

State Sovereignty, International Legality, and Moral Disagreement

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INTRODUCTION

The foundational principle of the international legal order is the “sovereign equality” of states. “Sovereignty” in this sense refers, not to authority altogether beyond the reach of law, but to the reciprocal terms of the recognition that the members of an international legal order confer on one another.¹ Although the predication of international order on respect for the sovereignty of each member entity is traceable to the 1648 Peace of Westphalia – a point frequently highlighted by those seeking to portray the notion as outmoded – the legal implications of this sovereignty have varied markedly from era to era.

The current understanding of sovereign equality is owing in part to the 1945 United Nations Charter, which exalts the concept,² but even more to the geopolitical realities of the period from the late 1950s to the late 1980s. As Western and Socialist blocs turned from open confrontation to espousal of “containment” and “peaceful coexistence” (respectively), and as a Non-Aligned bloc emerged from decolonization to assert distinctive interests and values in the name of a “Third World,” the United Nations system became a platform for accommodation among international actors who recognized few common principles of legitimate and just internal public order. The resulting normative formula, stressing non-intervention in the internal affairs of states, achieved its

¹ Much confusion arises from the use of the term “sovereignty” to refer, not merely to different conceptions, but to wholly different concepts, pertinent to different conversations. I have elsewhere distinguished the international-juridical sense of sovereignty (the terms of the reciprocal recognition that states accord one another in the international order) from the domestic-juridical sense (the ultimate source of authority within a particular domestic legal regime), the empirical political science sense (the effective capacity to exercise unilateral control over field of activity, or to set policies unilaterally in a particular field of activity), and the policy sense (a supposed imperative to maintain or reassert unilateral control over a field of activity). Brad R. Roth, “The Enduring Significance of State Sovereignty,” *Florida L. Rev.* 56 (2004), 1017, 1018-23.

² U.N. Charter, art. 2, para. 1.

most authoritative expression in the General Assembly's 1970 statement of legal principles known as the Friendly Relations Declaration.³

Sovereign equality, so understood, has all the while drawn moral and political criticism from nearly every quarter – from liberal cosmopolitans, from conservative realists, from neoconservative unilateralists, and from advocates for groups marginalized by the international system. The changed material and ideational conditions of the early twenty-first century have further called into question the continued viability of sovereign equality as the foundational principle of the international legal order. Long-term structural changes inevitably will – and indeed, should – result in modifications to normative constructs developed in a bygone era.

Nonetheless, calls for sweeping reform need to confront an accurate unifying account, and a properly qualified moral and political defense, of the existing legal framework. It is by no means clear that the core elements of that pluralistic framework are outmoded or dysfunctional. The foundations of the United Nations system reflect persistent, albeit bounded, disagreement within its membership as to fundamental principles of political morality. While the boundaries of the system's pluralism have narrowed progressively in the course of the United Nations era – excluding conquest and genocide from the outset, colonialism and *apartheid* in the 1960s and '70s, and “ethnic cleansing” and peculiarly unpopular and violent seizures of state power in the 1990s – accommodation of diversity in modes of internal political organization remains a durable theme of the international order. This accommodation of diversity underlies the international system's commitment to preserve states' territorial integrity and political independence, often at the expense

³ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (1970).

of other values.

The persistence of sovereign prerogative within international legal doctrine is especially unpopular with certain human rights-oriented scholars – advocates for expansive assertions of *jus cogens* (non-consent-based norms), universal jurisdiction, and humanitarian intervention – for whom international legality represents the promise of a global justice that transcends territorial limitations as well as political, ideological, and cultural differences. Yet one can posit, *contra* this “transcendent justice” approach, a more modest project of international legality, based on a recognition that fundamental disagreement about principles of just public order constitutes, at least for the time being, an ineradicable aspect of the human condition. An alternative jurisprudence of “bounded pluralism” may vindicate the essence of the currently-prevalent doctrinal structure, even if not each and every victory of state prerogative. Moreover, because international obligations on matters of internal public order and international strictures on (even righteous) cross-border exercises of power operate on separate legal planes, one can concede the inviolability of illiberal systems of internal public order without withholding judgment on the duly incurred legal obligations – let alone the moral duties – that states owe to their own nationals.

Contemporary normative political theory has given little systematic attention to the distinctive problems of international legal order.⁴ Theorists of human rights have typically sought to derive universally applicable standards of internal public order from first principles, without much regard to the implications for the international system of the empirical reality of conflicting political

⁴ Allen Buchanan’s recent book, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford University Press, 2004), points out and seeks to remedy this deficit.

moralties.⁵ Theorists of “ethics and international affairs” have been more concerned to develop moral standards for a given state’s external behavior in discrete subject areas (e.g., the criteria of “just war”)⁶ than to formulate a legal framework for coexistence and cooperation among non-like-minded states. Even John Rawls’s path-breaking late work on a liberal *ethos* of relations with non-liberal political communities did not purport to provide a blueprint for an international public order; whatever implications Rawls expected his “law of peoples” to have for international law, he understood his enterprise as the development of moral rather than strictly legal standards, recognizing that the latter would need to take account of practical considerations beyond the scope of his project.⁷ It is one project to develop guidelines for unilateral action in the absence of a positive legal order, and quite another to prescribe reforms to the standards and processes that govern an existing (even if only partially efficacious) multilateral order, or to establish thresholds for unilateral *ad hoc* flouting of applicable positive norms that impede morally desirable action in particular instances.

The moral justification for a pluralist international order is frequently assumed to rest on a claim that human beings’ very identities are shaped by the communities in which they are “radically situated,” and that, consequently, political values can be assessed only within the framework of a given community’s distinctive character and traditions. This claim, however, is not only highly

⁵ Much literature has, of course, addressed the philosophical validity of the cultural relativist challenge to the assertion of universally applicable moral rights, but less has focused on evaluating institutional responses to the fact of moral discord. Important exceptions are Michael Walzer’s brief defense of non-intervention doctrine in *Just and Unjust Wars* (New York: Basic Books, Inc., 1977) and his more elaborate response to critics of that defense, Walzer, “The Moral Standing of States,” *Phil. & Pub. Aff.* 9 (1980), 209.

⁶ Walzer’s *Just and Unjust Wars* is, of course, a classic in this respect.

⁷ John Rawls, *The Law of Peoples* (Cambridge, Mass: Harvard University Press, 1999).

questionable on its merits, but also a poor fit with the pluralism that the international system actually embodies. Moreover, cultural difference, so frequently discussed in this context, is neither a necessary nor sufficient condition for radically conflicting conceptions of legitimate and just public order. The relevant challenge is not, as Rawls imagined, the existence of inherently “non-liberal peoples,” but the existence of highly unfavorable social conditions that give rise to a multiplicity of plausible, but sharply clashing, political solutions. Harsh circumstances call forth harsh measures, frequently adopted (often mistakenly, to be sure) by informed persons of good faith and sound reason. A focus on the constant rather than the contingent, on the collective past rather than the present collective projects that call for distinctively political decisions, distorts the understanding of fundamental political disagreement and the consequent need for accommodation among such political entities as have adopted, for the time being, incompatible conceptions of public order.

Sovereign equality is an unromantic foundational principle, designed for an unromantic social reality. Its moral and pragmatic justifications are intertwined. The first section below will summarize the unifying account of the principle’s manifestations in international law.⁸ The second section will defend the principle as a morally sound response to persistent and profound disagreement within the international community as to the requirements of legitimate and just internal public order.

⁸ For a more elaborate account, see Brad R. Roth, “The Enduring Significance of State Sovereignty,” *supra*, at 1026-37. That article articulates in more general terms an approach developed in earlier writings on collective non-recognition of governments, armed intervention, and international criminal justice. See, e.g., Roth, *Governmental Illegitimacy in International Law* (Oxford: Clarendon Press, 1999); Roth, “Bending the Law, Breaking It, or Developing It? The United States and the Humanitarian Use of Force in the Post-Cold War Era,” in Michael Byers & Georg Nolte, eds., *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003), 232; Roth, “Anti-Sovereignism, Liberal Messianism, and Excesses in the Drive against Impunity,” *Finnish Y.B. Int’l L.* 12 (2001), 17; Roth, “Retrospective Justice or Retroactive Standards? Human Rights as a Sword in the East German Leaders Case,” *Wayne L. Rev.* 50 (2004), 37.

I. SOVEREIGN EQUALITY IN THE INTERNATIONAL SYSTEM

A. *The Nature and Content of Sovereignty in International Law*

The term “sovereign equality” might well be deemed semantically inept, as on its face it demands a reciprocal renunciation of the same unlimited authority that it nominally invokes. The international system affirms and bolsters only such assertions of state prerogative as are consistent with the system’s animating purposes; it therefore necessarily qualifies the nature and scope of state prerogative. Yet the paradox and tension inherent in the term are appropriate to describing a complex, contested, and not strictly hierarchical relationship between international and internal legal orders.

The sovereign equality of states is best understood to establish three strong, but not irrebuttable, legal presumptions: (1) a state is presumed to be obligated only to the extent of its actual or constructive consent; (2) a state’s obligations, while fully binding internationally on the state as a corporative entity, are presumed to have legal effect within the state only to the extent that domestic law has incorporated them; and (3) the inviolability of a state’s territorial integrity and political independence, as against the threat or use of force or “extreme economic or political coercion,” is presumed to withstand even the state’s violation of international legal norms.⁹ Thus, however paradoxically, international law demands respect for state prerogative, even at the risk of impeding, not only the establishment of new legal norms, but also the implementation of existing legal norms.

Consequently, states are, at once, legally bound by obligations pertaining to the character of

⁹ See Roth, “The Enduring Significance of State Sovereignty,” *supra*, at 1026.

internal public order (i.e., human rights norms) and legally protected from the very coercion that may be required to assure their compliance. Human rights norms do not, in and of themselves, vitiate the legal constraints on the application of power across territorial boundaries.¹⁰

Yet respect for sovereignty in no way excludes judgmental scrutiny of, or international ostracism for, internal practices. Even to the extent that such respect renders international standards of internal public order effectively non-compulsory, it renders them no less obligatory.

Moreover, the barriers that sovereignty poses to international regulation of internal public order are somewhat less formidable than they may initially appear. International norm-formation is in many respects only superficially consensual: states can become bound to customary international human rights norms collectively and implicitly, as a result of their acquiescence in (largely rhetorical) patterns of practice. Although “persistent objection” would in principle exempt a state from an emergent norm’s coverage, there is no way to “opt out” after the customary norm is deemed to have been fully established (even if the state in question came into being only after the norm’s formation). Moreover, certain norms, such as the prohibition of genocide, are so fundamental that “the international community of States as a whole” is said to have recognized them as “peremptory” norms (*jus cogens*), subject neither to persistent objection nor to “derogation” (i.e., justification or

¹⁰ Frustrated by such legal constraints, W. Michael Reisman has complained that “[b]ecause rights without remedies are not rights at all, prohibiting the unilateral vindication of clear violations of rights when multilateral possibilities do not obtain is virtually to terminate those rights.” W. Michael Reisman, “Sovereignty and Human Rights in Contemporary International Law,” *Am. J. Int’l L.* 84 (1990), 866, 875. As Reisman himself acknowledges, however, routine circumvention of those constraints would erode the underpinnings of the system that makes those rights possible. Reisman, “Why Regime Change Is (Almost Always) a Bad Idea,” *Am. J. Int’l L.* 98 (2004), 516, 516-17 (“Our international legal system is scarcely imaginable without” territorial communities having the right to govern themselves “without interference”; “state sovereignty prevails in all but the most egregious instances of widespread human rights violations”).

excuse for non-performance).¹¹

In addition, although international obligations are ordinarily addressed to states and not to individuals, certain norms (most prominently, the core standards of the humanitarian laws of war) are understood to entail personal criminal (as well as civil) liability, even where they are unreflected in or contradicted by the domestic legal order in force at the time and place of the offending act's commission. Notwithstanding extensive jurisdictional limitations, personal and functional immunities, and safeguards against retroactive criminalization of conduct, individuals – including state officials carrying out putatively official functions – may under certain conditions be prosecuted in Security Council-authorized *ad hoc* international criminal tribunals, in the newly created International Criminal Court, or in foreign state courts asserting extraterritorial jurisdiction.

Finally, the Security Council (operating on the basis of nine out of fifteen affirmative votes, absent a veto from one of the five Permanent Members) has unreviewable discretion under Chapter VII of the Charter to find even purely internal crises (such as Somalia in 1992) a threat to international peace, and pursuant to that finding, to authorize coercive measures, both short of and including the use of military force.¹² Furthermore, in certain instances in which the Security Council has issued no such authorization, forcible responses to perceived threats of imminent humanitarian catastrophe have proceeded without international condemnation and even have received, in the cases of interventions by the Economic Community of West African States (ECOWAS) in Liberia and Sierra Leone, a *post hoc* Security Council imprimatur.

Thus, the international system's deference to sovereign prerogative is by no means absolute.

¹¹ See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 53, 1155 U.N.T.S. 331, 352.

¹² See U.N. Charter, arts. 39, 41, and 42.

Still, non-consensual norms, personal legal accountability for state-sponsored conduct in breach of international obligations, and coercive intervention to enforce breached obligations are exceptional, not routine. Efforts to extend, let alone to generalize, these exceptions occasion principled confrontations between those committed to maintaining, and those committed to transcending, the pluralistic framework of the international legal order.

B. *Self-Determination and Non-Intervention*

The central normative idea underpinning the existing sovereign equality framework is the right of “peoples” to self-determination. “All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”¹³ Yet contrary to common belief and a torrent of wishful scholarly rhetoric, the authoritative interpretation of the self-determination right that emerges from United Nations pronouncement and practice reduces almost entirely to a prohibition on coercive interference in the internal affairs of existing states. The right’s bearers are territorially-defined political communities – conforming to the recognized borders of either existing states or overseas colonial territories – not ethno-national groups or other affective communities.¹⁴ Those accredited to assert the right in the

¹³ *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514 (XV) (1960) (89-0-9), para. 2. The Security Council reaffirmed the statement in S.C. Res. 183 (1963), para. 4, and the language is repeated verbatim in Common Article 1 of the 1966 Human Rights Covenants. *International Covenant on Civil and Political Rights* (opened for signature Dec. 19, 1966), art. 1, 999 U.N.T.S. 171, 171 [hereafter ICCPR]; *International Covenant on Economic, Social and Cultural Rights*, (opened for signature Dec. 19, 1966), art. 1, 993 U.N.T.S. 3, 3. Moreover, one of the enumerated purposes of the United Nations is to “develop friendly relations based on respect for the principle of equal rights and self-determination of peoples,” U.N. Charter, art. 1(2), and the Charter itself speaks in the name of “We the Peoples of the United Nations,” *ibid.*, preamble.

¹⁴ Although the definition of the term “people” for the purposes of the self-determination right is not so limited in principle, the international community has never authoritatively designated a bearer of this right outside of the context of colonialism and its vestiges. Even “indigenous peoples,” the sub-

name of its bearers earn their standing by achieving, not popular approval by democratic means, but popular acquiescence by whatever means (with the exception of undue interference from abroad). The right can be summarized, with much irony but little exaggeration, as a right of territorial populations to be ruled by their own thugs, and to fight their civil wars in peace.

1. *Popular Sovereignty and Effective Control*

For the purposes of international law, sovereignty belongs not to any governmental apparatus, but to “the state” in the abstract. Sovereignty is a legal attribute of a territorially bounded political community enjoying full membership in the international system. Recognized exercises of sovereignty are acts legally attributed to the will of the designated territory’s permanent population as a whole. From international law’s external standpoint, sovereignty itself lies not in a given constitutional order (*pouvoir constitué*), but in the underlying constituency (*pouvoir constituant*) whose will to accept or repudiate that order must somehow be discerned.

Nonetheless, a governmental apparatus exercising “effective control through internal processes” has presumptive standing to assert rights, incur obligations, and confer immunities on behalf of the sovereign entity. According to the system’s prevalent wisdom, empirical investigation to ascertain public opinion in a foreign state is most often impracticable, “popular will” itself is a complex and normatively-loaded concept, and any imposition from abroad of procedures calculated

national groups to which the self-determination right might most plausibly apply, have not been accorded this status. *See Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No. 169), 72 ILO Official Bull. 59, entered into force Sept. 5, 1991, art. 1(3) (“The use of the term ‘peoples’ in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law”).

to measure “popular will” is presumptuous at best, and a usurpation at worst.¹⁵ The Friendly Relations Declaration accordingly transforms the language of the right of peoples to self-determination into the right of states to non-intervention: “Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.”¹⁶

Lacking shared normative criteria for governmental legitimacy, the international community has most frequently taken popular acquiescence, as an indicator of – or proxy for – sovereign will, provided that only that such acquiescence be secured without undue external interference.¹⁷ There thus follows a presumptive duty, on the part of each of the entities bearing equal juridical status, to respect the outcome of political processes – that is to say, civil wars, insurrections, and coups no less than free and fair elections – internal to the others.¹⁸

¹⁵ See generally Roth, *Governmental Illegitimacy*, *supra*, at 136-49, 160-71, 253-364.

¹⁶ Friendly Relations Declaration, *supra*. The document elaborates as follows:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.

¹⁷ See Roth, *Governmental Illegitimacy*, *supra*, at 136-49, 160-71, 253-364.

¹⁸ The non-intervention norm was most famously elaborated by the International Court of Justice in condemning U.S. military support for Nicaraguan “*contra*” insurgents. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), paras. 257-68. The Court reached beyond the pleadings to address the claim of the U.S. Congress that the Government of Nicaragua had breached “solemn commitments to the Nicaraguan people, the United States, and the Organization of American

Throughout most of the history of the current system, internal armed conflict was widely perceived, not as an anomaly or as evidence of “state failure,” but as a legitimate way for questions of public order to be worked out within states. Most governments through most of that period, after all, traced their origins more or less directly to a *coup d’état*, insurrection, or decisive civil war. The warring factions typically succeeded in presenting internal armed conflicts (often inaccurately) as struggles between ideologically-motivated factions for standing to speak for the undivided population, rather than as ethno-nationalist bloodletting or as the simple thuggery of armed gangs. Since foreign intervention has generally been assumed to be predatory, and to be perceived internally as such, even a tyrannical government would figure to be a more authentic representative of the polity’s interests and views than foreign powers announcing benevolent intentions. Thus, the decision of the bulk of the population to acquiesce, however grudgingly, in the winning faction’s project of public order has been taken as a decision to have that faction speak for the political community in international affairs.

In recent years, these assumptions about political life have eroded considerably, and for good

States” regarding the character of its internal public order. The Court examined “whether there is anything in the conduct of Nicaragua which might legally warrant counter-measures by the United States.” The Court pointed out that even had there been a legal commitment (which there had not been) and standing on the part of the United States to enforce the commitment unilaterally on behalf of the OAS (which there would not have been), the U.S. “could hardly make use for the purpose of methods which the Organization could not use itself; in particular, it could not be authorized to use force in that event. Of its nature, *a commitment like this is one of a category which, if violated, cannot justify the use of force against a sovereign State.*” *Ibid.*, para. 262 (emphasis added).

The Court went on to note that to hold a state’s adherence to any particular governmental doctrine a violation of customary international law “would make nonsense of the *fundamental principle of State sovereignty, on which the whole of international law rests*, and the freedom of choice of the political, social, economic and cultural system of a State.” *Ibid.*, para. 263 (emphasis added). The Court further pointed out that the Friendly Relations Declaration and related documents “envisage the relations among States having different political, economic and social systems on the basis of coexistence among their various ideologies; the United States not only voiced no objection to their adoption, but took an active part in bringing it about.” *Ibid.*, para. 264.

reason. Nonetheless, effective governments have been denied legal standing only in rare instances – as following coups against overwhelming winners of internationally sponsored elections in Haiti in 1991 and Sierra Leone in 1997– where popular repudiation of the effective regime has been so manifest as to be perceived in common across the international community’s spectrum of political, ideological, and cultural perspectives. Pluralism remains the rule, and exceptions must meet a high threshold of justification.

2. *Peoples and Territorial Units*

Cultural and ethnic affinities do not establish political communities for the purposes of international law. Apart from the peculiar context of the struggle to eradicate the international system’s original sin, Western European colonial domination of overseas territories, the self-determination right has operated in support of the territorial integrity and non-fragmentation of existing states – conceptualized as consummations of the self-determination of their territorial populations – at the expense of the secessionist aspirations of territorial sub-communities.¹⁹

It is no accident that the most vociferous advocates of the right to self-determination, the new states emerging from decolonization, were also the most determined to limit its application. The new states perceived most keenly their vulnerability to territorial fragmentation and to threats to their political independence posed by neo-colonialist penetration. Just as the long-established states were concerned to contain secessionism, so too were new states just as eager to close the door on the

¹⁹ The Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 36/103 (1981) (passed 120-22-6 over the opposition of many Western liberal states) emphasized, *inter alia*, “[t]he duty of a state to refrain from the promotion, encouragement, or support, direct or indirect, of rebellious or secessionist activities within other States, *under any pretext whatsoever*, or any action which seems to disrupt the unity or to undermine or subvert the political order of other States.” Annex, Art. 2(f) (emphasis added).

recognition of new “peoples” within established self-determination units.

The new states were furthermore determined to assert in the most extravagant terms the *absolute* inadmissibility of *any form* of foreign interference, *for any reason whatsoever*, with the right of their political communities – now presumptively represented, like the rest, by a ruling apparatus in effective control – to determine their own systems of internal public order.²⁰ Self-determination, by light of this notion, entails a people’s right to maintain its cohesion by whatever means it (or the effective authority that speaks on its behalf) sees fit, and to resist all efforts (including advocacy of any conception of internal rights not harmonious with the state’s purposes) to subvert its unity and independence.²¹ The General Assembly’s increasingly aggressive approach to self-determination beginning in the 1960s thus coincided with a stream of maximalist articulations

²⁰ See Friendly Relations Declaration, *supra*; see also Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 36/103 (1981) (120-22-6); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131 (XX) (1965) (109-0-1).

²¹ In order to fully appreciate the point, one must understand the fear of neo-colonialism (often manipulated for partisan advantage, of course) that played so central a role in the era’s politics. In the words of Ghana’s founding President and Third World icon Kwame Nkrumah, the colonial power that grants independence

[b]y its very next act ... seeks without grace to neutralize this same independence by fomenting discontent and disunity; and finally, by arrogant ingratiating and wheedling it attempts to disinherit the people and constitute itself their conscience and their will, if not their voice and their arm. Political decisions, just as they were before independence was won, lose their reference to the welfare of the people, and serve once again the well-being and security of the erstwhile colonial power and the clique of self-centered politicians.

Kwame Nkrumah, *Consciencism: Philosophy and Ideology for Decolonization* [1964] (Monthly Review Press, 1970), at 101-02. The new African states faced danger, Nkrumah believed, from internal forces seeking “to promote those political ties by which a colonialist country binds its [former] colonies to itself with the primary object of furthering her economic advantage.” The colonial power’s local clients are “the political wolf masquerading in sheep’s clothing”; “like a wasting disease they seek from the inside to infest, corrupt, pervert and thwart the aspirations of the people.” *Ibid.* Thus, the imperative of self-determination was hardly antithetical to, but actually a justification of, repressive dictatorship.

of the non-intervention norm.²²

The Friendly Relations Declaration “squares the circle” in an instructive way. It follows its elaboration of the right to self-determination with the following “safeguard clause”:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.*²³

Subsequent iterations have broadened the last clause of the qualifier to speak of “a government representing the whole people ... without distinction of any kind.”²⁴

This supple and nuanced provision is best read, in light of its historical and political context, to reflect the animating principles of a global legal order marked by pronounced ideological pluralism (in 1970, it should be remembered, only a minority of states espoused liberal-democratic political principles) and extraordinary deference to states’ choices of “political, economic, social, and cultural systems” (including, on the basis of sovereign equality, one-party regimes that tolerate

²² Michael Walzer’s 1980 exaltation of the self-determination right as the collective right on which all individual rights depend was, if a bit overly exuberant, consistent with the spirit of the times:

[T]he distinction of state rights and individual rights is simplistic and wrongheaded. Against foreigners, individuals have a right to a state of their own. Against state officials, they have a right to political and civil liberty. Without the first of these rights, the second is meaningless: as individuals need a home, so rights require a location.

Walzer, “The Moral Standing of States,” *supra*, at 228.

²³ G.A. Res. 2625, *supra* (emphasis added).

²⁴ See G.A. Res. 50/6 (1995); United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993, 32 I.L.M. 1661, 1665 (1993).

no organized opposition). The above italicized qualification to the imperatives of territorial integrity and political unity seems to have been designed to function, not as an ongoing operative exception to the sovereign prerogative of existing states, but as a moral rationalization for singling out “colonial domination, foreign occupation and racist [i.e., *apartheid*] regimes” as special cases of derogation from the otherwise-fiercely-reaffirmed non-intervention norm.

In this reading, each existing state is the presumed manifestation of the self-determination of “the whole people belonging to the territory.” This presumption allows the Declaration to justify attributing to the state the people’s “inalienable right to choose its political, economic, social and cultural systems, without interference in any form,” a choice that the state’s effective government (even where objectively tyrannical) is further presumed to embody. Thus, the qualification, which appears to open a door, is best understood as an ingenious effort to keep that very door closed, while at the same time rendering a moral rationale for the disparate treatment of Western European colonialism and its vestiges.

Still, having articulated the principle, the fraternity of sovereign states cannot blunt its edge entirely.²⁵ Where a government manifestly fails to “represent the whole people belonging to the

²⁵ Despite overwhelming international resistance to a right to secession outside the colonial context, self-determination continues to be presented as a right of general applicability. Thus, when India attached to its ratification of the ICCPR a declaration interpreting the right of self-determination to “apply only to the peoples under foreign domination and [not] to sovereign independent States or to a section of a people or a nation,” invoking in support of this interpretation “the essence of national integrity,” it drew objections from the Netherlands, France, and the Federal Republic of Germany. James Crawford, “The Right of Self-Determination in International Law: Its Development and Future,” in Philip Alston, ed., *People’s Rights* (Oxford: Oxford Univ. Press, 2001), 7 at 28.

Some international jurists have sought to reconcile self-determination with non-fragmentation by speaking of a “right to internal self-determination.” This language is, however, misleading insofar as it suggests an international legal mandate for any of the consociational devices that certain domestic systems have employed to empower sub-national groups – such as territorial autonomy, representational quotas in governmental and other institutions, super-majority legislative voting rules for group-sensitive subject matter, and so on. Except for “indigenous and tribal peoples” (additional victims of the Western

territory without distinction,” as by the conduct of ethnic cleansing, the imperatives of “territorial integrity” and “political unity” lose their rationale. Arguably, being subjected to gross and systematic discrimination reveals a minority group (whether marked by ethnic or other characteristics) to be a “people” with its own right to self-determination – though no minority group in the non-colonial context has ever been authoritatively declared to be a “people.”²⁶ More likely, patterns of extreme discrimination are now seen as justifying the international community – especially collectively, through Security Council action under Chapter VII of the Charter – in derogating from the system’s ordinary respect for territorial integrity and political unity, as in the case of the international trusteeship that has supplanted Serbian rule over Kosovo.²⁷

On the whole, an understanding of the self-determination right as it has operated in the

European colonialism that represents the “original sin” for which the international system seeks to atone), sub-national groups, whether or not territorially coherent, have no established standing in international law. Individuals, however, may have special rights in consideration of their group membership. *See, e.g.,* ICCPR, *supra*, art. 27 (cultural rights of “persons belonging to national or ethnic, religious and linguistic minorities”).

²⁶ Instructive on this point is the domestic court decision dealing most elaborately with the international law of self-determination, the Canadian Supreme Court’s advisory opinion in *Reference re Secession of Quebec*, 1 S.C.R. 217 (1998), available at <www.scc-csc.gc.ca/reference/rea.htm>. In deciding that the right, though applicable in the non-colonial context, did not justify unilateral secession, the court managed to sidestep the elemental question of whether the “people” entitled to self-determination was comprised of (a) the entire Quebec population, (b) Francophone Quebecois, or (c) all Francophone Canadians. *Id.* at para. 125. It stressed merely that none of these groups is blocked from the meaningful exercise of self-determination, since Canada is “possessed of a government representing the whole people belonging to the territory without distinction.” *Id.* at para. 136. *But see* Crawford, “The Right of Self-Determination,” *supra*, at 59-60 (construing the court’s position as consistent with “both the view that self-determination applies to peoples in the ordinary sense of the term, and is not confined to the whole population of existing states, and the view that several peoples may co-exist in relation to a particular territory”).

²⁷ *See* S.C. Res. 1244 (1999) (paying lip service to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia while setting up an international administration to hold those norms in abeyance, at least temporarily); *see also* S.C. Res. 1160, 1199, 1203 (1998) (all invoking Chapter VII powers in addressing the Kosovo situation prior to the NATO intervention).

existing international system requires a flair for the counterintuitive and the paradoxical, not to say the Orwellian. But contrary to the inferences that may be drawn by political theorists not steeped in the intricacies of international law, the right's paradoxical elements entail only a rebuttable presumption of certain core inviolabilities. The collective right does not pre-empt individual rights maintained against the collectivity. It operates primarily on a different plane, limiting, not the content of a state's duties toward its citizens, but cross-border exertions of power undertaken in the name of implementing those duties. Pluralism is not moral relativism, either in rationale or in effect.²⁸

II. A MORAL JUSTIFICATION FOR THE SOVEREIGN EQUALITY FRAMEWORK

A. *International Ethics and International Law*

Sovereign equality is an institutional response to persistent disagreement about what constitutes a just and legitimate territorial public order. The persistence of sovereign prerogative as a barrier to recognition and implementation of international norms is not a mere inconvenience or failure of political will. It is the basis for respectful accommodation, based on a “bounded pluralism” in regard to clashing political moralities. It is morally irresponsible to eschew respectful accommodation, not because the truth of political morality is culturally relative or because moral

²⁸ The duty of foreign states to respect core inviolabilities does not preclude states from giving effect to moral judgments within the confines of the discretionary aspects of their foreign policy, e.g.: declaring objectionable political figures *persona non grata*; providing peaceful refuge for militant opponents of objectionable regimes; severing diplomatic relations with, cutting off economic assistance to, and effecting a direct economic boycott of a state that engages in objectionable internal practices (but not a “secondary” boycott of the target state's trading partners, which is a form of economic sabotage likely constituting unlawful coercion). What the doctrine limits is the authority of individual (more powerful) states – themselves both untrusted and untrustworthy – to employ extraordinary measures of compulsion in the service of their controversial moral judgments. And as noted above, even these limitations, while strongly presumptive, are subject to exceptions, both express and tacit.

truth is unachievable on ontological or epistemological grounds, but because pluralism is needed to satisfy an objective moral interest in coexistence and cooperation. The fact that human beings systematically and profoundly disagree has morally significant consequences, irrespective of how wrong the dissenters might be.

1. *Moral and Practical Considerations in the Crafting of Legal Standards*

In lamenting the lack of systematic theorizing about international legal order, Allen Buchanan has recently observed as follows:

[I]t is often said that humanitarian intervention is justified only to stop gross and large-scale violations of the most fundamental human rights, in particular the right against genocide, not to stop “lesser” human rights violations. What remains obscure is whether this constrained view on intervention is (1) grounded on a belief that a wider range of interventions is in principle morally justifiable, tempered by an appreciation of the fallibility and abuse that a less constrained rule would risk, (2) a concession to feasibility (on the assumption that states would not agree to a more permissive rule), (3) an implication of a particular theoretical tenet about the moral right of self-determination, according to which this right provides a fundamental moral barrier to intervention, or (4) a combination of all the preceding. Only a self-consciously systematic approach – an attempt to develop a moral theory of international law that distinguishes between basic moral principles and practical prescriptions responsive to the constraints of feasibility – can sort these matters out.²⁹

Buchanan is surely correct that clarification is necessary, but the promise of a “sorting out” is misleading. Where one takes unilateral *ad hoc* decisions in a legal vacuum, one treats considerations of moral justification separately from those of feasibility and diplomacy; once one articulates a persuasive moral standard under which one’s own measures are properly subsumed, one can move on to the discrete practical questions of whether one’s well-intentioned measures will

²⁹ Buchanan, *supra*, at 29.

miscarry or whether they will so anger others as to produce bad overall consequences. The crafting of legal norms, however, entails additional moral responsibilities.

First, whereas the above-hypothesized author of a moral norm will also determine its application, and so can trust that the norm's application will be marked by the same judgment and integrity brought to bear on its creation, the author of a legal norm must take care that the norm not license the kinds of decisions that tend, for systematic reasons, to be made badly. Legal standards are designed to impose accountability on not-fully-trusted implementers; a rule-of-law *ethos* militates against broadly licensing "totality-of-the-circumstances" judgments, since such judgments, even if potentially the most sound ones, also have potential to be radically unsound. The contours of a legal right to self-determination need to reflect not only the political community's moral interest in immunity from even enlightened coercive interference in its internal affairs, but also the community's moral interest in immunity from an undue risk of self-interested, arrogant, or sophomoric interference.

Second, in authoring standards for a "basic structure" of international legal order, one must take appropriate account of the moral interest in peaceful coexistence and cooperation among bearers of conflicting conceptions of legitimate and just public order. This moral interest should not be confused with any supposed moral duty to respect non-like-minded human beings' capacity to exercise reason on matters of political morality,³⁰ nor with a supposed moral duty to accept as valid

³⁰ Such an argument might arise as an extrapolation – albeit probably not a very good one – from Jeremy Waldron's respect-based argument against judicial usurpation of the political participation rights of those who might not be trusted to reason correctly about substantive rights. See Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999), at 250-51. Though inspired in part by Waldron's focus on disagreement about justice, I do not accept the proposition that equal respect for persons requires allowing the supporters of substantive injustice an equal say in political decisions.

for culturally different societies such home-grown ordering principles as are minimally “decent.”³¹ One might, indeed, accept the proposition that a single-minded effort to eradicate unjust public order everywhere would be morally desirable if it could be undertaken at an acceptable human cost. But insofar as the projected human costs of forsaking peaceful coexistence and cooperation render such an effort morally irresponsible, a designer of international legal order must offer good-faith terms for respectful accommodation among such polities as one has decided – based on a calculation of the human costs and benefits of toleration and confrontation – to include. The resulting *modus vivendi* will contain elements of both overlapping consensus and compromise among bearers of differing conceptions of just public order, and fidelity to that *modus vivendi*, even at the expense of optimally just outcomes, will henceforth be a presumptive moral obligation, as a matter of *honor*.

Consequently, in the crafting of international legal standards, moral and pragmatic rationales are intertwined. This observation is important to an appreciation of paradoxical aspects of the enterprise: a stricture that requires objective injustice to be left undisturbed may nonetheless be a product of moral, rather than “merely” practical, considerations.

2. *Moral Obligations to Comply with Existing International Law*

In a provocative recent essay, Eric A. Posner has called into question whether international law, as such, is ever morally binding, and thus whether breaches of existing legal norms should be evaluated entirely on the basis of prudential considerations. He concludes as follows:

It can be useful for international-law scholars to point out that an act of the United States or some other country “violates international law” as long as we understand what this phrase means. It means that the United States is not acting

³¹ See Rawls, *The Law of Peoples*, *supra*, at 59-61.

consistently with a treaty or a customary international-law norm, and as a result the expectations of other states might be disappointed (or not), and these states might retaliate (or not), or adjust their expectations in ways that may not be to the advantage of the United States. These are all reasons not to violate international law, but they are prudential reasons, and they are reasons to be taken into account even when international law is not at issue. The phrase does not mean that the United States has a moral obligation to bring its behavior within the requirements of the treaty or customary international-law norm, or that its citizens or leaders have a moral obligation to cause the United States to do this.³²

Although Posner's is a realist perspective, many moralists display a parallel resistance to regarding international law as a source of moral obligation; the latter selectively regard particular positive norms (especially human rights norms) as a reflection of moral duties binding on independent grounds (just as Posner regards particular positive norms as supported by prudential considerations), but do not ascribe moral significance to positive norms that impede, rather than further, their moralistic designs. Thus, whatever may be thought of Posner's politics,³³ his skepticism is hardly parochial.

Posner's contention rests essentially on two points. The first is that the supposed consensual basis of international legal norms is illusory. Posner has chosen to emphasize in this regard the difficulty of establishing a moral obligation on the part of individual citizens – the sole bearers, he

³² Eric A. Posner, "Do States Have a Moral Obligation to Obey International Law?" *Stanford L. Rev.* 55 (2003), 1901, 1919. In arguing against international law's advocates, Posner's article tends to conflate support for obedience to existing legal standards with support for expansion of international legal commitments. International law's advocates contend, he says, "that if states entered treaties with more precise and stronger obligations, gave up more sovereign powers to independent international institutions, used transparent and fair procedures when negotiating treaties, and eschewed unilateralism and bilateralism for multilateralism, then a greater level of international cooperation would be achieved than is currently observed." *Ibid.* Support for obedience to existing legal standards, however, in no way depends on, or commits one to, this optimistic view.

³³ Posner is generally associated with unilateralist thinking within the current Bush Administration, and has come to the defense of the highly controversial positions on international humanitarian law developed by John Yoo and other Justice Department officials. See Eric Posner & Adrian Vermeule, "A 'Torture' Memo and Its Tortuous Critics," *Wall St. J.*, July 6, 2004.

believes, of moral personality – to shoulder the burden of a past government’s commitment.³⁴ He might equally have focused on the methodological finesses by which consent is imputed to states, on the power imbalances that mark international negotiation processes, or on the problematic relationship between a government’s consent and the collective will of the underlying political community – all of which constitute facially plausible objections.

Second, Posner argues, the international legal order is inefficacious. Although admitting that state behavior most frequently conforms to the standards of international law, Posner concludes that it does so principally for reasons of convenience and confluence of interests, not because the standards have the authority of law. International law does not, according to his empirical assessment, prevail upon states to do what they are disinclined to do.³⁵

The illusoriness of consent is a familiar point, but the objection is troubling only if a moral obligation can be predicated on nothing short of a genuine voluntary undertaking. However artificial, what passes for “consent” is the common theme of the international legal system’s

³⁴ Posner complains that unlike shareholders, who are free “not to join the corporation if they prefer to avoid the corporation’s liabilities,” citizens cannot avoid the supposed obligation, even if they had been powerless under the political system that undertook the commitment, or had not yet been born. *Ibid.*, at 1905, 1907. But as E.H. Carr wryly observed sixty-six years ago, the idea of a state as a “group person” with moral responsibilities “seems to present more difficulty to the philosopher than to the ordinary man.”

The question whether the Belgian Guarantee Treaty of 1839 imposed an obligation on Great Britain to assist Belgium in 1914 raised both legal and moral issues. But it cannot be intelligently discussed except by assuming that the obligation rested neither personally on Palmerston who signed the treaty of 1839, nor personally on Asquith and Grey who had to decide the issue in 1914, neither on all individual Englishmen alive in 1839, nor on all individual Englishmen alive in 1914, but on that fictitious group-person “Great Britain,” which was capable of moral or immoral behaviour in honouring or dishonouring an obligation.

Carr, *The Twenty Years’ Crisis* [1939] (New York: Harper & Row, Pubs., 1964), 150.

³⁵ Posner, *supra*, at 1914.

“secondary rules” (to use H.L.A. Hart’s term for those rules that govern the recognition, legislation, and adjudication of the “primary rules” regulating conduct).³⁶ These secondary rules are established and accepted within a system that brings a modicum of decent regulation to what otherwise would be a severely chaotic state of affairs, with bad consequences not only for governments but also for their constituents, jointly and severally. Just as Rawls, following Kant, ascribed to individuals “a natural duty ... to support and to comply with just institutions that exist and apply us,”³⁷ so, too, one can attribute to collectivities and their constituents a natural duty to support and comply with international institutions that, even if not “just” in any thoroughgoing sense, facilitate coordination and militate against predation to a greater extent than any available alternative. Moreover, while the “consent” that the system’s secondary rules represent is concededly far too thin to be a self-sufficient source of moral obligation, the secondary rules, in deferring to the internal processes of territorial political communities, at least draw on such vehicles for stakeholder participation as are available. In the absence of a more legitimate and just alternative system that might feasibly be implemented, there is a fully plausible obligation to uphold rather than to undermine the existing international legal order.

This rationale presupposes, of course, that Posner’s second objection cannot be sustained. If, as an empirical matter, international law does not meaningfully contribute to peaceful coexistence and cooperation, then it cannot be morally binding. The empirical controversy cannot be resolved in

³⁶ H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 91-96.

³⁷ John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), at 115; see also Immanuel Kant, *The Metaphysical Elements of Justice*, trans. John Ladd (Indianapolis: Bobbs-Merrill, 1965), sec. 42, at 71 (“If you are so situated as to be unavoidably side by side with others, you ought to abandon the state of nature and enter, with all others, a juridical state of affairs ...”); see generally Jeremy Waldron, “Special Ties and Natural Duties,” *Philosophy & Public Affairs* 22 (1993), 3, 4-5, 14-15.

this space, but it is worth noting that the best evidence for international law's efficacy may be only indirectly observable. A world without international law would be a world without the baselines that are partly constitutive of international actors' very understanding of the issues at stake. To speak of a state is already to have in mind a package of legal attributes, rights, and responsibilities; a world without these could be imagined, but it would require rethinking much that is currently taken for granted, and pondering measures that are currently almost never considered. It is true that breaches are frequent in those few areas of international law (e.g., the use of force and human rights) where parties have enough of a stake in their momentary ends to risk destabilizing long-term accommodations, but even in those instances, there is a commonly recognized basis for mobilizing opposition to the breaching acts, and breach entails a real, even if not a decisive, cost. A world in which this were not the case would be a very different, and even far more troubled, world.

In the absence of commonalities of short-term material interest and substantive moral principle, efficacious actors need to find common ground on a different plane. A shared sense of honor fills this need, transcending differences of material and moral ends through a common commitment to keep faith with whatever accommodations are concluded. The duty to honor agreements – and other forms of accommodation on which others are led to rely – in part reflects a pragmatic concern of the “repeat player” to maintain a reputation that will enable her to obtain cooperation on subsequent “plays,” but it is also a matter of integrity and of respect for the other.

Of course, considerations of justice, even unilaterally conceived, may override considerations of honor in particular cases,³⁸ but they do not automatically do so. For instance, one

³⁸ In such cases, it is important that the norm be breached in the name of an alternative norm that most of the international community could plausibly embrace. I have made this argument at length in regard to the NATO intervention to prevent the Serb campaign of “ethnic cleansing” in Kosovo. Roth, “Bending the Law, Breaking It, or Developing It? The United States and the Humanitarian Use of Force

ordinarily upholds guarantees of safe passage given to criminals and terrorists, not merely because one will have to trade on one's word in the future in similar contexts, but because there is something deeply unvirtuous about perfidy, even when employed against actors who are themselves immoral.

International law is thus capable of generating moral obligations. Such obligations may be binding not only where they demand compromise of material interests, but also where they demand forbearance from the single-minded pursuit of one's unilateral moral ends.

B. *Conflicting Political Moralities in the International Arena*

1. *The Elusive Consensus on Universal Norms*

Moral criticism of the sovereign equality framework typically cites universal norms that purportedly transcend territorial and other boundaries. Invocations of universality often contain an ambiguity about whether the norm in question is asserted to be *universally espoused* as well as *universally applicable*. The claim that a norm is universally applicable need not rest on, but frequently trades on (and would always benefit from), a claim that the standard is universally espoused. Moreover, whereas philosophical truth alone is sufficient to establish the authority of moral norms, bare invocations of natural law are a problematic basis for the assertion of legal norms.

Assertions of universally espoused norms in real-life disputes amount to the rather curious contention that empirical discord has a solution rooted in empirical consensus. Whereas consent can, without contradiction, bind someone to standards with which she does not presently agree, the

in the Post-Cold War Era,” in Michael Byers & Georg Nolte, eds., *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003), 232

same cannot be true of consensus unless a peculiar condition holds, such as (a) the relevant community that is the referent of consensus does not include the dissident, or (b) all informed persons of good faith and sound reason can deduce from an uncontested consensus a conclusion that the dissident, for lack of one or more of these attributes, rejects.

The real problem with condition (a) is not the debater's point that the condition becomes tautological where dissidence itself suffices to expel the dissident from the relevant community. One can, without doing too much violence to the concept, redefine "consensus" as an insistent near-consensus, as in the authoritative definition of a peremptory (or *jus cogens*) norm as one "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."³⁹ More seriously problematic are efforts to redefine the lawmaking community so as systematically to exclude the non-like-minded. Thus, "global civil society" may be cited as an alternative source of lawmaking authority. "[W]orld social and decision processes" may be said to include the participation of, "[b]esides the traditional nation-state, ... intergovernmental organizations, non-self-governing territories, autonomous regions, and indigenous and other peoples, as well as private entities such as multinational corporations, media, nongovernmental organizations, private armies, gangs, and individuals."⁴⁰ Absent a formally structured account of their supposed juridical authority, the views of any such actors can be invoked or ignored, as expediency dictates. The "international community" can thus become a pseudo-empirical category, membership in which is ascribed on the basis of cosmopolitan characteristics

³⁹ Vienna Convention on the Law of Treaties, *supra*, art. 53.

⁴⁰ Siegfried Weissner & Andrew R. Willard, "Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity," *Am. J. Int'l L.* 93 (1999), 316, 323. The article elaborates the jurisprudential approach of the so-called "New Haven School," which offers an alternative to legal positivism in international law.

that correlate with liberal views.

The more frequent and significant problem, however, is posed by condition (b) above, which rests on the assumption that consensus on an abstract norm can be unproblematically projected forward to a determinate application. The scope of consensus is easily exaggerated. We often imagine that the matters of which we feel the most certain and to which we assign the greatest importance are matters as to which human beings share a common intuition, and that genuine differences pertain only to the peripheral questions, concerning which we can plainly perceive room for disagreement. It is not easy to accept that informed persons of good faith and sound reason can find themselves on opposite sides of violent confrontations, that they may apply characterizations such as tyranny and freedom, hero and murderer, in opposite ways.

The beginnings of wisdom about political conflict lie in recognizing that informed persons of good faith and sound reason,⁴¹ while subscribing to familiar moral principles in the abstract, can disagree fundamentally on questions of public order, including on whether to support ruthless measures such as dictatorship, repression, and terrorism. If this is so, a substantial incidence of

⁴¹ The criteria of the three characteristics – “informed,” “good faith,” and “sound reason” – are intended to be as independent of normative judgment as possible (though the criteria for empirical categories are never really free of the influence of normative perspectives). Thus, by “informed” I mean not ignorant of the basic facts of the situation, rather than possessed of the insights about the situation that we would like for persons to have (so that they see it our way); by “good faith” I mean that they take seriously some general duty to “do right by” all other human beings (even if their conception of that duty is objectively inadequate), and genuinely believe that their support of particular measures observes that duty (even if they are objectively mistaken); by “sound reason” I mean that they process information in a fairly sophisticated and non-pathological way.

The goal of this formulation is to avoid the question-begging that results from conflating principled disagreement (a descriptive characterization) with “reasonable” disagreement (a normative characterization). I cannot exclude the possibility that, for example, some Nazis fulfilled the criteria of the above categories (even though Nazism *per se* seems to have entailed a general repudiation of moral duties to non-Aryans). Rather than to blur the distinction, I would prefer to say that there is some objective threshold of aberrational injustice beyond which possession of the three characteristics is simply irrelevant to the question of toleration.

harsh political methods is endemic to the human condition, even if most human beings are basically good.⁴² However much of the world's illiberal coercion, force, and violence may be attributed to human evil, much would withstand even the eradication of that evil. Global conflict management thus requires a pluralistic framework.

2. *Culture-Based Pluralisms: Walzer and Rawls*

Michael Walzer and John Rawls have both offered pluralistic approaches to international ethics. Both approaches, in different ways, predicate international pluralism on the cultural differences thought to be reflected in political communities' varying systems of public order.

Walzer posits a "morally necessary," though rebuttable, presumption to govern relations with foreign states: "that there exists a certain 'fit' between the community and its government," such that the community is "governed in accordance with its own traditions."⁴³ This presumption is overcome in extreme cases, as where governments engage in "massacre or enslavement."⁴⁴ But the presumption holds in the case of "a military dictatorship and a religious 'republic,' without civil and political liberties, and brutally repressive," under which women are subjected to "their traditional religious subordination to patriarchal authority," in keeping with the locality's "political and

⁴² It is worth recalling, as Jeremy Waldron frequently points out, that Kant attributed the perils of the state of nature not to selfishness, but to moral vehemence. "Even if we imagine men to be ever so good natured and righteous before a public lawful state of society is established, individual men, nations, and states can never be certain that they are secure against violence from one another, because each will have his own right to do what *seems just and good to him*, entirely independent of the opinion of the others." Kant, *supra*, sec. 44, at 76.

⁴³ Walzer, "The Moral Standing of States," *supra*, at 212.

⁴⁴ *Ibid.*, at 217.

religious culture” and the regime’s “deep roots” in the community’s history.⁴⁵ Walzer does not deny that a foreign community’s principles of internal public order “may be wrong or badly conceived.”

Still, he maintains:

[I]t is not the sign of some collective derangement or radical incapacity for a political community to produce an authoritarian regime. Indeed, the history, culture, and religion of the community may be such that authoritarian regimes come, as it were, naturally, reflecting a widely shared world view or way of life.⁴⁶

Given a hypothetical opportunity to transform the situation by drugging the community’s elites and masses with a “wondrous chemical” that “would wipe out of their minds their own political and religious culture” and turn them into Swedish-style social democrats, he would refuse to do so on the ground that this would deprive them of “the only kind of state that they are likely to call their own.”⁴⁷

Rawls’s pluralism is not nearly as broad as Walzer’s, but it is every bit as deep – coming close to accepting foreigners’ illiberal practices as “right for them,” rather than merely as immune from coercive interference – and just as reliant on cultural difference as a justification. In regard to “decent, non-liberal peoples,” Rawls posits a duty “not only to refrain from exercising political sanctions – military, economic, *or diplomatic* – to make a people change its ways,” but also “to recognize these non-liberal societies as equal participating members in good standing of the Society of Peoples.”⁴⁸ He stresses “the great importance of all decent peoples’ maintaining their self-respect

⁴⁵ *Ibid.*, at 225.

⁴⁶ *Ibid.*, at 224-25.

⁴⁷ *Ibid.*, 225-26.

⁴⁸ Rawls, *The Law of Peoples*, *supra*, at 59 (emphasis added).

and having the respect of other liberal or decent peoples,”⁴⁹ in consideration of which an international system should not even “offer incentives for its member peoples to become more liberal.”⁵⁰ Rawls does not elaborately account for the rejection of liberalism by peoples that are nonetheless “decent,” but he assumes that a “people” is the kind of entity that can properly be characterized as liberal or non-liberal, and that a non-liberal people’s self-respect is somehow invested in its non-liberal principles of public order. From these assumptions, and from his choice of a hypothesized Islamic republic (“Kazanistan”) as his illustration of a decent non-liberal order,⁵¹ one must deduce that Rawls, like Walzer, regards principles of public order as, at least potentially, embedded in a community’s history, traditions, religion, and culture, and worthy of presumptive respect on this basis.

Rawls’s toleration is deep, but for just that reason, necessarily narrow. The “decent” non-liberalism that he posits reflects only such deviation from liberal norms as a liberal sensibility, straining for open-mindedness, can abide. Decency ends up as a near-liberal requirement that the non-liberal authority structure be (a) reasonably close to just (oriented toward a plausible conception of a common good and not in violation of a truncated set of core human rights) and (b) reasonably close to legitimate (participatory, even if through a merely consultative process and subject to hierarchical premises). (Informed persons of good faith and sound reason are supposed to agree, it would seem, on the normative points that liberals deem most central and certain, but may differ on more peripheral details.) Relations with non-decent systems of public order – outlaw states, burdened peoples, and even benevolent dictatorships – are not to be governed by the terms of

⁴⁹ *Ibid.*, at 62.

⁵⁰ *Ibid.*, at 84.

⁵¹ *Ibid.*, at 75-78.

reciprocity that Rawls sketches out, but are left to be governed in accordance with what amount to standard “cosmopolitan liberal” principles – the “transcendent justice” approach, as defined herein.

Since real-world decent non-liberal regimes, by Rawls’s criteria, comprise almost a null set (Singapore might qualify), Rawls’s *Law of Peoples* makes little practical contribution, except as an alternative, and more attractively broad-minded, rationale for the international pursuit of liberal justice. In setting conditions for inclusion appropriate to an overlapping international consensus among liberal and (almost exclusively hypothetical) “decent non-liberal” communities – conditions for a deep respect – Rawls’s text forgoes devising a useable platform for a real-world *modus vivendi* based on a more shallow respect among political communities.

3. *Rejecting Culture-Based Pluralism*

Walzer and Rawls join many other less systematic thinkers in predicating their calls for an international pluralism on cultural difference. This emphasis has several troubling implications. First, as noted above, if respect for persons is understood to demand respect for cultural characteristics as constitutive of personhood, and the culture is understood to include principles of public order, then respect precludes even such measured responses to foreign public-order practices as condemnations or boycotts. Second, cultural difference is privileged over mere ideological difference: traditional-hierarchical non-liberalism has this special immunity, whereas revolutionary-egalitarian non-liberalism, being mere ideology, does not. Third, culture-based pluralism is naturally disposed to accept convenient claims of illiberal factions about the authoritative interpretation of cultural norms, while dismissing local liberal dissidents in non-Western societies as culturally inauthentic, thereby potentially rendering aid and comfort to repression. Fourth, the association of public-order practices with a social phenomenon as intractable

as “culture” tends to encourage ordinarily justice-minded actors to write off whole societies – and their most vulnerable members – as a lost cause.

None of these consequences seems justified on the merits. Liberalism has supporters and opponents in all parts of the world. The level of support depends on many variables, including the compatibility of liberal ideas with local traditions, but liberalism’s following has gradually increased even in parts of the world where it had been thought unpromising. The success of liberal ideas seems to depend less on cultural norms than on the presence of the economic, political, and social circumstances of liberalism – conditions that produce questions to which liberalism is a plausible answer. These circumstances attend economic development. Of course, resistance to liberalism, whether from the Right (traditional-hierarchical) or the Left (revolutionary-egalitarian), remains viable in developing societies to varying extents, but it also remains viable to varying extents in the developed Western societies in which liberalism was born.

Moreover, “globalization,” which actually started centuries ago, has long since done away with any possibility of hermetically sealed “cultures.” Many local representatives of supposed non-Western interests and values have been either directly or indirectly Western-educated, and many post-colonial ideologies would have been impossible without influences from Western thought. Efforts to reach back in time for a purer, more “authentic” approach are not traditionalist but revivalist, applying venerable ideas to conditions never imagined in, say, the days of the Koran. Whatever else may be said for or against these ideas, they are ideology, pure and simple, not culture.

A culture, as such, does not entail a distinctive conception of public order, unless the former is tendentiously defined so as to make the point tautological. Indeed, whereas territorial political communities have boundaries that more or less identify a permanent population as a fixed membership to which political judgments can somehow – whether or not by popular vote – be

imputed, cultures have no established boundaries; it is not clear who is and who is not a member, and it is impossible for a culture, even metaphorically, to take a decision.

To be sure, culture influences subjective perceptions of the essential nature of the relationship between the individual and the community. Such perceptions affect the popularity of liberal thought, and especially of the rhetoric by which liberals habitually express themselves. But it is important not to conflate the individual's relationships to three separate entities: (a) a community of attachment – whether it be a local village, a geographically coherent or dispersed ethnic group or clan, or a notional community of coreligionists living anywhere in the world – that may be regarded, subjectively or even objectively, as constitutive of the individual's identity and ends; (b) the notional political community associated with the state, which is unlikely to be coextensive with any community “constitutive” of the individual's identity or ends; (c) the governmental apparatus that rules in the name of, and may or not be accountable to, that notional political community. Although some human rights issues authentically concern the relationship between the individual and a local community's traditional structures of authority (e.g., female genital mutilation and honor killings), most concern the conduct of an at least quasi-modern governmental apparatus that is usually unaccountable to, and often directly at odds with, such traditional and/or local structures.

In general, there is no reason to presume that the patterns of coercion, force, and violence being inflicted on individuals reflect the authentic ordering principles of some community to which these individuals are organically attached.⁵² Indeed, seriously illiberal practices are less likely to be a product of coherent cultural communities than of internal cultural clashes that exceed institutional capacities for conflict management.

⁵² Allen Buchanan makes a similar point. *See* Buchanan, *supra*, at 179.

None of this is to say that cultural difference is not one of the main forces driving deep political disagreement. But in this regard, culture is not worthy of special standing, analytically independent of and morally privileged over garden-variety ideological difference. The proper focus is on ideological difference, irrespective of its (always-contested) relationship to cultural difference.

Beyond this, cultural difference may present practical considerations that affect human rights implementation. Liberal institutions and processes, designed for a Western setting, may produce perversely illiberal results if implanted without adaptation in a society where conditions, including but not limited to culture and tradition, are different. But this calls into question merely the familiar institutional implementations of liberal principles, not the applicability of liberal moral criteria. Moreover, in any political context, local sensibilities determine what kinds of measures and arguments will be effective, and these sensibilities, of course, depend partly on cultural factors. Such sensibilities will affect strategy and tactics, and may impose practical limitations on what can be achieved, but these are not matters of normative principle.

Liberal cosmopolitans are thus correct in rejecting cultural difference as a basis for a pluralistic approach to international order. Yet they are wrong in rejecting global pluralism on the whole, for completely different reasons.

4. *The Justification of a Non-Culture-Based Pluralism*

The problem of deep political disagreement is rooted, not in the immutable cultural characteristics of holders of conflicting views, but in the nature of political life. The quest for an international justice that transcends territorial and political divisions comes to grief because that quest operates, at least implicitly, from an unrealistic premise: that informed persons of good faith and sound reason, notwithstanding such disagreements as are conceded to be inevitable among

human beings, can be expected to reach an overlapping consensus on a core set of morally imperative political norms.

The quest finds encouragement in an empirical consensus that can be found to exist on abstract norms, such as those found in international human rights instruments. But such consensus too often ends up being illusory: First, apparent consensus on abstractions frequently dissolves at the level of application, because in the face of concrete circumstances, adherents of competing “comprehensive doctrines,” who endorsed the abstractions for differing reasons, will interpret the same abstract norms in conflicting ways, or assign them conflicting priorities. Second, consensus as to the presumptive wrongfulness of particular conduct often gives way to discord about under which adverse conditions the presumption is overcome; agreement as to inadmissible means typically fails to hold in the face of sufficiently grave threats to what some see as morally imperative ends.

The fact of political life that necessitates a pluralistic solution can be summarized as follows: *Under sufficiently adverse conditions, such as extreme ethno-national or socioeconomic polarization, the interaction of these two problems – the inability to agree on a fair basic structure of public order, and the inability to agree on what measures are inadmissible in the struggle to install or maintain a basic structure of public order that comports with one’s own conception of fairness – leads informed persons of good faith and sound reason to support ruthless measures against one another.* Where the gap between competing conceptions of fairness is sufficiently great, and the perceived moral stakes of political conflict sufficiently high, efforts to forge a mutually acceptable institutional solution will fail, prompting recourse to an unmediated clash of social forces. The result is a principled recourse to measures, such as dictatorship, repression, and terrorism, that would be rejected in the abstract.

This unhappy tendency is not something that is true of some discrete, culturally different,

“them.” It is true of “us.” What follows is a schematic account of why politics, even when driven by wisdom and good intentions, is universally a “contact sport” that, under the right (or more properly, the wrong) social conditions, will lead to harshly incompatible moral stands on vital issues.

Universal principles demand political action to secure to all the conditions of a dignified human existence. It is for this very reason that the contemporary human rights movement posits not merely state duties to avoid violating human dignity by discrete and direct acts of violence, but further state duties to affirmatively protect the right-bearer from violence and from analogous inflictions with similarly dehumanizing effects. Beyond those lie duties to take all necessary measures to secure for all right-bearers (within the limits of what is materially feasible) the conditions that permit human potentialities to be realized. The proliferation of internationally certified human rights – now encompassing “first-generation” civil and political rights well beyond inviolability of the physical integrity of the person, “second-generation” economic and social rights, and “third-generation” collective rights to the minimal conditions of societal flourishing – represents a series of efforts to correct for the manifest inadequacy of simple negative imperatives.

The more holistically rights claims address human dignity, however, the more inexorably and expansively do they appropriate the space of politics. Invocation of the term “human rights” altogether fails to preempt political contestation because competing views of how to prioritize and how to accomplish the posited ends constitute the very core of politics.

By all accounts, individual pursuit of the good life requires the existence of certain non-divisible public goods. The creation of these public goods is burdened by collective action problems, the solution to which frequently requires collective decisions authorizing coercive implementation. Social life, by its nature, presents myriad coordination problems. However much one may wish to exalt the self-actualizing individual, individual aspirations cannot be realized – or

often even conceived – without others’ coordinate actions and forbearances that combine to establish the infrastructure for that realization (just as a career as a cellist presupposes compositions, instruments, orchestras, and orchestra halls, which themselves presuppose complex social institutions, and so on in regression). The coordination of actions and forbearances depends, in turn, on decisions attributable to and binding on some collectivity, backed by a capacity for compulsion that militates against free riders and other spoilers.

Human flourishing therefore demands decisions of particular political communities about the nature of the good society wherein the good life is pursued. These decisions pertain, not merely to distributive justice, but to the moral environment that lays the foundation for the fulfillment of the civic responsibilities indispensable to the good society. If, in the inevitable trade-offs that such decisions entail, fundamental interests of end-choosing human subjects turn out to be rival, the political community has little choice but to establish priorities by comparatively evaluating, in light of preferred conceptions of the good life, the ends that those subjects might choose.⁵³

The main current of contemporary liberal thought – reflected in Rawls’s *Political Liberalism*⁵⁴ – seeks to establish that a basic constitutional framework for such a society can be specified independent of a collective adoption, not simply of a particular “comprehensive doctrine of human flourishing,” but of a particular accommodation among some such doctrines to the disparagement or exclusion of others. This variant of liberal theory resists regarding the basic structure as a site of ineluctable conflict among bearers of common-good-oriented but mutually incompatible worldviews, which conflict will necessarily result in, if not outright victory for bearers

⁵³ For an elaboration of the argument that liberalism’s core encompasses rival freedoms that cannot be prioritized by deduction, see John Gray, *Two Faces of Liberalism* (2000), 69-104.

⁵⁴ John Rawls, *Political Liberalism* (Cambridge, Mass.: Harvard University Press, 1993).

of one conception, a bargain reflective of the comparative political leverage of the factions, with some factions disadvantaged and others excluded altogether. Rather, the theory imagines, as an achievable ideal, a basic structure that reflects an overlapping consensus among all “reasonable” worldviews.

This notion has spawned a debate far beyond the scope of the present work. Suffice it to say here, though, that the losers in this formula would scarcely accept the “persuasive redefinition” of reasonableness that Rawls devised to effect their delegitimation, and not for lack of knowledge, intelligence, or public-spiritedness. Informed persons of good faith and sound reason will inevitably struggle over the terms of the basic structure.

This inevitable struggle does not, in itself, necessarily augur severe strife or harsh measures. Constitutional compromises often secure social peace, not because they are universally fair or engender universal satisfaction, but because no faction that is sufficiently efficacious to destabilize the institutional framework has sufficient motive to do so, based on a comparative assessment of the attendant risks and benefits. Moreover, even where the constitutional order’s specifications are in tension with international standards, the very context of social peace will likely persuade international agencies and jurists to find the deviations to fall within a “margin of appreciation.”

Nonetheless, in polities sharply polarized on socioeconomic, ethno-national, or other bases, efficacious factions who regard their material interests and moral principles as unfairly subordinated or marginalized may have insufficient motive to remain loyal to the prevailing processes of decision. The potential for an unmediated clash of social forces augurs decisions, of both government and opposition, to employ harsh means against what appear, by light of their particular projects of public order, as threats to the community’s vital interests. In such cases, genuine advocates of plausible conceptions of fairness can be found on both sides. This is made no less true by the fact that key

actors on one or both sides might properly be classified as “thugs.”⁵⁵ For example, the Chilean coup of 1973, the Salvadoran and Nicaraguan internal armed conflicts of the 1980s, and the attempted Venezuelan coup of 2002 – all conflicts rooted in socioeconomic polarization – sharply divided the respective societies, including their liberal-democratic elements. Ethnic polarization is, if anything, even more likely to pit sincerely held, but clashing, conceptions of fairness against one another in conflicts that are beyond the capacity of institutions to contain.⁵⁶

Participants in unmediated social conflict are consequentialists, almost by necessity; political actors are expected to take responsibility, not exclusively for their own acts, but for the outcomes that befall their constituents. In such contexts, the cause of human dignity frequently appears to demand the violation of the rights of some as a means to protect or establish the rights of others. If there is a “universal” intuition on this topic, it would seem to be that while many acts can be presumptively condemned as heinous, no acts are absolutely excluded where the most vital moral interests are perceived to be at stake.⁵⁷

⁵⁵ Indeed, it is no less true where demagogues are responsible for having exacerbated the polarization, for the fact that the *other* side is in the grip of demagoguery presents genuine dilemmas for one’s own side. One’s reactive ruthlessness, in turn, may perversely serve to vindicate the fears initially conjured by the demagogues, so that both sides are trapped in a logic of escalating violence. This is one way to interpret the calamity of Yugoslavia in the 1990s.

⁵⁶ The Israeli-Palestinian conflict, though not an “internal” conflict in the ordinary sense, comes to mind as an example of a violent confrontation as to which liberal internationalists from all over the world have taken up different sides, in vitriolic opposition even to one another. Any use of illustrative examples has the serious pitfall that readers, depending on their own substantive political principles, will perceive different conflicts differently. Rest assured that the author has very strong loyalties of his own in regard to each of the conflicts cited here; the concession that informed persons of good faith and sound reason could support the opposite side of each is rather a grudging one.

⁵⁷ One need only mention the general complacency of Western populations, statesmen, and even scholars about the deliberate incineration of hundreds of thousands of innocent people in Hamburg, Dresden, Tokyo, Hiroshima, and Nagasaki. Even those who condemn the fire-bombings and atomic bombings generally feel compelled to engage seriously with the empirical question of whether these measures were necessary to prevent far worse harms. See, e.g., Walzer, *Just and Unjust Wars*, *supra*, at

This is not to say that sadism, venality, bigotry, and a plethora of other human vices do not play a major role in such practices around the world. But the typical focus on these human vices distracts from the role that principled persons often play on both sides of violent conflicts. Even where leaders are cynical demagogues, their demagoguery operates precisely by mobilizing the moral dispositions of constituents in support of decisive action. And while many of the worst atrocities are committed, by thugs recruited for this purpose, in at least partial secrecy from those constituents – an implicit acknowledgment that they go beyond what even a wartime sensibility can abide – this is often because the constituents prefer not to know (and know that they prefer not to know) the details of what is done in pursuit of ends they endorse.⁵⁸

251-68. Moreover, even condemnation of the acts seldom crosses the line to vilification of the actors; the scope for good-faith disagreement militates against attributing criminality to those who were in the unenviable position of having to make the decisions. Of course, whereas “civilized” folk may incinerate innocent civilians for weighty reasons, it is easily assumed from a distance that “other” folk commit analogous acts for frivolous reasons.

The increased stringency of *jus in bello* norms since World War II should not be taken to indicate any transcendence of consequentialism. International law continues to bar only those tactics anticipated to be unnecessary to legitimate military objectives, and conflicting assessments of necessity continue to reflect the parties’ differential access to military technology. The collateral infliction of civilian losses is criminalized only where such losses figure to be “clearly excessive in relation to the concrete and direct overall military advantage anticipated,” *Statute of the International Criminal Court*, art. 8(2)(b)(iv), and the International Court of Justice has been unwilling to rule out the legality of the use of nuclear weapons in the case of a dire threat to a state’s survival, *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (8 July), paras. 95-97.

⁵⁸ The truth of this observation hides in plain sight. The Reagan Administration’s conduct of the Cold War, after all, is associated in the public mind with “moral clarity,” rather than with that Administration’s underwriting of armed factions whose ruthlessness (indeed, brutality) was known beyond cavil, such as the Salvadoran armed forces, the Nicaraguan *contras*, the Angolan UNITA rebels, Cambodian anti-Vietnamese insurgents operationally (as well as formally) conjoined to the genocidal Khmer Rouge, and the various unsavory factions battling Soviet troops in Afghanistan. Whether the end justified the means in any or all of these cases is beyond the scope of this discussion; what matters is that a great many informed persons of good faith and sound reason thought so. And among those who thought otherwise, some proclaimed solidarity with opposing factions themselves known to employ ruthless means. Still others, while eschewing ruthless means in all of these cases, have accepted them, however reluctantly, in other cases.

Of course, this observation alone does not suffice to justify a pluralistic global order. The mere fact of intractable disagreement about the moral quality of political acts does not make the conduct in question any less wrongful (let alone any less harmful to its victims), and no moral immunities automatically attach to having thoughtful and decent reasons for acting on an egregious conception of justice. But the observation does have important implications for the design of a morally responsible approach to political difference.

If deep political disagreement is endemic rather than aberrational, efforts to manage political conflict must accept a certain modesty of mission. A moralistic campaign to eradicate political ruthlessness will likely lead either to disillusionment or, far worse, to the licensing of a ruthlessness to end all ruthlessness. Attributions of outlawry to adverse regimes, in addition to hardening positions counterproductively (akin to the insistence that one “never negotiate with terrorists”), tend to place enforcement demands on international institutions that such institutions characteristically cannot bear, opening the door to unilateral exertions that can be rationalized as implementation of universal principles. Transnational criminal proceedings against foreign state actors, if directed at non-aberrational conduct, not only will be skewed by a political selectivity of prosecution, but may degenerate into festivals of self-righteousness, orchestrated not only to designate scapegoats for international dissensus, but also to reveal the fecklessness of those who counsel restraint and compromise in the face of a certified evil.⁵⁹

⁵⁹ If my scholarship in this area can be said to have an immediate political purpose, it is to expose the latent kinship of certain human rights advocates with the neo-conservatives, whose practical positions they rarely embrace. *But see* Fernando Tesón, “Ending Tyranny in Iraq,” *Ethics & International Affairs* 19 (2005), 1 (defending the 2003 Iraq invasion on human rights grounds); W. Michael Reisman, “Unilateral Actions and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention,” *European J. Int’l L.* 11 (2000), 3 (generally advocating the unilateral coercive implementation of the norms of a supposed human-rights-based international order).

A responsible approach to global order, therefore, is a pluralist approach. A commitment to pluralism in no way implies agnosticism about the wrongfulness of the other's conduct, nor need it assert that the conduct, albeit wrong "for us," may be right "for them." Rather, pluralism (or more precisely, a qualified or "bounded" pluralism) accords to the other, within a system of reciprocity, certain basic prerogatives and inviolabilities that withstand the other's wrongful, but non-aberrant, conduct.

Fidelity to such a system of respectful accommodation is a moral duty, insofar as that system is reasonably efficacious, compared with the foreseeable alternative, in preventing uncontrolled international conflict, limiting predation (often carried out in the name of humanitarianism) against poor and weak states, and providing the basis for international cooperation on matters of significant human concern. That fidelity also reflects a humility and restraint becoming of an outsider who lacks a stake appropriate to participation in an internal struggle. Even the best-intentioned outsiders faces certain moral hazards. Our lack of familiarity and stake allows us: (a) to make judgments based on limited information, often packaged for us by partisans in the conflict; (b) to make judgments, supposedly in the interest of the whole, where our objectivity has been contaminated by identification with certain sectors of a foreign society at the expense of others; (c) to make judgments that leave others to bear the consequences of our decisions long after we have lost interest and moved on. Beyond this, as a matter of dignity, participants in a struggle over the basic direction of

In my view, a substantial element of human rights advocacy has lost its way, departing from the path that leads more reliably to peace. In generating demands that exceed the institutional capacities of the international system, the quest for a transcendent justice leads to a fork in the road, where one path leads to frustration and disillusionment and the other to alliance with the neo-conservatives – who are, in essence, liberal internationalists who have become disillusioned with the constraints of both broad multilateralism and deontological ethics. What I offer is a moral argument for adherence to international legal constraint that is unavailable to those who see international law merely as an instrument of transcendent justice.

their own society should not, presumptively, have to suffer the coercive interference of those who will not have to live with the resulting conditions. (In principle, of course, deference should be reserved for those who speak authentically for the society, but this is typically what the conflict is *about*.)

Fundamental human concerns necessitate uniquely political decisions about the nature of the good society wherein the good life is pursued. The state – as opposed to non-territorial or micro-territorial communities rooted in sentimental attachment rather than potential for order-creation, and as opposed to an international community encompassing an unmanageable multiplicity of interests and values – represents the only community in the name of which the ineluctably contentious decisions needed to structure social life can be effectively made and enforced. Even in states where these decisions are not made democratically – by light of even the loosest of the standards that may be derived from any of the radically conflicting available conceptions of democracy⁶⁰ – the political independence of the territorial entity preserves for its population at least the object of democratic struggle, and therefore the possibility of eventually achieving what may plausibly be described as self-government. Notwithstanding the inherent messiness and frequent nastiness of the processes by which these matters are worked out internally, the impositions of intermeddlers, themselves systematically prone to self-interestedness, arrogance, or well-meaning short-sightedness, are rarely to be preferred. Human beings therefore have an important moral interest, albeit not always a paramount interest, in being part of a territorial political community that maintains the last word on

⁶⁰ I have addressed radically conflicting conceptions of democracy at length elsewhere. See, e.g., Roth, *Governmental Illegitimacy in International Law*, *supra*, at 75-120; Roth, “Evaluating Democratic Progress,” *Ethics & International Affairs* 9 (1995), 55; Roth, “Retrieving Marx for the Human Rights Project,” *Leiden J. Int’l L.* 17 (2004), 31, 52-61; Gregory H. Fox & Brad R. Roth, “Democracy and International Law,” *Review of International Studies* 27 (2001), 327, 343-48.

its internal public order.

5. *The Legal Terms of a Bounded Pluralism*

Sovereignty is the legal expression of the territorial political community's presumptive monopoly of the last word on internal public order. This entails more than merely the authority to give or withhold consent to international legal obligations. Although the point is often misunderstood, sovereign authority continues to exist alongside legal obligation with respect to the very same subject matter.

Sovereignty represents the political community's retention of ultimate authority within the territory, notwithstanding international legal obligations pertaining to the exercise of that authority.⁶¹ Although local authorities' failures to implement obligations are breaches that require remedies and license appropriately limited countermeasures, breaches do not license external forces to take action within the territory without the consent of local authorities, and local officials may be immune from personal liability in foreign courts for breaches committed within the scope of state authority. States do not typically renounce the capacity to put themselves out of compliance with international law; indeed, internal law may provide for a decision to override the dictates of international obligations, temporarily or permanently, based on a residual capacity to find the existence of emergency conditions or a fundamental change in circumstances, whether or not such findings preclude wrongfulness as a matter of international law. States anticipate that disagreements about norms will manifest themselves in contingencies, the details of which cannot be fully anticipated in the course of

⁶¹ "International law ... recognizes the power – though not the right – to break a treaty and abide the international consequences." Louis Henkin, *Foreign Affairs and the Constitution* (Mineola, N.Y.: Foundation Press, 1972), 168.

legal standard-setting. Without some assurance of the maintenance of the core legal capacity to resist impositions, states would be chilled in their willingness to subscribe to international obligations.

The international system licenses proportionate sanctions against states for adopting internal practices that breach obligations, but only in relatively rare cases – not ordinary human rights violations, but aberrant atrocities – are states deemed to have renounced, not only the practices themselves, but also the legal capacity to authorize them.⁶² In still rarer cases will the international system approve recourse to armed intervention, either expressly through Security Council authorization under Chapter VII or tacitly through acquiescence in unauthorized actions to forestall imminent humanitarian catastrophe.

Advocates of a “transcendent justice” approach to international legal order find such negation of sovereign prerogative to be far too rare. And to a significant extent, they may be correct. The justification of the existing sovereign equality framework operates from the assumption that internal political conflict represents, in the largest number of cases, struggle among competing factions seeking, however ruthlessly, to apply their principled conceptions of public order to governance of the undivided whole. Yet internal political conflict has turned out, on too many occasions, to be a cover for something else: unlimited violence unleashed against civilian populations, either for reasons of ethno-nationalist ideology (e.g., Rwanda, the former Yugoslavia) or as a by-product of efforts by wholly unprincipled armed gangs to usurp control of economic

⁶² See, e.g., “Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences,” *Am. J. Int’l L.* 41 (1947) 172, 221 (“He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.”). Although attributions of international criminal responsibility are no longer limited by the Nuremberg Tribunal’s requirement of a nexus to interstate warfare, the threshold for the international criminalization of state acts remains higher for purely internal conduct.

activity and natural resources (e.g., Somalia, Liberia, Sierra Leone). Although the existing system has an available mechanism to address internal humanitarian crises as to which diverse elements of the international community can agree on the equities and the response – Chapter VII – and although the system’s failures to intervene are far less attributable to legal strictures than to an unwillingness of the powerful to invest blood and treasure in purely humanitarian pursuits, the inflexibilities of the existing system are genuinely problematic. Moreover, improved mechanisms of international criminal justice are needed to deny impunity to perpetrators of acts that, notwithstanding the color of state authority, are beyond the pale of any plausible good-faith conception of public order.

Nonetheless, it is important not to move, from a conceptually narrow (if empirically altogether too ample) class of cases in which the equities are starkly clear, to a sweeping rejection of strictures on the pursuit of moralistic causes. Whether or not (as conservative lawyers tend to say) “hard cases make bad law,” easy cases surely invite bad “dicta” (i.e., broad elaborations of principle unnecessary to the outcome of the particular case). Although discrete reforms to the current system are needed, the system’s underlying principles are sound. A broad licensing of cross-border exercises of power is less likely to further global justice than to open the door to arrogant (let alone self-interested) impositions, and to undermine the institutional basis for cooperation among the non-like-minded. The precise scope of exceptions to sovereign prerogative may properly be debated, but the exceptions should not be allowed to swallow the rule.

CONCLUSION

For those who impute to the international legal order an inherent purpose to establish a universal justice that transcends the boundaries of territorial communities, the legal prerogatives

associated with state sovereignty represent impediments to the global advance of legality. Sovereignty thus appears as the unconquered domain: a realm of lawlessness that must recede for international law to advance. This view, however, tends to neglect persistent and profound, albeit bounded, disagreement within the international community as to the requirements of justice. An alternative conception of international order predicates peace and cooperation on continued respect for each political unit's capacity to make and enforce the ineluctably contentious decisions needed to structure social life.

The international order's pluralism should never be confused with the "gorgeous mosaic" pluralism of the liberal imagination, in which an overarching unity as to "the right" renders inoffensive, and even enriching, the persistence of differences over "the good." A duty not to intervene in a foreign political community's internal conflict, so far as that duty extends, is a duty to respect patterns of coercion, and even violence, within a collectivity of which one is not a member. As long as profound disagreement about justice remains part of the human condition, an international pluralism, even in its ideal form, will at moments be a tense and even ugly pluralism, an accommodation among political communities dominated by incompatible positions on matters of justice and injustice, freedom and tyranny, and, ultimately, life and death.

Nonetheless, such pluralism is a moral, not merely a practical, imperative. Would-be reformers of international order must accept that internal struggles over competing conceptions of legitimate and just public order cannot always be contained by liberal constitutional solutions, and that recourse to ruthless means, while often objectively unjust, is a fact of political life that unbridled interventionism cannot eradicate – and may well exacerbate. Such reformers must acknowledge the unique stake of a territorial political community's members in the collective decisions that condition life in their society, and the inherent untrustworthiness of even well-intentioned and thoughtful (let

alone self-interested and arrogant) outsiders poised to impose unilateral implementations of supposed universal standards. Moreover, such reformers must serve the moral interest in international coexistence and cooperation by strengthening, not weakening, the institutional basis for good-faith accommodation among the non-like-minded.

All of this can occur without any abandonment of moral judgment. Pluralism is not skepticism or relativism. To uphold limitations on transnational prosecution or forcible intervention is not to refrain from condemning or sanctioning breaches of legal obligations, just as to insist on consent-based methods for ascertaining states' legal obligations is not to abjure more wide-ranging standards for evaluating states' performance of their moral duties. A moral approach to international relations does not require – and properly conceived, does not permit – unleashing the strong to impose justice as they understand it.