete conquest of the Indians and their territory, as it was only in this way that the Spanish could ensure their own safety. 'It is

> After the exhaustion of peaceful remedies and a careful consideration of the consequences, in the face of overwhelming evidence of an imminent threat, a nation may take preemptive action to defend its nationals from unimaginable harm.
>
> (William H. Taft, IV, Legal Adviser, Department of State, The Legal Basis for Preemption, November 18, 2002, <http://www.cfr.org/publications)

[69] Tuck, *The Rights of War and Peace*, p. 18.

[70] See John Yoo, 'International Law and the War in Iraq', (2003) 97 *American Journal of International Law* 563–576; Ruth Wedgwood, 'The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defence', (2003) 97 *American Journal of International Law*, 576–585.

[71] William H. Taft, IV and Todd F. Buchwald, 'Preemption, Iraq, and International Law', 97 *American Journal of International Law* 557–563.

[72] Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c.1500–c.1800* (New Haven: Yale University Press, 1995), p. 63.

[73] Vitoria, *De Indis*, p. 165. [74] *Ibid.*, p. 170.

undeniable that there may sometimes arise sufficient and lawful cause for effecting a change of princes or for seizing a sovereignty . . . when security and peace cannot otherwise be had of the enemy and grave danger from them would threaten the State if this were not done.'[75] Vitoria, of course, as I have already argued, establishes a legal framework which makes it entirely legitimate for the Spanish to enter Indian territory, and trade within and occupy that territory, thus making inevitable the tensions that later manifest themselves between the Spanish and the Indians. While providing extraordinary comprehensive rights of war, however, Vitoria continuously reiterates that a just reason for war must exist: 'Wrong done is the sole and only just cause for making war.'[76] For Vitoria, a just war is a defensive war. Thus, even in relation to the Indians who are regarded as only nominally human, Vitoria attempts to prescribe limits.

The relationship between law and self-defence poses enduring problems that Kant addresses in his attempts to construct a perpetual peace. He famously dismisses Grotius, Pufendorff and Vattel as the sorry comforters who 'are still dutifully quoted in justification of military aggression', on the basis that, in the final analysis, the principles they lay down 'cannot have the slightest *legal* force, since states as such are not subject to a common external constraint'.[77] Kant, by contrast, seeks to provide such a constraint, in part by focusing on the internal constitutional order of states. Kant, among his contemporaries, was particularly eloquent in his recognition of the evils of colonialism, and his analysis of the hypocrisy of European states 'who make endless ado about their piety, and who wish to be considered as chosen believers while they live on the fruits of iniquity'[78] has an enduring validity.

PESD, as Tuck pointed out, is problematic because the party seeking to exercise it has not been injured. The relationship between injury and war is discussed by Kant:

> It is usually assumed that one cannot take hostile action against anyone unless one has already been actively *injured* by them. This is perfectly correct if both parties are living in a *legal civil state*. For the fact that one has entered such a state gives the required guarantee to the other, since both are subject to the same authority. But man (or an individual people) in a mere state of nature robs me of any such security and injures me by virtue of this very state in which he

[75] *Ibid.*, p. 186. [76] *Ibid.*, p. 163.

[77] Hans Reiss (ed.), *Kant: Political Writings* (Cambridge: Cambridge University Press, 1991), p. 103.

[78] Immanuel Kant, 'Perpetual Peace', in Reiss, *Kant*, p. 107.

coexists with me. He may not have injured me actively (*facto*) but he does injure me by the very lawlessness of his state (*statu iniusto*), for he is a permanent threat to me.[79]

By making this argument, Kant enlarges the justifications for war to a quite extraordinary extent by expanding the concept of an 'injury'; those societies, which lack a 'legal civil state', by their very existence, injure their neighbours, thus justifying the use of force against them. What this permits – indeed, requires – then, is the development of a set of ideas relating to how we should understand a legal civil state and the formulation of a set of criteria for distinguishing a civil state from a not-civil state, a task that evolved into the nineteenth-century project of distinguishing civilized states from non-civilized states. As Anne-Marie Slaughter has argued in illuminatingly applying Kant's theory of the liberal peace to international law, a distinction between liberal and non-liberal states is crucial to this system:

> The most distinctive aspect of Liberal international relations theory is that it permits, indeed mandates, a distinction among different types of States based on their domestic political structure and ideology.[80]

The definition of non-civil states takes on a particular importance because those states, by their very character, present a threat to humanity and exist either outside the given laws, or else in violation of them. International law can be said to operate only among liberal states, while non-liberal states operate in a zone of lawlessness, untrammelled either by international or by domestic law – and it is precisely for this reason that Kant feared such states. This basic division between the civilized and the uncivilized has existed in the discipline since at least the time of Vitoria. The vocabulary of international human rights law, democracy and the rule of law – and, indeed, market oriented economies – have now become the markers of a 'civil state', and it is for this reason that Cooper, for example, makes a distinction between pre-modern and post-modern states, and calls explicitly for different standards to apply to these two categories. The fundamental premise of this argument – that liberal-democratic states comply with international law while non-liberal states do not – has been searchingly challenged by Jose Alvarez.[81]

[79] *Ibid.*, p. 98.

[80] Anne-Marie Slaughter, 'International Law in a World of Liberal States', (1995) 6 *European Journal of International Law* 503–538 at 504.

[81] Jose Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory', (2001) 12 *European Journal of International Law* 183–246.

Kant's solution to the existence of the non-civil state does not immediately and explicitly call for war; rather, 'I can require him either to enter into a common lawful state along with me or to move away from my vicinity'.[82] What globalization has ensured, of course, is that it is no longer possible to distance oneself from the uncivil state. Thus it is only the first possibility that remains, and it is that delicate word 'require' that now comes into question. Kant's anti-imperial position, then, exists in tension with his arguments in favour of self-defence – and, indeed, a version of self-defence that appears to make conquest of the non-civil state imperative.

Now, the particular criteria that define an uncivil state – or a 'rogue state', to use a more contemporary term – have been suggested by Anne-Marie Slaughter, who has argued that the Security Council should

> adopt a resolution recognizing that the following set of conditions would constitute a threat to the peace sufficient to justify the use of force: 1) possession of weapons of mass destruction or clear and convincing evidence of attempts to gain such weapons; 2) grave and systematic human rights abuses sufficient to demonstrate the absence of any internal constraints on government behaviour; and 3) evidence of aggressive intent with regard to other nations.[83]

The doctrine of PESD can be institutionalised within international law through this mechanism. But the proposal, despite its careful wording, raises complex questions as to whether the Security Council can legitimately pass such a sweeping resolution, who can decide whether the conditions have been met (there is an arguable case that the United States itself meets the first and third of these criteria, and perhaps even the second) and who would use force in response.

It is not only by recourse to the doctrine of self-defence, of course, that the current US strategy is attempting to displace various doctrines of international law that limit the use of force and prohibit intervention and aggression. Rather, as the action against Iraq has demonstrated, these policies are buttressed by a series of inter-related arguments that are based on human rights considerations which allude in various ways to Kosovo and the example it provided of 'humanitarian intervention' that was 'illegal but legitimate'. The attack on Iraq is principally an attack on a 'rogue state'; but it is also an act of liberation of the people of Iraq from a dictator who subjected them to extreme abuse. The Iraqi,

[82] Kant, 'Perpetual Peace', p. 98.

[83] Anne-Marie Slaughter, 'A Chance to Reshape the UN', *Washington Post*, April 13, 2003, B7.

then, is both dangerous and oppressed, but conquest is the appropriate response in either event, the difficulty being that this might succeed in producing a liberated terrorist. These simultaneous and varying characterizations of the non-European are, again, familiar from Vitoria's time.[84] Vitoria provides a useful approach to Iraq, not only because the arguments he presents are being so closely replicated, but because he provides a variety of possible reasons for exercising legitimate title over the uncivilized.

Importantly, however, in the contemporary setting the humanitarian arguments are inextricably connected with – fused with – self-defence, rather than seen purely as alternative and adjunct arguments. This is because, following the logic of Kant, security can now be achieved only through the transformation of the uncivil state into a civil state, and in a globalised world awash with WMD, the 'other' ceases to be a threat only once it is transformed into an 'us'. It may maintain its 'difference' only to the extent sanctioned by Western understandings of tolerance and plural identities, all of which have to conform, largely, to the liberal-democratic state.

The transformation of 'the other' has been the continuous goal of the 'civilizing mission', but this task has acquired an unprecedented urgency, an imperative character, precisely because it is now so powerfully linked to the idea of self-defence and survival, not only of the United States but of civilization itself. Within this scheme, cultural differences in themselves may become a marker for an armed attack justified as self-defence. The new imperial imperative created in these new circumstances, while promising to establish perpetual peace, may very well instead result in endless war.

Terrorism and the United Nations: a Vitorian moment

What, then, is the relationship between this imperial WAT and the existing law of the United Nations?[85] How is American hegemony affecting

[84] Another possible title is founded either on the tyranny of those who bear rule among the aborigines of America or on the tyrannical laws which work wrong to the innocent folk there, such as that which allows the sacrifice of innocent people or the killing in other ways of uncondemned people for cannibalistic purposes. (Vitoria, *De Indis*, p. 159)

[85] See speech of Kofi Annan to the UN General Assembly, September 2003, where it is clear that the US concerns have animated a whole series of initiatives within the United Nations, including the establishment of special groups to investigate these matters. Kofi Annan, Speech to the United Nations General Assembly, 23 September 2003, Press Release SG/SM/8891, www.un.org/News/Press/docs/2003/sgsm8891.doc.htm.

the basic doctrines of international law?[86] Some aspects of these issues can be illuminated by examining three instances of actions directed against international terrorism: the action against Libya arising from the Lockerbie bombing; the US action against Afghanistan; and the US action against Iraq.

The very invocation of 'the terrorist' suggests a threatening entity beyond the realm of the law that must be dealt with by extraordinary emergency powers, or even extra-legal methods. In the *Lockerbie* Case, the spectre of terrorism was invoked to justify recourse by the Security Council to its emergency (Chapter VII) powers, under which the Council decided that Libya had to take a series of measures to 'cease all forms of terrorist action and assistance to terrorist groups' and, in effect, to surrender two Libyan nationals accused of plotting the Lockerbie bombing.[87] The ICJ held – in the provisional measures hearing of the dispute – that the resolution prevailed against the rights that Libya alleged it possessed under the Montreal Convention, under which Libya claimed it had the right to try the suspects themselves.[88] Here, the extraordinary measures taken under Chapter VII prevailed against established treaty rights but were nevertheless taken in a manner compatible with the Charter which explicitly provides for such measures.

Following the 9/11 attacks the Council, on 12 September 2001, passed Resolution 1368, which simultaneously recognized the right of individual and collective self-defence, while expressing its 'readiness to take all necessary steps to respond to the terrorist attacks'.[89] Antonio Cassese acutely argued that '[t]his resolution is *ambiguous and contradictory*',[90] and the Council 'wavers between the desire to take matters into its own hands and resignation to the use of unilateral action by the US'.[91]

In Security Council Resolution 1373, passed on 28 September 2001, the Security Council appeared to give states the broad power to '[t]ake the necessary steps to prevent the commission of terrorist acts'.[92] The 'necessary steps' arguably included the use of force for the very broadly stated

[86] Michael Byers and Georg Nolte (eds.), *United States Hegemony and the Foundations of International Law* (Cambridge, Cambridge University Press, 2003).

[87] SC Res. 748 (1992).

[88] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. US)*, ICJ Reports 1992, p. 114.

[89] SC Res. 1368 (2001). [90] Cassese, 'Terrorism', 996.

[91] Cassese, 'Terrorism', 996. [92] SC Res. 1373 (2001).

purpose of preventing terrorism.[93] It was not clearly established in international law that force could be used by a state attacked by terrorists against the state which simply harboured terrorists. Indeed, the rules of state responsibility suggest that a number of conditions have to be satisfied before the actions of a private actor can properly be attributed to the state and thereby give rise to responsibility on the part of the state.[94] Even if the Security Council resolution could be read as authorizing the use of force against states such as Afghanistan, a profound question remains as to whether the Security Council had the legal power to issue such a permission. Nevertheless, in his analysis of Resolution 1373 and its relationship to the US actions against Afghanistan, Michael Byers argued that the United States, rather than relying on Council authorization, justified its actions on the basis that self-defence permitted the use of force against states 'which actively support or willingly harbour terrorist groups who have already attacked the responding State'.[95] Byers further concludes that this principle has now become a part of customary international law.[96] The attack on Iraq, of course, takes this trend a step further, as the action was not explicitly authorised by the Security Council, but might arguably be justified as an exercise of preemptive self-defence.[97]

What is evident in the developments from the *Lockerbie* Case to Iraq is the gradual subordination of the UN system and its emergency, Chapter VII powers in responding to terrorism, to the unilateral use of force ostensibly in self-defence. In *Lockerbie*, the United Nations controlled the situation; in Afghanistan, a system of UN control seemed to co-exist with unilateral action; and with Iraq the United States took unilateral action. The WAT, if it is to be accommodated within international law, has such far-reaching consequences that it can be seen, in effect, as creating a new international jurisprudence, of 'national security', that

[93] Michael Byers suggests that the phrasing could be used as an argument to justify the use of force, while disagreeing that such an argument would be valid. Michael Byers, 'Terrorism, the Use of Force and International Law after 11 September', (2002) 51 *International and Comparative Law Quarterly* 401–414 at 402.

[94] Byers, 'Terrorism, the Use of Force', 408–409; Sean Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter', (2002) 43 *Harvard International Law Journal* 41–51 at 50.

[95] Byers, 'Terrorism, the Use of Force', 409–410 (footnote omitted).

[96] *Ibid.*

[97] See, for example, Yoo, 'International Law and the War in Iraq'. Others argue that the Council resolutions while not explicit, nevertheless permitted the use of force. My own position is that the US action was illegal.

recreates the sort of Hobbesian universe whose defining character is fear,[98] and which will be based on the right of the world's one superpower, the United States, to wage unilateral, preemptive war, rather than the system of the United Nations. While the right to preemptive self-defence articulated by the United States might be couched in general and universal terms, political realities would suggest that it is a right, in effect, that can be exercised only by extremely powerful states.

These basic characteristics of the WAT suggest, I would argue, why we could be seen as living in what might be termed a 'Vitorian moment' – that is, a moment when the conceptualization of 'the other' – the terrorist, the barbarian – invokes a response that combines doctrines of violation, self-defence, intervention, transformation and tutelage that threaten the existing law and could result in a dramatic shift in the character of the law. The terrorist is in various ways connected with fundamentalist Islam and the Muslim world which has, since the time of the Crusades at least, represented the extreme 'other' against whom the civilized West must respond. The measures taken in the WAT have tested, if not undermined, international human rights law, international humanitarian law and, most significantly, the law relating to the UN Charter and the use of force.[99] And just as the novelty of the threat posed by terrorism is invoked to justify departures from the UN system, so too was the novelty of the Indian reiterated and emphasized by Vitoria in his attempts to justify and elaborate a new jurisprudence that was based on secular natural law rather than on a religious law administered by the Pope. While subtly incorporating aspects of that papal jurisprudence within the new scheme he was developing, Vitoria's work marginalized the Pope and expanded the realm of operation of the new secular law that was administered by the sovereign. Now, the UN Charter is threatened with displacement, much as the Pope was, and the power to administer the decisive natural law is transferred to the individual sovereign – the United States acting in self-defence. Sometimes, of course, it is the United States that appears to be assuming the powers of the Pope, God's representative on earth who will decree what is just and unjust and punish wrongdoers. Confusingly, on other occasions, the

[98] See Anthony Carty, 'The Terrors of Freedom: The Sovereignty of States and the Freedom to Fear', in John Strawson (ed.), *Law After Ground Zero* (London: The Glass House Press, 2002), pp. 44–56 at p. 45.

[99] Vaughan Lowe, 'The Iraq Crisis: What Now?', (2003) 52 *International and Comparative Law Quarterly* 859–871.

United States itself seems to be God, the God of the Old Testament who speaks through his prophets in their regular appearances on CNN and who is slow to anger but, once aroused, terrible in his vengeance which turns night into day, stunning the people of Babylon into shock and awe.

The *Lockerbie* Case, together with a number of other actions taken by the Security Council in the 1990s, raised a number of crucial legal issues – whether the actions of the Security Council could be reviewed by the ICJ and whether in fact the Security Council was bound in any way by international law, and the question of the powers of the Security Council to act, in effect, like a legislature. Those important questions have been replaced by another set of issues in which it is not the ICJ alone, but the Security Council and the United Nations itself that might be undermined by the imperatives of the WAT and the doctrines devised by the United States to conduct that war.

What these developments might bring about, then, is not the shift from natural law to positivism, or from positivism to pragmatism, but a law, once again initiated and animated by the invocation of the 'uncivilized' and the 'barbaric' that, in the name of security, produces a new form of imperialism. Self-defence is, for the reasons I have outlined above, in many ways the most problematic and delicate doctrine of international law, the one doctrine that is inherently connected with unilateral action. It is precisely through the doctrine of self-defence that the entire structure of the 'civilizing mission' is being recreated. This new jurisprudence of security does not, however, completely repudiate international law, just as, in Vitoria's new jurisprudence, papal law continued to play a role in the system. Rather, the new international law of security invites international law and institutions, appropriately amended, to join with it in this great task of protecting civilization.

This new international law seeks to further itself at a number of different levels. It furthers itself jurisprudentially by exploiting all the techniques and distinctions that undermine the idea of law and its formally binding quality, through recourse to ethics and international relations.[100] It seeks to elaborate the ambivalences and uncertainties, that have been generated by the agonizing question of how international law should respond to the threat of genocide in Kosovo by asserting that

[100] See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002); Martti Koskenniemi, '"The Lady Doth Protest Too Much", Kosovo, and the Turn to Ethics in International Law', (2002) 65 No2 *Modern Law Review* 159–175.

the actions in Iraq, similarly, could be 'illegal' and yet 'legitimate'. In institutional terms, it seeks to make a reconfigured and compliant United Nations a crucial actor in this war against terrorism. Thus the United Nations is invited by the United States to make available all its resources to recreate the state of Iraq – and, in effect, legitimize the violation of its own founding principles. Further, the new imperialism of national security law infuses and seeks to deploy all the other areas of law, such as human rights and democracy, to further itself. Human rights is deployed as both an argument for invasion and then, that invasion having been completed, as an argument for transformation, in which international human rights law – as a proxy for the law of the United States – stands for the norms that must be achieved in order to bring about a 'civil state' thus, supposedly, bringing about international stability. The attraction for human rights scholars is considerable, especially given the atrocities committed by Saddam Hussein, because what human rights law has notoriously lacked is enforcement. It is in this way, through the invocation of human rights, that what might be seen as an illegal project of conquest is transformed into a legal project of salvation and redemption.

This new imperialism seeks, then, to further itself jurisprudentially (by using the recourse to 'international relations' and 'ethics', both of which have been deployed to undermine the idea of a formal and binding law), doctrinally (principally through the new version of self-defence and then through human rights and humanitarian intervention) and institutionally (for example, through the use of the enforcement mechanisms of the United Nations and its nation-building capacities, and the use of the Security Council to change international law itself, most prominently the law relating to the use of force).

Terrorism, self-defence and Third World sovereignty

The Third World, I have argued through this book, lacks effective sovereignty because of the manner in which sovereignty doctrine has been developed in international law. Nevertheless, at the very least, Third World peoples did acquire political sovereignty, an important development that was consolidated through the evolving law of self-determination and the passage of a series of resolutions that elaborated and reaffirmed the principle of non-intervention. The *Nicaragua* Case could be seen as a landmark in the progress of this trend, as it reaffirmed the character and integrity of the sovereignty of a Third

World state that was being threatened by a superpower, the United States. As the ICJ reiterates in the *Nicaragua* Case:

> The Court cannot contemplate the creation of a new rule opening up a right of intervention by one state against another on the ground that the latter has opted for some particular ideology or political system.[101]

In all these different ways, Third World sovereignty was asserted and established, whatever the inequalities of power that compelled Third World states to enter into treaties to their disadvantage and agree, for instance, to wide-ranging and extraordinarily intrusive IFI authored programmes. At least in this most basic sense, then, the United Nations developed a system of international law that outlawed conquest and affirmed the right of a state to establish a particular ideology or political system. It is precisely this set of ideas that is being threatened by the new developments that I have termed 'imperialism as self-defence'.

Self-defence is a crucial right of states. Indeed, the self-defence of the United States is of such massive significance that the attempts to ensure it have resulted in all the profound consequences that I have attempted to trace here. The anxieties of many states regarding their own self-defence are no greater than the anxieties experienced by the United States. In this era of massively sophisticated and destructive technology, 'weapons of mass destruction', arguably, are essential for any state's self-defence. Certainly, the established nuclear powers show very little sign of relinquishing their weapons. On the contrary, some of them vehemently argued, in the *Nuclear Weapons* Case, that they had every right to use them in self-defence. Nevertheless, any attempt by states that could be characterized by the United States, at its own discretion, as 'rogue states' to acquire WMD – broadly defined – appears to make it a potential target of attack. Vitoria's jurisprudence established that the right to wage a just war is a fundamental right; nevertheless it is to be enjoyed only by Christian states. It now appears that the right of self-defence, which surely implies the right to arm oneself, is a fundamental right, affirmed in every jurisprudence, but exercisable only by Western civilized states.

This emerging position regarding the significance of WMD in the context of the war against terrorism furthers a trend that was evident to judges more sensitive to the Third World position in the *Nuclear Weapons* Case, who confronted the peculiar situation that would arise if the use

[101] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)*, ICJ Reports 1986, p. 14 at p. 133.

of nuclear weapons in self-defence was found to be legal, in a situation where the use of less damaging but no less horrifying weapons such as chemical weapons that would be more readily available to poor countries would be deemed illegal. As Judge Weeramantry pointed out in that case, there are injustices inherent in a view where nuclear states could be subjected to one regime and non-nuclear states to another with respect to international humanitarian law.[102] The fundamental principle of international law that stipulates that all sovereigns are formally equal would posit that any right of PESD that develops in international law should be enjoyed by all states, as it derives from the inherent right of all states to self-defence. The development of the doctrine in the context of the WAT, however, suggests that it is only certain states, powerful states that would enjoy such a right.

The UN system risks being gradually distorted as a result of all these developments. Its considerable enforcement mechanisms are now being used, in effect, to prevent certain states from developing nuclear weapons through Security Council monitoring of the Non-Proliferation Treaty, while established nuclear states are not subject to any comparable pressure to dispense with their weapons. Similarly, the United States continues to attempt to use the Security Council as an international legislative power even while asserting its right to disregard the Council and the United Nations when it thinks fit. Not the least of the consequences of the WAT is the possibility that it will establish an imperial Security Council that exists permanently in a Chapter VII mode and that will purport to legislate all manner of international activities in the name of the WAT. These developments suggest a dual process: the further expansion, ostensibly within the framework of the UN Charter, of the powers of the large states, and a corresponding diminution in the powers of the smaller states. The United Nations, if it accedes to the US position about its proper role, runs the risk of being transformed, to an even greater extent, into the Bank or the IMF: that is, into an institutional mechanism by which certain powerful states can impose on the rest of the international community a law by which they do not regard themselves

[102] See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226 at pp. 526–527 (Dissenting Opinion of Judge Weeramantry); 'Least of all can there be one law for the powerful and another law for the rest.' *Ibid.* Further, Weeramantry points out: 'A legal rule would be inconceivable that some nations alone have the right to use chemical or bacteriological weapons in self-defence and others do not. The principle involved, in the claim of some nations to be able to use nuclear weapons in self-defence, rests on no different juristic basis.' *Ibid.*, p. 527.

as bound. Even the UN Security Council's current record in the WAT surely raises several problematic questions. The vital questions raised by the *Lockerbie* litigation regarding, for example, the powers of the Council and the extent to which the Council itself is bound by international law and the law of the Charter, are now especially significant. Was it legally open for the Security Council to purport, however obliquely, to authorize so quickly the use of force against Afghanistan?

To argue for the continuing validity of the current UN system is not meekly to acquiesce to terrorism. In exploring the way in which language creates the 'other' I am not, of course, in any way, attempting to suggest that the killing of thousands of innocent people in attacks that have deliberately targeted civilians is in some way 'unreal' or negligible or condonable. Rather, as many scholars and commentators almost immediately after 9/11 pointed out, different ways of understanding and characterizing those events had a profound impact on how to address them. The resolve of the international community to address the problems and threats of terrorism is surely evident in the many steps the United Nations has taken to address these problems. Some views of the Non-aligned movement on the issue of terrorism needs to be quoted in full:

> 119. The Heads of State or Government rejected the use, or the threat of the use of armed forces against any NAM [Non-aligned movement] country under the pretext of combating terrorism, and rejected all attempts by certain countries to use the issue of combating terrorism as a pretext to pursue their political aims against non-aligned and developing countries and underscored the need to exercise solidarity with those affected. They affirmed the pivotal role of the United Nations in the international campaign against terrorism. They totally rejected the term 'axis of evil' voiced by a certain State to target other countries under the pretext of combating terrorism, as well as its unilateral preparation of lists accusing countries of allegedly supporting terrorism, which are inconsistent with international law and the purposes and principles of the United Nations Charter. These actions constitute on their part, a form of psychological and political terrorism.[103]

This emphatic assertion on the continuing importance of the United Nations is surely significant, not only because of the large number of countries that belong to the NAM, but precisely because many of them have suffered the worst consequences of terrorism. Thousands

[103] Final Document of the XIII Conference of Heads of State or Government of the Non Aligned Movement, Kuala Lumpur, 24–25 February 2003, para. 119, www.nam.gov.za/media/030227e.htm.

of people have died in these countries as a result of terrorism, without those deaths ever being so exalted as to represent an attack on 'civilization' itself. Nor have these countries, despite these ongoing tragedies, sought to dismantle the existing system of international law. Indeed, when taking action against terrorism they have been continuously condemned by the very states that now disregard foundational international norms relating to international humanitarian law and international human rights law in their own WAT. Terrorism is universally condemned. The great danger of the war against terrorism, however, is that it will fragment the international community to such an extent that the coherent global action needed to respond to the real problems of terrorism will become impossible.

Scholars and policy makers confidently recommending imperial rule characterize it as both desirable and easily achieved. There is a presumption in much of this writing that imperialism is simply a matter of will, that the Western states, in a moment of weakness and delusion, provided independence to backward native peoples who – being incorrigibly backward despite their years of colonial tutelage – lacked the capacity properly to exercise it. As events in Iraq have suggested, imperialism may not be so easily implemented. The consequences of imperialism are unpredictable for both the ruler and the ruled. Edmund Burke, for example, argued that imperialism had an inevitably corrupting effect on the polity of the imperial power.[104] Since the time of Kant, at least, international relations literature has either implicitly or explicitly characterized democratic governments as being more responsible, mature and far-seeking in their judgements. As Jose Alvarez has suggested in his searching article on the subject, liberal democratic states do not always behave better.[105] The United States and United Kingdom justified going to war in Iraq, despite the absence of any UN authorization, on the basis that Saddam Hussein possessed WMD. The absence, so far, of any such weapons, and the complex questions surrounding the failure of intelligence and the manner in which available intelligence was used by the

[104] See Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth Century British Liberal Thought* (Chicago: University of Chicago Press, 1999), pp. 152–189. Mehta's study contrasts Burke's approach to empire, on the one hand, with that of John Stuart Mill, and J. S. Mill on the other, both of whom, despite their commitment to liberalism, were staunch supporters of empire.

[105] Surveying the issues of compliance, Alvarez argues that 'we still have little reason to be confident that the levels of compliance across the range of subjects covered by international obligations fall along "liberal"/"non-liberal" lines'. Alvarez, 'Do Liberal States Behave Better?', 210.