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Laura Westra

Globalization, Violence and World Governance

BRILL

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Globalization, Violence and World Governance

By

Laura Westra

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To my son Richard Westra

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FOREWORD

It is a privilege to 'introduce' this thought-provoking analysis, moved by a 'desire to discover a better, more solid source of universal principles, embodied in international law, precisely in order to combat the lack of principles and the "lawlessness" endemic to transnational markets and globalization.'

To 'discover' is not just to see but (recoursing to etymology) to 'uncover,' 'disclose,' 'expose,' and even 'reveal.' This work reveals, as it were, the *lawlessness* of the modern law itself. At one level, Laura Westra constantly reminds us of the vast distance between the law in books and the law in action, which can and must be remedied by activist imagination and action questing a 'radical overhaul' of instruments and agencies of world governance. At another level, she shares the perspective that the form of law itself is the quintessence of predation. Westra traverses thus many a history of human rightlessness and geographies of injustice.

Confronting this duality—subjecting imperfect workings of international law to a discipline of emergent global ethic and the idea of international law as predation—takes us beyond the work of discovery to the tasks of courage, a resoluteness to tear the 'veil of ignorance' under which (to be somewhat unfair to John Rawls) alone the principles, tasks, and doings of justice may be best addressed. And this virtue is remarkably displayed in every chapter of this book.

The work of discovery necessarily leads to the labours of *invention* of a 'solid source of universal principles, embodied in international law.' These labours need to be kept apart from the notion of 'innovation'—a notion with many histories at least as celebrated and affirmed with and since the germinal work of Joseph Schumpeter. Innovation is often presented as invention—as, for example, the survivors and beneficiaries of hyperglobalizing international law know well—and as Chapters 3 to 5 of this book illustrate with poignant urgency. But innovation-as-invention pursues distinctly an amoral idea of efficiency in wealth maximization, and some catastrophic forms of global politics of immunity and impunity.

In contrast, feats of 'invention' signify the labours of those who imagine (in the catchphrase of the World Social Forum) that 'other

worlds are possible.' These become possible, Westra wisely suggests, only by opening ourselves to a 'better solid source of universal principles, embodied in international law.'

Postmodernist readers may wish to speak otherwise: instead of 'solid' they may prefer the languages of 'fluidity' (or even, with Zygmunt Baumann, 'liquid' modernities); they may contest the implicit referent in any talk of 'universal principles' as constituting new metanarrative dispositions and despotisms; and, further, may look askance at the 'cargo cult' of a new international law. Yet they may after all find in Laura Westra (Chapters 4 and 5) a kindred companion as well!

Granting that dichotomous logics always invite their own disruption, as I read this work, the labours of invention constitute the performatives of ethical imagination. Of course, these need always to be distinguished from 'moralization' of international law and politics, which proceeds to perpetrate the worst evils in the name of progress, even to the point of the 'gunboat ethics' that Alain Badiou so eminently critiques. Innovation produces the maxim: 'free markets, free men' (a favourite phrase of the senior George Bush).

In contrast, invention as an ethical feat remains animated by the logics, paralogics, and languages of contemporary human rights. Not the best by any means, yet still an effective way to interlocute the barbarism of power at all levels—local, regional, national, supranational, and global. Not the best because in variegated ways human rights languages invented by long-suffering peoples and communities of resistance remain at each of these levels unconscionably appropriated by the wielders of power without hegemony. If any reminder was still needed, this work provides it in some munificent modes, at least when read as a long tribute to the endless voices of human and social suffering, outside which human rights may *not* ever be taken *seriously*.

In this sense, the work of discovery and the labour of invention may be best grasped via the contrast Jean Baudrillard makes between '*production*' and '*seduction*.' If the former consists in making the invisible visible, the latter renders the visible invisible. Baudrillard thus summons us to think of sovereign power as combined and uneven development of the management, administration, and organization of powers to inflict death—biological, social, cultural, 'developmental,' and even civilizational infliction of 'death' (the latter, as this work shows, even today fully operative relative to the world's ancient peoples and crimes against environment). Giorgio Agamben expresses this insight differently in terms of biopolitics—the maximization of 'lethal'

powers of politics and governance in which the 'Camp' becomes a 'nomos' of modern law.

Given all this, the appropriation for the ends of 'governance/domination' of the ethical potential of logics, paralogics, and languages of human rights presents disturbing portents for our 'common future.' Laura Westra addresses the 'seduction' of some of our ways of 'seeing' a vastly transformed world in the lenses of 'cosmopolitanisms' and 'multiculturalisms.'

At stake remains (as some law and economics genres guide us into thinking) the difference between considering rights (even human rights, perhaps) as factors of production contrasted with human rights of human beings and caring for all forms of sentient life as non-tradable moral public goods. I may think of few better guides than Laura Westra who in this work (as elsewhere in her writing) so deeply contests this axiom.

This fully said, it still remains worthy of recall that her present critique stands well anticipated by some 19th century CE (Christian era, if only because there do exist other registers of reckoning historic time!). 'Neoliberalism,' as Michel Foucault reminds us, has many different histories presenting the tendency, as well as the site, of the axiom: '*One must govern for the market, rather than because of the market.*' No longer, then, may one imagine the State (or the communities of States) as ethical political communities; as seats, sites, and sources of authority to define basic moral goods. Foucault thus suggests a reading of the neoliberal credo with a fatal accuracy: I may only whisper a remark that this work constitutes a vigorous reinforcement of this insight.

Further, the progresses narratives of toxic global capitalism were unusually always at hand. I may do no better than to invoke Richard Cobden, who was candid enough to say as early as 1843 that a law which prevents free trade is a law 'which interferes with wisdom of the Divine Providence, and substitutes the law of the wicked men for the law of nature.' By this measure, Laura Westra is a 'wicked' woman, indeed! All I may say here is that such normative progeny needs endless 'cloning!'

Moving summarily further ahead, I may only express a couple of anxieties. There is no doubt that the Monsanto-type induced 'monocultures of mind' (to borrow a germinal activist phrase from Vandana Shiva) now define some thresholds for a critique of contemporary forms and formats of contemporary economic globalization. Further, as Westra especially guides us via an empirical study of the right to

water in a never-ending situation of Israel/Palestine (Chapter 5), even the recrudescence of a newly imagined international law of human and humanitarian international law may matter but little, if at all, in the contexts of what I insist on naming as the 'wars' *of* and on 'terror.'

May I, by a concluding word of appreciation of empathic, even committed reading of this work, invite your attention to the imagery of Bruno Latour, who famously insists that: 'Political ecology has not begun,' thus fully suggesting a discomfiting quest deconstructing the conventional bright lines between 'nature' and 'politics.' Put another way, and starkly, 'politics' is another name for destruction of 'nature.' If so, the question always is: how may we 'disinvent' politics as a 'second nature?'

Towards this end Laura Westra here makes a singular contribution—a high encomium yet fully deserved.

Upendra Baxi
Warwick and Delhi
September 2010

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The general topic of this book benefitted from my early law school exposure to such thinkers as Upendra Baxi and Richard Falk, as well as my own recent correspondence with Bhupinder Chimni. As well, Klaus Bosselmann suggested a number of German scholars who had written some of the seminal papers and books on world law and world governance.

Judge Amedeo Postiglione, whom I had originally met in 2003, convened an impressive meeting of ICEF (International Conference of the Environmental Foundation) in Rome, Italy, 20–21 May 2010, and the many judges and legal scholars in attendance provided additional knowledge and inspiration.

But the greatest inspiration by far has been the work of my son Richard Westra, to whom this book is dedicated. Not only did I read his latest work, but I learned a lot from our many conversations, as he spent Christmas 2009 with us in Toronto, from his University in Busan, South Korea. Much of his more technical work on economics is beyond me. But the general gist of his work, I found, was quite close to the direction my own work was starting to develop.

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INTRODUCTION

After teaching environmental ethics and the politics of environmental racism for many years, it became increasingly obvious that environmental ethics was the locus of an ongoing "battle" of different positions and arguments. Little of this filtered down to public policy or actual legal regimes to make a difference on the ground. The research I engaged in for my publications indicated the urgency of the situation confronting millions of people affected by environmental causes ranging from climate change to the extreme weather events it engendered—from drought, with the consequent famine in Southern regions, to the melting ice in the Arctic, with the related devastation in the life and the very survival of peoples in the far North; and from the ongoing thrust of globalization and trade, with its disastrous effects on local and Indigenous communities, to the proliferation of hazardous chemicals affecting the developed world.

Moral exhortation, while necessary, appears to be insufficient to stem the tide of ongoing collective harms. The triumph of capitalism over the rights of the "commons" started a long time ago in agrarian England. Yet I have argued that what we are facing today represents the final "enclosure" movement; the commons today are no longer available to the collective, as most of the natural world is either inquinated and commodified, or turned into private exploited property (Westra 2004). The early "enclosure movement" was the result of capitalism, but some today question whether the earlier forms of capitalism can even be equated with the modern notion of globalization. In fact, Richard Westra argues that "the neoliberal state policy … is undermining the very conditions for the existence of capitalism" (Westra, R. 2009: 97).

At any rate, neoliberalism and globalization dominate global governance today, with the resulting increase in breaches of human rights law. The vital importance of law to attempt to redress the harms persuaded me to return to school for a second Ph.D. in law, resulting in a thesis published as *Ecoviolence and the Law* (Westra 2004). As I continued to research the effects of environmental injustice on human rights, I chose the areas where it appeared to be most obvious and to engender the gravest harms. What emerged from my research was that the rights

of communities and collectives—especially those of traditional, land-based groups—were the ones most at risk. Starting with the largest collective, that of unborn and future generations, I worked on three book-length "case studies", to produce a trilogy on environmental justice (Westra, L. 2006, 2007, 2009). What the trilogy indicated was that, while there were numerous legal instruments, domestic and international for the protection of individual rights, the collective did not fare as well.

Essentially, for the most part, the "common good" is not even discussed, let alone given primacy in law today; "development" is seldom viewed critically (*pace* Sen's "individual freedom" interpretation), despite the heavy toll of harms it causes, especially to communities in the south. Finally, as Judge Weeramantry said recently at a meeting in Ottawa, neither lawyers nor judges are trained to deal competently with the many cases throughout the world where the (individual) rights of corporate bodies to pursue their interests clash violently with the basic survival rights of poor communities, to the great detriment of the latter.

In fact the major problems appear to be the lack of implementation and enforcement in international law, and the inequalities in state and regional powers. In addition, the state itself has lost much of its own power as its sovereignty has been eroded by such organizations as the World Trade Organization (WTO) and the International Monetary Foundation (IMF), as well as trade agreements such as the North American Free Trade Agreement (NAFTA). The state has been the traditional first line of protection for human rights, whereas the UN's power was intended to secure that, in the event of state failure to protect (at least in grave cases), intervention would restore the "responsibility to protect".

The glaring ongoing failures of these arrangements were the reason for undertaking the present work, the purpose of which is to summarize the status of international law instruments and world governance in this era of globalization. However, this work is not intended as a comprehensive review of all domestic and international legal instruments pertaining to our topic, nor of all the related jurisprudence. It is simply intended to present an argument, using the examples of both instruments and case law, to explore the protection of collective rights today and to examine the institutions of global governance.

My research disclosed the presence of various "proposals" in the scholarly legal literature, such as the possibility of establishing a "world

state" (Wendt 2003) in order to ensure better protection and more effective forms of governance. The aim of this work is therefore to expose the main reasons for the difficulties that affect the implementation of international legal instruments, while also preventing UN declarations, mandates and reports from achieving their desired effects of changed policies for states and alliances. Also, current alternative proposals will be evaluated, and novel approaches will be proposed. Some of the works consulted will include Ragazzi (1998), Salomon (2007), Goodwin-Gill and Talmon (1999), Meron (2006) and Anghie (2006).

The major proponents of a "world law" as a form of governance are the topic of Chapter 1, together with both the advantages and disadvantages of their positions. Public international law includes "two layers", the first of which regulates the relation between states while the second regulates the "law of the community of six billion human beings" (Sassoli 2002). It is the failure of present regimes and institutions to respect the rights of the latter that is the main focus of my research in this work. A number of German scholars (such as Alexander Wendt, Jorg Friedrichs, Frank Biermann and Steve Charnovitz) propose a radical review of the UN, its organs and instruments, as they propose a world law, world state or other form of world governance.

Chapter 2 turns to the reasons why change in global governance is sought, starting from the failures of today's international law from a "leftist perspective" (Marks 2000). It aims to disclose the true effects of "development" (Chimni 2006) and the ongoing "exploitation" of poor local communities, as well as the case for considering today's powerful alliances to be guilty of "plunder" (Mattei and Nader 2008). Both exploitation and plunder are, essentially, economic terms, so that it is necessary to lay bare the component of violence endemic to these practices, in addition to their economic effects.

Chapter 3 considers the possibility of a "World Environment Organization" (Biermann and Bauer 2005; Aginam 2005) and the need to reinforce the World Health Organization (WHO), as public health ought to be a major consideration in global governance (Gostin 2008; Pogge 2008). Judge Amedeo Postiglione and his group, who support and recommend an International Court of the Environment (ICE), have been working tirelessly to see reforms in world governance, to include both a UN Environmental Organization (UNEO) and a parallel court intended to deal exclusively with environmental cases. The Conference on Global Environmental Governance (Ministry of Foreign Affairs, Rome, Italy, 20–21 May 2010) included a large number of

government officials from several countries, as well as judges and well-known legal scholars. Hence it would seem that Postiglione's work for over 30 years is not reaching a stage where the world community appears to be ready for such a reorganization, given the multiple failures of present institutions throughout such recent events as the inconclusive UN Climate Change Conference (COP15) in Copenhagen in December 2009 and the Deepwater Horizon oil spill in the Gulf of Mexico in April 2010.

Also apparent are the ongoing protests in all major capitals of the world against the conflicts and human right violations, both environmental and non-environmental, that the UN and its Security Council seem unable or unwilling to address. A recent US case (September 2009) before the New York court indicates possible new developments in that direction, as the case was successful through the use of traditional principles such as *parens patriae* and the public trust doctrines.

Chapter 4 returns to the failures at the interface between neoliberal democracy and globalization, and emphasizes the limits of legal positivism for world governance, as indicated by the failure of well-drafted constitutions to protect their own people, particularly Indigenous communities within their own borders (Ecuador v. Colombia, 2008); hence the need to ensure such protection through international courts. In fact, given the limits of state power when conflicts arise with powerful economic international organizations and instruments such as the WTO or NAFTA, we need to return to such basic principles as are embodied in *jus cogens* norms, as they support *erga omnes* obligations beyond the legal positivism that mostly limits obligations to treaty-based commitments, without acknowledging the severity of the harms imposed by various environmental exposures.

Chapter 5 describes one of the clearest examples of the failures of UN mandates, reports and declarations to ensure the protection of people under ongoing illegal threats: the situation of Palestine. This case study is based primarily on Amnesty International's report on the "right to water". The situation in Palestine is one that combines grave environmental harms to the population with a number of other gross violations of human rights. This situation is well recognized by both the UN (which appointed rapporteurs) and the whole world community, all the more so after the attacks on Gaza in 2009 and the May 2010 attacks on the flotilla bringing humanitarian aid, as well as the subsequent seizure of the Rachel Corrie aid boat. Aggression, piracy on international waters and a number of other crimes committed by Israel

are glaringly obvious to the world community, but aside from a strong condemnation on the part of UN Secretary-General Ban Ki-moon, thus far neither the UN nor its Security Council are taking any action, while the US continues its support of Israel.

Finally, Chapter 6 returns to the role of the United Nations in global governance and the dysfunctionality of today's legal regimes, in order to propose the changes and novel approaches required in order to restore the "rule of law" in what appears to be a "lawless" world today (Sands 2005). This chapter turns from a consideration of basic human rights to that of civil and political rights, as also indicated by the discussion of the previous chapter. In today's global governance, there are at least two more obvious breaches of civil rights: one arises from the present approach to the so-called "war on terror"; the other emerges from the presence of "supranational constitutions"—that is, from the imposition of practices and conditions not allowed by the constitutions of countries (beyond the EU), but enforced nevertheless by the WTO and by NAFTA, institutions that appear to have the "last word", beyond the legal instruments of the countries who seem to offend against their support of the primacy of trade.

The evidence implies the need for a better, more principled approach to world governance, almost forcing us to consider a radical overhaul of present institutions. The immense difficulties present in such an enterprise suggest that our efforts in that direction may use EU institutions as a model, while recognizing that it is far easier to point out the multiple failures and inconsistencies in the present forms of world governance than it is to find the appropriate way to redress them. This work's analysis aims to provide at least the first step in that direction.

CHAPTER ONE

GLOBALIZATION AND WORLD GOVERNANCE: A PRELIMINARY DISCUSSION

Introduction: Understanding the Impact of Globalization

> Over the last 10 years or so, in the disciplines of International Relations (IR) and International Political Economy (IPE), there has been much talk about globalization and fragmentation in a world of disintegrating nation-states (Friedrichs 2001: 477).

Much has also been written about the weakening of the state powers as one of the most significant effects of globalization: the autonomy of the state is increasingly reduced because of the constraints imposed by globalization (Strange 1988). International relations theory poses at least three basic problems, embedded in the present approaches to those disciplines, none of which is sufficient to fully explain the relations between globalization and the state:

1. the traditional state-centric approach that was dominant over the last 50 years;
2. the discourse about globalization, according to which the nation state is being eroded by the forces of economic, technological and societal transformation;
3. the discourse of fragmentation, according to which the nation state is being eroded by the emergence and re-emergence of cleavages along ethnic, cultural and religious lines (Friedrichs 2001: 479).

According to Friederichs these approaches only represent some aspects of the reality of globalization, without providing a comprehensive theory. Such a theory, he believes, can be found in the analogy he proposes with medievalism (Friedrichs 2001: 479). His argument is that substituting "the primacy of the economy" (Friederichs 2001: 481) for that of politics seems insufficient. He proposes "new medievalism", a theory defined by Hedly Bull in 1977 as "a modern and secular counterpart of

[medieval Western Christendom] that embodies its central characteristics: a system of overlapping authority and multiple loyalty" (Bull 1977: 245).

This appears to be a reasonable explanation, but when such a "post-international system" (Friederichs 2001: 483) proposes to substitute the Christian universal principles, based on the authority of the Pope, with the "transnational market economy" (Friederichs 2001: 486), while the current state system would be loosely represented by Medieval emperors and kings, then we truly leave the realm of reality altogether. Such a transposition is based on a false analogy: unlike the Christian universalism and the authority of the emperor, there is nothing universal or "principled" about transnational markets, and little more of either in state governance today (Westra 2011).

That is the main reason for undertaking the present work. What I am seeking to discover is a better, more solid source of universal principles, embodied in international law, precisely in order to combat the lack of principles and the "lawlessness" endemic to transnational markets and globalization. These owe their negative impacts on human rights to their lack of universal principles beyond their support of the economic interests of the major powers in the present geopolitical configurations.

During the medieval period there was, ultimately, no real conflict between emperors and popes, as the former had to follow the lead of the latter, at least on major issues. By replacing Christianity with secularism, the main impetus of principled action was and remains lost. Friederichs might be right in saying that market power has replaced God's power in the eyes of states and governing elites, but there is no true "conflict of loyalties" there, as states must now submit to the dictates of the WTO (and hence the market, in its current incarnation).

What is ultimately lost is the strength of universal principles, which in turn eliminates the primacy of respect for humanity. Hence, although that "substitution" has indeed happened, we cannot be content to acknowledge it and hope that more of the same might somehow provide a minimum of security and protection that states (or, in earlier days, noblemen and kings) might have been able to offer, at least in principle.

Hence this "explanation" of globalization serves to lay bare its gravest flaws. In the next section, as we move beyond the "gutted" (or unprincipled) "new medievalism" that Friederichs proposes, we will consider whether the present globalized form of governance may be

viewed as a transitional stage to the development of a "world state", and whether such a development might help to alleviate the harms arising from the present "transnational markets" stage.

A Preliminary Discussion of the Possibility of a World State

> Paradoxically, globalization creates simultaneously homogeneous spaces transcending formal state boundaries and new borders delineating new fragmentations at inter- and intra-state levels. In sum, globalization is more than internationalization or regionalization and less than universalization (Gulmez 2009: 2).

Also, globalization is not a single phenomenon, either political, legal or economic (Westra, R. 2009: 120). Essentially, the retreat of the state is increasingly in evidence through the institutional aspects of globalization (Ferrarese 2009: 2; Sassen 2006), as the "denationalization of states" embeds globalization. Sassen acknowledges that "state participation in global policies" embeds "corporate capital", but also supports "those seeking to subject the latter to great accountability and public scrutiny" (Sassen 2004: 1158).

However, *pace* Sassen, present international institutional settings are clearly oriented to the primacy of trade, and therefore to the triumph of the relativity of a particular individual and aggregate interest, in direct contrast with either cosmopolitanism (Kant 1795) or the universality necessary for the respect of the human collectivity (Westra 2011).

Is the global system moving towards a "world state"? And is such a systemic development desirable as well as inevitable? Further, would a "world state" add to the ongoing disregard of human rights present in today's globalized world order, or could it possibly provide a new, powerful force in support of normative obligations? These are some of the questions we will discuss in this work, as we consider the legal scholarship on this issue.

Alexander Wendt believes in the inevitability of such an outcome, and his conviction is based on the generality of systems, according to self-organization theory (Wendt 2003). For my part, almost twenty years of work on various aspects of ecological integrity—and on the necessity to understand ecosystems sufficiently to allow them to retain their optimum capacity for self-organization in order to sustain life on earth (Westra 1994; Kay and Schneider 1995: 49–59; Karr 2000: 209–226) —encourages me to a positive agreement with Wendt's argument,

at least in principle. Ecological/biological integrity is vital to the maintenance of ecosystem services, without which neither humans nor non-human animals can survive, let alone establish just governing institutions (Westra 1998; Bosselmann 2008a: 319–332; Karr 2008: 21–38).

However, much of the literature critical of integrity[1] is based precisely (though not exclusively) on the teleological aspects endemic to the concepts. Hence the importance of Wendt's recent "rehabilitation" of teleological explanation, which is part of his argument for the necessary emergence of a "world state". Wendt says:

> Self-organization theory hypothesizes that order in nature emerges not only through the mechanism of mutation retention, but also "spontaneously" from the channeling of system dynamics by structural boundary conditions toward particular end states (Wendt 2003: 492).

Of course there is a vast gulf between accepting self-organization and teleological behaviour in natural systems, and accepting the same characteristics in social systems as well (for the former, see Ulanowicz 1997; for the latter, see Thompson 2001). Wendt also notes that "a pacific federation of republican states, or … a realist world of nation states in which war remains legitimate" and a "world state" are among the possible outcomes of the development of the present international system. He adds that the first is associated with the work of Immanuel Kant (1784), the second with that of Georg Wilhelm Friedrich Hegel (Hegel 1977; see discussion in Wendt 2003: 493).

In general, however, multiple forms of causality must return to Aristotle and oppose Newtonian causality with its single mechanical form. For Aristotle (and his followers), material causality is only one of the "four causes", as efficient causality, formal causality and final causality are all also integral parts of a full understanding, and of a thorough and complete causal explanation (Ulanowicz 1997: 12; Gotthelf 1987; Westra 1994).

Nevertheless, even aside from debates about the possibility of intentionality in teleological explanations regarding natural systems (Wendt 2003: 496; McLaughlin 2001; Mayr 1982), it is highly controversial to attempt to transfer the understanding of goal-oriented behaviours and processes observable in nature to similar processes in social or historical systems. After all, for natural systems,

[1] Primarily in the mid-nineties; see, for instance, Shrader-Frechette 1997: 73–81.

> … the paradigm case is ontogeny, the process by which embryos become adults. Here there is no goal seeking (a puppy does not seek to become a dog) and therefore, no "purpose". But the process is still end-directed, since unless interrupted by disease or death, a normal organism will inevitably become an adult (Wendt 2003: 496).

Wendt proposes two basic points that require clarification before teleological explanations can be transferred to social/political systems. The first one hinges on what makes any system teleological. The second, although obvious when biological systems are at issue, is much harder to discern, as we are not confronted with the goal, or at least with the "endstage", of the process (thus avoiding intentionality altogether at this stage; Wendt 2003: 503).

For the latter, the possible emergence of a world state could be anticipated; first, because throughout history we have seen the tendency of political authority to consolidate into larger units; second, because "existing states … can be seen as local attractors of regional subsystems"; and, finally, because the possibility of relying on computer modeling shows this tendency as well (Wendt 2003: 503).

At any rate, these three points appear somewhat unconvincing given the many desirable aspects of state sovereignty on the part of those who benefit from its existence, both citizens (especially elites) and rulers, quite apart from any theories of convergence to explain a world state as desirable emergent development (Spruyt 1999). It is obvious that the governing political elites benefit strongly from the existence of a state that allows them the sole command of its force and grants them the legitimacy to design policies and laws, as through the state they acquire sole discretion to enforce such policies as well (Wendt 2003: 504).

The state is also a "corporate actor", able "to act consistently as a single agent" (Wendt 2003: 504). It is here that we may also see the convergence of interests of rulers and ruled, at least when optimum conditions obtain, and a true, "thick" democratic rule prevails (Engel 2010: 26–40). If the citizenry feels a sense of patriotism, a special attachment to their nation's culture (Kymlicka 1997), and if the appropriate procedural processes prevail, then one may ideally see a commonality of interests between states and citizens so that the state's actions may be viewed also as "our actions".

It is important to note the major difficulty with this model: the commonality of interests here proposed as ideal in some sense can mask the most immoral, oppressive and "lawless" activities on the part of a

state (Sands 2005). It is sufficient to recall South Africa during the time of apartheid, or today's "democratic" state of Israel, as examples; or the many policies of the George W. Bush administration in the US. There are obvious limits to the desirability of single nation states. The only existing way of curing those who will transcend those limits is the presence (and the effectiveness) of international law and of the UN.

Hence it is easy to discern why Wendt leans toward a world state as necessary to change the current political situation: such a state, if effective and principle-based, could ensure "universal collective security" and "universal supranational authority" (Wendt 2003: 505). A state is a "corporate actor", but its structure is based, at best, on "collective intentionality" (Wendt 2003: 505). The state is therefore "capable of goal-seeking behaviour" (Wendt 2003: 505).

The legal and moral status of a state, like that of a corporation, should be discussed in the context of *mens rea* requirements for assault convictions in corporate crimes. To sum up, briefly: corporations are indeed legal persons, and there are several theories that address the meaning of that terminology (Chick 1993: 134–145). For our purpose, it will be sufficient to mention three major positions: the "fiction theory"; the "legal aggregate theory"; and the position that is taken to be most appropriate, the "corporate internal decision-making structure," the latter being the clearest approach to predicate corporate intentionality (French 1979: 58–69). The "fiction theory" has its roots in Roman jurisprudence, but its main flaw is that in relying on the description of "legal fictitious persons" it ignores the biological existence of real persons (as well as, by implication, any others). The "legal aggregate theory" recognizes the biological reality of persons and grants priority to these legal subjects, while treating corporate persons as purely derivative, and identifying them only with "directors, executives and stockholders" (French 1979: 102). In so doing, however, aggregate theory supporters are choosing arbitrarily where to ascribe responsibility, making it impossible to distinguish between a group (or mob) and corporate reality.

A case in English law demonstrates the difficulties embedded in the first two theories. In Continental Tyre and Rubber Co. Ltd. vs. Daimler Co. Ltd. (1915) a company whose directors and shareholders were German subjects and residents was incorporated in England and carried on its business there. The question was whether Continental Tyre should be treated as an English subject and could bring suit in an English court (while Britain was at war with Germany). The Court of

Appeal's majority opinion (five to one) was that "the corporation was an entity created by statute". It was therefore "a different person altogether from the subscribers to the memorandum, the shareholders on the register" (French 1979: 102). Hence, the corporation's biological composition may not be identical to its true "personhood" or its intentional structure.

It is also worthy of note that not all who are subjects of rights can in fact be the administrators of rights, and infants, fetuses, animals, future generations and ecosystems are relevant examples of entities that have been declared at one time or another to have some rights, although it has never been argued that any of these could administrate their own rights (Stone 2000: 240–248). If we accept a non-specific description of a person as the subject of a right, we can at least make the following claims:

1. biological existence is not always necessary to personhood;
2. the subject of a right is "the non-eliminatable subject of a responsibility ascription" (French 1979: 103).

Responsibility is the necessary correlative of a right. In this sense, it goes beyond simply being the one (or the corporate person) who performed an action. We must address the question of intent. For corporations and institutions, the corporate internal decision-making (CID) structure is the locus of the intentionality we intend to establish. Through the CID structure, corporate power is deployed, setting in motion a series of actions flowing from a central, hierarchically made decision, but involving the "acts of biological persons who … occupy various stations on the organizational chart of the corporation" (French 1979: 106).

An advantage of this approach is to be able to maintain corporate responsibility while also retaining the ability to consider varying degrees of intent or of desire to bring about a certain result, the product of corporate ordered activities. French's (1979) argument strongly supports corporate responsibility and, because of its inclusivity, could easily be extended to other institutional bodies, as long as these too are possessed of "internal decision-making structures". Perhaps we can also argue that the CID structure approach *implies* intentionality, as corporate activities are performed by subjects of rights in all cases where an action has been performed or omitted. But neither institutions nor corporations may be free to be the subjects of rights without

accepting the corresponding full responsibility toward all other right-holders, be they individual or corporate.

In other words, once a corporate body has been distinguished from a mob or an aggregate, and is, in fact, *defined* by its Structure, then it is clear that its very nature is to be capable of intentional agency: that is the root of its "personhood". In addition, because it is not a biological entity, it can also be argued that such persons are not capable of the emotions that characterize individual biological entities. Corporate persons, then, can only intend, rationally, whatever activity they choose; such actions cannot be the result of sudden impulses or passions (provocation), fear for its own life (self-defense), or addiction (intoxication). Neither mental disorders nor automatism, nor any other syndrome, will be possible. In a sense, by claiming to be persons, yet admitting they are not individual biological ones, corporations may represent the clearest examples of pure purposefulness, or desire to bring about certain results, including the activities of which the results are the physical elements of an *actus reus*. This analysis also applies quite well to states.

As is evident even through a cursory examination of the current geopolitical situation, interstate unity and commonality of intent is the exception rather than the rule. Thus the possibility of a world state with a common will and a common power is correspondingly harder to envision. Wendt proposes some fundamental changes to be implemented before such a transformation of the international order might occur:

> The first is the emergence of a universal security community—members of the system must no longer routinely perceive each other as physical threats … The second is a universal collective security; if crime does occur, other members of the system must act as if a threat to one is a threat to all … The third is universal supranational authority—a procedure for making binding and legitimate decisions about the exercise of this common power (Wendt 2003: 505).

Probably the most problematic aspect of this scenario would be the emergence of a "global common power" with "universal supranational authority", which Wendt envisions as drawing together all present states as "local realizations of a larger State" (Wendt 2003: 505).

The common power would entail the acceptance of a common security system, without the dominance of certain powers and absence of most states that are the case in today's Security Council (Lamb 1999: 361–388). But it seems that the complete elimination of the individual

sovereignty of states, required by Wendt in order to support the legitimacy of a "common power" of the world state, may well pose an impassable obstacle, as at least the specific cultural flavour based on traditions, languages, religion and the like should be retained as they are in the European Union (EU).

In some sense, the UN is already working to achieve this commonality, but it lacks the power or ability to enforce its own mandates, which renders it, unfortunately, a very poor model. Wendt acknowledges that "the key problem for any other architecture is unauthorized violence by rogue Great Powers" (Wendt 2003: 506). The government of a world state, however, would need to be able to commandeer a "collective response to threats" in order to implement its "common power". In fact, "were a completed EU to be globalized, it would be a world state" (Wendt 2003: 506).

However, there is not in Wendt a clearly articulated explanation of why this conclusion has been reached. Some of my previous work tends toward a similar conclusion as well, albeit reaching it by a different path: the main point was not the necessity of a world state as the goal of a "natural" evolution of sorts. My argument was based on the need for strong principles to guide a common entity, beyond economic and trade advantage and the power requirements of certain state alliances, in order to ensure our survival and the respect of our most basic rights (Westra 2004: Chapter 8).

Wendt's approach, by pointing to the EU, also tends to the model of a power that is indeed common, but is far more respectful of both basic rights and collective concerns than any other existing association. Later in this chapter (as well as in Chapter 6) we will attempt to provide some examples of EU governance that might render it appropriate as a world state model in the sense Wendt advocates.

Some Difficulties with "World State Institutions"

We can start by raising some procedural objections to this scenario. Such international organizations already exist: one is the UN, the other is the WTO. However, unfortunately, neither can claim either impartiality or adherence to principles regarding respect for human rights, beyond what either regional systems or states themselves indicate. The UN Security Council guarantees that only the preference of the most powerful Western countries are given priority both on the ground and in the appropriate tribunals (Westra 2011).

During the last days of 2009, we saw the failed attempt by a lone individual bomber on a plane merit first page mention in all newspapers and networks from Canada and the US to the BBC and Euronews; in contrast, an attempted march of protesters in Egypt, bound for Gaza, with its ongoing blockade by Israel, was met with several days' delay and a brief report by some news stations, but no newspapers, except a belated story in the *New York Times*. This minimal reporting occurred despite the beating and jailing of the marchers (including US citizens) by the Egyptian police.

During the same period, despite repeated pronouncements by US president Barack Obama about the need for Israel to cease their illegal construction of housing settlements and open requests to withdraw from those already existing, Israel blithely continued to flaunt both international law and public opinion. This anecdotal evidence is simply an example of an ongoing trend, as other similar violations of international non-derogatory norms persist. They include war crimes, maltreatment of refugees and prisoners, and other such immoral activities, as well as wars of aggression, such as the infamous "Operation Cast Lead".

Many other areas of the world manifest similar disrespect for human rights; the "leitmotif" for all is who gains, or whether the friends and allies of the major powers (US and UK, for the most part) are on the side of those committing the crimes. In common law, the interested party's involvement constitutes "motive", and renders more grave the illegal act's criminality. In current international law, in contrast, such self-interest on the part of friends and allies of a major Western power simply appears to clinch the "reasonableness" of their position; hence it serves to excuse their criminal activity. For instance, as China is a valuable trading partner of the West, their record of repression of human rights and their ongoing recourse to the death penalty merit some words of condemnation, and some degree of media coverage, but the trading relationships are not really affected.

This brief digression only represents an initial critique of the possibility of establishing a world state with institutions that might be better able to deal with the present lawlessness and the ongoing inability of existing institutions to ensure compliance with present laws. Wendt sees the new world state as follows:

> Since I have defined the territorial state partly in terms of sovereignty, this would in effect mean that the elements of a world state would no

> longer be "states" in a strict sense, but local realizations of a larger state (Wendt 2003: 505).

The examples adduced indicate the difficulties endemic to the governance of a larger state, given the presence of elites that would be determinant components of the possible success of such a state in the sense of rendering the state's institutions more just than what prevails. Although these difficulties are basic to the desirability of a world state, and of our support of its "development", they are not a counter-example to the teleogical understanding of causality that Wendt sees as the necessary replacement of the dominant paradigm of causality that is purely mechanistic. We will return to the desirability of the end goal (that is, the world state) below; for now a discussion of such causality appears appropriate, as its "rehabilitation" on the part of Wendt does not stand or fall together with the final goal he anticipates.

Teleology and Causal Explanations: The Better Alternative

> Insofar as each item in motion can "desire", it desires to be better; that is, it will desire being rather than not-being, life rather than non-life, etc … (Rist 1989: 1222).

While in practice the world state alternative may well be fraught with difficulties similar to the ones we already encounter today, the defense of teleology appears to offer a better way of understanding the very difficulties we have noted. This perhaps allows a clearer, more informed way of dealing with them, and therefore a more effective solution. Perhaps some of the examples in the previous section, together with the insufficient responses they have generated, might lend themselves to better solutions as their causality becomes clearer.

If we start as far back as the official origin of the "war on terror" after 9/11, we see that only the "material" or at most the "efficient" case of those events is ever mentioned. This approach tends to obscure the true causality and suggest only inappropriate responses. In a similar vein, a doctor that treats a fever without any understanding of what has caused the fever to occur will probably misdiagnose and misprescribe for her patient.

The "reasons" for terrorism vary and include several silly versions of what might motivate "different" people with different social institutions and religious beliefs to put their own lives on the line repeatedly for a cause they believe in:

> Suicide bombers were spurred on by Islam's promise of virgins in Paradise, we were told. That line lasted only until the ascent of women bombers, especially in Chechnya, who had no such sexual favours to anticipate in heaven (Siddiqui 2010: A/19).

Other "explanations" included a critique of the backwardness of "radical Islam" that needs to be eradicated, "except that, of late, terrorists have been coming out of the public schools of Canada, the US and Europe. And the US Army, as in Fort Hood, Texas" (Siddiqui 2010: A/19)

Examples of "explanations" could be multiplied, but they systematically exclude the reality of a strong principled stance—such as the defense of religious freedom—and of whole peoples whose "fault" is to hold beliefs on many issues that do not coincide with Western paradigms. This reality is ignored as they are easily dubbed "terrorists" because of the result of their actions, not their motivation, which is that of "freedom fighters". The "crusades" against such peoples originate from so-called "democratic states" whose "thin" (Engel 2010) democracy allows them to attack without qualms in their own economic interest, and permits them, like the sovereign in Hobbes's *Leviathan*, to assert their power to redefine right and wrong (Hobbes 1958).

This example, counter-intuitive as many may find it, is an excellent test of the meaning of causality. If we limit ourselves to considering the "material cause" of the 9/11 event, and even if we add the "efficient" aspect, all we have is the physical disaster (and perhaps the planning and complicity leading up to it). What has been entirely left out of the equation is the rest of it: that is, the "formal" and "final" causal aspects, which are the most essential and determinant ones.

In other words, the "terrorism" giving rise to a "legitimate war on terror" defines the attacks on the World Trade Center's twin towers only if we ignore the real significance of the illegal and immoral acts on the part of Al-Qaeda: an effort to draw international attention to the immoral and illegal treatment of Muslim peoples everywhere (but especially in the Middle East) in a clear and graphic manner, during a particularly bad period in US history (that is, during the administration of George W. Bush).

That clear and openly declared meaning can be identified as the "formal cause" of the event. What of the "final" causal aspect? The question here is: what is Al-Qaeda's ultimate goal, or what are they hoping to achieve? That goal is equally clear: they want to see the end

of the illegal and genocidal activities of the state of Israel with its policies of apartheid and "ethnic cleansing", as well as the racist/imperialist practices against other Muslim states on the part of the US and its supporters, in the name of bringing Western-style "democracy" to them (while ensuring Western countries of their oil resources). This simple, perhaps superficial example demonstrates clearly the dangerous incompleteness of relying only on material and efficient causality, while blocking the formal and final aspects of the explanation.

This deliberate oversight allows the acknowledgement of the violent action and of its declared perpetrators, but no solution can be found if the motivation and goals of the 9/11 attacks, as well as the many suicide bomb attacks that still continue with deadly regularity, are not fully understood and addressed. One cannot fight ideals and principles with bombs, armies and airline checkpoints. It bears repeating: when the goals and motives are legitimate—even noble—no end to the violence will be in sight and no lasting solution can be found unless a serious dialogue addresses those concerns and appreciates their motivation,

This is why no amount of armies and attacks by powerful and well-funded countries can succeed in quashing the revolts of peoples fighting for their lives, their dignity and their rights. The importance of a teleological understanding of current events and situations cannot be over-stated, while the general refusal to consider anything but the material and efficient causality of events impedes an appropriate assessment and a complete understanding of many of the difficult situations that face us today.

From Biological to Social Systems?

> In short, as long as it has a common power, legitimacy, sovereignty and agency, we should not prejudge the form a world state might take. The EU is already not far from meeting these requirements on a regional level. Were a "completed" EU to be globalized, it would be a world state (Wendt 2003: 506).

The development of the writings of Ernst Haeckel include an inexorable move from the biological/ecological principles of Darwin's *Origin of Species* (Darwin, 1859; Haeckel 1903) to a well-known (and wrong-headed) application of those principles to social systems: "civilization and the life of nations are governed by the same laws as prevail throughout organic life" (Haeckel 1916: 16). However, this step did not lead to

a just and cosmopolitan world governance, but to what Stein saw as providing the "roots of Nazism" instead (Stein 1988: 53). In fact, in my earlier work on biocentric holism, I was at great pains to distance myself from such a mistaken attempt to transpose a correct understanding of biology to social/political institutions (Westra 1994).

I concluded that this is a dangerous misinterpretation of the reach of natural science and of complex systems theory, whatever the possible superiority of a world state, and the benefits it might provide beyond the present institutions. In fact, the interpretation provided by Haeckel and his followers is a powerful incentive against accepting as inescapable the development of present institutions towards the governance of a world state, especially since the superiority of such an end has not been conclusively proven as yet.

Complex Systems and the Problem of Surprises

> In order for the scientific method to work, an artificial situation of consistent reproducibility must be created. This requires simplification of the situation to the point where it is controllable and predictable. But the very nature of this act removes the complexity that leads to the emergence of phenomena which make complex systems interesting. If we are going to deal successfully with our biosphere, we are going to have to change how we do science and management. We will have to learn that we don't manage ecosystems, we manage our interaction with them (Kay and Schneider 1995: 49).

"Managing ourselves" essentially means understanding that many areas must be left "unmanaged" as well, so that "nature's services" (Daily 1997) and their optimal capacity to follow their own natural trajectories may continue unimpaired (Kay and Schneider 1995: 77–87). In other words, we cannot see the natural world—let alone the social/political one—according to the Newtonian perspective, with components interacting predictably in a linear way, similar to billiard balls hitting one another (Kay and Schneider 1995: 50).

Once we transcend a world view dealing with "mechanistic/reductionistic predictions about time and space" (Kay and Schneider 1995: 50), we need to take into consideration the presence of catastrophes. That is, we need to acknowledge that "the system will undergo sudden changes in a discontinuous way" (Kay and Schneider 1995: 50). However, I am not sure that Wendt acknowledges this very real possibility in relation to the development of the complex socio-political

systems he is considering. In fairness, Wendt states that Daniel Deudney's proposal "does not attribute a telos to the system, and thus defends only the 'probability' of integration, not its inevitability" (Wendt 2003).

Once we eliminate the aspect of inevitability from the development of the world state that Wendt envisions, then the process may be better able to accommodate the aspects of surprise and even of sudden "catastrophe" that must be anticipated in natural systems and organisms. In contrast, the "non-management" position that is required for the safe functioning of ecosystems seems to be a highly unlikely alternative when man-made systems of any sort are at stake, since all policies are designed to advance the success of present and short-term plans of various governments and regimes in relation to other equally motivated states.

In fact, it is the quest for economic advantage and power that normally motivates states, not an interest in optimal global functions, nor respect for human rights. This is so entrenched today that we repeatedly see the failure of UN mandates, and even of legal regimes designed for the ultimate protection of all people, as most of these documents fail to give the desired support to individual and aggregate state interests (as globalized trade regimes do; Westra 2011: Chapter 7).

It is therefore neither evident nor convincing to propose that the functions that are appropriate to natural systems may simply be transferred to socio-political ones instead. There are grave logical problems involved in such a transfer, as well as moral ones, as we have noted above. Further, the development of ecosystems is open to changes and surprises due to their complexity, which renders the ultimate state of their development uncertain, to say the least.

Wendt acknowledges the fact that the desirable world state he envisages cannot be fully specified at this time. Thus, perhaps, he might be prepared to accept the "surprises" that may well alter and change the ultimate contours of the system of governance he views as both desirable and unavoidable. As noted above, the present situation in the European Union appears to show a form of governance that already approximates a world state, according to Wendt. I have argued elsewhere that many of the present problems facing global society today are handled better by the form of supranational governance we find in the European Union than they are in the rest of the world (Westra 2004: Chapter 8). Hence it will be useful to review some of the aspects of transnational governance already existing today.

European Citizenship: A Blueprint for Cosmopolitanism? Identity and Democracy

> I suggest then, that the proper grounds for a group's claim to statehood are that it is living, or could live a decent communal life which would be protected or enhanced by statehood, so long as the life of similar groups is not thereby worsened in a way that they have a right to avoid (Gilbert 1994: 123).

Paul Gilbert is here attempting to set the limits to terrorist intervention for a new or re-established "state", on behalf of peoples who cannot achieve statehood simply by democratic procedures. Hence his argument must set out the minimum acceptable conditions for the claim that taking up arms on behalf of a people might be justified. He adds:

> It is not what people do desire, but what is desirable for them, that generates the right, although what is desirable for them is something that they are in a good position to judge (Gilbert 1994: 123).

The appeal to the "good" is what must be defended in this work, often in contrast to majority preferences, but always in line with the Kantian understanding of universal laws based upon reason. And this is the first point to consider when we turn to the example of the EU as a "blueprint" for future cosmopolitanism: how do we move from democratically elected nations to a supranational entity? Weiler says:

> Citizenship and nationality are more than an element in the mechanics of political organization. We live in an era—perhaps the entire century—obsessed with the question of individual and collective identity (Weiler 1999: 326).

From the point of view of morality and the principles of international law, our "obsession" and our quandaries about nationality and about what can make a "people" can and should be viewed from the standpoint of the "common good"—one that is truly universal, rather than representing the aggregate good of the most powerful individuals and institutions.

This is the focus of this work: how to protect and enhance a basic, universal common good. There would be no need to seek a supranational entity if this good could be achieved and protected through the laws and the constitutions of individual states. But this is not the case; even the presence of international law instruments, based entirely on consensus or comity, represents a step forward, but it is not enough. Hence the further question: what, if anything, is lost by seeking

European citizenship, and what might be gained instead? Weiler argues that "integrationists" claim to be deeply committed to *both* national identity and welfare, and that "they simply argue that the European Union will enhance these goals and values rather than threaten them" (Weiler 1999).

The EU is intended as a union of the "peoples of Europe", thus demonstrating recognition and respect for the existence of different "peoples", rather than seeking a unitary "melting pot". Aside from questions of legitimacy for the EU, the basic point is that states involved may lose control of their functions, but will have already lost much of that control to economic supranational organs of globalization, and that is what they need to *regain*. Minimally, they should regain control of the security (both ecological and biological) that is their own ability to protect their citizens from harm. As labourers the world over have discovered, unions are generally far more powerful than individuals.

From both an environmental and a health point of view, no community, state or people is or can be entirely independent: forming a union to repel or at least restrain unacceptable conditions of life may be the only possible way to protect the ecological integrity of a people's land and of its citizens' health. Both appear more basic and important considerations than the possible loss of "national identity", as even "multiculturalism" in a country such as Canada effectively masks the presence of many differences among individuals (Weiler 1999: 329).

In addition, when we weigh the presence of democracy, or the affective commitment common to citizens of national states, against the possibility of a "democratic deficit" and the lack of such commitment, we should not start with a romanticized view of national governance. The reality is that, as we have argued, there are already in existence powerful supranational entities such as the WTO, complete with their own tribunals that supersede national states in the name of trade. Susan Strange says:

> Today it seems that the heads of governments may be the last to recognize that they and their ministers have lost the authority over national societies and economies that they used to have. Their command over outcomes is not what it used to be (Strange 1996: 3).

Hence, it is disingenuous to decry the "democratic deficit" of regimes that, despite their nominal status, have already lost their claim to fully independent national democracy. Limits of power persist in the

domestic law context, as corporate support virtually eliminates the possibility of a fair and rational choice based on "one person, one informed vote", while it allows dollars, not issues, to decide not only elections but also, often, regulatory outcomes. The same occurs, albeit "writ large", in the international realm, through globalization. As Strange argues, this is unfortunately not a point of debate: it is the reality of the present situation, and therefore the starting point of any argument for a better approach.

The proposed cosmopolitanism is intended to ameliorate the *status quo* by a Kantian revision designed to substitute for it a "blueprint" based on what Gilbert (1994) terms an "ethical revolution", to depart from the present economic hegemony. In other words, if the national state has already had its powers eroded by globalizing structures and instruments of financial power, then those democracies are *already*, in some sense, "on the block". Our proposal is to substitute the power of Kantian principles for the present economic control. This goal will require that global structures and instruments be accountable to all "cosmic citizens" because of universal moral norms, regardless of their ties to nationalities and ethnic or religious traditions.

The contrast between this approach and that of globalization is clearly in evidence, for instance, when one considers the effect of NAFTA on Canada's welfare state. Prior to its introduction, Canada's federalist welfare policies included outright support for the poorest regions in eastern Canada, ranging from the support of work plans to incentives to prospective corporate employers. Under the threat of Chapter 11 of NAFTA, such welfare measures have become illegal. If we assume that the previous welfare policies were established by the Canadian government under free democratic conditions, then NAFTA, like the General Agreement on Tariffs and Trade (GATT) and the WTO, runs counter to the choices of national democratic states.

The quest for a new cosmopolitan orientation based on universal moral principles is therefore a step toward respect for human rights, not a regressive move, even if it requires us to jettison some of the "sacred" tenets of liberal democracy. Fukuyama argues that "Western liberal democracy [has emerged] as the final form of human government" (Fukuyama 1989: 33–34). As we have argued, no longer are liberal democracies truly democratic in today's world, but both their economic interests and their "warlike attitudes" to non-liberal states have supported wars, genocide and neocolonialism (Homer-Dixon 1991: 76–116).

Susan Marks notes that the belief that liberal democracy is the pinnacle of human achievement is questionable in the present-day context. But Marks also believes that liberal democracy corresponds to Kant's "republic" in his work on "perpetual peace" (Marks 2000; Kant 1795). But this is far from the basic position of Kant's work. "Free will" and "autonomy", the defining characteristics of human beings for Kant, are based on the self-imposition of substantive, non-derogable moral imperatives, not on the procedural emphasis that characterizes liberal democratic "choices", even leaving aside for the moment the manipulated, unfree basis for those choices at this time (Korten 1995).

For Kant's understanding of "republic" and of the meaning of cosmopolitanism, we need to return to Stoic doctrine:

> The Stoic doctrine that those who have reason, right reason, law and justice in common, thereby belong to a single community, is therefore a reasonable and intelligible thesis (Schofield 1999: 73).

This passage lends support to the argument that Kant's cosmopolitanism is clearly influenced by the Stoic principles and tradition: it is more credible to trace Kant's historical antecedents than to view him as "anticipating" liberalism.

As Cassese has it, the emergence of this sort of cosmopolitanism demonstrates the "coexistence of old and new patterns" (Cassese 1986: 30). Cassese refers to the old patterns of international legal institution based (1) on Hobbes, or the "realist tradition" that views states primarily as competitors, and (2) on the "Grotian, or internationalist conception", based on co-operation among states. The "new" international model appears "to be largely patterned on the Kantian" tradition instead, as it seeks a "potential community of mankind" (Cassese 1986: 31). A truly Kantian model, based on moral imperatives while also embodying and developing the principles of international law—which Weeramantry (1992) believed were already implicit in it—unites the other traditions while showing continuity with them. Its main purpose may be to draw away from the wrong turn of economic globalization in favour of seeking a true cosmopolitanism.

In sum, when we turn to a supranational entity and we appeal to the principles of Kantian cosmopolitanism, we do so to regain respect for universal human rights, not to abandon it.

> Crucially, the community idea is not meant to eliminate the national state but to create a regime which seeks to tame the national interest with a new discipline. The challenge is to control at the societal level the

> uncontrolled reflexes on national interest in the international sphere (Weiler 1999: 342).

In contrast with Marks's position on the commonality between liberal democracy and Kant's moral philosophy, the latter grounds both rights and obligations in sheer humanity, after tracing the rejection of nationalism as the ultimate expression of attachment to a "group", rather than to universal principles. Weiler says:

> Supranationalism at the societal and individual rather than the state level, embodies an ideal which diminishes the importance of the statal aspects of nationality … as the principal reference for transnational human intercourse (Weiler 1999: 343).

Weiler recognizes that "the technology of transnational democracy" needs consideration (Weiler 1999: 349). It can be argued that accepting an entity like the EU may not pose as large a stumbling block as some may believe: the "democracy deficit" remains a difficulty, but the EU offers exceptional benefits through supranational governance, and democracy possesses its own serious problems.

But the often-discussed democratic deficit that some see as problematic in EU governance may not be a deficit at all, but rather a bonus; an indication that the form of governance under consideration may depart from a model of governance fraught with problems. C.B. Macpherson terms the Western affluent nations models of "equilibrium democracy", but, as he points out, "democracy is simply a mechanism for choosing and authorizing governments, not for involving rational deliberation about political matters among citizens"; this model "deliberately empties out the moral context," as democracy is not viewed as a vehicle "for the improvement of mankind", and citizens are here viewed "simply as political consumers, and political society simply as a market relation between them and the suppliers of political commodities"; therefore "democracy", in this model, supports "citizen consumer sovereignty", but delivers nothing better than "equilibrium in equality" (Macpherson 1977: 77–86).

This model explains the present level of citizens' apathy: as with toothpaste brands or shampoos, for the most part North American political parties offer no real choice. As in all market transactions, however, those with the higher socio-economic status are benefiting, whereas those who do not enjoy such status do not. Hence, this model remains unjust; in addition, it is totally unsustainable from the ecological point of view (Rees and Wackernagel 1996; Rees and Westra

2003: 99–124). Macpherson argues that this model of democracy will continue to be considered adequate "… as long as we in Western societies continue to prefer affluence to community and to believe that the market society can provide affluence indefinitely" (Macpherson: 91–92).

This understanding of democracy in Western societies clearly indicates the presence of that "normative abyss" that Falk perceives as endemic to today's political realm. It also points the way to the need for an alternative society, one that has both normativity and community as its focus. Community is emphasized instead in the EU institutions and legal instruments.

According to its Article B, the Treaty on European Union (Maastricht Treaty) shall set itself the following objective:

> … to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union.

Citizenship is automatically achieved by belonging to a Member State. The final aim is to increase and support consensus, transparency and political participation by "constructing a European identity" (O'Leary 1996: 39–40). The question of political participation gains prominence because of the need to judge the EU according to the "defining characteristics of a distinctively liberal–democratic legitimacy (Beetham and Lord 1998: 5).

Beetham and Lord acknowledge that "legal or procedural legality alone" is insufficient to guarantee "political legitimacy" (Beetham and Lord 1998: 6). They also recognize that the purpose of government in a liberal democracy "can best be summarized in terms of Lockean rights protection (life, liberty and property)" (Beetham and Lord 1998: 6).

Hence our standard here is *not* the one that defines liberal democracy as outlined above (Westra 1998: Chapter 3). The last thing that is needed is an EU governance that is reduced to a carbon copy of the US-style liberal democracy, as Beetham and Lord even cite the US Declaration of Independence (1776) as an example of what supports the legitimacy of a government. It is worth noting that, even aside from the Kantian/Stoic principles of cosmopolitanism, the Earth Charter (for instance) is understood to be a covenant of "interdependence", and is therefore far better suited to what we now understand to be the situation of mankind, universally.

Because of the failure of liberal democracies to recognize and respect the primacy of life and health and the protection of their habitats as the basic rights of all humanity, there is a need to radically alter our present regulatory infrastructure and governance. The EU appears to provide a possible "blueprint" for a future "product", or for a cosmopolitan form of governance. Simon Hix's analysis of the "re-regulative policies" of the EU offers positive support for future strategies. Speaking of the "values" implemented by the EU, Hix says:

> As a result EU environmental and social policies may not redistribute resources, but they do produce a reallocation of values in European society (Hix 1999: 224).

After listing all the EU environmental regulations since 1970, Hix adds that the EU "addresses single market failures" as it "sets standards at both the national and the European levels", adapting the "high standards" of Denmark, Germany and The Netherlands rather than the "low standards" of Britain, Ireland, and southern Europe (Hix 1999: 225–226). Therefore, environmentally speaking, the EU has been able to raise the standards of environmental regulations to a higher level than those prevalent in Member States. This remains a desirable result for the protection of everyone's basic rights, even if it is not, as such, the majoritarian choice of all Europeans.

A World State Reconsidered

> Neither a world state nor the simple multi-state system are appropriate for the nuclear era.
> Instead of a world state, it is more appropriate to expect the territorial state system to be augmented by an institution for the comprehensive containment of nuclear capability (Deudney 1995: 209, 216).

In the previous sections, we first argued that the emergence of a world state was not unavoidable. We then considered whether the development of such a state was desirable, as a move away from the present statist system. From the moral and legal point of view, the "improvement" we can acknowledge in the evolution of legal regimes in the last 60 years is the superiority of human rights over those of states, as the main positive result of the erosion of the state's sovereignty.

Borders are no longer sufficient to isolate immoral, violent, or discriminatory national governments from the results of their actions, at

least in principle. In practice, nations that are either part of or supported by a major power bloc, as noted above, may well commit any number of human rights violations with impunity. Hence the "centralized" powers to declare some wrongs, to indict certain practices and even to attempt to sue major wrong-doers are already in the hands of a supranational power, weak and flawed as it is: the United Nations.

The European Union is more successful as a regional supranational "state", at least in regard to basic human rights within its own area of competence, although the weakness exhibited by the UN regarding the US and the UK is also present to some extent in the EU. Deudney sees the "nuclear era" as the major reason why states can no longer be the ultimate source of either power or the protection of the security of their citizens:

> When the traditional image of the state is compared to the reality of security governance during the nuclear era, it becomes evident that the state form of providing security is incompatible with nuclear weapons (Deudney 1995: 212).

Nuclear weapons may be delivered from almost any area in the world and they can have an equally wide reach; hence, no state can guarantee safety on its own, and no state has the monopoly on violence in any territory:

> States today have a monopoly on the ability to legitimize violence, but they do not have the ability to monopolize violence (Deudney 1995: 214).

In addition, countries possess a plethora of weapons, so that "annihilation is easy" from any territory; in contrast, conquest is much more difficult (Deudney 1995: 214). No state, no matter how rich and powerful, can actually defend itself alone. These are good reasons for seeking a "superstate", or an institution with the power to restrain the use of nuclear power (and hence to provide what states cannot).

Further, nuclear power is not the only weapon of mass destruction from which all states are at risk: justice and basic human rights—including the rights to life, to health, to normal development—are all under severe threat from the ongoing proliferation of chemicals, from hazardous industrial activities, from pollution and from climate change. Like nuclear power, these other threats represent an inescapable danger to communities, individuals, and the human collectivity. Like nuclear power, they are—one and all—too widespread for any

single state to exert control over. This is the ultimate danger imposed by globalization: not a conflict of loyalties, but the domination of one worldview, one power—that of an unsustainable, unsafe and ultimately hazardous quest for economic growth at all costs.

It is clear that present global institutions, such as the WTO, already wield that power in such a way that no country alone can defend its citizens against this aspect of globalization. Thus, if not a world state, at least a powerful centralized world institution, comparable perhaps to those of the EU, is the goal to be achieved. Such an institution should, however, demonstrate the power that the UN does not possess at this time.

Even more than nuclear power, these all-pervasive threats are inescapably part of the impact of globalization. Like nuclear power, they require concerted, centralized action to control them: neither the WTO (which is the main origin of most of the non-nuclear threats) nor the UN (which is, today, the only supranational institution able—in theory—to control both nuclear and non-nuclear hazards) are capable of fulfilling a protective role at this time. The question remains, however, whether a world state might be able to be devised in such a way that both these threats could be restrained, in defense of humanity. We will examine various aspects of this question in the chapters that follow, before returning in the final chapter to the issue of a world state based upon world law.

CHAPTER TWO

GLOBALIZATION AS "PLUNDER", "EXPLOITATION" AND "ECOVIOLENCE": A CAUSAL ANALYSIS

Introduction

> Neoliberalism is thus an aggregate of social, political, economic, legal and ideological practices, carried out by a variety of actors that respond to what we consider a formidable logic of plunder (Mattei and Nader 2008: 53).

The unapologetic quest for a new world order advocated and discussed in the previous chapter gains its motive and impetus from the overwhelming and globalized threat of neoliberalism. It is not simply this or that hazardous industrial operation, or this or that lifestyle practice of affluent citizens: it is an ongoing, systemic assault on basic human rights. The whole project of "development" understood as it is, led by industrialized Western market-based societies, needs the present instantiation of the state as its engine, through its understanding within the parameters of "dependency theory":

> This placed a spotlight on the state, its economic or class character, international orientation and so on—as the organized force of development policy direction (Westra, R. 2010: 20).

Richard Westra's analysis is based on a Marxian understanding. Correct though it is, it is somewhat limited by the existence of Indigenous and local communities, which that perspective tends to view as collectives in transition to a more or less just future state. Bhupinder Chimni reinterprets "subaltern class" analysis to include "all oppressed and marginal groups in society", whatever the grounds of such divisions (Marks 2008a: 19). We will examine Chimni's opposition in the next section. But it seems that the Marxian enterprise itself tends to marginalize the most significant aspects of oppressed groups: such third world communities (not necessarily viewed as "developing countries" or national groups within such countries) represent the clearest and primary examples of resistance to neoliberal globalization. Their "backwardness" is not to be changed by revising their "forms of production": instead it may well be a conscious position combining

distrust for Western technologies with a strong respect for the Earth and for the sacred within it.

In fact, it is their existence and their example that indicates the wrong-headedness of the current practices of neoliberalism and globalization. Indigenous traditional leaders march and demonstrate shoulder to shoulder with other disaffected groups. The last thing they need, in lieu of respect and support for who they are, is to be characterized as being prey to "ideologies" and "theologies" that somehow diminish their credibility as—if nothing else—moral leaders in a world Richard Falk characterizes as facing a "normative abyss" (Falk 1998).

A problem arises in that Marxian analysis would critique all forms of social consciousness that inform communities whose traditional religious and cultural beliefs are not amenable to an analysis based on capitalist/industrial Western societies, but are, like all Indigenous communities, based on a *sui generis* understanding of the appropriate lifestyle—that is, one that is egalitarian, communitarian, and (hence) relevant to such land-based traditional groups. International law, at least in principle, respects and defends such communities, although the application of appropriate regimes in defense of their lifestyle often leaves much to be desired in practice. But at least the recognition of their status and their existence *as such* is not demeaned.

Martti Koskenniemi argues that, for Marx, "the language of justice obstructed reliable analysis of social relations" (Koskenniemi 2008: 31). He adds that Marx's view of the "proletariat" as a universal category is not accurate; I concur, with examples proposed above regarding Indigenous communities. Similarly, the very notion of "class" is far from universal: even in Marx's time, and before it, "class" and wealth could even be contrasted. Further, land-based communities are for the most part classless, in the sense that their outlook is communitarian. Private property does not apply to their form of self-governance, and the elders (and the *sui generis* knowledge base they represent) guide, rather than ruling. Their specific forms of traditional ecological knowledge (TEK) are based on their understanding of the land and of its cycles, and have been transmitted orally from generation to generation.

A case in point is that of Arctic peoples. Climate change not only threatens their individual lives and livelihood; it affects their social structures, as the TEK of the elders loses its relevance to their daily life, and their culture and existence as a people is increasingly at stake (Westra 2007; Ford and Wandel 2006). No change in their "mode of

production" will improve the situation of such peoples. However, the overwhelming economic power of Western nations is the basis of the consumerist practices and the oppressive ecological footprint (Rees and Westra 2003: 99–124) that generates their hazardous situation while, at the same time, fostering and enabling their "exploitation" (Marks 2008b), the "plunder" (Mattei and Nader 2008) and the "ecoviolence" that affect their existence.

Their oppression is an obvious fact. However, "Marx's economic reductionism remained blind to the significance of divisions emerging in the political and cultural realms of civil society" (Koskenniemi 2008: 49). From the point of view of this work, Marx's understanding of law as one more embedded tool of a capitalist society is limited by his neglect of the budding system of international law existing at this time. Koskenniemi demonstrates the importance of the latter in both principle and reality, as he relates the appearance of graffiti in Recife, Brazil, but also of similar signs in Helsinki, Finland, all proclaiming opposition to the US invasion of Iraq, and all eventually bringing millions of people from all continents to the street in protest. He adds:

> The point of this story is that the protest about "Bush's war" has nothing routine or bureaucratic about it. It focuses on a single fact and event, and condemns that event as not merely "wrong" but "illegal" (Koskenniemi 2008: 50).

Koskenniemi adds that the event was a "scandal" that went beyond "a problem about 'communism', or 'capitalism', or 'market' or 'the Washington consensus' or even 'American Imperialism' " (Koskenniemi 2008: 50). It was an event that, although it included all of the above, primarily had the character of a universal violation. Thus it showed the most important role of international law—a role that has not yet been fully actualized, as I argued above (see Chapter 1), but one that remains highly significant globally even in its present developing form. International law instruments originate from the only existing institution that embodies universal claims as it represents "civil society reaching beyond sectarian interests" (Koskenniemi 2008: 52).

The discussion of Chapter 1 clearly demonstrates the need for radical changes in legal institutions and forms of governance today. But the very existence of international law and of its institutions represents a magnet, a catalyst that provides a focus for the moral outrage felt by many in civil society in the face of excesses of globalization and the

abuses of power of Western leaders and states, and their impunity despite the gross violations of human rights they often perpetrate.

In the next section we will discuss Bhupinder Chimni's Marxist analysis of oppressed peoples, in order to discover whether he sheds any light on the problem of Indigenous peoples from that perspective.

Chimni on a Marxist Course for International Law

> The story [of socialism] is retold in the belief that Marxism as critique has not exhausted itself … despite its failure to articulate the normative basis for creating a just society (Chimni 2008: 55).

The main focus and subject of international law is and remains the state, as described in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States:

> The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States (Crawford 1979: 36).

The modern State "emerged" in response to certain fundamental social transformations, such as the transition from feudalism to capitalism in Europe in the 16th and 17th centuries (Chimni 2008: 58). More specifically, in 1991 the European Community defined the guideline for the recognition of new states in Eastern Europe[1] as to be committed "to the rule of law, democracy and human rights" (Chimni 2008: 58–59).[2] "Democratic governance" might well be an "emergent right" (Franck 1992: 46), but its ultimate effect, consciously and deliberately sought, is to ensure "the principal function of facilitation, the presence and operation of transnational capital" (Chimni 2008: 59; Grugel 2000: 125).

With the advent of globalization, international law has often served the intentions and the interests of dominant states against "dependent and dominated states" (Chimni 2008: 59), thus aiding the Western imperialist enterprise. However, international law is better used in

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[1] Letter from the Representatives of Belgium, France and the United Kingdom of Great Britain and Northern Ireland to the United Nations, Addressed to the President of the Security Council, UNSC Doc S/23293 of December 17, 1991, Annex I. The text of the Guidelines has been reprinted in 1992, 31 ILM 1486-7.

[2] Chimni (2008) suggests that these requirements define the "bourgeois democratic states".

several other areas beyond the "crude economic determinism" that would limit it to the development of the capitalist world economy (Chimni 2008: 60). The present diversity found in international law, which includes the emphasis on certain areas of human rights, is a positive development, especially when one considers the historical origins in the colonial enterprise (Angie 1996: 321).

In addition, it is true that international law regimes tend to support the movement of capital and the interests of dominant states, even through trade and economic institutions such as the International Monetary Fund (IMF) and the World Trade Organization (WTO). It is equally true that international human rights law and international environmental law both fail to protect weaker, "developing" states: "corporations influence almost every negotiation on the environment that has taken place under the auspices of the UN" (Aggarwal 2001: 382).

International human rights law, for the most part, protects individuals, natural and legal, not communities or the collective (Westra 2011). But Marx does not do much better as, according to Chimni, he observes that "right … can never be higher than the economic structure of society and its cultural development conditioned thereby" (Marx and Engels 1970: 8). Viewing dispossessed people as "subaltern classes" in some reductionist economic optic recognizes their plight to some extent, as well as the retreat of the welfare state, but it does nothing to acknowledge their difference, and their cultural and religious rights. *Pace* Sen (Chimni 2006), it takes much more than the promotion of better economic conditions, necessary though that is to protect communities in danger everywhere. Such limited protection is necessary but not sufficient, as the promotion of economic advantage of the most powerful states involves the use of force, neglecting respectful and thorough consultation for whatever activity is planned by corporate actors (and sanctioned and permitted by a state). Lacking a thorough consultation process, explicit consent is seldom sought or received.

Hence, not only powerful state alliances benefit from the limits imposed by the composition of the UN's Security Council as those states practice pre-emptive aggressive strikes and other proscribed activities, despite the limits imposed by international law regimes:

> Today however, the foremost imperial state, the United States, in the absence of global countervailing power, seeks to change the rules of the game in a bid to legitimize total global domination (Chimni 2008: 87).

Thus, a Marxian perspective may help to recognize the interface between capital, aggression, and the oppression of powerless peoples. Nevertheless, it does not appear to recognize that some other categories, beyond the economic, are fundamental to so-called "developing nations" and peoples, and to the minimal respect that is due to them.

The "Right to Development"?

> "State responsibility" simply put, is the name public international law gives to the normative state of affairs which occurs following a breach by a state of one of its legal obligations (whether that obligation derives from treaty law, customary law, or other recognized sources such as "general principles of law") (Scott 2001: 55–63).

State responsibility includes both positive and negative obligations; given the grave differences in the economic situation of citizens in various regions of the world, the issue of "development" is one of central importance. In September 2000, the Open-ended Working Group on the Right to Development of the Commission on Human Rights produced a document titled *The Right to Development*. While attempting to cover all aspects of poverty and hunger alleviation, that document also indicates clearly the grave problems present in such a right, and in the concept of "development" as such.

It might be best to start examining the major problems that arise within the concept, let alone with terming it a "right". The first question that arises is whose "right" it is. Presumably, one should think of "development" as being a right of those who are not yet "developed"; that is, poor people in "developing countries". In fact, that right is intended as a remedy for the problems those persons encounter, to redress "the effects of poverty, structural adjustment, globalization and trade liberalization, on the prospects of the enjoyment of the right to development in developing countries" (*The Right to Development*: para 4).

Development, then, is related to the "removal of poverty". It is therefore an economic goal, one to be implemented as a "process" of "economic, social, cultural and political development", so that all "human rights and fundamental freedoms can be fully realized" (*The Right to Development*: para 4). Much of the language of this document is patterned on the work of Amartya Sen (Sen 1999). But reliance on the work of even a famous economist carries its own pitfalls. Paragraph 6 of the document cites Sen (1999), and affirms that:

> To have right means to have claim to something of value on other people, institutions, the state, or the international community, who in turn, have the obligation of providing or helping to provide that something of value (*The Right to Development*: para 6).

No doubt, Sen would acknowledge that "something of value" would include more than the obligation to provide the economic means to relieve hunger or thirst. But it is unclear, with its globalizing drive to develop the undeveloped, whether this document takes into serious consideration the right of people *not* to "develop", if they so choose.

Economic development goes hand-in-hand with certain grave costs: first and foremost; the rights of peoples' own traditions and cultural lifestyles are indubitably at stake. One needs only to consider the abundant jurisprudence that demonstrates unequivocally the number of Indigenous and local communities who try to say no to development, but whose voice is neither heeded nor respected (Omniyak and the Lubicon Lake Band v. Canada 1996; Chagos Islanders v. Attorney General 2003; Aguinda v. Texaco, Inc. 1996; Aguinda v. Texaco, Inc. 2001; Alvarez-Machain v. United States 2003; Bancoult v. McNamara 2003; Doe/Roe v. Unocal Corp 2000; Filartiga v. Pena Irala 1980; Jota v. Texaco, Inc. 1998; Maria Aguinda and others 2002; 157 Oil and Gas Rep. 2002). The "something of value" these people treasure is the right to be free *not* to develop, *not* to lose the freedom to choose their own lifestyle and their children's future. In these cases, the "perfect obligation" (Sen 1999) of states and other non-state agents should be to respect agents' choices, especially when they represent the will of these communities.

Similarly, the preferred means of viewing state obligations—that is, "what Sen describes as the Kantian view of 'imperfect obligations'" (*The Right to Development*: para 8), applicable to anyone who is in a position to help—is no better if it excludes the choice not to develop, following Western economic patterns. What remains problematic is the starting point of this document: the assumption that "development" unqualified (that is, not educational, moral, artistic, cultural, etc) is the answer to poverty and hunger, despite the numerous ongoing examples to the contrary.

Consider first who truly benefits from the commercial activities that are viewed as bringing "development". It is, first, the multinational corporations who come to mine, extract, log, build, and—in general—"develop" an area rich in resources. The impassioned pleas of those

who are suffering the effects of those activities, mostly unrestrained by either environmental or public health mandates, ought to demonstrate that freedom must be understood as both negative and positive: the right to develop as well as the right to embrace and maintain the *status quo*, and refuse modern development.

The second group who benefits from "development" activities includes the bureaucracies and governments of the affected countries who may receive a part of the profits enjoyed by the corporate actors involved; at best, from building roads and other infrastructure; at worst, military or para-military support for their war-like action (Presbyterian Church of Sudan, Rev. John Gaduel and others v. Talisman Energy Inc., 2003). When these elites are undemocratic or they represent outright military dictatorships, then any hope of even the least "trickle down" benefit is eliminated.

This happened in Ogoniland at the time of the rule of dictator Sani Abbacha in the 1990s (Westra 2007: 281). It was only in 2009 that Royal Dutch Shell finally paid US$15.5 million over the Saro-Wiwa killing, but without admitting their guilt for the multiple murders, rapes, and other violence they had perpetrated (Pilkington 2001)—truly incompensable harms. The Vienna Declaration states categorically that "human rights and fundamental freedom are the birthright of all human beings; their protection and promotion is the first responsibility of governments" (Vienna Declaration and Programme of Action: Article 1; see also Article 56 of the Charter of the United Nations). When Shell arrived to bring its "development" to Ogoniland, the Ogoni people had a comfortable traditional lifestyle, cultivating their land and fishing, before the advent of what Saro-Wiwa termed the "ecocide" and "omnicide" that ensued with the oil extraction and open flares that eliminated all possible cultivation in the area. They eventually received some compensation, but not all local communities are so lucky.

For the most part, today, "development" is aimed at economic profit, not at the health and freedom from want of peoples, as it often destroys, alters or removes the resources upon which local communities depend. In addition, even when the community is neither an island nor a coastal one, nor yet one that is located in the high Arctic, climate change does the rest, as it imposes extreme events and temperatures.

Essentially, then, if the "imperfect duties" of state and non-state actors are to ensure freedom to (1) maintain and retain the cherished values of communities, and (2) to eliminate or at least reduce poverty and hunger, then these should have started long ago, before the present

impasse was reached. The obligations would have included allowing communities to say "no" to activities that harm the natural ecological basis upon which most of the world's people depend, "no" to international instruments that place environment and public health behind trade, and "no" to the political and economic support of corporate bodies whose activities and human rights records demanded careful scrutiny and regulation, rather than friendly cooperation.

All that *The Right to Development* document demands is that the right to development be understood as the right to a "process" that demands cooperation among all interdependent states, and that the form "development" should take should include "a sharp increase in GDP, or rapid industrialization, or an export-led growth… (*The Right to Development*: para 15). Yet paragraph 15 acknowledges that, despite the listed forms of development, poverty may not be reduced, and there might be no commensurate "improvement in social indicators of education, health, gender development or environmental protection". The placement of environmental protection as last in the list is a further symptom of the misunderstanding of what constitutes a real "basic right" (Shue 1996), which would indeed be "the entitlement of every human person as a human right". Hence, we can conclude that this document's perception of the meaning of "development", even with the unremarkable addition of "sustainable" (unspecified and mostly misunderstood), is flawed and incomplete.

The loss of cultural and ecological integrity is not compensated by the introduction of some Western "improvements", especially when these arise from an unconsented project. In fact, the overwhelming use of resources and energy already in existence, fostered by the overconsumption of Western affluent countries (as indicated by ecological footprint analysis; Rees and Wackernagel 1996; Rees and Westra 2003), casts all further industrial development in doubt. Not only are most of its effects extremely deleterious to life on Earth in general (and specifically to the most vulnerable people in impoverished developing countries), but also there is neither energy nor materials enough on Earth to continue to expand the industrial enterprise and to bring it to all countries, to "raise" them to the level of growth present in the West today.

Sustainable development therefore remains an oxymoron, as any form of development (beyond the intellectual/cultural/moral kind) is intrinsically unsustainable and physically unachievable. Perhaps the only positive aspect of this document is the fact that the right to

development is viewed as a *collective* rather than an individual right. But even that "plus" cannot begin to offset the numerous deficiencies discussed above. However, international instruments aimed primarily at collectives are few and far between, so it is necessary to devote careful study to each existing one in order to see whether any support can be found for the position of collectives today.

Introduction to the History of Development and International Law

> The Mandate System embodied two broad sets of obligations: first, the substantive obligations according to which the mandatory undertook to protect the natives and advance their welfare, and second, the procedural obligations relating to the system of supervision designed to ensure that the mandatory power was properly administering the mandate territory (Anghie 2006: 120; Covenant of the League of Nations 1920).

The League of Nations' mandate system attempted to protect colonized, non-European people, and to ensure their presence among other sovereign states within the International legal system, whereas "…the positivist international law of the nineteenth century endorsed the conquest and exploitation of non-European peoples" (Anghie 2006: 116). The main concern of this work is not to trace the history of colonization and the law, nor to show the polarization of European and non-European peoples, as has been ably done by many authors (Anghie 2006; Weeramantry 1992; Young 2001; Tomuschat 1993; Laughter 1995: 503–538).

Rather, the main focus at this time is to show how recent science (e.g. ecology, epidemiology, climatology) has demonstrated the ongoing shift from the classical imperialism and colonialism of earlier times to its new version, as it emerges from the current work of ecological footprint analysis, as well as the abundant scholarship on climate change and public health law, especially regarding Indigenous peoples and poorer communities in coastal areas, island states, the Arctic and elsewhere (Rees and Wackernagel 1996; Rees and Westra 2003; Ford and Wandel 2006; Gostin 2008: 3).

In other words, although the North v. South aspect of neocolonialism is alive and well (albeit more nuanced in recent times), it is no longer only one or another powerful country that aggressively annexes some developing country in order to plunder its resources. Instead, and in addition, most affluent countries practice economic oppression on weaker nations, individually or jointly, through such organizations

as the WTO, the IMF, and the World Bank, as well as through treaties such as NAFTA. Also, the legal instruments themselves are couched in such language that the protection of life, health and the rights of individuals and communities is regularly put at risk everywhere, with impunity. Indigenous, impoverished, and other vulnerable groups are the most affected, as we shall see below.

In order to emphasize this ongoing shift, I believe it is appropriate to call the increasingly obvious connection between the loss of environmental justice in many areas and the ongoing forms of imperialism and neocolonialism "ground zero", for two main reasons. First, the expression brings to mind the devastated centre of Western power and trade in Manhattan, termed "ground zero". Hence, we need to see the attacks of 11 September 2001 as the clearest expression of a violent revolt against that power, and the primacy of trade against human rights. That event needs to be examined not only as "terrorism" and a violent crime, but also as a declaration, a statement, a drawing of a line in the sand by oppressed, marginalized non-European peoples, whose rights did not (and still do not) fully appear on the radar of international law.

The second reason is even harder to defend: it is the claim that we are all under attack from the machinery of imperialism and its allied power, capitalist neocolonialism, and there is—at this time—no "mandate system" to protect us and to ensure that we acquire (or in some cases retain) some rights to life and normal development within our sovereign states (which are now largely powerless to protect most citizens from the pursuit of trade by institutions and organizations who ruthlessly pursue their own interest, which is instead presented as "ours" as well). Samir Amin puts it well:

> Imperialism is not a stage, not even the highest stage of capitalism: from its beginning, it is inherent in capitalism's expansion (Amin 2001: 6).

It is instructive to note that Amin writes in June 2001; that is, before 9/11, and he describes the "first phase" of imperialism as "the conquest of the Americas" coinciding with the "destruction of the Indian civilization"; in fact he views the enterprise as a "total genocide" (Amin 2001: 6). The 9/11 attacks the icon of capitalism and power, and the attackers represent precisely another marginalized, expendable civilization, where crimes against humanity (if not genocide) occur on a regular basis, against Islamic peoples in various countries (Westra, L. 2009: Chapter 6).

After 2001, the "war against terror" indeed ran apace with the quest for oil and other commodities, against nations and peoples on whom "democracy" was imposed without regard for their own pre-existing institutions and organizations (Mattei and Nader 2008). Again, this understanding of the present situation is not original, but the need to uncover the principles that support and "normalize" it is basic to any possibility of recovery of a less incendiary world, one where our rights (that is, the rights of all individuals) are not dependent on whether we live in "good" or so-called "rogue" states.

Recently, the coming together of globalization and climate change has been termed one of the most salient events in the history of humankind. Like the Black Death or—better—the abolition of slavery, the present situation will totally change the world as we know it, and most of those changes are becoming increasingly obvious today. Another epochal event, the discovery and worldwide spread of HIV/AIDS, was supposedly initiated with an employee of Air Canada, named "Patient Zero" at the time. Of course he was not the first to be infected, but he symbolized the start of the uncontrolled spread of an infection everyone understands today, although despite the millions poured into research, it still remains incurable. One can only hope that the present coming together of the gravest threats to the basic rights of humankind (that is, global change and globalization in many of its aspects) will be more susceptible to a "cure" than AIDS has proven to be.

The conflict between our rights (including environmental rights) and current institutions will emerge in the next chapters, as will the weakness of the United Nations and its legal regimes, and their inability to render many otherwise good legal instruments fully operational (or even to guarantee the respect due to its own main principles). At any rate, Amir's work is important because, among other things, his analysis clearly separates the approach of "Catholic Spaniards" from that of "Anglo-Protestants", although he does not fully pursue that thesis to the basic principles that support either approach. While the former saw their enterprise, at least in principle, as the duty to bring religion to non-believers (especially as seen by Dominicans like Francisco de Vitoria and Bartolomé de la Casas), the latter saw the economic goals as primary, giving them the "right" to exterminate the Indians and impose slavery upon imported Africans (Marks 1990–1991: 1–51).

We will return to some of the religious aspects of colonization below. For now it is important to acknowledge the fact that "development"

and oppressive capitalism have gone hand-in-hand in the Americas since 1492, and Thomas Anghie appropriately cites Christopher Columbus's words after reaching the "Indies":

> Sir, as I know you will be pleased at the great victory with which our Lord has crowned my voyage, I write this to you, from which you will learn how in thirty-three days I passed from the Canary Islands to the Indies with the fleet which the most illustrious King and Queen, our sovereigns, gave to me. And there I found many islands filled with people innumerable, and of them all I have taken possession for their highnesses by proclamation made and with royal standard unfurled, and no opposition was offered to me (Columbus 1988: 1; Anghie 2006: 13).

Columbus clearly pronounces his intent: not a "civilizing mission" or even a religious goal drives him; his goal is to take possession of the islands and their peoples in order to promote trade and the interests of the king and queen who funded his travels. The task of considering the legalities of the relations between the various states and peoples was a task that fell to the Spanish School and Francisco de Vitoria and Bartolome de la Casas. Anghie takes them to task because of their acceptance of the colonial relationship between Spain and the Americas, as he argues that "international law was created out of the unique issues generated by the encounter between the Spanish and the Indians" (Anghie 2006: 15). So the lack of respect given Indian communities appears to have originated at the time of this encounter rather than arising out of preceding legal regimes. In contrast, Pieter Kooijmans argues that

> [T]he rules that apply to European inter-state intercourse also apply to the intercourse with the American Indian political communities, because there is no intrinsic difference. The small Indian states are legal persons, they enjoy the same rights as European states (Kooijmans 1964: 57).

At any rate, de Vitoria theorizes on the emergent concept of national sovereignty, through his confrontation with the cultural differences between Spaniards and Indian peoples. In his enterprise he is supported by his understanding of natural law, which provides "a common framework binding both Spanish and Indian alike" (Anghie 2006: 16).

A debate on the origins of international law would take us too far from the present enterprise: the basis of human rights to life and to physical/biological integrity, as well as the respect due to our dignity as human beings.

Chimni on Sen, Development and International Law

> But the Sen theory of development is less successful in its analysis of these features of social processes and structures that are critical to the practical realization of the goal of development. Like critical theorists in general, Sen tends to be better at emancipation from than emancipation to, and still weaker on how to get from here to there (Chimni 2008: 3).

As noted above, most of the international literature relating to the right to development follows upon the footsteps indicated by Amartya Sen (1999). But the above paragraph by Chimni is, if anything, too kind to Sen, despite his fame and his general acceptance. "Freedom" in Sen's sense, within a capitalist, globalized world, may well be the precise opposite of any desirable state to be gained by an impoverished person in the third world.

As Chimni demonstrates, Sen's approach is flawed: one can be kind and say, with Chimni, that Sen's conception indicates a great improvement on the notion of development that prevailed in earlier times (a notion, that is, entirely related to a country's gross domestic product). In addition, one could also acknowledge that such a notion fits well within the present state of international law:

> there is a striking parallel between Sen's vision of development and contemporary international law (CIL) discourse on development. It explains why the Sen thinking on development is readily accommodated in CIL (Chimni 2008: 3).

Or, in contrast, one could start from the facts of this "accommodation" and notice that the development that is supported by international law today is both ineffective and indiscriminate. It is indiscriminate because it treats any activity that would add industrialization and tradeable commodities to a developing country as an unalloyed boon. It does not appear to discriminate, and it may not represent a positive improvement on what brings disaster to those who live in the region where the "progress" is planned.

It is also ineffective because it is viewed (as Sen views it) as an individual right to freedom (primarily understood as the possession of civil and political rights), rather than a *collective* right for communitarian, social improvement of a group's living conditions.

Sen's writing remains within "mainstream international law scholarship (MILS)"; hence, he "does not identify and interrogate those processes and structures in the international system that prevent the realization of accepted goals of development", nor does he identify

"that there are deep structures that constrain the pursuit of the common good through international law" (Chimni 2008: 3–4). In fact, for the most part, the proliferation of human rights instruments tends to increase the ambit of personal freedom at the expense of the common good. This is something that is seldom, if ever, identified, let alone promoted. But individual rights are often useless to remedy the grave problems of the most vulnerable people in the world. One cannot forget, as Sen appears to do, that the individual freedom of *natural* persons is more than offset, and most often limited not by communitarian concerns but by the rights of wealthy and powerful *legal* persons. Thus the freedom of individuals as the "basic building blocks" (Sen 1999: 18, 116) of development represents a patent untruth.

In some cases it might represent one of the factors necessary to reduce hunger and poverty, which should be the true goal of any development process. But the fact that Sen does not critique the primacy of capitalism/growth trends shows that he does not understand why no solution can come without a radical reordering of present political and economic conditions of globalization.

Unless what is basic and common is recognized as the physical, material conditions necessary for the normal and healthy development of human beings, individual freedom to participate in civil and political processes is only meaningful if each human being is healthy and she and her community are not facing starvation. Hence Chimni is correct as he says that Sen's analysis

> does not seriously explore specifics in the context of the real world situations. In simultaneously supporting liberalization of market and the goals of investing in education and health facilities he tides over the tensions between the two sets of goals (Chimni 2008: 8).

Further, even democracy and free political discussion (Sen 1999: 123) is neither conducive to improvement in the abject social conditions found in much of the developing world nor sufficient to achieve that result. At every G8 meeting, noisy and often violent political argument expresses the dissatisfaction of social groups everywhere in the world, with the results and the processes of neoliberal market activities, advocated by the most powerful states, and entrenched in much of today's international law.

Yet despite the continued and consistent presence of these political critiques, and the freedom to express these beliefs (the latter often limited by repression and containment on-site), there is neither significant change nor any obvious improvement on the ground, even for the most

basic of rights, the right to food and water (Pogge 2004; Dellapenna 2008).

Hence Chimni is correct once again as he states:

> In sum, Sen is the classic liberal who has faith in the institution of the market and the State to deliver, even under a capitalist dispensation. His notion of democracy is also an idealistic one, where political power, political economy and struggle are absent. His liberal humanism therefore remains problematic (Chimni 2008: 11).

As long as Sen does not offer a strong critique of the WTO and other institutions that have been instrumental to engendering and fostering the multiple crises, primarily ecological but also economic, that have produced the deprivation and inhuman conditions that characterize Southern countries today, he cannot hope to see any improvements as long as the development "tools" remain the ones that have contributed to the grave problems the world faces today.

"Exploitation": A Marxist Category?

> To exploit in the pejorative sense is to take wrongful advantage of another person for one's own ends, to pursue one's own gain at another's unfair expense … it too may involve the pursuit of one person's or collectivity's gain at another's unfair expense (Marks 2008b: 283).

Following upon Chimni's Marxist analysis of international law in relation to impoverished peoples, and the discussion of "development" in the previous section, it might be best to start with an analysis of the three categories of globalized oppression that are the topic of this chapter, with Marks's authoritative discussion of the meaning of exploitation and its presence, if any, in international law.

Marks discusses the historical roots of the term, which, she argues, passed from its original neutral or even positive sense to its present pejorative one at about the same time as the publication of Karl Marx's *Das Kapital* in 1867 (Marks 2008b: 283–284). In addition, it is important to keep in mind that, for Marx, "exploitation" has a very specific, technical sense. That sense does not coincide with any of the several legal aspects of the term that Marks lists:

> exploitation is not entirely absent from the vocabulary of international law. The exploitation of children is prominent in the international legal agenda, as is the sexual exploitation of women and, more generally, human trafficking. There is also a long history of international law-making with regard to slavery, forced labour and child labour (Marks 2008b: 282).

Marx's discussion of capital and its production hinges on the distinction between necessary labour and surplus labour (Marks 2008b). The latter is foundational to "exploitation", as presented in Marx's analysis "in the rate of surplus value" (Marks 2008b). No doubt Marks is correct; the labour situation of the present day adds a new "wrinkle" to the relation between surplus value and the enrichment of capitalist. Rather than resent the unfreedom created by the longer hours of work required by capitalist, the labourer, at least in Western capitalist countries, welcomes the opportunity to earn far in excess of her "needs": the surplus is spent acquiring the "goods" or luxuries that sustain the economy and enrich the capitalist.

It seems as though most workers in the manufacturing arena who fit this picture of "enriched labourers" become somewhat complicit with the capitalist in the promotion and support of consumerism (Brennan 2010: Chapter 22), with its ultimate effects of climate change, resource depletion, excessive and hazardous waste, and so on.

It is the "developing" countries who pay the price of this complicity, based on growth at all costs, despite the disconnect between the availability of materials of all kinds and the global thrust toward increased production. The heavy ecological footprint of Western nations thus represents and completes the exploitation of peoples and communities in the global South. In that sense, the effects of globalization follow, and they indeed bring various harms to the impoverished peoples of the world:

> In today's world, clothes, shoes, computers and other manufactured goods are "sourced". And just like natural resources, they are mostly sourced from countries in the Global South (Marks 2008b: 288).

This complex chain of connections is reflected in the complexity of modern forms of exploitation, and—endemic as they are to the recent thrust of globalization—they have no place in classical Marxist thought, aside from this general critique of imperialism, which remains highly relevant. Thus the exploitation of peoples in the South reflects far more than the alienation and commodification of Marxian fame.

As we shall see below, what is at stake is more than the survival or the conditions of individuals and aggregates: it is the survival of communities and collectives as well. These issues were not the primary focus of Marx's work in *Das Kapital*:

> in his later empirical work on the colonial question Marx demonstrated a greater degree of sensitivity to the plight of dominated peoples under

> the thrust of colonial expansion and arguably countenanced the possibility that colonization could obstruct development of capitalism (Westra, R. 2010: 17; see also Lorrain 1989: 45ff.).

The growth of neocolonialism coupled with globalization, after "colonial expansion" became illegal (in principle), is clearly beyond Marx's area of concern, although that is our main focus at this time. Yet because this modern development is distant from Marx's main interests, his work, while inspirational in some ways, is of little help to fully understand the present situation or the reasons why international governance appears insufficient to redress current problems.

The novel forms of exploitation that are part of globalized "progress" and "development" far exceed both the Marxian analysis of the relation between labour and capitalism and the categories explicitly covered by international law. The new forms of exploitation represent the oppression of the most vulnerable peoples in the world. They also manifest novel forms of illegality that are not spelled out in present legal regimes.

The relation between governance in the North/West and the commerce and dealings involving human and non-human resources in the South is neither fully understood nor protected by legal instruments. It is only when the "lawless" (Sands 2005) aspects it embodies are made explicit that trade—as presently practiced—will be recognized for what it is: a form of "plunder".

"Plunder" and Covert Illegality

> Development is the process whereby other peoples are dominated and their destinies are shaped according to an essentially Western way of conceiving and perceiving the world. The development discourse is part of an imperial process whereby other peoples are appropriated and turned into objects (Tucker 1999).

The history of the "rule of law" can be seen as a history of legalized plunder, according to Mattei and Nader (2008). Still, as we discuss the way things are now, and the roots of their historical development, we cannot forget the universal promise of international law as Martti Koskenniemi presented it (see Chapter 1). Now the glass is more than half empty, thus presenting a discouraging picture to the would-be optimist, but even that reality should not force us away from the promise of a cosmopolitan universalism, for which international law provides the only hope.

The paradox today is that international law is complicit in the worst problems, while at the same time it is also the only possible road toward just world institutions. At any rate, we can start by eliminating from consideration the rosy perspective of those who believe in "the dominant corporate capitalist model of development" (Mattei and Nader 2008: 24; Fukuyama 1992). That is the vision that fosters today's gross inequalities and violations of human rights. According to Mattei and Nader, the "other side"

> believes that it is precisely because of the current model of corporate capitalist development that the divisions between the "haves" and the "have nots" is so dramatic and irremediable. Thus freedom and prosperity for the rich, with their exaggerated patterns of consumption and waste, is possible only by a conscious effort to avoid liberation of the poor and disenfranchised (Mattei and Nader 2008: 24).

Simply put, the question is: can the rule of law help to remedy a situation that its current instantiations have helped to create? The parallel question concerns the ongoing misuse and abuse of the "right to democracy" (Franck 1992: 46), when it is contrasted with what "democracy" is now and what it was intended to be (Engel 2010).

While colonization in its original war-like sense is now illegal, neocolonialism is an ongoing phenomenon, most often presented as beneficial to those who are exploited and colonized:

> A strong emphasis on freedom, democracy and the rule of law as deeply rooted American values has accompanied almost all US foreign interventions, invariably presented as in the service of the public good rather than in the interest of the intervening power (Mattei and Nader 2008: 32).

This "narrative" is imposed on the victims "by means of propaganda and manipulation" (Mattei and Nader 2008: 32), and its racist component is obscured as the "enemies of freedom" are always portrayed as part of a different and hostile ethnicity.

In contrast, the reality is sometimes starkly expressed by those "others", and even by the "arch-terrorist" Osama bin Laden who, on 24 January 2010, said that "as long as our brothers in Palestine continue to suffer, the US can expect no security", or words to that effect. The following day Rabbi Dow Marmur (Marmur 2010) described the situation in Palestine as "a conflict of two narratives, and two peoples who have a history of possession of the same land". This vision completely ignores the fact that whatever "narrative" forms one's background

and gives rise to one's beliefs cannot justify gross violations of human rights and humanitarian law.

Only the presence of international law and its mandates, when observed and followed, can possibly lead to justice in the region. In fact, in law, motivation only becomes relevant at sentencing, whereas *mens rea* (including knowledge and awareness of the of the consequences of one's acts) is considered in the judgment of the gravity of an *actus reus*. The aspects of "knowledge and awareness" in that particular situation will be discussed below (Chapter 5) as just one example of plunder in the area:

> Thus, for example, the looting of Palestinian homes in the aftermath of the "Nakba" (Catastrophe) in 1948 (with 750,000 Palestinians forced to flee in terror) not only has been justified by the passing of laws such as Israeli Absentee Property Law, but on many occasions also by a discoursive practice of denial that the appropriated homes were actually ever inhabited. This is how many Israeli buyers, who might well have been acting in good faith, ended up accepting ownership of stolen Palestinian homes (Mattei and Nader 2008: 124).

Even aside from the "lawlessness" present in the Israel/Palestine situation (as well as in other areas where gross human rights violations prevailwithout international law intervention, such as Chechnya or Tibet), the poverty and the lack of appropriate infrastructures within "developing" countries have been used as excuses for interventions governed by obvious "double standard policies".

Poverty itself is viewed as "justification" for intervention leading to plunder, and aid itself serves to aggravate poverty through debt repayment (Moyo 2009: 152), including the presence of "phantom debt". The latter is one of the main causes of the ongoing deprivation, involving aid that is "wasted, misdirected, or recycled within rich countries":

- Of US aid, 86 cents in the dollar is phantom, largely because it is tied to the purchase of American goods and services.
- Of Japanese aid to Vietnam, 86% is spent on infrastructure projects because Vietnam is a key market for Japanese exports. These projects tend to be found in areas where Japanese firms operate (Elliott 2005).

In addition, foreign technical advisors in Vietnam were paid (in 2005) US$18,000 to US$27,000 per month, while local experts received between US$1,500 and US$3,000 per month (Elliott 2005). Comparable examples can also be cited from several European countries, including France and the UK.

Among the various aspects of plunder, the "legal" practices of NAFTA and the WTO stand out. Mattei and Nader cite a telling example:

> For example, milk powder produced in the United States and subsidized at 137 per cent has been dumped in Jamaica, literally forcing the entire dairy sector of the impoverished island out of business (Mattei and Nader 2008: 131).

Further examples include the WTO decisions regarding the "banana wars" between the EU and the US, concluding with the victory of the latter (Mattei and Nader 2008: 131), or the NAFTA decision against Canada and its efforts to protect Canadian citizens against a carcinogenic gasoline additive produced in the US (and costing Canada a hefty fine in the end; Boyd 2003).

Essentially, even a superficial survey of international relations indicates the subversion of basic rights and of accepted moral and legal principles in order to support and facilitate the economic, trade and corporate agenda against people, as plunder regularly includes not only the illegal taking of resources and the abusive practices against labour in impoverished countries, but also the "plunder" of their life, health, and normal development, the protection of which is no longer the first concern of today's weakened states.

From Economics to Biological Integrity: The Case for Ecoviolence

> The issue is not one of a right to intervention, but rather of a responsibility—in the first instance, a responsibility to protect their own populations, but ultimately a responsibility of the whole human race to protect our fellow human beings from extreme abuse wherever and whenever it occurs (Annan 2004).

With these words Kofi Annan emphasized the birth of a new era, and the novel concept of the responsibility to protect (RtoP), which was accepted—at least in principle—at the World Summit of 2005 (International Peace Institute 2009). This new direction for the UN and for international law started by defining "sovereignty" as responsibility (Melber 2009: 74). Initiated by the International Commission on Intervention and State Sovereignty in 2001, that work indeed represented "a momentous normative change", based on the principle that "sovereignty does not imply a license to kill" (Jolly et al. 2009: 176–177).

However, aside from this momentous development, there are several aspects of violence against too many, primarily but not exclusively in the so-called "developing countries", that must be examined today, reaching even beyond the ideological/ecological aspects I researched for my 2004 doctoral thesis (Westra 2004), and we will consider them in turn.

First, *pace* Marx, this chapter has fallen into the same error that is present in the work of that illustrious thinker: the mistake to view economic concepts like "exploitation" and "plunder" as the main sources of illegality and harm. In contrast, it is painful to acknowledge the reality of the current emerging and ongoing globalized violence in its aspects of (1) genocides, (2) crimes against humanity, and (3) ecoviolence, which most often underlies both (1) and (2), as we shall see below.

All three categories involve powerful states preying on weaker ones, and the rich corporate bodies abusing the poor, so that the concern with economics in the previous sections appears to be justified, at least in part, as pointing to the starting point from which graver harms originate. These other aspects of the harms arising from globalization represent the gravest infractions of international law, based for the most part on *jus cogens* norms and imposing, in principle, *erga omnes* obligations.

Hence, the growing impunity with which these criminal activities are perpetrated represents the major failure of international and domestic law, as well as the circumstance that most obviously cries out for radical change and redress. Indeed, for both corporate "plunderers" and complicit state institutions, the original motive for pursuing or allowing hazardous activities is indeed economic, but the effects of their practices goes far beyond exploitation, plunder or other forms of economic abuse.

The activities of mining and other extractive industries take place in so-called developing countries and represent Western-originated "development", with its disregard for the wishes, the needs and the very culture of the local (often Indigenous) communities. Hence, although initiated specifically as an economic activity, the resulting harms it produces include: (1) physical harms to the individuals that live off the land in the area, including unsafe and/or limited water access and unsafe soil and air conditions; (2) ecological harms that affect not only the local populations but produce harms and disruptions beyond the specific area affected (for instance, climate change—a global

phenomenon—is one of the results of ecological disruptions and global industrialization); and (3) harms to the community, whose traditional lifestyle is under attack, as are their religious and cultural natural symbols.

One may argue that because the original motive was purely economic these results—at most—may be viewed as "externalities" of war. But even in that case, "externalities" that kill or severely affect civilians are considered war crimes. When only a specific population is targeted, the situation becomes either genocide or a crime against humanity, and the difference hinges on the role played by intent. In some cases, we can conclude that the elimination (or at least the removal) of a specific population from a location that is viewed as desirable from a business perspective is very much a part of the decision to act and of the specific circumstances of the commercial activity planned, but this is not always the case.

International legal scholars such as William Schabas argue that only the presence of the *dolus specialis*, or specific intent, denotes the presence of genocide, which he terms "the crime of crimes" (Schabas 2000). Others, myself included, and including the iconic work of Raphael Lemkin (Lemkin 1947: 145), take a broader approach. It is possible to understand "knowledge" of the result of certain activities as indicative not only of negligence but also of "wilful blindness", and hence of a state of mind quite close to the explicit awareness of consequences, so that "intent" perhaps cannot be excluded (as it is not in Canadian criminal law, especially in regard to sexual offenses; Westra 2004: 75–86, 191–203).

Of course the option to treat these consequences as "crimes against humanity" remains as an alternative: it does not require the presence of special intent, nor the proposed appeal to criminal law in a different field. At any rate, aside from the proposed and novel RtoP, state responsibility for various harms (including environmental ones) has a long (though lackluster) history, and it is worthy of a brief review.

State Responsibility for Environmental Harms and its Difficulties

> The identification of responsibility also does little to encourage prevention. It quantifies the environment without being able to include in the quantification the value of nature as a spiritual amenity, its value to future generations and even less nature as a value in itself, regardless of its instrumental meaning for human beings (Koskenniemi 1992: 123–128).

This otherwise excellent passage leaves out the full impact of non-prevention: prevention is absolutely required because of the well-supported link between disintegrity and environmental degradation in the world and human health (Soskolne and Bertollini 1999). It is this connection that lifts environmental harms from their customary position to that of crimes against the human person and against humanity. When one understands the connection between starvation and preventable disease occurrences in children in developing countries, it is easier to acknowledge that those harms are, for the most part, incompensable. Hence, when the environment is perceived as a quantifiable entity, progress will be elusive: "Any quantification will be under-inclusive, costs will be externalized and an economic incentive to pollute will remain" (Koskenniemi 1992: 125).

It is worth noting that pollution is only the most visible sign of ecological disintegrity. In addition, the expansion of the "technohuman" enterprise (Westra 1998), leading to the encroachment and utilization of too much of the Earth's surface, leads to an increasing and often irreversible loss of biodiversity and of the processes that compose the basis of nature's services (Daily 1997).

The final critique acknowledges the dissonance between the "normative expectations" arising from soft environmental law, which, despite the ongoing regimes, never seems to harden into anything more than amicable meetings aimed at consensus rather than at justice or the common good. As Koskenniemi argues, even at best, dispute settlements produce too little much too late, as formal punitive procedures are not in place (Koskenniemi 1992: 126).

The question of the treatment of legal yet harmful activities has been a major concern in relation to state responsibility, and the topic of "International Liability for the Injurious Consequences of Acts Not Prohibited by International Law" has been on the agenda since 1978 (*Yearbook of the International Law Commission* 1986: 149 et seq.). There have been five reports, a "schematic outline" and a number of draft articles following the first report, through 1988. The problem is that of ensuring that transboundary harm, arising primarily in the environmental field, should be considered a "liability" even if the state could be considered to be "without fault" (Boyle 1999: 1–3).

In contrast, viewing the activities under consideration as lawful meant that "neither the payment of compensation nor the prevention of harm was seen as an absolute obligation" (Boyle 1999: 5). The emphasis is on the relationship between the activities, their economic

importance, and the "probability and seriousness of loss or injury": hence a balancing of interests was the main goal of any regulative effort, not ensuring that all harm would be avoided. As Boyle describes it: "In sum, what the schematic outline sought was a world in which nothing was either prohibited or made obligatory and everything was negotiable" (Boyle 1999: 5).

Instead of another approach based on consensus and negotiation, had the emphasis been placed on the harms themselves, the work of these commissions ought to have sought some redefinition of risk to indicate whether recurring but moderate pollution, or "large-scale but one-off accidents" such as Bhopal or Chernobyl, might be equally harmful. Liability in all these cases ought to be strict "in the sense that it is founded on cause, not on the lack of due diligence, or based on breach of obligation" (Boyle 1990: 7). It is disheartening that as late as 1986 Rapporteur Barboza stated that:

> within this topic there will be activities which, although they may cause significant injury, will be permitted because, on balance, the assessment of conflicting interests indicates continuation of the activity despite its risks and compensatable injury (*Yearbook of the International Law Commission* 1986: 152 at para 31).

Ecological disasters and ongoing disintegrity will indeed cause "significant injury." In addition, most environmental injuries, as we are increasingly learning, are incompensable. With the presence of scientific uncertainty, it is impossible to be sure which injury may be reversible or compensable at all.

Perhaps the problem should be reduced once again to that which was termed the "first obstacle," or the economic motive. The desire for "balancing interests" attempts the impossible: "balancing" (or even comparing) economic interests with life and health-related interests. Hence, it will remain regressive to attempt to prohibit the harm, but not the activity that gives rise to the harm, as was shown for instance in the *Trail Smelter Arbitration*, where the question of making the activity unlawful was not even raised.

Here is basically one of the most serious obstacles we encounter: in the environmental realm, harm is not prohibited at source (Boyle 1990: 16); at best, "end-of-pipe" mitigation is sought instead. This happens despite the gravity of the injuries inflicted and the prohibitions and punishments these harms would easily evoke, were they inflicted by other means than through the environment. One of the Rapporteurs

for the 1989 Commission attempted to include "consequences" in the meaning of "obligation" and that of "responsibility":

> Rapporteur Barboza has taken "liability" to cover not only the obligation of reparation, but also the whole range of obligation, of notification, information, consultation and harm prevention with which the topic is concerned (Boyle 1990: 10).

Although extending the range and meaning of "responsibility" appears to be a step forward, joining "prevention" with "notification, information and consultation" once again takes the issue back to a consensus-based model, rather than indicating clearly the assaultive nature of the harm-producing activities. In essence, such an approach takes, as a given, that the way business institutions presently operate is the only way they can operate, and that is something we all must bear, although we may attempt to mitigate the consequences of these activities, albeit in a "cost-effective" manner.

Unfortunately, it is not an occasional violation that is dramatic in its import, but the steady ongoing results of many less dramatic violations, amounting to an imminent threat to all life. The major cause of this global threat may well be the continuing reliance on regimes based on dialogue, at best, and at worst on power alliances between rich nations to the detriment of the rest. Of course, eliminating dialogue leaves very few options, if any.

Environmental violations or wrongful acts are not isolated occurrences, nor are they easy to dismiss because they do not represent the norm for states that are mostly law-abiding. But the reality is that limited or delayed compliance with environmental treaties typically represents acts or omissions that lead to environmental harm to all: "While declarations and agreements proliferate, the environmental situation keeps getting worse" (Koskenniemi 1992: 123). It is for this reason, and because the environmental situation translates into violent human rights violations, that we cannot agree fully with those who maintain that sanctions for violations are inappropriate (Chayes et al. 1995: 79–80).

There are two state conditions that can be accepted as reducing, mitigating and perhaps even eliminating the culpable responsibility of states for non-compliance or breach of treaties: (1) incapacity to comply, and (2) the presence of ambiguity in the norms that have been violated (Chayes et al. 1995: 79–80). The economic inability to comply parallels the inability to form the required intent for the commission of

a crime for reasons of mental defect, necessity, or other defenses (Roach 2000: 15–17). The states who plead inability to comply for lack of economic means or of appropriate technological or knowledge infrastructures need and deserve the help of richer, more developed nations, not punishment. In contrast, the states who flaunt their non-compliance, who maintain PR firms and legal teams to find ways to legitimately pursue their primary economic goals, and who are, in turn, funded and supported by those self-same economic interests, deserve the harshest condemnation of the international community.

The other reason cited for not employing coercive sanctions—that is, the imprecision of the laws—is an unacceptable excuse for rich Northern/Western countries as well. Treaties are consensual instruments and, for the most part, the most powerful nations are the ones who prefer watered-down, inconclusive or vague language (couched in terms environmental philosophers have termed "weasel words"), as this language might permit them to continue to act wrongfully with some degree of impunity.

In essence, the language of treaties is one of the most significant parts of an uneven, imbalanced dialogue between states, carried on through regimes involving widely different principles, supported by polarized national interests. Keohane and Nye speak of the "club model of multilateral cooperation"; a very apt metaphor (Keohane and Nye 2000: 104–119). It is ultimately more like a "country club" than the participants might be prepared to acknowledge. Some are admitted, largely on the basis of race, ethnic background, and socio-economic status in the global marketplace, while others are not. Within such exclusive enclaves, it is to be expected that a great deal of transparency, respect, equality, and other ideals will be lost: the opportunity for strategic manipulation of information is wide open to decision-makers (Keohane and Nye 2000: 104–119).

We are facing a "democratic deficit" (Keohane and Nye 2000: 28), which becomes acute as the common good does not even represent a small part of what these instruments attempt to achieve, despite their rhetoric to the contrary. Perhaps a more appropriate conception of the overarching goal of most of those instruments as they apply to the environment might be the maximum achievable common good compatible with the economic and the power interests of the richest and most powerful Western nations.

It is therefore unfair to blame and sanction those state actors who did not have the power to truly influence the formative dialogue in the

regimes where the specifics of various conventions were decided. It is those who have a clear intent at stake, and who therefore prefer less clear and strongly worded instruments, not those whose subsistence and security (Shue 1996) might have been protected by a stronger, hard law, but are not protected by the soft language and compliance protocols that have been eventually chosen.

In the previous chapter we have argued for radical changes to eliminate this all-too-familiar scenario of weak, ineffective covenants and limited effectiveness. Suggestions include (1) linking environmental violence unequivocally to reaches of international human rights law; therefore (2) insisting on the criminal nature of ecoviolence, no matter how unclear, delayed or unintended the effects of such violence; and (3) elevating environmental violence to ecocrime and placing it under the ultimate control of international law in order to utilize the other factors, beyond domestic practice, that distinguish the latter: principles of law, *opinio juris*, and the writings of publicists (Bederman 2001: 13–17, 23–24).

Before proposing additional principles and strategies, this section is intended to highlight the obstacles to the effective implementation not only of general principles, but also of the treaties to which responsible parties are signatories. Koskenniemi describes no less than six categories of obstacles (Koskenniemi 1992: 125–126). The first represents a recurring and basic problem: transboundary environmental pollution (despite the *Trail Smelter Arbitration*) is hard to ascribe to states when the basis for state responsibility is the presence of an illegal "wrongful act". The latter is only occasionally the origin of the polluting activity: for the most part, transboundary pollution occurs as the result of legal and institutionalized practices. Ecoviolence is, for the most part, the result of legal activities with both domestic and transnational effects that extend not only in space but also in time, across both continents and generations.

Principle 21 of the Stockholm Declaration of the United Nations Conference on the Human Environment (1972) entrenches the moral principle "do no harm" into environmental soft law. Together with Principle 22, which prescribes the procedures to be followed in disputes, these principles establish the fact that transboundary pollution, a "wrongful act" no matter what activity generates it, thus gives rise to clear state responsibility.

Another problem, according to Koskenniemi, is the difficulty of establishing a clear line of causality that would permit the international

community to isolate the responsible party. This is equally a problem in the domestic sector, because of the presence of non-point source pollution. The only constructive approach in response to this problem is to proscribe these substances, since the reach of their synergistic and cumulative effects cannot be fully anticipated or scientifically assured (Westra 1998). A case in point may be the proliferation of health and environmentally adverse impacts in the Great Lakes Basin. Despite the existence of the International Joint Commission to oversee and support the binational *Great Lakes Water Quality Agreement* (1978, ratified 1988), the increasing presence of "hot spots" in the area demonstrates the existence of violence in the area against all forms of life (Colborn et al. 1996).

From this point of view, ascribing state or other actors' responsibility after the fact is far less important than establishing that certain activities, products and processes cannot be tolerated as legitimate, even less as "innocent" until proven guilty of the havoc they will eventually produce (Draper 1991; Westra 1998).

The third problem addresses the inability to comply on the part of developing countries, for economic reasons and because of the lack of technological preparation, as discussed in the previous section (Chayes et al. 1995: 79–80). It is easy to concede this point. Hence, it does not constitute a serious difficulty of state responsibility for the effectiveness of treaties since, for the most part, the main concern of all people ought to lie with the practices of the North, as the largest producers of pollution and polluting activities.

The fourth problem hinges on the indeterminacy and vagueness of the language of the treaties to be implemented: neither "appreciable risk" nor "significant harm" provide a clear standard for state responsibility (Koskenniemi 1992: 125). This problem parallels the one found in the language of common law environmental instruments. In essence, environmental violence exists in a broadly polarized world, because the North and the South play—generally speaking—in opposite camps. For the most part, the economic interests and lifestyles of the affluent North are responsible for and causative of the harms experienced more strongly and more clearly by the South (Rees 2000).

The violence is environmental, as indeed are the resulting harms, so that the whole global community of life is affected. However, those who are rich enough both as nations and as individuals can still find ways of protecting themselves, at least by delaying the result of environmental violence. For instance, global warming engenders floods,

temperature imbalances, storms and various other disturbances. It is clearly easier to survive a significant sea rise in The Netherlands than in Bangladesh; a flood in Germany or in Manitoba, Canada, than anywhere in Asia; a drought in the Canadian Prairies than in Africa; and a heatwave wherever individuals can afford air conditioning.

Thus, the unclarity, with a corresponding lack of stringency in the norms and principles of environmental instruments, is not a problem for all in the same way: it plays into the hands of the rich Western nations, as it allows them to continue their destructive practices with relative impunity, while the vagueness itself is an instrument of violence against those who are more vulnerable and those the instruments themselves fail to protect.

The fifth point addresses the heart of the environmental problems: prevention ought to be the goal, not the ascription of responsibility after the fact.

Ecoviolence and the Responsibility to Protect

> Under a state obligation to "respect" the right to health a state must not interfere with the negative rights necessary to realize health. Looking beyond the state and its agents, the obligation "to protect" the right to health requires a state to ensure that others, including non-state actors, do not violate this right; lastly, the obligation to "fulfill" the right to health mandates that a state must take positive measures to ensure the fulfillment of the right to health (International Covenant on Economic, Social and Cultural Rights (ICESR), General Comment No. 14).

While the general RtoP is viewed as a novel development in international law, the protection of health has been entrenched in international regimes since 2000, although (like many other comments and declarations issued by the UN) the lack of enforcement renders this excellent document just another paper tiger. In addition, there are several problems present in both the General Comment and the RtoP itself.

First, what precisely is the "protection" proposed by RtoP? That is, what is the principle intended to protect? One would assume that the right to life and health, hence the right to survival, would be absolutely primary, as no other human right can be respected unless that right is.

Second, there is a missing legal (though not actual) link between chemical/industrial exposure, extreme climate events, ecological disintegrity in general, and the right to health. Current science is copious

and well-founded, with abundant legal scholarship and critiques of globalization in this regard (Soskolne and Bertollini 1999; McMichael 1995; Patz 2005: 310–317; Susser and Susser 1996: 674 Kim et al. 2000; Gostin 2008: 334; Attapattu 2002: 65; Davidsson 2005: 173; Meier 2006: 711–752). Yet despite the clearly established connection between environmental hazards and human health and normal development, there is no separate and binding instrument that establishes that connection in law, either in the domestic or in the international arena. Most often, various substances and practices are "regulated" at best, but the possibility of elimination of either is never even considered (Boyd 2003: Chapter 8), despite the endemic uncertainties present in the scientific assessment of almost all dangerous substances.

Elimination should be the first choice once the high toxicity of many such products has been acknowledged, as well as the possible cumulative harms they may produce in combination. The science is solid, and the material cited above is only a sample of the wealth of available research. The 2006 article by Philippe Grandjean and Philip Landrigan is outstanding as it indicates the gravity of the consequences of those exposures, ranging from the underdevelopment of the brain to the childhood and young adulthood tumours, as well as disease of old age, all clearly increasing with time, and all dependent on perinatal and early exposures (such as Alzheimer's and other degenerative diseases; Grandjean and Landrigan 2006: 2167–2178).

Hence, it is not the science that is uncertain or lacking, it is the legal infrastructure that is lagging behind. For instance, in 2002 the UN Commission on Human Rights created a Special Rapporteur on the Right to Health in 2002. The "effects of trade on health" are part of his mandate, and especially relevant for this work:

> The Rapporteur's work includes gathering and sharing information, reporting on the status so the right to health and proposing recommendations. … The first Special Rapporteur, Paul Hunt, was appointed in August 2002. He focused on themes relating to vulnerable populations; poverty, discrimination, and stigma. He offered leading indicators (measures for evaluation) for the right to health: structures, processes, and outcomes. Structural indicators inquire whether adequate systems that affect health are in place (e.g., does the state include the right to health in its constitution?). Process and outcome indicators measure progress over time, consistent with the idea of the progressive realization (e.g., benchmarks or targets). Process indicators monitor effort (e.g., the proportion of women receiving prenatal care) and outcome indicators measure results (e.g., infant mortality and life expectancy). … The Special

> Rapporteur has issued reports on the elements of the right to health, reproductive rights, mental disabilities and the effects of trade on health. By opening a dialogue between governments, civil society organizations, and international bodies, the Special Rapporteur has increased the visibility of the right to health while clarifying its meaning (Gostin 2008: 282).

Gostin adds:

> The meaning of the right to health is not inherent in the text. Work is therefore needed to clarify state obligations, identify violations and establish criteria and procedures for enforcement (Gostin 2008: 283).

The ecoviolence to which we are all exposed, singly and collectively, in various measures, has been well-researched and is fully acknowledged in recent epidemiological work. In fact the Centers for Disease Control and Prevention funded a National Envinronmental Public Health Tracking (EPHT) program in 2002 in the US (Centers for Disease Control and Prevention undated). In 2004, the US Institute of Medicine extended its support to that initiative (Institute of Medicine 2004; Gostin 2008: 290–295). A "public health information infrastructure" is necessary in order to fulfill "essential public health functions".

Table 1 *Essential public health functions*

Function	Definition
Assessment	Identify needs, analyse causes and find cases
Policy Development	Determine priorities, objectives and means
Assurance	Ensure services to meet health needs

The question is whether environmental hazards represent an acknowledged aspect of epidemiological "Assessment" and "policy development". This question can be answered in the affirmative:

> Hazard surveillance assesses the occurrence of, distribution of, and trends in levels of hazard-chemicals, physical agents, biochemical stressors, and biological agents responsible for injury and disease. Exposure surveillance monitors members of the population for the presence of environmental hazards (E.g. pediatric lead, arsenic, radon, and radiation levels). Disease surveillance monitors the population for incidence of illnesses attributable to environmental hazards (e.g. cancers, birth defects, and respiratory disease) (Gostin 2008: 293).

The acknowledgment of environmental hazards raises several legal and moral questions, particularly in regard to the responsibility of sources of contaminants to inform those who are exposed.

It would be much easier to examine and specify rights and responsibilities, for instance, in those carrying or exposed to sexually transmitted diseases. For individuals the major problem is the legal obstacles engendered by the "right to privacy" and the conflicting "right to know". "Partner notification" is obligatory in those cases to minimize exposure and the spread of disease (Gostin 2008: 302–304). To ignore the directive of health care providers and deny a partner's right to know may lead to criminal prosecution.

A clear example of what I would term responsibility for diffuse harm can be found in the aggravated assault case of *R. v. Cuerrier* (1998). The case concerned a man who was advised by a public health nurse in 1992 that, because he was HIV positive, he was to use condoms when engaging in sexual intercourse, and that he was to inform all prospective sexual partners of his condition. Cory J., in his factual background exposition, adds "the respondent angrily rejected this advice. He complained he would never be able to have a sex life if he told anyone he was HIV positive."

Eventually Cuerrier formed a relationship with KM, who, in February 1993, was informed by another public health nurse that, while her tests were negative, Cuerrier was indeed HIV positive. After their breakup, Cuerrier formed another sexual relationship with BH, again not disclosing his condition. Subsequently, when the second woman also found out, Cuerrier was charged with two counts of aggravated assault. In addition, a question was raised about whether uninformed consent was still truly consent, given the dishonesty of the accused, who, Cory J. added, engaged in "fraudulent misrepresentation". Cory J. said:

> The possible consequences of engaging in unprotected intercourse with an HIV positive partner is death. In these circumstances there can be no basis for distinguishing between lies and a deliberate failure to disclose. Without disclosure of his HIV status, there cannot be true consent.

When Cuerrier was advised of his duties with respect to all future sexual partners, there was no specific person named or intended, nor was any question raised about his intent to do harm, or to cause death. But the possible death of any partner in his case could be reasonably viewed as a "consequence within the risk" (Hart and Honoré 1985: 94). Like the environmental harms we have described, the lack of openness and transparency on the part of the risk imposers was termed "fraudulent misrepresentation" and his actions were described as "aggravated assaults", although it would have been hard to prove *mens rea* in his case.

Lack of transparency on the part of risk imposers, misrepresentations about the possible gravity of the risks, and unconcern about the negligence with respect to the duty of care, are all typical in environmental crimes. When one engages in intercourse, especially with a stranger, there is even in the best of cases some element of risk, but so is an element of choice or preference gratification. No such element can be found in those who are exposed to ecoviolence in general.

If "risk notification" is obligatory in cases when one partner (or at most a few partners) could be harmed, one wonders why corporate plunderers are not equally obliged to fully disclose the risks they impose, and then be criminally charged even in cases when only the exposure and the reckless negligence inherent in that exposure can be proven, but not the disease contracted by some, nor the harms imposed on many.

Yet this is indeed the "ecoviolence" practiced with impunity, despite the wording of ICESR General Comment No.14 on the right to health and the novel emphasis on the RtoP, which explicitly indicts the present practices and demands the protection of the most vulnerable. Thus those who impose such risks with full knowledge of the characteristics and effects of the substances they manufacture and the activities in which they engage should be obliged to give all information to the public, like those infected with HIV/AIDS, as the effects of many ongoing economic practices and activities also contribute to the spread of grave disease.

Sovereignty as Responsibility: The Report of the International Commission on Intervention and State Sovereignty[3]

> 2.14 The Charter of the UN is itself an example of an international obligation voluntarily accepted by member states … On the other hand, the state itself, in signing the charter, accepts the responsibilities of membership flowing from the signature. There is no transfer or dilution of state sovereignty. But there is a necessary re-characterization involved: from sovereignty as control to sovereignty as responsibility in both internal functions and external duties (ICISS 2001: 13).

This passage indicates the dilemma faced by the United Nations because of the two senses of sovereignty, as well as the same dichotomy

[3] ICISS (2001); http://www.idrc.ca).

present in its mandate. Sovereignty refers to the territorial integrity, political independence and national status of member states in the interest of the maintenance "of peace and security" (ICISS 2001: 13). At the same time, the UN, with its increasing number of instruments addressing human rights concerns, *also* has "the compelling mission to promote the interests and welfare of peoples within those states ('We the peoples of the United Nations')" (ICISS 2001: 13).

Thus the clear responsibility of the United Nations in the protection of individuals and peoples cannot only be filtered *indirectly* through states, but must also be seen as a direct responsibility to humankind itself. Similarly, the direct reference to peoples' "welfare" cannot simply be the limited protection in times of outright conflict, as "welfare" is a complex concept which includes physical protection in all its aspects. The ICISS document acknowledges this complexity as it discusses the "threefold significance" of sovereignty as responsibility:

> 2.15 First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And thirdly, it means that the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and omission (ICISS 2001: 13).

We will address the second and third aspects of this understanding of sovereignty in the next chapter. At this time, as our focus is ecoviolence, it is the first implication that is most relevant: the protection of the "safety and lives" of citizens, which, we note, is not further specified by the addition of, say, "in times of war or other conflict". Hence, it would seem reasonable that such possibilities as extreme weather events or exposures related to the wide reach of globalized industrial activities could be included:

> 2.19 Just as the substance of human rights law is coming increasingly closer to realizing the notion of universal justice—justice without borders—so too is the process (ICISS 2001: 14).

The rest of the language of the section on human rights, with its emphasis on special international tribunals, seems to focus on conflict situations, although the sections on "human security" acknowledge the broadened scope of the notion:

> 2.21 Human security means the security of people—their physical security, their economic and social wellbeing, respect for their dignity and

> worth as human beings and the protection of their human rights and fundamental freedoms …
> 2.22 … the security of people through human development with access to food and employment, and the environmental security (ICSS 2001: 15).

As well, Section 2.23 of the same document refers to "security" as understood in the context of conflict situations as "narrow" and such that it "leaves out the most elementary and legitimate concerns of ordinary people". In addition, the traditional sense of the concept inspires states to direct

> enormous amounts of national wealth and human resources into armaments and armed forces while countries fail to protect their citizens from chronic insecurities, hunger, disease, inadequate shelter, crime, unemployment, social conflict and environmental hazard (ICISS 2001: 15).

Thus, the responsibility to protect emerges from its founding document as a notion both flexible and progressive, such that it might be used to fill the critical gap existing between legal instruments and the grave situations confronting the legal community. Not yet a new principle of customary international law, it could be viewed as an emerging guiding principle, perhaps in the same way as the precautionary principle eventually found its way to acceptance into the regimes of international law.

In the next chapter we will return to the conflict between present-day international legal regimes and collective human rights protection not yet subsumed under the responsibly of states.

CHAPTER THREE

HAZARDS, ECOVIOLENCE AND THE NEED FOR WORLD LAW

Introduction to the Possibility of New Organizations for Protection from Collective Hazards

> Public health has clearly become globalized. Transboundary disease spread now constitutes a global crisis that requires the pooling of efforts and resources by nation states in a multilateral context (Aginam 2005: 58).

While Aginam's observations above are beyond doubt, the facts presented do not make the necessary connection between environment and disease, which is a major lacuna in international law today. Aginam, however, is aware of the connection that defines the "new era in mutuality of vulnerability", as he adds:

> Globalization is not the only factor that contributes to the transboundary spread of emerging and re-emerging infectious diseases. The power of nature, complacency, the breakdown of surveillance capacities, and *socio-economic and environmental degradation* also play a role (Aginam 2005: 47; see also Fidler 2000).

If we are seeking to establish the true protection of collective human rights, beyond situations of conflict as required by RtoP, one of the best bets appears to be to strengthen and expand public health laws. In contrast, others have argued (Biermann and Bauer 2005) that the best way to institutionalize the protection of collectives against the hazards of globalization would be to establish a "World Environment Organization" (WEO), and we will consider both possibilities below.

The most important thing to keep in mind is the nature of the problem, so that when we consider possible solutions we can measure these options against the ongoing, real attacks against human rights. We can characterize these attacks, according to our analysis in the previous chapter, as the triple results of neoliberalism through globalization, which we listed as "plunder" (Mattei and Nader 2008), "exploitation" (Marks 2008b) and "ecoviolence" (Westra 2004).

While the two first concepts represent, roughly speaking, two aspects of torts (that is, of depriving the rightful owners of their property) or abusing the rights of workers and others (a crime that has become particularly heinous when the deprivation includes the resources needed for the survival of a community), the last one defines a crime. It is a criminal attack: an aggression perpetrated on the physical integrity of indivudals within a collective and on their habitat.

All three concepts suffer from the underinclusiveness present in international human rights law: "plunder" and "exploitation" are mostly viewed as aspects (or perhaps collateral damage) of "development", sometimes even of "sustainable development", and as part of a globalized trade agenda of which the "trickle down" properties are seldom questioned. "Ecoviolence", in contrast, does not even appear on today's radar of various institutions (such as the WTO or the IMF, to cite just the two most powerful ones).

The connection between "aggression" (not fully defined anywhere, not even in the Statute of the ICC) and neoliberal economic deprivation and oppression, however, is well represented in the legal literature (Sachs 2004). In contrast, the World Health Oragnization's 2008 Report (WHO 2008) recognizes the connection between poverty, economic deprivation in general, poor health and the spread of disease, as it proposes measures to "close the gap" between rich and poor "within one generation", although it does not point the finger at the specific actors who promote and support the *status quo*.

Many scholars address this "gap" in their work, especially Thomas Pogge in his analysis of hunger and of the incompleteness and failures of the Millennium Development Goals (Pogge 2002, 2004: 377–389), or Henry Shue in his defence of "basic rights" (Shue 1996), to name just two of the best-known scholars. We must also keep in mind the weakness (in fact, the "retreat") of the state, which is one of the main reasons for seeking an organ, organization or institution able to take in hand the protection of the human collective against the present "reigning" organizations mentioned above (the WTO and the IMF), both of which support the primacy of trade and economics (perhaps tempered by considerations of "fairness" and "procedural rights") over any other concern, according to their respective mandates.

Worse yet, the communities and collectivities under attack in the name of "development" agendas on the part of multinational corporations have, at best, the possibility of bringing their cases to some court of law only *after* the damage to their life, health, habitat or culture has

already occurred, so they can cite it as "proof" of the violence they have suffered.

Hence, as we consider possible options to redress this wrong, we need to keep in mind that even additional courts and legal instruments that might tilt the scales in the favour of affected communities are perhaps necessary, but not sufficient, to accomplish what should be done. The ultimate goal would be to ensure that harm is *not* inflicted, rather than simply attempting to secure better, easier or more generous redress after the fact.

Thus the quest for world law and the best possible institutional arrangements, from the point of view of the protection of basic collective human rights, must start with a radical revision of legislation, even before attempting to reach for that elusive, centralized organization that might be able to fulfill the obligations that today's states and institutions are not able to fulfill. Organizations can be defined as "social devices for efficiently accomplishing through group means some stated purpose" (Siebenhüner 2003), according to a conceptual analysis of organizations as emerging in a system of global governance.

That conceptual analysis, however, takes existing organizations such as UNEP, UNDP or UNESCO as somehow "locked' in their expected roles and targets, even though "learning and development" can be expected. However their present role is not fully understood. Siebenhüner says:

> In the case of public sector organizations in the international arena, it is mostly the nation states and the larger UN organizations to whom they are accountable. Moreover, as public authorities, they are submitted to the supervision of courts (Siebenhüner 2003: 13).

This understanding, though fairly recent, ignores the responsibility of such organizations beyond the nation states to the individuals and communities within the human collectivity. Further, it defines their accountability as due, ultimately, to the courts, once again with no consideration of civil society and its rights. Finally, to refer to their possible failures of responsibility to the legal system ignores both the reality on the ground and the near impossibility of expecting a trial for such organizations, when the number and gravity of gross human rights violations is increasingly beyond the capacity of the International Court of Justice (ICJ) and the International Criminal Court (ICC) to deal with effectively.

Any simplistic solution—such as, for instance, strengthening existing organization, but leaving them basically as they are—will not work.

In the next section we will examine a proposed approach to better centralized governance and world law: the possibility of establishing a World Environment Organization (WEO). We will then turn to another option: the establishment of an unnamed centralized institutional entity, based on public health instead.

A World Environment Organization: A Better Approach to the Protection of Collective Human Rights?

> One point is agreed to by all participants in the debate over environmental governance—current environmental policies are inadequate to address the ecological threats. Thus the debate is not about the need for more concerted international action, but rather about the feasibility and practicality of a more centralized management structure for solving these problems (Charnovitz 2002: 323).

The first thing to note about the possibility of such a novel organization is that if it were formed without acquiring significant additional powers and strength—that is, if it has "only an enhanced 'conscience' role" (Charnovitz 2002: 337) —it would be no more effective than the present UNEP and, most of all, it could not fulfill what I believe to be the most important possible role such an organization should have: to be a "counterweight to the WTO" (Charnovitz 2002).

In fact, it is vital not to discuss the possible formation of a WEO in the abstract, but with specific reference to what aspects the new organization would manifest that would show it to be superior to and more effective than existing institutions and organizations. That said, the arguments in its favour appear to be, *prima facie*, convincing: ecosystem deterioration is uncontrolled (Charnovitz 2002: 339), and human rights effects of the globalized threats that arise are not even considered in relation to the environment as argued above. Thus it is far worse than the need for better coordination of existing regimes.

There is an urgent need for a radical re-assessment and reorganization of what exists, in the light of novel and emerging science regarding the ecoviolence we have outlined above (see Chapter 2). Charnovitz believes that present environmental regimes are "far from dysfunctional":

> In recent years important new MEAs were negotiated on biosafety, persistent organic pollutants, prior informed consent on trade in chemicals and pesticides, liability and compensation regarding hazardous wastes

> and on the implementation of the Kyoto protocol on climate change (Charnovitz 2002: 339).

While these points are beyond dispute, the "effectiveness" and "functionality" of environmental regimes cannot be judged exclusively from the mounting number of existing instruments, whenever enacted, but on their results. Chemicals and pesticides still severely affect multitudes of local and Indigenous communities in the South, and in too many racial minority pockets in the North; hazardous wastes are still growing in quantity, with no appropriate solution for their disposal (Shrader-Frechette 1993); and the Kyoto Protocol is effectively stalled after its latest review at the UN Climate Change Conference (COP15) in Copenhagen in December 2009.

In fact, Konrad von Moltke argues that a review of international environmental management has never been conducted (Von Moltke 2001: 15; see also Report of the United Nations Task Force on Environment and Human Settlements, UN Doc. A/53/463, 1988).

There are two major obstacles to the possibility of establishing a solid and effective system of environmental governance: first, "the formidable resistance from individual governments" (Charnovitz 2002: 341; see also Kennan 1970: 401–409); and, second, the indisputable power of globalized neoliberalism and the WTO. At any rate there have been a number of proposals suggesting that we should have an organization based on the ILO, GATT, the IMF, WTO or the WHO, with varying mandates including special decision rules, settling disputes, integrating MEAs, integrating UNEP and other groups, and even as "an equal partner with the WTO" (Lodefalk and Walley 2002). These proposals started in the early 1990s and have been evolving since then. By the same token, the reason why such an organization is needed have also been discussed during that period. The problems such an organization is intended to address include some of the following:

> free riding, lack of internalization, strong special interests, environmental disputes turning into trade disputes, sidelined environmental debate (focused on the GATT/WTO), the use of trade restrictive measures as environmental instruments, disregard for environmental problems connected to trade liberalization and vice versa, lack of incentive mechanisms, patchy and unsatisfactory monitoring and follow-up, limited harmonization of environmental standards and instruments, and insufficient, unstable and inefficiently managed funding (Lodefalk and Walley 2002: 603).

What emerges clearly from all documents calling for a WEO, and specifically from the concerns they cite, is the ongoing linking of environmental and trade/economic issues, coupled with the complete neglect of any connection to either health or basic human rights. Still, many appear to believe in the importance of a WEO, perhaps not to solve all environmental problems but, at least, as a "partial contribution' to their solution (Biermann and Bauer 2005: 139).

In contrast, others view the proposed organization as a matter of "symbolic politics" (Oberthur and Gehring 2005: 221). The same authors add:

> A WEO constructed after the UN model could be expected to realize limited efficiency gains at best, but it would not make a significant contribution to the solution of problems of international environmental governance related to decision-making implementation and coordination (Oberthur and Gehring 2005: 220).

But no institutional re-organization could possibly correct the deep problems besetting environmental governance in the present world situation, with its ongoing unfairness, inequalities of power and the imperialistic domination of Western states. Adil Najam says it well as he recognizes that some continue to believe that "global cooperation is a function of inappropriately designed organizations, rather than a reflection of a fundamental absence of willingness on the part of state" (Najam 2005: 238). In fact, the problem is not a "puzzle of administrative efficiency", it is a "challenge of global justice" (Najam 2005). And that is precisely the main problem: tinkering with organizational arrangements improving communication and coordination among the present weak and ineffective environmental organizations might yield some improvements, but Najam is right as he notes that

> Unless we somehow address the core institutional questions first, any new organization will fall prey to the exact same pathologies that confront existing arrangements (Najam 2005).

Yet even Najam admits that coordination may promote some improvements, despite the persistence of existing global injustice. But it seems that even improved coordination of various organizations cannot overcome the major problems that impel us to seek radical new solutions.

Some Preliminary Considerations

Before dismissing the WEO as a viable option to correct the existing lacunae in the law regarding the environment, it might be useful to review why it is hard to embrace it as a strong contender. The most discouraging aspect of all proposed versions of the WEO appears to be both procedural and linked to the global economy. When the ongoing attacks based on the "development" agenda of globalization, which inflict both physical and non-physical harms on vulnerable populations, are still seen as "disputes" to be settled as torts, then even if the form might have changed, the substance has not.

Even using the UN as a model to emulate would simply place the WEO within the same geopolitical scenario of Western domination through the UN Security Council and the ongoing G8 meetings. As Article XX of GATT (still in effect under the WTO framework) indicates, human rights to health *may* be considered, provided they do not interfere with the neoliberal agenda of trade:

> *Article XX General Exceptions*
>
> Subject to the requirements that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement of any contracting parties of measures
>
> (b) necessary to protect human, animal, or plant life or health;
>
> […]
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption
>
> (General Agreement on Tariffs and Trade, Article XX).

This document, like the Agreement on the Application of Sanitary and Phytosanitary Measures (1994), is entirely oriented to trade, not to the protection of health and the environment. In the Hormones Decision (1997) case, as in the other cases, the government appealing the use of substances or products judged to be harmful to human health lost their cases.

These decisions may represent violations of human rights, but they are defended purely on economic grounds (although clearly there are

other values at stake, including democratic values, such as the right to due process). For instance, Robert Howse raises an obvious question: because of their role as transnational organizations with power over individual states, what of democracy? Howse claims that democracy is not implemented by responding "to widespread fears of citizens about risks"; instead, the WTO decisions

> can and should be understood not as usurping legitimate democratic choices for stricter regulations, but as enhancing the quality of rational democratic deliberations about risk and its control (Howse 2000: 2329–2357).

Howse adds that "popular choices should be respected", but only "if the choices have been made in awareness of the facts" (Howse 2000: 2329–2357). But that is precisely the point raised here: the "facts" provided by the corporate interests who wish to avoid regulation and their hired "experts" may be far removed from the true facts of the case.

Perhaps the basic error lies in expecting these documents, specifically and openly oriented to deal with *trade*, to also provide the health and environmental protection that we all require, and that humanity should have a basic right to. However, given the lack of other instruments of equal or superior enforcement and implementation power designed for our protection, it is hard to see why we should reduce our expectations of fairness and justice (principles that govern all laws, including civil laws pertaining to trade). We need to be aware of this cardinal problem: "free trade" has been described as a "corporate charter of rights and freedoms" for Canada (Barlow 1999: A25), and the notion of an "economic Constitution for North America" was proposed by Ronald Reagan when he was president of the US (Laxer 1991: 209). For a country less rich and powerful than the US, such as Canada, the effect of WTO judgments may include "trading away one's national sovereignty" (McBride and Shields 1993: 162–164), as well as a number of consequences far beyond "trade" issues (Wallach and Sforza 1999: Chapters 2 and 3). In some sense, what is at stake is the existence of sovereignty itself.

In the 17th century, Jean Bodin set out clearly a view of the limits of sovereignty: "all princes and people of the world … [are] subject to the laws of God and Nature" (Bodin 1962: 92). This understanding of the limits of human planning and decision-making even in commercial relations is still held by many today, although God and Nature are combined in one concept. For a popular understanding, the limits of

liability in insurance claims routinely exclude the effects of such disasters as earthquakes, by terming these "acts of God". Nevertheless, humanity as a whole has lost most of the understanding of its own limitations (Rees 2000: 139–156). Dupuy says:

> Humankind is engulfed by the planetary environment, even though people tend to behave as though they were outside of nature. In antiquity all was sacred, except humankind. Mountains, spring, the winds, and the sea were deified; people did not enjoy any particular rights. With the advent of Judeo-Christian culture this has been reversed, and Man alone is sacred. Nature, having become secularized, has been treated as if it were at man's disposal, indeed as if it were a reservoir of riches subject to unlimited exploitation. Today, we have begun to understand that we cannot retain this dualistic vision (Dupuy 1991: 201).

But we ignore and depreciate nature and its complex processes only at our own risk and peril. In fact, we are placing the very continuity of life at risk, as we increasingly impose disproportionate burdens on people of colour and people in developing countries, as well as future generations and the whole environment (Westra 2006; Westra and Lawson 2001).

Part of what is at issue is the increasing dissonance between the proliferation of explicit "green" soft law instruments that give primacy to our habitat and to humanity, and the even greater proliferation of "trade-as-sovereign" documents. These, for the most part, express a few "green" sentiments in their non-binding preambles, perhaps, but continue to view cases and issues as "business first". In the first group, we can include such documents as the UN Convention on the Moon (1979), The Convention on the Law of the Sea (1982), The Hague Conference (1989), The Rio Declaration (1992), The Vienna Convention of the Protection of the Ozone Layer (1985), The Montreal Protocol on Substances that Deplete the Ozone Layer (1987; adjusted and amended in 1990, 1992, and 1995), and others pertaining to forests and to the "Common Heritage of Mankind" (1982).

All these documents make explicit the principles invoked in the International Court of Justice decision concerning Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain, 1970): that is, the principle that states do not only have obligations to one another, but they have obligations to humanity as a whole (obligations *erga omnes*), and these are particularly directed to "respect for the rights of man and the environment" (Dupuy 1991: 202). Dupuy's position parallels my own but, to be fair, "the rights of man and the environment" are by no

means explicitly coupled in the above-mentioned case of Barcelona Traction.

The persistence of these problems today indicates that Najam is probably right—the WEO would at best contribute to the administration and coordination of better environmental legal regimes than we have today, but it would not have the capacity, as such, to initiate the radical changes that are required.

UNEO: Another Proposal for Global Environmental Governance

> The "ecological truth", especially in the field of damages, is presented as a primary and absolute necessity which cannot be negotiated by States. An Environmental Global Governance able to verify the ecological "truth" in every single case, according to legal rules does not represent a "permission" by the States, but their responsibility for the present and future generations (Postiglione 2010: 33).

Amedeo Postiglione has been promoting "global environmental governance", including both institutions and legal regimes that "set up … environmental values as a priority", since 1989, both writing on that topic and participating in and organizing meetings and conferences. His activities have added a special twist that no other supporter of a World Environment Organization—or a United Nations Environment Organization (UNEO)[1], as he prefers to term it—has proposed: the foundation of a Global Environmental Court of Justice, as well as the establishment of working groups on global justice and the environment in each state (Postiglione 2010).

Postiglione's proposal is both important and timely in several of its aspects; however, it presents a number of difficulties as well, and both positive and negative aspects need to be discussed. The previous sections also argue for a thorough and radical reorganization of present environmental international institutions, but Postiglione does not propose reforms as radical as those proposed by other scholars. He asks for the establishment of a "supranational authority" (both administrative and judicial), presently absent from global governance (Postiglione 2010: 13); he also seeks to establish "the international responsibility in the environmental field" (Postiglione 2010: 14–19), which he deems to possess a solid legal basis. Nevertheless, he does not envision a clear

[1] Intended as a reform of the United Nations Environment Programme (UNEP), a movement initiated in 1972.

and inescapable link between "environmental rights" and the basic human rights to life, health and survival (Shue 1996; Taylor 1998; Tamburlini et al., 2002; Westra 2006). Although these specific traits of environmental rights are not listed, he cites several other important aspects of the interface between human rights and environment:

- the legal basis of international responsibility;
- the existence of a general principle of international responsibility for environmental damages;
- the "spatial extension" of the principle of the "common heritage of mankind";
- the "temporal extension" through future generations;
- the extension of the contents of responsibility with respect to all natural resources and in the future to the "sustainability of life on earth" (also connected to the "common heritage of mankind";
- the "parties responsible (States, multinational corporations, individuals)";
- the "forms of responsibility";
- "the parties entitled to take action (States, international organizations, NGOs, individuals)"; and
- "supranational authorities" for solving disputes and possible mandatory penalties" (Postiglione 2010).

Postiglione notes that the progress achieved at the regional level (that is, at the level of the Council of Europe) is the best so far, compared to other regions of the world, both regarding the Member States' governance and the individuals who have access to the Court of Human Rights in Strasbourg (Postiglione 2010: 29). Nevertheless, neither the ICJ nor the Permanent Court of Arbitration has succeeded in solving environmental conflicts in the legal sense (Postiglione 2010).

But the main issue is not how to solve legal problems after damage or harm occurs, but how to establish and enforce laws that prevent legal problems from arising. Thus the main principle, basic to establishing the "ecological truth" Postiglione is committed to, renders the main issue one of prevention, rather than simply the best way to handle "damages" (as damages to the ecological integrity of the environment and to the biological integrity of human beings are increasingly proving to be incompensable). Postiglione adds:

> Therefore, the problem is not whether to establish an Environmental Global Governance, but "when" and "how" (Postiglione 2010: 33).

Yet several problems remain before we can fully accept Postiglione's position. For instance, he argues against a "single human right to the environment" on the grounds that it comprises "three rights", to information, participation and access (Postiglione 2010). But we note that neither the rights to life, health and normal development nor the basic right to veto industrial activities *before* hazardous exposures can occur are included.

The latter is a particularly important aspect of the "ecological truth" requirement. For the most part, states bargain and discuss safety standards they should be imposing unconditionally (at least in North America). The states' aim is to retain the jobs and the tax basis that industry brings in, rather than enforce environmental and public health standards (Boyd 2003).

In a similar vein, in North America, both NAFTA and the WTO explicitly and forcefully support the primacy of economic and trade interests over environmental and health concerns. Therefore, a "partnership" with business interests, as Postiglione proposes, would probably eliminate (at least outside of Europe) any chances of establishing "ecological truth", let alone human rights to the environment. A further significant difficulty is that, while Postiglione cites UN instruments, reports and declarations, he neglects to note the total lack of implementation and enforcement regarding most of the activities proscribed by those documents.

Hence the UN itself needs a radical overhaul if any new or reformed organization within it is to become truly effective. At least the aspect of an independent but specialized court to try environmental cases is unique to the proposal of Postiglione, and, given the large load of both the international courts (ICJ and ICC) and the European Court of Human Rights itself, and the number of grave cases that appear to take precedence over environmental ones, such a court appears to be a highly desirable development.

One possible caveat, however, has been offered by Judge Christopher Weeramantry, who believes that a proliferation of courts would make it even harder to get convictions based on ecology, as it would be more difficult to decide which legal precedent might be determinant (personal communication from Judge Weeramantry, University of Ottawa, September 2008). Although Judge Weeramantry is undoubtedly one of the most important scholars, and perhaps the best known in the quest for environmental justice, it might be possible to put in place procedures to remedy this difficulty, whereas, as Postiglione argues, the very

existence of that court would make a difference to the impunity that today accompanies what should be termed environmental crime (Westra 2004). It would perhaps succeed to give such "crimes" a higher visibility and a better understanding worldwide.

"*Employing Public Health for Global Justice*"?

> In confronting the insalubrious ramifications of globalization, human rights scholars and activists have argued for greater national and international responsibility pursuant to the human rights to health […] However, in pressing for the highest attainable standard for each individual, the right to health has been ineffective to address burgeoning inequalities in underlying determinants of health focusing on individual medical treatments at the expense of public health (Meier 2006: 711–712).

It is easy to see the major difference between the proposal discussed in the last section and this approach: the major underlying problem is evident in the form of the dominance of neoliberalism and globalization. The latter's emphasis on individuals, particularly individuals in affluent Western states, at the expense of the "underlying determinants of health" necessary for the protection of collective public health, is the main issue that needs to be addressed.

Although Meier does not cite the environment directly, coupling "neoliberal economic policies" on with health hazards and contrasting them with the collective right to public health (Meier 2006: 71) entails the implicit acknowledgement of how the former adversely affect the latter. The two major symptoms of globalization are the weakening of the state powers and the spread of "development". Both disproportionately affect the poor and people of colour everywhere (Westra and Lawson 2001), hence re-affirming the conclusions drawn so far about the doctrine of social justice as the necessary foundation from which to seek novel institutions.

The weakening of state powers, now secondary to the mandates of such economic organizations as GATT, NAFTA or the WTO, implies that the gains made in developed countries regarding public health (Westra and Lawson 2001; McMichael and Beaglehole 2000) cannot always be sustained in the face of the increasing powers of the trade-related organizations. These organizations deny states their legitimacy as protectors of the health of their citizens, if any possibility of trade "protectionism" might be alleged.

"Development" as the neoliberal engine of globalization has served to exacerbate the disparities in health between rich and poor (Meier 2006: 715; Kim et al. 2000). Global trade itself promotes the spread of infectious diseases beyond national borders (Fidler 2000; Taylor 1997: 1327; Patz 2005: 310–317), as do accelerated and widespread travel patterns.

In addition, measures such as quarantines, originally designed to protect some populations from exposure, are no longer sufficient to restrain the spread of disease and to ensure protection (Meier 2006: 717; Berkelman et al. 1994). Further, current so-called "agricultural" practices such as industrial factory farms, with their overuse of antibiotics to counter the unnatural over-crowding and hazardous living conditions of those animals, directly increases antibiotic resistance in those who eat meat grown under those conditions (which are also undesirable from other perspectives):

> The dominant economic and development perspectives that inform the present market-based model of agrifood governance tend to champion agro-industrial techniques and the development of technological methods of intervention in agriculture. Such methods focus on increasing production and are reliant on biotechnology, fossil fuels and genetic modification (Bevilacqua and Duncan 2010: 1).

Hence there are issues that render current agro-industrial practices contrary to social justice, beyond the overuse of antibiotics. For instance, even aside from other injustices connected to the systems of production upon which agro-industry is based, the spread of non-infectious diseases (such as obesity, cancers and cardio-vascular diseases) in developing countries is also connected with the overuse of fatty meat products laced with chemicals.

In addition, there are other direct environmental harms that eventually rebound on individuals and countries through climate change:

> Agriculture and food production account for 10 to 12 per cent of greenhouse gas emissions. Livestock farming is responsible for four-fifths of these emissions, which include methane (a greenhouse gas more potent than CO_2) emitted by ruminant animals. Land-use changes, including deforestation for livestock production, add substantial further emissions. Increasing affluence boosts meat consumption, and forecasts predict that livestock production will increase dramatically in the future to meet consumer demand (Friel et al. 2009).

The spread of meat consumption in "low and middle income" countries already produces increases in non-infectious diseases "connected

with over-nutrition, high-fat diets and reduced exercise" (Friel et al. 2009).

The increase in non-infectious diseases in developing countries beyond the affluent West indicates yet more culpable activities causing harm on the part of legal commercial persons, through globalization:

> the "double disease burden" of both infectious and non-communicable diseases has risen to unprecedented levels, creating a heightened need for expanded national health responses. Paradoxically, however, just as the burden of disease is reaching its apex, additional public health systems are being downsized to meet the requirements of international financial institutions (Meier 2006: 718; see also Yach et al. 2004: 2616).

In fact, it is the subjection of public health and environmental concern to "international financial institutions" that has prompted the research of this work regarding a revamped world law. Essentially, what renders the public health approach superior to the possibility of adopting a WEO is the fact that, for any organization based on public health, there is no need to prove the connection between environmental conditions and human rights to life and health: the causality is direct, rather than indirect, as it would be if the central mandate remained the protection of the environment.

Globalization and Public Health: The Disappearance of State Responsibility in International Law

> … market-oriented policy changes, taken without regard to economic and social rights, have acted to weaken state sovereignty, eliminate the welfare state, and limit public action to provide for health care and other basic life-sustaining resources (Meier 2006: 719; see also Falk 2002: 61).

The responsibility of states has been discussed in Chapter 2, but the orientation of RtoP is not fully congruent with the sort of legal and domestic responsibility that is being considered at this time. For instance, the Canadian Charter of Rights and Freedoms (1982) ensures all citizens of their right to "life, liberty and security of person" (section 7), without however fully fleshing out the meaning of "security of person". Is it only the right of citizens to protection in times of conflict? Or is it also police protection against violence? Or does the concept entail a basic respect for the right to life of everyone?

It seems that the latter sense cannot be excluded from the notion of state protection in any country, even in those which (like the US for

instance) refuse to ratify the American Declaration of Human Rights because of its explicit support of the right to life. In that case, it would seem that the protection of health, in the sense of protecting the basic conditions of life and of normal human development (in the biological sense of the term), should be included in the right to health:

> There are at least two main ways of depriving persons of the right to life: (1) by execution, disappearance, torture and various forms of cold-blooded murder, and (2) by starvation and lack of fulfillment of basic needs such as food, basic health facilities and medical care (Menghistu 1985: 63).

Two questions that arise are (1) whether the domestic provisions are comprehensive enough in all countries to ensure internal life/health protection, and (2) whether international law requirements, as they exist today, are stringent enough to accept and enforce the measures needed to guarantee that protection. The first question has been answered for the most part by the previous chapter's discussion of the relation between international regulatory regimes and the remaining state powers; hence we will turn to the latter.

The starting point of this overview should be a consideration of what constitutes a "wrongful act of state" (Cassese 2004: 246). A technical discussion of the issue must be limited to the related jurisprudence, which excludes any mention of environmental wrongs or public health concerns, for the most part. Even the cases that do address these questions do so without attributing any fault to states or suggesting any appropriate reprisal beyond the compensation requirements of a tort case, which seems insufficient when life and health are at stake rather than mere monetary losses (Guerra v. Italy 1998; Lopez-Ostra v. Spain 1994; Oneryldiz v. Turkey 2004).

In addition, "normally international courts do not inquire whether or not state officials who have allegedly performed an international wrong acted intentionally" (Cassese 2004: 251). Yet there are exceptions of great relevance to our topic: the first circumstance of "fault in the form of knowledge amounts to an indisputable subjective element of state responsibility", and this additional responsibility may occur when a state "directs or controls" another state to act in that manner, or when there is actual coercion of the other state involved (Cassese 2004: 251).

Thus "inconsistency with an international obligation", although still limited to the responsibility for damages, should fit, say, a US-dominated organization such as the WTO or NAFTA when it reaches decisions

that conflict with the legal protection of life and health to which citizens of any country should be entitled.

Despite treating knowledge as an aggravating circumstance at sentencing, however, what is at stake remains only a question of "how much" in damages. And yet international law is increasingly the most appropriate aspect of the required domestic constitutional elements for citizen protection:

> In a globalized world, the cases of human rights violations are increasingly not exclusively domestic. Powerful states take decisions that have extra-territorial effects. Intergovernmental organizations affect standards of living. Companies organize across borders (De Feyter 2007).

But the gravity of the current situation regarding both environmental hazards and public health effects demands that not only global legal instruments and organizations be established, but also that such organizations be capable of united and forceful action to ensure protection to citizens and the enforcement of serious consequences for all states that are in breach of their obligations to protect human rights.

As noted, the most important aspect of the present question is whether a new or expanded organization based on the primacy of public health would promote and even ensure better institutions and instruments of world law than the WEO discussed above. The required organization and the instruments that would enforce it must transcend the mandates of present constitutions, as we shall see in the next section when we turn to current cases and judgments. The reality on the ground, even for states with new and excellent constitutions, supports the current scholarship on the eclipse of the state: "statelessness [is the] dominant ideology and potential institutional reality" (Evans 1997: 64; Pikalo 2007: 24–25).

Meier acknowledges the import and the consequences of this "eclipse" as he decries the "dramatic scaling back of the government's role in providing social services, particularly public health services" (Meier 2006: 720), even aside from the state's additional role of complicity in the ongoing toleration of the infliction of diffuse collective harms on the part of the corporate bodies, both within the state's own borders and abroad (Scott 2008: 29).[2]

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[2] See, for instance, the film *Toxic Trespass* (www.toxictrespass.com), about an ongoing Canadian situation affecting both the inhabitants of the city of Windsor, in Ontario, and those living in the Aamjinwaang First Nation in nearby Sarnia, with its declining male-to-female ratio in live births, as well as numerous other health problems present in this "chemical valley".

It is because of this common phenomenon (that is, the complicity between states and polluters connected with the jobs they may provide or the taxes and other gains of various governments) that domestic law is not unable but often unwilling to impose such restraints as are needed for the protection of their own citizens, or those who are or will be affected in other countries. It is also for this reason that a radical evaluation of present international law is necessary, as powerful Western states dominate and control present international trade instruments, but also dictate and direct how international legal instruments may be applied and how seriously the UN mandates are to be followed.

An example of multiple environmental harms in the US and the disappointing decision of the court in that regard can help us focus on the reasons why the present "state of the art" in domestic environmental cases demands a changed approach to environmental/public health issues. We will discuss the Kivalina case in the next section.

A "Lawless World" and Global Warming: Environmental Harms and Domestic Law

> Now, however, almost every decent person recognizes that it would be most equitable and efficient for those countries which have benefited the most from lax environmental controls over the past 200 years to bear the burden of immediate actions to address global warming (Sands 2005: 87).

Climate change is perhaps the most well-known global problem today, where the desire of major powers like the US to avoid even the possibility of domestic economic harms has led to misinformation campaigns, to inaction, and eventually to the collective harms with which we are familiar today. Despite the fact that the origins of global warming lie in the presence of various hazardous gases, the results we see today, from glacial melts to desertification and tsunamis, render water as the main actor in most climate change disasters.

Philippe Sands lists the tortuous process leading to the signing and ratification of the Kyoto Protocol and the earlier Framework Convention (Sands 2005: 86–94), as he acknowledges that (1) the process leading to the Protocol was not driven by sound science, but by the quest for consensus; and (2) that the US's resistance to principled cooperation was perhaps the major obstacle to a better and faster agreement; he also notes that (3) those who denigrated the words of the

Intergovernmental Panel on Climate Change (IPCC) and the Kyoto Protocol only saw its problems rather than the fact that it was and is only the first step of the international community towards the protection of the collective rights of humankind (Sands 2005).

Breaches of such rights are occurring almost everywhere at this time, but they are particularly visible in Arctic regions. Yet even in those cases, the lawyers employed by Aboriginal communities treat those human rights breaches as torts, at best. Although the following will be discussed in more detail in the next section, there is one particular case (unfortunately not resolved in favour of Kivalina) that merits mention as one dealing with water issues in relation to an Indigenous community: the Native Village of Kivalina v. ExxonMobil et al. (2008). The village of Kivalina is an Inupiat village of approximately 400 people:

> Kivalina is located on the tip of a six-mile barrier reef located between the Chuckchi Sea and the Kivalina and Wulik Rivers on the Northwest Coast of Alaska, some seventy miles north of the Arctic circle (Kivalina v. ExxonMobil et al.).

This case demonstrates the dangerous aspects of water, when it is at its most harmful—that is, when it becomes a destroyer of peoples' territorial integrity, in contrast with the health-giving and even sacred aspects of water.

Because of global warming, actively fostered by ExxonMobil and many other US and multinational corporations through CO_2 emissions, the Arctic sea ice is melting and the village is therefore no longer protected from winter storms. The village is being destroyed as increasingly severe storms batter it:

> its ground crumbles from underneath it … Critical infrastructure is imminently threatened with permanent destruction. If the entire village is not relocated soon, the village will be destroyed (Kivalina v. ExxonMobil et al.: para 4).

Nor is this simply a claim advanced by a few members of a Native community; the US Army Corps of Engineers and the US Accountability Office agree that the Kivalina village must be relocated, and they have estimated the costs to be from US$85 million to US$400 million (Kivalina v. ExxonMobil et al.).

The substance of the case hinges on the culpable actions (and omissions) on the part of multiple corporate defendants, and that is an extremely significant aspect of this case, as we shall see. However, an

even more significant part of the consequences of this series of events was not even considered as part of the case: the cultural and territorial rights to the Kivalina Natives. Even if the US government spends US$400 million to "relocate" the inhabitants of the Native village, their land, their religious and cultural rights will be lost, as most Aboriginal peoples' lives are inextricably tied to the area they have always occupied.

Removed from their traditional areas, even if the individual lives of citizens are saved, their survival as a people (that is, as those *specific* peoples of Kivalina) is no longer possible. One could argue, then, that water's natural beneficial services are affected by these ultimate polluters that even pervert water's true nature, as that is changed by human agency from being a "giver of life" to the source of a deadly threat.

Of course, the arguments offered by the lawyers in the case are conservative, as they refer to the "federal common law public nuisance", despite the fact that the villagers' health, home and family life are clearly affected (European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950: Article 8.1) and that more protection might well have been available to them had they been mainstream Americans (say from Boston or New York), so that racial discrimination appears to have been also involved to some degree.

In the next section we will consider the interface between some of these rights and water, in relation to the general population.

Water as Danger and the Negative Consequences of Climate Change

> Globalization, with the inequalities it promotes, challenges if not threatens the integrity of human rights law, precisely because it uses human rights as a means of furthering itself (Anghie 2006: 256).

No doubt storms and floods existed from time immemorial, and the story of Noah's ark bears witness to one of the earliest examples of that history. But in modern times this aspect of water includes all the hazards that originate from climate change: severe glacial melts; warming of the oceans, with consequent increased hurricanes, tidal waves and tsunamis; and excessive warming of many land areas leading to desertification, and hence to starvation and resource wars, especially in sub-Saharan Africa.

Once again, those who live closest to the land (the Indigenous communities), but also those who live in island states and coastal towns,

bear the brunt of these negative impacts. It will be useful to trace the causal interface between globalized human industrial/economic activities and climate change, as it shows clearly its impact on the world's waters. We will return to the Kivalina case, as the lawyers for the plaintiffs lay out the historic background of Kivalina's impending destruction.

The case merits careful analysis because, whatever our location, we are all affected in various measures by climate change, so that we need to understand what climate change is and what it does or how it operates not only in purely scientific terms. We need to understand the institutional and policy implications on which the present climate change crisis is based. The Kivalina case was being tried before the US District Court of California (San Francisco Division), and it cites as defendants not only ExxonMobil but another 23 corporations.[3] The case before the court started with a detailed analysis of the causes of global warming, describing the main corporate activities and issues under three headings: (1) oil companies; (2) power companies; and (3) coal companies.

These companies have all deliberately contributed to the global warming that caused "Kivalina's special injuries" (Kivalina v. ExxonMobil et al: para 3). In addition,

> Kivalina further asserts claims for civil conspiracy and concert of action for certain defendants' participation in conspiratorial and other actions intended to further the defendants' abilities to contribute to global warming (Kivalina v. ExxonMobil et al: para 2).

Global warming is also briefly defined in another recent case, People of State of California v. General Motors Corporation et al. (2006), as follows:

> Global warming [is a] change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods (California v. General Motors et al.).

[3] The full list of 24 corporations is: ExxonMobil Corporation; BP plc; BP America Inc.; BP Products North America Inc.; Chevron Corporation; Chevron USA Inc.; Conocophillips Company; Royal Dutch Shell plc; Shell Oil Company; Peabody Energy Corporation; The AES Corporation; American Electric Power Company Inc.; American Electric Power Services Corporation; DTE Energy Company; Duke Energy Corporation; DYNEGY Holdings Inc.; Edison International; Midamerican Energy Holding Company; Mirant Corporation; NRG Energy; Pinnacle West Capital Corporation; Reliant Energy Inc.; The Southern Company; and XCEL Energy Inc.

Essentially, plaintiffs claimed that defendants "knew or should have known" the results of their continued "substantial contributions to global warming", specifically in relation to such Arctic coastal communities as Kivalina; additionally, some of the defendants conspired "to create a false scientific debate about global warming in order to deceive the public" (California v. General Motors et al.). The attorneys for the plaintiffs stated that Kivalina asserted a claim for public nuisance under federal common law (28 USC §1331), as well as under state law (USC §1367(a)), and were right to do so because defendants either reside in California or have "substantial or continuous and systematic contacts with the state of California" (USC §1367(a): paras7–9). These connections also ensured that the venue chosen was legally appropriate. After relating the amounts of CO_2 emissions on the part of each of the defendants, each acknowledged that they were indeed emitting hazardous gases.[4] Similar research projects can also be found for most of the other defendants. However ExxonMobil stands out for two main reasons; first, for the large quantities of its emissions:

> ExxonMobil has interest in more than 80 cogeneration facilities in more than 30 locations worldwide, with a capacity to provide about 3,300 megawatts of power. These facilities now supply more than 90 per cent of ExxonMobil power-generating capacity in its refineries and chemical plants worldwide. These emit hundreds of millions of tons of CO_2 (USC §1367(a): para 39).

In addition, ExxonMobil also "owns and operates coal mines". But the second reason for singling out ExxonMobil is the fact that it took the lead "in the industry efforts to disseminate false information about global warming" (USC §1367(a): para 41).

The Kivalina Complaint and "Civil Conspiracy Allegations"

In January 2001, a report from the Union of Concerned Scientists produced a comprehensive report regarding the "disinformation tactics" used by ExxonMobil in order "to delay action on the issue" (USC §1367(a): para 247), as it has

> *Manufactured uncertainty* by raising doubts about even the most indisputable scientific evidence. Adopted a strategy of *information laundering*

[4] See for instance BP's "Carbon Disclosure Project" (CDP5) at www.cdproject.net/search.asp (converted from metric tons to short tons).

> by using seemingly independent front organizations to publicly further its desired message and thereby confuse the public. *Promoted scientific spokespeople* who misrepresent peer-reviewed scientific findings or cherry-pick facts in their attempts to persuade the media and the public that there is still serious debate among scientists that burning fossil fuels has contributed to global warming and that human-caused warming will have serious consequences. *Attempted to shift the focus* away from meaningful action on global warming with misleading charges about the need for "sound science".

In order to substantiate the "civil conspiracy allegations", defendants ExxonMobil, AEP, BP America, Chevron, Conoco Phillips, Duke Energy, Peabody and Southern, who were participants in the campaign to deceive the public, started by denying the existence of global warming. Later their efforts turned to the attempts to demonstrate "that global warming is good for the planet and its inhabitants or that even if there may be ill effects, there is not enough scientific certainty to warrant action" (USC §1367(a): para 189). The dissemination of this misinformation made use of industry-formed front groups, "fake citizen organizations", and "bogus scientific bodies, such as the Global Climate Change Coalition (GCC), the Greening Earth Society, the George C. Marshall Institute, and the CoolerHeads Coalition" (USC §1367(a): para 190).

Under the leadership of the most active among the defendants (that is, ExxonMobil), these companies funded "global warming skeptics" and "professional scientific experts", many of whom had no qualifications, to place their pieces in various journals (but seldom mainstream peer-reviewed scientific journals), all funded and supported by trade associations such as Edison Electric Institute (for the electric power industry), the National Mining Association (coal industry), and others. The most important front group has been The Advancement of Sound Science Coalition (TASSC), formed in 1993. Originally a public relations company working for Philip Morris tobacco company, it was instrumental in the origin of the term "junk science". For Philip Morris and other tobacco companies, the "science" was manufactured to deny the links between smoking and cancer, and the effects of secondhand smoke. Their targets were "older, less educated males from large households who are not typically active information seekers", and "younger, lower income women" (USC §1367(a): paras 192 and 194).

The IPCC Working Groups have been documenting the unfolding of global warming and the increasing presence of greenhouse gas

emissions through regular meetings at international forums (IPCC 2004, 2007; Westra 2007: Chapter 8):

> Carbon dioxide levels in the atmosphere have increased by 35% since the dawn of the industrial revolution in the 18th century, and more than one-third of the increase has occurred since 1980. The current level of carbon dioxide in the atmosphere is higher than any time in the last 20 million years. The current level of methane in the atmosphere is approximately 250% higher than pre-industrial levels (IPCC 2007: para 125).

Hence, despite the efforts of industry's representatives, and of the defendants' various "citizens' groups", the effects of global warming put all the inhabitants of Kivalina at grave risk, as their property and their very location is on the brink of being destroyed. The parallel with the history of "Big Tobacco", prior to the convention setting up strict parameters for its use and forbidding any practice that might inflict secondhand smoke upon others (Framework Convention on Tobacco Control), is undeniable.

A clear difference between the two issues, however, is the fact that the use of tobacco is an individual choice (at least initially, even if eventually the habit that ensues represents a form of addiction and can no longer be described as a free choice). The addiction itself is the result of the deliberately planned chemical composition of cigarettes, which makes the resulting use a forced activity. In contrast, the extreme effects of global warming on Arctic peoples and other Indigenous communities are not the consequence of "choices" by these peoples, even at the start, as their traditional lifestyles exclude the overconsumption and overuse of energy endemic to most affluent Western societies.

Hence there is a dissonance between the choices that foster global warming and the passive recipients of the effects of those choices. Thus the painstakingly drafted case presented to the San Francisco court seems to be understated. Although the language used ("public nuisance") cannot begin to truly characterize the "substantial and unreasonable interference" with their public and human rights, the attorneys acknowledge the role of the defendants in the ongoing crisis as they add that "intentionally or negligently defendants have created, contributed to and/or maintained the public nuisance".

In addition, the complaint itself recognizes the *sui generis* aspects of plight of Kivalina's residents:

> 258. Plaintiffs do not have the economic ability to avoid or prevent the harm.

> 259. Plaintiffs, due in part to their way of life, contribute very little to global warming.

Given the effects of the defendants' actions, and the results that ensued, it may seem appropriate (though not formally acceptable in a US court of law) to view this case as involving criminal activities. The Canadian criminal law category of "wilful blindness" may also be used to bridge the gap between knowingly committing actions that would eventually deprive populations of their human rights and the refusal to accept the inescapable effects of actions embraced and fully understood on the part of the defendants (Pappajohn v. the Queen 1980). The same critique applies to the "Second Claim for Relief", "State Law: Private and Public Nuisance", claiming relief under "state statutory and/or common law of private and public nuisance" (Kivalina case: para. 264–267).

More interesting is the "Third Claim for Relief" for *Civil Conspiracy* (Kivalina case). The deliberate actions on the part of the defendants aimed at (1) misleading the public regarding the existence and the effects of global warming"; (2) the efforts to discredit sound science regarding global warming; and (3) the further efforts to delay their own inevitable costs, while ignoring or discounting the "externalities" that resulted in human right breaches and eventually in the destruction of towns and communities; in fact, for the Kivalina case, (4) the elimination of an Indigenous community as such.

These activities were pursued in concert by the "conspiracy defendants", as described in the "Fourth Claim for Relief":

> 279. Defendants have engaged in and/or are engaging in tortious acts in concert with each other or pursuant to a common design (Kivalina case).

At this time, neither the requested trial by jury nor the relief for the damages suffered by Kivalina have been awarded. The trial and its eventual outcome is extremely important: just like the earlier Inuit Petition submitted to the European Court of Human Rights, aside from its value in providing relief for the affected persons, it ties climate change to water, not only as oceans warmed by the effects of climate change, but also as melting ice.

Finally, and most significantly, it uses the few vague and incomplete legal categories presently available in domestic law to pinpoint the role of multinational corporations and the complicit governments that allow their activities to inflict incompensable harms, which could only

be described as crimes against humanity (Westra, L. 2009; Luban 2004: 85; Aminazadej 2007: 231).

This is only one example of a case that should be won with ease; the melting of glaciers is a routine occurrence today. By the same token, other Arctic and small island states ought to sue those who originated the conditions of climate change, while simultaneously belittling or denying its existence and impact. Although the specific perpetrators are hard to identify in such a diffuse harm, the respective home states of these corporations may also be viewed as complicit in the industrial activities that perpetrate the harm, and should be held responsible.

It seems necessary to revisit the interface between domestic legal instruments and human rights to environmental protection and public health, in order to reinforce the need for an answer to the questions raised in this work. It is equally necessary to understand the connection between "development" and globalization. Wolfgang Sachs says:

> Development, in short, became denationalized; indeed globalization can be aptly understood as development without nation states (Sachs 2009: viii).

But "without nation states" implies without the restraint of political organizations whose principal obligation is the protection of their citizens. Hence "development's" potential for harms runs largely unchecked at this time, without the limits imposed by previous "sovereign" states, but also without the necessary restraints from a powerful "sovereign" (but international) organization whose responsibility is to the human collectivity, not to procedural and economic issues related to trade.

We will return to issues, concepts and principles in the next chapter; but before leaving domestic jurisprudence we must first consider a successful case against polluters from September 2009, which also occurred in the US, in the New York Courts.

Connecticut et al. v. American Electric Power Company et al.: New Hope in Old Doctrines

The tone of the discourse changes radically with the case that is the focus of this section, The State of Connecticut et al. v. America Electric Power Company, Inc. et al. First, several "Trusts" (the Open Air Institute, Inc., Open Space Conservancy, Inc. and the Audubon Society of New Hampshire in this case) join with the States of Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont and

Wisconsin, as well as the City of New York, against several electrical power companies. Second, these States and Trusts jointly claim "the ongoing contributions to the public nuisance of global warming" are causing "and will continue to cause serious harms affecting human health and natural resources" (Connecticut v. American Electric Power, 2009).

Third, although defendants claimed the whole issue was a "non-justiciable political question", or that they "lack[ed] standing", or that they attempted to displace "federal common law", the Court of Appeals rejected all these arguments. Fourth, the States itemize singly and collectively the harms of climate change, which will produce "substantial adverse effects on their environments' residents, and property", all of which will cost each State billions of dollars to respond. As an example, "the reduction of California's mountain snowpack, the single largest freshwater source critical to sustaining water to the State's 34 million residents during the half of each year, when there is nominal precipitation" (Connecticut v. American Electric Power, 2009: 8).

In the fifth place, the States list several significant cases of "increased illnesses and deaths caused by prolonged heatwave", the harms from smog, and poor air quality, as they couple explicitly the impacts on "property, ecology and public health" (Connecticut v. American Electric Power, 2009: 9). In the sixth place, the Trusts add "how the ecological value of specific properties in which they have an interest, will be diminished or destroyed by global warming" (Connecticut v. American Electric Power, 2009: 10).

Hence the emphasis on the connection between ecological values and public health is particularly relevant, as is the argument presented to the courts. Well beyond the expected focus on economic impacts and property values (although these are also a significant part of the States' and Trusts' argument) is the rejection of the "political question" doctrine, and especially in the use of the *parens patriae* doctrine. This doctrine, I believe, provides the first new approach to the problems discussed, although it is a *principle*, rather than a legal instrument. That will be the topic of the next section.

The Parens Patriae *Doctrine: An Old Principle and a Novel Application*

> *Parens patriae* is an ancient common law prerogative which is inherent in the supreme power of every state [and is] often necessary to be exercised in the interests of humanity and for the prevention of injury to

> those who cannot protect themselves (Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States).

There is a history of protective jurisprudence dating back as far as the Middle Ages. In its most recent instantiations, the *parens patriae* doctrine has been used to support judicial decisions that deal with the protection of those who cannot speak for themselves, especially in the case of health issues (E. (Mrs.) v. Eve 1986; Winnipeg Child and Family Services (Northwest Area) v. D.G.F. 1997).

The language of these judgments is extremely suggestive and well worthy of attentive study. But before turning to the cases it might be worthwhile to review briefly the history of the doctrine. The doctrine of *parens patriae*, despite its Roman name, is entirely a common law doctrine. While the Canadian Supreme Court, for instance, makes use of it, it does not exist in Quebec law (Morin 1990: 827–924; *Droit de la Famine* 1988). It is perhaps an anomaly that a doctrine with a Roman name and origin is presently only found in the common law, as Morin indicates in his description of the doctrine's historical background (Morin 1990).

Until 1873 a fundamental dichotomy prevailed in Britain's legal system. From the Middle Ages, royal tribunals used the "communeley", but the great majority of cases were heard by the lords and the local courts. Only rarely did the King, as "fountain of justice", participate in decisions of the courts through the person of his chancellor, who until the 16th century was also the King's confessor (hence perhaps the use of the Latin phrase; Morin 1990: 830; Baker 1979: 273).

The chancellor's aim was the promotion and the triumph of equity principles, learned in his study of Roman law. The rules guiding these judgments and their results eventually became codified, so that "precedent" was born (Morin 1990: 830; Baker 1979: 273). The doctrine was used for custody and guardianship matters involving the relation between a lord and a minor; perhaps one whose father might have been a tenant of the lord before his death, so that guardianship was required until such time as the child could be recognized as a tenant in his stead, at the age of 14.

Eventually the "Court of Wards and Liveries" was instituted by parliament, after 1540 (Morin 1990: 32), and this court remained in operation for some time. The concept of royal protection was substituted in the 15th century by a Court of Chancery, which kept the concept of wardship alive, and was able to introduce a novel move by 1792, when it forbade a violent father to interrupt his son's schooling and continue

with his guardianship (Skinner v. Warner, Dickens 799, 21 E.R. 473 (Ch.1792)).

Although the Court of Wards was abolished, the concept of "wardship" remained as an aspect of its *parens patriae* jurisdiction:

> In time wardship became substantively and procedurally assimilated to the *parens patriae* jurisdiction, lost its connection with property, and became purely protective in nature (La Forest, J. in *Re Eve* [1986] 2 S.C.R. 388 and P.X.11. R. 273, 185 A.P.Q. 273, para 35).

The inception of the use of the doctrine thus explains both its Latin roots and its evolution from the protection of a minor's economic interests to the protection of children's interests, *simpliciter*. Without any further effort to trace its antecedents, we will now turn to its development, in order to see whether this renders the doctrine applicable to the protection of human beings in general. The classic statement of the modern principles that govern state intervention in the best interests of the child can be found in Rand, J.'s judgment:

> The view of the child's welfare conceives it to lie, first, within the warmth and security of the home provided by his parents; when through a failure, with or without parental fault, to furnish that protection, that welfare is threatened, the community, represented by the Sovereign, is, on the broadest social and national grounds, justified in displacing the parents and assuming their duties. This, in substance, is the rule of law established for centuries and in the light of which the common law courts and the Court of Chancery, following their differing rules, dealt with custody (Hepton v. Maat 1957).

La Forest, J. ties recent cases to their British background:

> It will be obvious from these provisions that the Supreme Court of Prince Edward Island has the same *Parens Patriae* jurisdiction as was vested in the Lord Chancellor in England and exercised by the Court of Chancery there (La Forest 1986: 39).

A further point worthy of note: the increasingly wide reach of the doctrine gave the courts the ability to protect children from injury. In Re X (a minor) (1975), Latey, J. cited,

> a passage from Chambers on Infancy (1842), p.20 that indicates that protection may be accorded against prospective as well/as present harms (Re Eve, La Forest, J. at para 44).

With this statement we come a lot closer to the possibility of protecting health in the sense we have been seeking (without much success) to find explicitly in legislation. If "prospective harm" is explicitly a part of

the *parens patriae* doctrine, then it is not only a juridical tool to be used after some crime has been committed or to prevent some obvious injustice. It could instead be especially powerful when there is an unconsented medical treatment at issue, as there it can be used to prevent damage being done. A similar approach exists in the US (Stump v. Sparkman 1978). In another American case, the court said:

> The jurisdiction of the Court in this proceeding arises *not by statute*, but from the common law jurisdiction of the Supreme Court to act as *parens patriae* with respect to incompetents (Moore v. Flagg; Matter of Weberlist; emphasis added).

Essentially there are two possible approaches included in the doctrine: the "best interest" approach and the "substituted judgment" approach. What is relevant from our point of view is the fact that *neither* approach needs a "person" in order to protect. In fact *parens patriae* only comes into effect when the rights of the individual needing to be protected are not those of a "person" able to think and decide, or even to protect her own interests.

We noted the use of the doctrine/principle in the case of "incompetents" or—in general—for those who are not able to protect themselves from harm. Hence the doctrine is particularly appropriate for the protection from harm to future and unborn generations, as well as those who are first harmed by any exposure (that is children and infants, as the research of the WHO and other epidemiologists and scientists indicates; Licari and Tamburlini 2005; Grandjean and Landrigan 2006, Westra 2006). Essentially, the particular physical configuration and growth pattern of children makes them particularly vulnerable to all forms of pollution, whether chemical or air/water-based, and the WHO research supports this fact.

Temperature variability is also particularly hazardous for infants and children, as are the droughts and floods that are endemic to climate change, together with the spread of vector-borne diseases that follow global warming (Patz 2005). However, even a cursory consideration of the general "collective" of humankind indicates that all citizens are affected in varying degrees, although pregnant women, infants/children and the elderly are sure to be the first to suffer grave effects from climate change, as do the poor and other vulnerable populations.

In Georgia v. Tenn.Copper Co. (1907) the Supreme Court affirm that:

> the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether … its inhabitants shall breathe pure air" (Georgia v. Tenn. Copper Co. 1907: 237).

The second seminal case for *parens patriae* standing in the US is Snapp v. Puerto Rico (1982), which noted that there had been a "line of case … in which States successfully sought to represent the interests of their citizens in enjoining public nuisance" (Snapp v. Puerto Rico 1982: 4, n. 10), where a "test" for *parens patriae* standing is identified:

> A state: (1) "must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party";
> (2) "must express a quasi-sovereign interest"; and
> (3) must have "alleged injury to a sufficiently substantial segment of its population."

In addition, the Court in this case identified two kinds of "quasi-sovereign interests" as follows:

> (1) protecting the health and well-being…of its residents" and (2) securing observance of the terms under which [the state participates in the federal system" (*Snapp v. Puerto Rico* 1982: 41, and n. 11).

From our perspective only the health and well-being are relevant as we seek a possible future application of this doctrine to protection of basic collective human rights anywhere.

At any rate, here we encounter the first possible difficulty to advocating a wider use of the *parens patriae* doctrine. These are "quasi-sovereign states", which must acquire the parental standing necessary to legislate or use for the protection of all (or even a "significant segment") of their people. If the doctrine were to be used elsewhere for the protection from environmental harms, especially in the global setting and for international effects of climate change, it should be incorporated within international law, and, when collective human rights breaches occur, it should be used in international courts.

The problem that arises is which entity could, logically and legally, take the place of the "parent" whose responsibility for its "dependent" children would indicate the applicability of the doctrine. Perhaps for the EU it could be said that all the citizens of the states within it are in a position similar to that of citizens of individual states. But it is much harder to envision a similar "parental" role for the UN, even aside from

the fact that, to my knowledge, this doctrine has not been appealed to by either the UN or the EU in any environmental case thus far.

Nevertheless, the self-appointed task of this chapter was to seek out not only what might be already available to protect basic collective human rights, but also to propose any doctrine, principle or instrument that *might*, in the future, be involved to fulfill that role. For that purpose, *parens patriae* has now been used domestically to protect these rights by acknowledging the state's responsibility to ensure that its citizens are not exposed to the health hazards that are the inescapable result of environmental exposures.

The Public Trust Doctrine: A Discussion

> In the case of the equation of the public trust doctrine and the police power, where the state purports to act pursuant to police powers but rests its powers on the property rights of the public, the fallacy is not well concealed, and the potential for state intrusion upon the private rights of individuals is limited only by the vision of those who would extend the reach of the public trust doctrine (Huffman 2003: 21).

Perhaps it is this position and the apparent ongoing debates regarding the public trust doctrine that suggested, in the previous case, the use of a different (albeit related) tool—the *parens patriae* doctrine—to better protect the rights of the collective. James Huffman sees the public trust doctrine as "property law" (Huffman 2003: 2) as he argues against Joseph Sax (1980: 185). His main point is that the "public trust" doctrine is traditionally and explicitly part of property law, so that legal scholars who seek to extend it to other fields such as "trust, constitutional, administrative and police power law" are mistaken (Huffman 2003: 3).

However, it is interesting to note that Huffman acknowledges "its birth in English common law" (Huffman 2003: 4). In that case, like *parens patriae*, the doctrine originated when the King and other noblemen held rights and power, and the common people needed to protect their own rights to the "commons", such as land and waters, from the sole discretion of the King. Public Trust implied that the King could not alienate the public rights in the use of those waters and lands (Huffman 2003: 22); in that case, *pace* Huffman, it seems appropriate to understand the doctrine as a form of restraint on private rights (particularly the private rights of legal persons, but also those of democratic decisions that might consider majoritarian preferences to be the

ultimate word on the use of the commons, to the detriment of minorities or distant peoples affected by those decisions, as well as all future human beings).

In fact, in Illinois Central R. v. Illinois (1892) the US Supreme Court decided that the grant of "submerged lands" to the railroad violated

> a trust for the people that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties" (Illinois Central R. v. Illinois 1892: 23).

Of course, at that time the full impact of the interference of private property on public rights to the commons was not fully appreciated, and future scientific research could not have been anticipated. But today it would be even more appropriate to invoke the doctrine to protect basic collective human rights. Nevertheless, given the debate about its true meaning, use and the procedural issues that surround it, one can perhaps appreciate why the drafters of the case of the State of Connecticut chose not to employ it.

From the standpoint of this work, whether the doctrine is interpreted correctly in US case law is not determinant. What is more important is the historical basis of "public trust", which, like *parens patriae*, indicates that even an all-powerful sovereign's policies and decisions may be limited by some of the basic needs of his people, long before the modern emphasis on legal human rights. Hence, common law offers two possible options for the protection of collective human rights—that is, for the general welfare (Newman 2004: 127), as discussed in Chapter 1. At least in principle, either could be used to support and defend basic collective human rights.

Still within the ambit of US law, Mary Christine Wood defends a very different position on the issue, as she proposes

> a paradigm shift away from the current system of natural resource management, a system driven by political discretion, to one that is infused with public trust principles and policies across all branches of government and at all jurisdictional levels (Wood 2009: 43).

The first step needed is not to think of the public trust doctrine simply as another form of property right. As Wood has it, speaking of environmental laws, "we have won many victories, but we are losing the planet" (Wood 2009: 56; Speth 2008). In support of her position she cites a number of statistics, including chemical and other pollution exposures affecting people from the womb onwards, as well as the "loss

of life and ecosystem on the planet", all of which she terms "ecological bankruptcy" (Wood 2009: 47).

Despite the global reach of the "ecological bankruptcy" of which she speaks, it is not only the US law that suffers from "administrative dysfunction" such that the severity and number of grave difficulties she cites indicate a similar "dysfunction" at the international level. The latter should be the most appropriate level from which to address global problems that affect basic collective rights. Wood notes the following:

- "The modern environmental administrative state is geared almost entirely to the legalization of natural resource damage" (Wood 2009: 55).
- "… agencies have created a regulatory complexity that is mind-boggling … the complexity—legal baklava so to speak—carries several perils for environmental policy. It distracts agencies from seeing the macro picture of resource health" (Wood 2009: 57).
- "… agencies regularly confront and succumb to political pressure to issue permits and sanction other harmful actions" (Wood 2009).
- "… the public has become disenfranchised within this system of environmental laws. While NEPA and other statutes provide for ample public notice and comment in order to promote environmental democracy, these protections often amount to a sham … standard environmental analyses contain acronyms, technical findings and conclusions that are unduly complex and incomprehensible to the average citizen" (Wood 2009: 61).
- "… the judiciary has lost its potency as a third branch of government speaking in the environmental realm. This is primarily due to the tendency of courts to invoke the administrative deference doctrine" (Wood 2009).

As in international law, political discretion and deference to the most powerful states and to powerful corporations trumps scientific research and moral obligation: it is not inappropriate to term this situation a form of "institutional decay" (Wood 2009: 62). Hence, despite the acknowledged difficulties in isolating "a firm source of legal obligation" (Wood 2009: 63), aiming for a fiduciary obligation resting on the historical foundations of the public trust doctrine appears to be a good move, and one that ought to prevail in some way in international law as well.

For the latter, however, it would be necessary to start by securing an appropriate understanding of who would be "King", or the entity on whom the legal obligation may rest. The United Nations appears to be the only candidate for that role. But, as is well known, the UN is both

an "actor" and a "stage", and it is the latter designation that indicates most clearly the difficulty the UN would face in fulfilling that role.

Nevertheless, if the UN is to represent the global community—not only all states, but also all people—then the expected allegiance and compliance with its mandates needs to rest on the assurance of protection and respect for global collective rights. Without the latter, it seems unrealistic to assume the legitimacy of the international legal order headed by the UN. Perhaps we would assume the presence of a fiduciary obligation on the part of the UN-based international legal regimes, somewhat similar to that owed by the Canadian government (as well as some other governments) to its First Nations. Their protection, individually and collectively (as a community), provides the most solid "last word" in cases where their welfare is at stake. Thus, like the *parens patriae* doctrine, to understand the fiduciary basis of the public trust doctrine appears to provide desirable and possible first steps toward the protection of the "commons", and of basic collective rights.

CHAPTER FOUR

COSMOPOLITANISM AND NEOLIBERAL DEMOCRACY IN CONFLICT

Introduction: Adopt World Governance or Modify Existing Institutions?

Sed quis custodiet ipsos custodes? (Juvenal)

Whether we term the results of "development" and of neoliberal globalization "plunder", "exploitation" or "ecoviolence", the main contention of this work is that these consequences, however defined, cannot be mitigated—let alone eliminated—by current instruments, courts and institutions. Hence the subject of our research has to reach beyond the harms inflicted and beyond the violations of human rights that follow upon the practices of globalization, but it must also ask why we need to seek a new organization when the UN has been promoting human rights and supporting related declarations and conventions that have been multiplying since the Universal Declaration of Human Rights of 1948.

Therefore, in this chapter we will need to move from a consideration of the harms reviewed in Chapters 2 and 3, to discuss the relation between existing institutions, laws and (in particular) organizations, in order to show why they are insufficient, and why new institutions are needed to change the present situation. The last case discussed in the previous chapter shows clearly the importance of the basic principles of natural law and, by implication, *jus cogens* norms; traditional doctrines that appear to be best suited to deal with the novel threats that do not respond to the current legal regimes and approaches.

We start with the first requirement of a possible changed regime: it must not stop with positivist legal systems that work well in combination with neoliberal policies and globalization. At any rate, international law is what the term states: law between nations, first and foremost. Thus it would be easiest to start by improving the state in some way. Klaus Bosselmann believes that the state ought to be the "environmental trustee" regarding both its own citizens and others affected by its policies, and that appellation is supported by the case

cited in Chapter 2 of Connecticut et al. v. American Electric Power et. al. (2009). Bosselmann says:

> The state has the central authority to govern people in a given territory. The authority involves the making and enforcement of rules based on fundamental principles such as justice and human rights. Without the state, these principles could not be guaranteed (Bosselmann 2008b: 145).

No doubt Bosselmann is influenced by the presence in Germany of debates on "the relationship between *Umweltstaat* [environmental state] and the *Rechtstaat* [consitutitonal state]" (Bosselmann 2008b). Unfortunately, most other Western democracies have no prominent place for such debates, either within or without their constitutions. Whether we consider developed Western countries or developing ones from the global South, ultimately both citizens and the states themselves are powerless because of the unequal global power distribution, and the weakness of international law and of the UN itself.

Western states for the most part support the tenets of neoliberalism through their constitutions; hence they resist any substantial "greening" of state institutions. Bosselmann asks, "How can the state's territorial integrity be reconciled with the Earth's ecological integrity?" (Bosselmann 2008b: 16). The answer is obvious, as the fragmentation of the state's borders and the support of "national interests over global interests" (Bosselmann 2008b: 148) both militate against the recognition of the human rights of the collective, including the ecological integrity of the region.

In fact, international law itself—as it stands—protects neither the environment nor the related human rights, as it is "essentially a regime for the protection of property rights" (Taylor 1998: 118).

Therefore the present "state-centric" international law instruments, as well as the present power of sovereign states, will need a radical review. In addition, the interface between human rights and ecological realities must be laid bare, and the protection of both must be added to present *jus cogens* norms. This basic change would ensure that the protection would be viewed as an *erga omnes* obligation, thus transcending the limited obligations of current agreements.

Yet even if such changes in instruments and principles were achievable, the major block remains the lack of a centralized, principled "sovereign" power, beyond the politically driven present organizations such as the WTO and the biased authority of the UN's Security Council.

State Sovereignty Revisited

> Even society as a whole, a nation, or all contemporary societies taken together, are not owners of the Earth. They are merely its occupants, its users; and as diligent guardians must hand it down improved to subsequent generations (Marx 1865: 718).

Marx sounds surprisingly modern, aside from the dated references to the possible "improvements" of the Earth, as well as the inaccurate reference to contemporary societies as "diligent guardians". Given the state's lack of interest in being a "diligent guardian", wherever its location and form of government, we still believe that the state is seriously compromised, because of the structure of international law at this time, by the economic thrust of neoliberalism, by the presence of globalization and, most of all, by the power of organizations such as the WTO.

Yet many noted publicists think that to anticipate the "demise" of the state as a necessary force in the protection of the global commons and human rights is a mistake. After all, "sovereignty" may be rethought and redefined (Sand 2004: 1, 47); also, the state may be viewed, as we have noted, as an "environmental trustee" (Bosselmann 2008b: 146 ff.), to mention but two such proposals. But even their work acknowledges several aspects of the ongoing interface between state sovereignty and the present realities.

The problem is far greater than the limits or incompleteness of the constitution of states, or even than their general lack of inclination toward "green" policies or the protection of public health: both eventually run aground on the fact of the present political power structures and the existing "super-sovereigns" that are the WTO on the one hand and the weak UN on the other. Indeed the "common interest would necessitate rearrangements of sovereign concepts" (Bosselmann 2008b: 150), but even the best "rearranged" state law is totally powerless in the face of international organizations bent on imposing the primacy of trade.

No doubt these difficulties initiate within the separate countries themselves, as Daniel Farber notes:

> in all areas of law, there are gaps between the "law on the books" and the "law in action", but in environmental law the gap is sometimes a chasm (Farber 1999: 297).

This work has argued for the intimate connection between ecological integrity and its protection, and the basic rights of the human

collective. This connection becomes even clearer in the context of the conflict between even well-meaning state policies and the "attacks" upon such policies from international legal regimes. In fact a recent report by the US Congress concluded that, because of trade agreements, "it is no longer possible for a country to create an appropriate environmental policy entirely on its own" (Boyd 2003: 24).

A Canadian case will help to demonstrate the truth of this claim. In 1994, NAFTA came into force, with its highly problematic Chapter 11 on the investor–state dispute resolution mechanism (Boyd 2003). Under Chapter 11, a corporation based in one state can sue the government of another state if the latter passes "environmental laws that allegedly affect their investments through expropriation or actions 'tantamount to expropriation'" (Boyd 2003). What this means is laws that might affect not only a corporation's property but their future profits or opportunities, no matter what the environmental or public health advantages of that law. Canada faced such a problem when they gave primacy to public health by banning methylcyclopentadienyl manganese tricarbonyl (MMT), a gasoline additive containing the heavy metal manganese (Boyd 2003). Unfortunately, Health Canada could not or would not declare MMT a toxic substance under the Canadian Environmental Protection Act (CEPA), despite the fact that its toxicity is still debated and a precautionary approach would appear to be indicated. David Boyd describes the case:

> The American manufacturer of MMT, Ethyl Corporation, filed a NAFTA lawsuit seeking C$250 million in compensation for harm to its business and reputation. Corporate lawsuits under NAFTA proceed in secret, and efforts by nongovernment organizations to intervene in the Ethyl case were rejected. In 1998 the government of Canada negotiated a settlement with Ethyl. Environmental Minister Christine Stewart and Industry Minister John Manley apologized to Ethyl, promised that the ban on MMT would be lifted, stated that Health Canada found that MMT poses no health risk, and agreed to pay Ethyl almost C$20 million in compensation (Boyd 2003: 258).

Nor is this the only case of this kind. An ongoing case targets Canada's federal government for having banned lindane, a pesticide already banned in many nations because of its grave health and environmental consequences (Chase 2001).

Both cases strongly indicate what Bosselmann terms "the existence of a common interest in a legal sense" (Bosselmann 2008b: 151).

Although we concur with Bosselmann's position, as he states that "territoriality in its classic form is outdated" (Bosselmann 2008b: 152), even a changed, improved sovereignty that might acknowledge "ecological rights" in Taylor's sense (Taylor 1998), and even support basic human rights to life and health, would have no power against organizations such as NAFTA.

It is obvious that environmental issues do not respect borders, and neither do public health concerns, but even the presence of many such unplanned and unintended attacks, commonplace as they are today (consider for instance climate change or various health pandemics), have so far not changed the basic legal structures that combine the porous, weak sovereign state and the powerful trade organizations that remain unaccountable to any state's citizens. The state should be held accountable by civil society, although it is hard to see how that can be in the face of its legal inability to block attacks on its own power and its commitments to the protection of its citizens. However, Sand says,

> Transnational civil society groups—emerging as powerful actors in the environmental arenas—are beginning to develop and invoke their own tangible criteria for holding public trustees accountable (Sand 2004: 51; see also Slaughter 2000; Petkova and Veit 2000).

Thus the main issue remains: it would seem that the "state as trustee", accountable to its citizens as well as to those beyond its borders, appears to be a desirable and perhaps even an achievable goal. But unless the international legal regimes and organizations achieve a corresponding change, starting with the somewhat improbable elimination of NAFTA, the WTO and others holding (and forcing) similar goals upon states, the protection of human rights and of our habitat will not increase.

In order to see any change in the global situation, as supported by "state trusteeship" and as proposed by Sand and Bosselmann, it is necessary to replace the neoliberal trade organizations with one or more principled central organizations. Such a move would serve to block present trade organizations from taking over state powers, and might in fact help to restore the aspects of their sovereignty that are being eroded or eliminated at this time.

In the next section we will discuss an ongoing case that indicates that the internal national position of states, even the principles enshrined in their own constitutions, are equally powerless against the present political power structures, even beyond trade organizations.

Plan Colombia and the Indigenous Peoples of the Colombia–Ecuador Border Region[1]

> Relying partly on Vitoria's naturalist theory of international law, Brazil recognized the right to primordial occupation of land. While, under the pre-1988 Constitution, lands occupied by "forest-dwelling aborigenes" [sic.] were part of the "patrimony of the Union", i.e. property of the federal government, those lands were inalienable and it was prescribed that the Indians "shall have permanent possession of them, and their right to the exclusive usufruct of the natural resources and of the useful things therein existing [was] recognized" (Wiessner 1999; see also the Constitution of the Federal Republic of Brazil).

Although the passage above refers to Brazil rather than Colombia or Ecuador, the status of all three in relation to the governments of their respective countries are similar, although Colombia has the additional problem that Wiessner terms the "fog war of narcoterrorism" (Wiessner 1999: 81). Still, Colombia's constitution has a new "unit of protection for human rights (*accion de tutela*)" (Wiessner 1999), as well as the constitutional recognition of their collective property rights, the official protection of native languages and dialects, a guaranteed share in oil and mining royalties, and respect for their cultural identity through the national education system (Wiessner 1999).

Yet despite their protected position within the country, the US and Colombian governments established a contract to combat the illegal drug trade in the area:

> the agreement, labeled Plan Colombia, involved the eradication of illegal crops in Colombia, using the aerial herbicide Roundup, which was produced by the American chemical company Monsanto (Mayers 2009).

Can we consider this "plan" an effect of development? Perhaps not in principle; but neocolonialism or the economic/political power of a stronger and richer state against a poorer and weaker one is indeed a major aspect of globalized development. The problem is that "glyphosate", the major component of Roundup, cannot be directed only to the coca plants slated for eradication, as it is sprayed aerially. The UN Commission on Human Rights (2002) states that

[1] This section is based on the research of Rebekah Mayers, University of Windsor; a version of it appears in Westra, L. (2010a).

> Reports indicate that the mixture likely contains herbicide concentrations that are more than five times greater then levels [permitted] for aerial application (Mayers 2009: 15).

Because the airplanes fly over the border region between Colombia and Ecuador, the Indigenous population of Ecuador is constantly at risk, far more than the coca growers of Colombia. In addition, the Indigenous peoples of this impoverished region have little or no access to health care or other social services.

The position of the US agencies in this regard is that any possible negative results caused by their activities "would be more than compensated by their extensive financial contributions, in the name of social and economic development" (Storrs and Serafino 2002; see also discussion in Mayers 2009: 16). Can these activities be considered in any way as forms of "advancement" or as positive "development" for the affected countries? The health and the very survival of the Indigenous communities around the border area are gravely at risk, as are the basic necessities of their survival: their crops and their water, both of which are affected (Oldham and Massey 2002). The violations of human rights are obvious, and a report commissioned by the UN High Commissioner for Refugees recognizes the reality of the situation:

> Ecuador is arguably Colombia's most vulnerable neighbour and has suffered profound effects from both Colombia's internal conflict and Plan Colombia. Problems on the border include drug-related violence, increased rates of crime, kidnappings, the forced migration of Ecuadorians from their homes, effects on human health and the environment from the aerial spraying of coca that drifts across the border, and food insecurity (Walcott 2008: 5).

Hence, it is Indigenous peoples who have been gravely affected, not "drug lords", and even Plan Colombia has not achieved its goals other than to promote and enrich Monsanto (a US-based multinational corporation), as it is often the case, at the expense of the health, safety and cultural integrity of the affected and displaced persons in the local Indigenous communities. These activities and their results are in direct conflict with the mandates of the UN Declaration of the Rights of Indigenous Peoples (Article 7), which aim to ensure "life, physical and mental integrity, liberty and security of person" (UN Declaration of the Rights of Indigenous Peoples, Article 7). In addition, the survival of the traditional culture should be equally protected, as all activities that might affect their lands or resources are in violation of

Indigenous rights (UN Declaration of the Rights of Indigenous Peoples: Article 8).

Nor is this particular case unusual or the first "attack" on Indigenous rights and survival, as oil companies have also carried out their "development" in the region for some time, with grave effects on the health of the local populations, especially in Ecuador and the Amazon region (Acosta 2007; Earth Justice 2002; Tenebaum 2002: A236; Walcott 2002; Anaya and Grossman 2002; see also the Inter-American Commission on Human Rights's Report on the Situation of Human Rights in Ecuador).

Despite the efforts of the US government to maintain secrecy, the substance sprayed was identified as glyphosate herbicide, manufactured by Monsanto under the brand name Roundup, although it has now been established that it is in fact Roundup SL, "considerably more toxic than Roundup Ultra" (Oldham and Massey 2002: 1–2). The health effects have been studied for some time:

> Aerial spraying has a significant negative effect on the lives of large numbers of people, particularly the rural poor in Colombia. There is strong evidence linking spraying with serious human health effects; large-scale destruction of food crops; and severe environmental impacts in sensitive tropical ecosystems. There is also evidence of links between fumigation and loss of agricultural resources, including fish kills, and sickness and death of livestock (Oldham and Massey 2002: 2).

The Indigenous Cofan people of the Putumayo province complained to their health department of "dizziness, diarrhea, vomiting, itchy skin, red eyes and headaches" (Oldham and Massey 2002: 3) after the spraying, and similar reactions were reported in the Sucumbio Province of Ecuador, near the Colombia border, as well as in Mataje, Esmeraldas.

In September 2001, the Ecuadorian Indians who live near the Colombian border filed a class action suit against Dyn-Corp Corporation, the company in charge of the spraying in Colombia (Aguasanta Arias et al. vs. DynCorp 2001). The physical and monetary damages were evident, as was the loss of cultural integrity and identity of these peoples, many of whom had to abandon their homes. Aside from the question of whether this sort of globalized industrial activity can be stopped, or at least "humanized" (that is, modified to respect human rights), these events raise a number of other questions related to human collective rights, and these will be addressed in the next section.

A Brief Overview of the Constitutional Protection Available for the Environment in Colombia and Ecuador

> It is the duty of the State to protect the diversity and integrity of the environment, to conserve areas of special ecological importance, and to foster the education for the achievement (Constitution of the Republic of Colombia, 1991).

This clear commitment is even preceded by several related statements, all of which would appear to be in direct conflict with what is happening on the ground. They are:

- every individual has the right to a healthy environment;
- the laws must guarantee the Community's participation in the decisions that may affect the environment; and
- the state must also cooperate with other nations in the protection of the ecosystems in border areas.

If these are constitutional mandates, it is hard to see how the government of Colombia could even enter into Plan Colombia with the US, let alone permit the human rights violations that ensued.

When we turn to Ecuador's legal instruments, it is even harder to see how the country's new constitution (Republica del Ecuador 2000), a unique and inspirational document, could allow the country to tolerate the toxic operations taking place at their borders. The articles approved by Ecuador's Constitutional Assembly on 7 July 2008 state the following:

> *Chapter – Rights for Nature*
>
> Article 1. Nature or Pachamama, where life is reproduced and exists, a right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution. Every person, people, community or nationality, will be able to demand the recognition of rights for nature before the public organisms. The application and interpretation of these rights will follow the related principles established in the Constitution.
>
> Article 2. Nature has the right to an integral restoration. This integral restoration is independent of the obligation on natural and juridical persons to the State to identify the people and the collectives that depend on the natural system. In the cases of severe or permanent environmental impact, including the ones caused by the exploitation of non-renewable resources, the State will establish the most efficient mechanisms for the restoration, and will adopt adequate measures to eliminate or mitigate the harmful environmental consequences.

> Article 3. The State will motivate natural and juridical persons as well as collectives to protect nature; it will promote respect to ward all elements that form an ecosystem.
> Article 4. The State will apply precaution and restriction on measures in all the activities that can lead to the extinction of species, the destruction of ecosystems or the permanent alteration of the natural cycles. The introduction of organisms and organic and inorganic material that can alter in a definitive way the genetic patrimony is prohibited.
> Article 5. The persons, people, communities and nationalities will have the right to benefit from the environment and from natural wealth that will allow being. The environmental services cannot be appropriated: its production, provision, use and exploitation will be regulated by the State.

Articles 4 and 5 appear to address specifically the problems encountered by the local/traditional inhabitants.

Hence it appears that even the best constitutionally entrenched protection for both the environment and the peoples who depend upon it are totally insufficient against a background of corporate and neoliberal state power from a powerful country. That said, for an international instrument to be effective in a national setting it has to be explicitly included in the domestic constitution or charter of each particular accepting country, but the converse does not hold. The articles cited from the new constitution of Ecuador should be inserted and explicitly adopted in the international instruments mentioned thus far. Only then could these provisions be appealed to in international courts, to help curb and redress the sort of abuses we have cited, and other similar (but common) situations.

Yet we must acknowledge that even the constitution of Ecuador does not explicitly link environmental degradation and disintegrity to human rights, as, for instance, "people and communities will have the right to benefit and to achieve natural wealth", rather than to have right to the protection of their life and health.

Similarly, even the European Court of Human Rights, the only one where one finds some of the few existing cases that link environment and human rights, makes use of Article 8 of the European Charter—that is, the "right to one's home and family life" —instead of addressing directly the right to life, to one's dignity and to health (Guerra v. Italy 1998; Lopez Ostra v. Spain 1994; Fedeyava v. Russia 2005; Oneryildiz v. Turkey 2004). The few cases that the European Court of Human Rights decided in favour of the plaintiffs were individual human rights cases and, for the most part, did not involve minorities or Indigenous peoples.

The State and Neoliberal Globalization: Democracy v. Principles and Jus Cogens *Norms*

> Globalism, the ideology supporting economic globalization, favours the withdrawal of the state from the provision of many services essential to human rights, and its replacement by private actors (De Feyter 2007: 67).

The main difficulty lies, as expected, in the necessity to reconcile the actual situation on the ground (what *is*) with what *should* or *could* be instead; that is, *lex lata* versus *lex ferenda*. Perhaps to say that considering the state as a major player, a trustee, accountable to citizens within and without its borders, may still be a worthwhile position to hold, provided that the remaining difficulties (that is, the state's limited remaining powers, and the roadblocks placed against the exercise of such powers by international organizations and political structures) are kept firmly in mind.

It would be wrong to attempt to fight globalization while also assisting it to overpower the state. The situation appears to be paradoxical: the state must be both changed and reinforced, but neither change nor additional power can be part of the state unless the global institutions that control it now, and the international regimes that direct it, are changed *first*. It seems clear that the "demise of the state" (Pikalo 2007: 17) is not a desirable goal; yet it is difficult to see the conflict between globalization and the state simply as "a false, artificial opposition" (Pikalo 2007: 18). Pikalo cites the abundant scholarly literature that discusses the situation. Yet to state simply that "there is a great deal of empirical evidence available suggesting that states, especially stronger states of the world's northern regions, retain substantial capacities" (Pikalo 2007) appears to be an overstatement.

Again, not all states are equal in power. For instance, the EU—a good example of resistance to many of globalization's worse effects—is a supranational unit, and hence more than a single state (see for instance the lengthy resistance to the WTO in the EC Measures Concerning Meat and Meat Products case of 1997). The main concern is that the state remains, at least in principle, the "central institution" for governance, especially if we add the concept of "trusteeship", with all its implications, to the state's functions (Bosselmann 2008b: 175; Sand 2004).

Whether "weakened" or even "obsolete" in some respects (Pikalo 2007), minimally, the state remains one of the actors on some of the most important "stages" of international law, such as the WHO and the

UN itself. Thus it is not only constitutional and domestic changes that are urgently needed in order to reaffirm the protection of the basic rights of the collective, but also—even more significantly—what is needed is the courageous voice of all states to stand up and respond with their objections to the *status quo*.

It is true that already NGOs and others, including the participants in the Social Forums (De Sousa Santos 2002), protest strongly at all WTO rounds of meetings and those of the G8. But the fact that the national governments themselves do not protest as such, but continue "business as usual", lends an air of fringe groups to these important and well-founded protests.

It seems that the main source of problems lies in the political aspects of international governance within a novel, changed global situation:

> Today the scenario is radically different. First, decolonization is a distant memory and the Cold War has ended, giving way to concerns about a unipolar world dominated by a hegemonic power and by the threat of terrorism (Francioni 2008: 247).

Francioni says it well, and the presence of the "hegemonic power" is also the origin of the "threat of terrorism", to a great extent. Most of today's "terrorism" originates from the belief that the "hegemonic power" with its friends and allies may thwart and ignore international law with impunity, regarding certain peoples and certain issues; that peoples who have different beliefs from those of Western nations are viewed as second-class citizens (or worse), so that their claims to the right to self-governance, their request for safety from attacks, and their right to safe and healthy living conditions do not need to be attended (see Chapter 5 of this volume for an example of this approach).

The presence of such uneven and unfair globalism (that is, the unequal application of international law regimes and mandates) is not only clearly in evidence in the conflict between Israel and Palestine, and the behaviour of the UN and the world community in that regard, but also in the ongoing conduct of business. When Toyota's "trouble" emerged, the CEO was immediately called to Washington to answer for risking the life of human beings for their own corporate aims, and for not obeying the laws governing such business transactions (Keenan 2010: A1, A2).

In contrast, despite repeatedly flaunting UN conventions and international legal regimes, as well as the finding of specific UN reports (such as the Goldstone Report) and declarations, no one in Israel has been called to The Hague, or at least to Washington, to attempt to

justify the ongoing gross violations of human rights for which they are responsible.

Simple anecdotal evidence is not thorough research on the topic, but it seems clear that the involvement of "democratic" countries is by no means sufficient to eliminate the presence of the wrong choices, the wrong emphasis on the wrong issues, and the disregard for the major principles of civilized nations that these "anecdotes" indicated. Thus the main problem appears to be separate and distinct from the democratic practices within countries, and even from the design of the constitution in these countries.

Pace Bosselmann and this laudable support for the Earth Charter as an example of democratically based international soft law, democracy essentially describes the domestic governance within a state, and it is surely prey to its own problems (Westra 2011; Engel 2010). No doubt, "the greener" a state becomes, the more environmentally oriented its laws and institutions, and the more likely such a state will be to play a positive role in the defense of collective human rights on the international stage.

But unless the international stage with its institutions and organizations changes first, and most radically, no socially conscious, green-oriented state will stand a chance to see its beliefs and principles implemented domestically or transborder, as we saw in the examples cited above (e.g. in Ecuador). This is more than a "chicken or egg" question; it is the basis of all protests we see globally against the secret and inflexible governance of neoliberal organizations. What is at stake is too grave to be left to continue under procedurally oriented court proceedings *after* the harmful practices continue unabated. It seems that the time is right to return to principles and non-derogable norms, and to international organizations that are willing to support their primacy.

The Limits of Legal Positivism for World Governance

> [It] is undeniable that in Article 38(1)(c), some natural law elements are inherent. It extends the concept of the source of international law beyond the limits of legal positivism according to which the States are being bound only by their own will, and international law is nothing but the law of the consent and auto-limitation of the State. But this point, we believe, was clearly overruled by Article 38, paragraph 1(c), by the fact that this provision does not require the consent of States as a condition of the recognition of the general principles. States which do not

> recognize this principle or even deny its validity are nevertheless subject to its rule. From this kind of course international law could have the foundation of its validity extended beyond the will of States, that is to say, into the sphere of natural law, and assume an aspect of it supra-natural and supra-positive in character (Ethiopia v. South Africa, Liberia v. South Africa, 1966: 248–324).

From the political point of view, we can point to globalism with its inherent neoliberal policies, and even to the hegemonic power of major Western states. From the legal point of view, these political structures are ruled by legal positivism, comprising treaties of which the language is negotiated to its lowest possible impact by bilateral and multilateral agreements among those who share similar neoliberal convictions, and where those who would disagree or resist are "convinced" or even coerced to fall in with the positions supporting the interests of the hegemonic powers.

Thus, if we want to move beyond the scenario Francione envisions, we need to transcend legal positivism and turn to non-derogable norms and to "general principles of law" instead, confident that these principles are included in the Statute of the ICJ (Salomon 2007: 164). Salomon adds that such principles "reflect consensus", even if they do not require formal ratification procedures on the part of states (Salomon 2007). Perhaps it might be best to accept the presence of the principles of natural law instead, which surface clearly in the preambular sections of the International Covenant on Economic, Social and Cultural Rights (ICESCR), where the basis of the principles of human rights are acknowledged as they "derive from the inherent dignity of the human person" (ICESCR para 2).

It is most appropriate to return to such a source, as the general principles of law, given their history (and, most of all, given the specific aspects of their role and definition) offer the best "weapon" against the lawlessness of neoliberalism. Cassese says:

> Normally principles are spelled out by courts, when adjudicating cases that are not entirely regulated by treaty or customary rules. In this respect courts have played and are increasingly playing an essential role: they identify and set out principles "hidden" in the interstices of the normative network, thus considerably contributing to the enrichment and development of the whole body of international law (Cassese 2004: 189).

In international law, there are principles that are specific to a certain branch of law such as the law of the sea, humanitarian law, etc). In addition, there are the general principles of international law.

Courts must resort to principles where there are gaps in the body "of treaty and customary rules", thus enabling courts to avoid a *non liquet*—that is, to avoid being unable to adjudicate in a case where a claim does not appear to refer to a behaviour that is not prohibited by law—therefore, a behaviour that remains allowable at this time (Cassese 2004).

The ICJ was able to issue an Advisory Opinion in the case of The Threat or Use of Nuclear Weapons, as well as in its judgment in Furundija (ICTY 1998; Furundija (Appeal) 2000); the court could appeal to general principles in both cases and say, in the first case, that

> in view of the current state of international law, and elements of act at its disposal, the court [could not] conclude definitely whether the threat or use of nuclear weapons would be lawful in an extreme circumstance of self-defence in which the very survival of a State would be at stake (Advisory Opinion (WHO) 1996).

In the second case, the legal issue was whether "forced oral penetration constituted rape as a crime against humanity or a war crime" (Advisory Opinion (WHO) 1996). Neither case had uniform decisions of states upon which the court could rely. Although these principles fulfill also a second role, that of choosing among competing interpretations of existing conventions, it would appear that the first function of the principles is the most important one in a world where novel technologies, new scientific research and particular conditions brought on by globalization introduce a growing number of situations and circumstances that did not exist when most legal instruments were drafted.

In fact, the very interface between environmental conditions and human life and health represents a novel circumstance, in the sense that it has been less than fifty years since most of the related hazards have been discussed in the literature, including that of the WHO (Grandjean and Landrigan 2006; McMichael et al. 2003; Patz 2005; Gostin 2008). Hence, it is not only for geopolitical reasons but also (and more significantly) for scientific reasons that the present legal *status quo* is unacceptable.

From 1921, after the First World War and the Statute of the Permanent Court of International Justice, when Belgian jurist E.E.F. Descamps proposed that "in addition to trade and custom, the court should also apply the rules of international law as recognized by the legal conscience of civilized nations" (Cassese 2004: 190), a debate arose as to whether the court should be "endowed with the power to *create* law" by using "principles of objective justice", or only follow the will of the

states as it appears in treaties and custom. Eventually the formula referring to "the general principles of law recognized by civilized nations" served to please both sides of the disagreement (Cassese 2004: 191).

In fact, principles, and especially *jus cogens* norms, have remained "dormant", although it is generally recognized that "new areas" of international law demonstrate serious gaps, which indeed call for the renewed role of such principles (Cassese 2004: 193). Because they establish a "hierarchy" of norms, as they possess a peremptory voice not normally heard in international law, *jus cogens* norms provide a solid basic position. Particularly welcome to Southern/Eastern states, *jus cogens* norms were viewed as a desirable means of "fighting against colonial countries":

> The representative of Sierra Leone at the 1968 Vienna Conference made this point, when he noted that the upholding of *jus cogens* provided a golden opportunity to condemn imperialism, slavery, forced labour, and all practices that violated the principle of the equality of all human beings and of the sovereign equality of all states (Cassese 2004; UN Conference on the Law of Treaties 1968).

At this time, it was most important to ensure that an impartial body such as the ICJ would guarantee the proper application of these rules, as they pre-empt any convention that might conflict with their mandates. This aspect of *jus cogens*, however, does not represent an exhaustive definition of the term:

> this description of *jus cogens* fails to apprehend its real essence, since the definition is based on the legal effects of a rule and not its intrinsic nature; it is not that certain rules are rules of *jus cogens* because no derogation from them is permitted; rather, no derogation is allowed because they possess the nature of rules of *jus cogens* (Cassese 2004: 201; Jimenez de Arechaga 1978: 64).

Given the difficulties inherent in the affirmation of justice and human rights inherent in the global power structures existing today, and the presence of hegemonic alliances, no matter whether states accept these norms, no other agreement they might want to contract may stand if it contradicts the norms. Hence, this is indeed a positive step, as we are seeking to discover a world law to counter the global difficulties existing today. As well, in establishing *jus cogens* norms, as Cassese has it, a body of supreme or "constitutional" principles was created (Cassese 2004: 202). In the next section we will consider the content of these norms and their (albeit limited) use today.

The Content and Limits of Jus Cogens

> [A]n essential distinction should be drawn between the obligations a State owed towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination (Barcelona Traction, Light and Power Company Limited (Second Phase) (Belgium v. Spain) 1970).

It is clear that this celebrated *obiter dictum* on obligations *erga omnes* specifies only certain acts arising from *jus cogens* norms: acts of aggression, of genocide, and human rights to the protection from slavery and racial discrimination. Yet these rights are so singled out because they derive "from the principles and rules concerning the basic rights of the human person", and as such it can be argued that the basic rights of the human collective, founded in the tenets of natural law (thus *jus cogens*) and respect for the human person in general, are the main object of *erga omnes* obligations.

Despite this case's commercial topic, the natural law reference (as well as the specific activities named) lift this case out of the ongoing debates regarding the operation of business. However, it is correct to acknowledge that environmental rights are not explicitly included, although they could be according to Maurizio Ragazzi (Ragazzi 1998). I have argued that the connection between "aggression" and the human person should characterize activities that can be termed forms of eco-violence, especially as (1) aggression has not been fully defined at this time in the Rome Statute of the ICC, nor anywhere else; and (2) in the same context at least there is no specific reference to the presence of a conflict situation to define it in the Rome Statute (Westra 2004: 299–329).

The argument advanced in those pages goes well beyond the inclusion of environmental attacks in the understanding of basic human rights, to their condemnation as various forms of 'ecocrimes", as follows:

1. ecocrimes as a form of unprovoked aggression;
2. ecocrimes as attacks on the human person;

3. ecocrimes as a form of genocide;
4. ecocrimes as a breach of global security;
5. ecocrimes as attacks on the human environment; and
6. ecocrimes as breaches of global justice (Westra 2004: 308–309).

Without revisiting all the details of the earlier argument, it is undeniable that (1) environmental violence is not the response of either a state or a corporate legal person to attacks directed against them by the citizens of an area, who will eventually be gravely affected by the pollution or deprivation of safe environmental conditions arising from those state-sanctioned activities. The argument proposed was that even when violence is lawful and permitted within the ambit of just war (if such a thing is still possible with today's weaponry), civilians and noncombatants could not be attacked. *A fortiori*, then, outside the possibility of a just conflict, peaceful citizens ought to have the right to have their life and health protected from the effects of activities the only aim of which is to provide profits for their principals, a goal that is not supported as a right by any international or domestic legal instrument, to my knowledge.

In that case, (2) follows as well: attacks against the human person, in our sense, are clearly attacks in and through the environment (5). In 1970, the interface between (2) and (5) was not well supported in science, as it is today, by an increasing number of scholars and by the WHO itself (WHO 2008). But in the intervening years there has been no legal instrument explicitly linking human rights to life and health to the environment, except for some preambular pronouncements, so no binding law is available to proscribe harm arising from that connection even today.

Even more controversial today is (3) and the question of what constitutes genocide. Genocide is also linked to (6) and to (4), as we shall see. If one follows today's foremost scholar on genocide, William Schabas (Schabas 2000), then one must agree that the available jurisprudence and the original definition of genocide both place severe limits on which actions can or cannot be categorized as such. However, the main proponent of the concept, Raphael Lemkin, was far more liberal in his interpretation (Lemkin 1947).

The main problem is the presence of the required "specific intent" or *dolus specialis*, which, *prima facie*, does not represent the general aims of either states or corporations. The harms eventually imposed are viewed as unintended "collateral damage" (Sheldon 2004); simply

externalities to the quest for profit and even "development". Nevertheless, "environmental racism" has been recognized for several decades, particularly (but not exclusively) as a North American issue, starting with the seminal work of Robert Bullard and others (Bullard 1994, 2001).

Environmental racism attests to the inequities in the harms imposed by development, and in general by industrial activities, on indigenous and impoverished local communities globally, when we compare their resource depletion and various forms of pollution with those suffered by affluent communities. As well, Bullard himself proposed the elimination of the "intent requirement" necessary to prove discrimination when the facts at issue speak for themselves. For example, a case that directly involved this author (Westra and Lawson 2001: 113–140) hinged on the insalubrious and inappropriate placement of waste dumps and recycling facilities across the street from a elementary school in Titusville, an African American suburb of Birmingham, Alabama. The evidence of the case disclosed that Browning Ferris Industries had 27 such facilities in Alabama, 26 of which had been placed in African American neighbourhoods, pleading purely economic reasons for their decisions. We will return to the question of intent below. For now, it is important to address the health connection, which is basic to the argument as it underlies the question of what constitute "attacks on the human person".

Attacks on the Human Person

There are many ways in which ecoviolence attacks the human person, and we have discussed some of these in the previous chapters. The most pernicious and least visible of all these attacks are the ones that interfere with our normal functioning through endocrine disruptors (Colborn et al. 1996). We will return to this theme when we address the question of genocide.

At this time, a document produced by the WHO (Rome Office) will help situate this question in context (Soskolne and Bertollini 1999). In 1993 A.J. McMichael published his seminal work *Planetary Overload*, following upon the WHO publication, *Our Planet, Our Health* (Report of the WHO Commission on Health and Environment, 1992). In 1997, WHO (Geneva) also published another document, *Health and Environment in Sustainable Development Five Years After the Earth Charter*.

In December 1998, the WHO (Rome office) convened a workshop based on research of the "Global Ecological Integrity Project" and in 1999 published a document entitled "Global Ecological Integrity and 'Sustainable Development': Cornerstones of Public Health", in which the main points required to support the claims of this section emerge clearly.

The authors start by explaining both the long-term perspective they take and the presence of concerns that are "more compelling" in this work, as they state:

> The combination of these circumstances means that the message contained in this document could actually trigger global actions, where previous efforts, whether in the form of conference reports, books, agency reports or movies, did not (Soskolne and Bertollini 1999: x).

This "pilot" workshop served to bring together two sciences that had so far been viewed as separate: ecology and public health. In fact, the report admits that "scientists have not systematically linked life-support systems with human health concerns at the global level" (Soskolne and Bertollini 1999: 2). This new focus forced scientists, accustomed to consider public health risk assessment from the standpoint of a specific threat, to evaluate matters from the standpoint of a "scenario based risk assessment as the method conducive to identifying and establishing important ecological connections to human health". The harms are similar to those listed by Karr and Chu (1995) and reported in this document:

1. *Alteration of Earth's Physical and Chemical Systems (Indirect Depletion of Living Systems)*
    (a) Soil depletion
    (b) Degradation of water
    (c) Chemical pollution
    (d) Climate change, globally
    (e) Alteration of global bio-geo-chemical cycles
2. *Direct Depletion of Non-human Living Systems*
    (a) Renewable resource depletion
    (b) Crop homogenization
    (c) Habitat destruction and fragmentation
    (d) Extinction
    (e) Diseases, red tides, and pest outbreaks
    (f) Alien taxa (growth of foreign organisms)
3. *Direct Depletion of Human Living Systems*
    (a) Epidemics
    (b) Emerging and re-emerging diseases

(c) Reduced quality of life
(d) Reduced human cultural diversity
(e) Economic deprivation
(f) Environmental injustice (Soskolne and Bertollini 1999: 5).

The WHO document authors explain that this "kind of organization" has distinct advantages, as it permits the following:

1. It illustrates the breadth of the challenge;
2. It makes the human-environment connection explicit;
3. It illustrates the common underpinning of ecological and human health challenges as well as social concerns (Soskolne and Bertollini 1999: 6).

There are several basic points that emerge from this innovative consideration of ecological systems and human health:

1. First, both the former and the latter are dependent on the "integrity of ecosystems and the ecosphere";
2. Most cities and other "urban regions" may support healthy populations, but their health is based on using more "productive", healthier ecosystems elsewhere (that is, these systems are used through the "ecological footprint" of those cities; Rees and Wackernagel 1996);
3. The use of far-away natural systems described in (2) is not sustainable, and many indices describing the state of the biosphere point to the reality of these hazardous circumstances (Soskolne and Bertollini 1999: 6).

As we acknowledge the connection between environmental disintegrity and health, we can once again briefly sum up some of the hazardous trends discovered and analysed in this report. Global climate change aggravates and exacerbates all the hazards listed by Karr and Chu (1995). What used to be severe storms in the province of Quebec, a normal winter occurrence in an area where snowy weather is the norm, turned in 1999 into an unprecedented ice storm: a major disaster. Soil erosion and floods bring famines especially in the developing countries where medical and social infrastructures are lacking or minimal, so that a flood in Germany or The Netherlands, cannot be compared in its consequences with the devastating results of a flood in Africa or India.

The risks from UVA/UVB exposure are not limited to rich sunbathers in affluent countries. Inuit people in the Arctic, for instance, suffer a loss of their immune system's ability to protect them because of that exposure. Exposure to radioactive and toxic wastes disproportionately

affect the powerful, rich countries in the North/West and the vulnerable minorities and the people of developing countries who suffer from toxic trade (Westra and Lawson 2001) and exposure to pesticides and herbicides banned in the North/West (Shrader-Frechette 1991). The risks of cancers from these exposures are well known and documented (Epstein 1978). But the other risks to reproductive and parenting functions, intelligence and ability to concentrate (and—in some cases—to DNA) are also relevant.

The point of this litany of disasters and harmful, often irreversible consequences of multiple exposures is that they do not arise from mistakes or occasional culpable errors, but they are accepted as the norm—the results of the normal, legal way of conducting business and regulating technologically advanced life in the 20th and 21st centuries. These assaults are not limited to a specific locale: they appear in various forms and with varying severity everywhere; hence, it appears appropriate to elevate these assaults to the level of international crimes, and to proceed to describe and stigmatize them as such, even if full prosecution of those responsible remains a difficult and debated issue at this time (Ragazzi 1998: 16–17).

Ecocrimes as Forms of Genocide: A Possible Way to Link Environmental Crimes and Jus Cogens

When we consider genocide, we encounter the problem of the possible *mens rea* component of the crime. Article II and Article III of the Genocide Convention (adopted 1951) define the crime:

> *Article II*
> In the Present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.
>
> *Article III*
> The following acts shall be punishable:
>
> (a) Genocide;
> (b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide (Convention on the Prevention and Punishment of the Crime of Genocide, 1951).

But note that crimes against humanity, or even against the human person, do not appear to be defined by a specific intent to achieve a certain result, except, it would seem, "persecution" may require "specific intent". For instance Article II(d) concerns intent, Article II(c) says "deliberately inflicting", and the introductory defining section speaks of the "intent to destroy". It is therefore clear that genocide is one of the international crimes where intent appears to be required. William Schabas adds: "But in cases that cannot be described as purely accidental, the accused's mental state may be far from totally innocent" (Schabas 2000: 206).

In fact, degrees of culpability may be appropriate in this crime, and the degree of intent may affect the way punishment is meted out. But intent is not the only requirement for the crime of genocide. Article 30 of The Rome Statute of the International Criminal Court (1998) declares "that the *mens rea* or mental element of genocide has two components"; that is, "knowledge and intent" (Schabas 2000: 207). Perhaps full responsibility and the gravest punishment should be assigned to those with a "plan" a "project" involving a "conspiracy" to commit genocide. It may be best to cite Article 30 in full:

Article 30 Mental Element
1. Unless otherwise provided a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this Article, a person has intent, where:
    (a) In relation to conduct, that person means to engage in that conduct;
    (b) In relation to consequence, that person means to cause that consequence *or is aware that it will occur in the ordinary course of events* [emphasis added];
3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or that a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

An appeal to the crime of genocide appears more tenable when knowledge of consequences to take place in the natural course of events is concomitant with the awareness that whatever consequences will

ensue, these will affect a specific group. Hence, ecocrimes consisting of dumping or otherwise polluting or eliminating natural systems, clean air or water supplies, will best fit the category of genocide when it is known to the actors that (1) the consequences will primarily affect people in developing countries or people of colour in developed Western countries, and/or (2) the consequences will affect disproportionately, or more gravely, those in developing countries or people of colour in the "home" country from which the activities originate, wherever they are ultimately carried out.

Examples of this sort of ecocrime might be the presence of "toxic trade" (Gbadegesin 2001: 187–202) and the disposal of hazardous material to countries like Africa, or the results of the activities of Canadian mining companies in the developing world: "Accidents at Canada-owned mines in just the last five years have resulted in massive toxic waste spills in Kyrgyzstan, the Philippines, Guyana and Spain" (Seck 1999: 139).

If we understand "knowledge" in Article 30 in a sense similar to the knowledge present at least as wilful blindness in domestic assault cases (R. v. Pappajohn) then we have a group targeted deliberately, negligently or through a refusal to accept that consequences will follow "in the normal course of events". When they are perpetrated by either a state or a corporate actor, these crimes deserve the gravest punishment applicable, short of death and life sentences, which, unfortunately, cannot be imposed. But if knowledge and awareness are at least necessary (if not sufficient) to indicate genocide, then perhaps we may be able to bridge the gap between *mens rea*, or clear intent, and a simple consideration of the factual consequences of ecocrimes.

Therefore, even if it is hard to pinpoint a motive other than personal gain and a lack of care for the rights of others, we need to consider seriously whether a move to criminalize ecoviolence on a grand scale as a form of genocide may be the only way to attempt to protect the most vulnerable populations, regardless of the presence of a clear intent or at least motivation. Schabas reports on a number of countries who concurred with the position held by Gerald Fitzmaurice: "Motive was not an essential factor in the penal law of all countries. Motive did not enter into the establishment of the nature of the crime; its only importance was in estimating punishment" (Fitzmaurice (UK), UN Doc. A/C.6/SR.75; Schabas 2000: 248).

Many other countries concurred that, insofar as genocide is concerned, "motive was of no importance" (Venezuela, UN Doc. A/C.6/

SR.69) and that "to prevent the destruction of those groups, the motive was of no importance" (Norway, U.N. Doc. A/C.6/SR.69); Panama noted that the addition of motive was "unnecessary" since "no provision was made for it in any penal code" (Panama, UN Doc. A/C.6/SR.75); and Brazil simply noted that motive was only relevant "in the penalty phase" (Brazil, UN Doc. A/C.6/SR.69; Schabas 2000: 248).

In the ad hoc tribunal for Rwanda case (The Prosecutor v. Jean-Paul Akayesu 2004), a clear position on intent is taken at No. 42, where *dolus specialis* is invoked: "Genocide is distinct from other crimes inasmuch as it embodies a special intent, or *dolus specialis*". But at No. 44 is the following:

> On the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult or even impossible to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact.

On the other hand, in the work of the International Criminal Tribunal for the Former Yugoslavia (Tadic Case, 1995), although the defense filed a motion "challenging the jurisdiction of the ICTY", "disputed the legality of the establishment of the ICTY by the Security Council" and objected on several other grounds, the Trial Chamber dismissed the motion (Steiner and Alston 2000: 1159). Eventually the Trial Chamber found Tadic guilty on several counts, but it described the law as "quite mixed" with respect to the need to prove "intent", and for the requirement that intent be "inherent in crimes against humanity" (Steiner and Alston 2000: 1171).

Nevertheless, in its judgment of 15 July 1999, the Appeals Chamber "affirmed the convictions of Tadic, while reversing several holdings of the Trial Chamber" (Steiner and Alston 2000). From our point of view, the Appeals Chamber "concluded that Article 5 of the Statute did not require all crimes against humanity to have been committed with a discriminatory intent" (Tadic Appeal Judgment, at 285; Steiner and Alston 2000: 1172).

Another question that must be considered is the question of "command responsibility". For instance, the International Tribunal established by the UN Security Council, under Chapter VII, for the "Serious Violations of International Humanitarian Law (Former Yugoslavia)", discusses these issues. For instance, Article 3 addresses "(b) conspiracy to commit genocide", "(c) direct and public incitement to commit

genocide" and"(d) complicity in genocide". In addition, "command responsibility" is not limited to humanitarian law:

> Most important, it is found that not only military commanders, but also civilians holding positions of authority, are encompassed by this doctrine. Furthermore, for the attribution of criminal responsibility, not only persons in *de jure* positions of superiority, but also those in such positions *de facto*, may be held criminally responsible (Kindred et al. 2000: 740).

Hence, both those who commanded and those who carried out the commands resulting in genocide against a whole group or part of one (Annex, Article 4.2.(c)) can be viewed as criminal, albeit there might be some mitigating circumstances, especially for those following commands in some cases.

In the US, Pennsylvania is the only state to incorporate "the right to a healthy environment" in its constitution (Article I, §27). It is instructive to cite it in full:

> Article I, Section 27:
> (1) The People have a right to clean air, pure water and to the preservation of the natural, scenic, historic and esthetic values of the environment.
> (2) Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As Trustee of these resources, the Commonwealth shall ensure and maintain them for the benefit of the people.

In the US, environmental crimes such as felonies and misdemeanours give rise to jail sentences and produce a criminal record, without requiring proof of intent, or *mens rea*.

Much more needs to be said on this conflicted topic. For now, there appears to be at least some significant support for the elimination of the "discriminatory intent" requirement in international law for genocide and crimes against humanity. One final point might be useful: although most "environmental justice" prosecutions are not criminal in the United States, one of the major representatives of the movement strongly advocates the elimination of the "intent to discriminate" requirement for all cases of "environmental racism" (Bullard 1994).

Based on these clarifications, there are two specific forms of ecocrime that can be clearly termed forms of genocide. One is the toxic and chemical waste trade and the other highly hazardous industrial practices that occur routinely in developing countries, many of which would

never be permitted in the home states of the institutions responsible for those practices. Consider toxic wastes sent to Africa (Gbadegesin 2001: 187) as an example, or the well-documented activities of Royal Dutch Shell in Nigeria's Ogoniland (Westra 2007: Appendix 1).

The other form of genocide, far less obvious or visible, was noted at the start of the section on crimes against the human person: the presence of hormone mimics and endocrine disruptors (Colborn et al. 1996), and the multiple effects these substances have on normal human functions. These effects include alterations to normal reproductive functions. Reproductive anomalies in animals, due to persistent chemicals in their habitat, or to abnormal temperatures, may lead to the predominance of one-gender births (Scott 2008: 29); in humans there may be reproductive failures and parenting inability. In either case, not only specific individuals and populations may be at risk, but—through DNA mutations—the human race may be at risk as well (Colborn et al. 1996).

Jus Cogens *and* Erga Omnes *Obligations in Defence of the Collective*

> According to the ICJ, the principles and rules concerning basic rights of the human person are "[b]y their very nature" the concern of all states and thus impose obligations *erga omnes* upon them. The reference to nature, as opposed to conventional obligations, as the starting point, reaffirms that the rationale for the possibility of obligations *erga omnes* is not to be found in extrinsic principles, such as the presumed effective predominance of the will of the majority of states or the more powerful states over a dissenting minority, but in the universal validity of the moral values that these obligations were meant to protect (Salomon 2007: 171; Ragazzi 1998: 466).

No matter how convincing the arguments of the previous sections, we are still firmly based in *de lege ferenda*; in what should be done, rather than what can be done right now in the courts. In addition, even if courts might be persuaded to consider such arguments in their decisions, the main problem remains: the flawed and incomplete legal instruments that do not forbid (or at least work to mitigate) the activities that result in harms.

The main issue is the lack of connection between ecology and human rights in law; as well, human rights are mostly viewed as *individual* entitlements, and the question of collective rights has not been seriously addressed in international law at this time (Newman 2004: 127;

Westra 2011). In this sense, both racial discrimination and especially genocide are—almost by definition—examples of collective harms, as a person may be the target of discrimination for her race only if the race itself is considered less worthy than one's own.

Similarly, genocide, or the extermination of a "genus", cannot be limited to one person, whatever the degree of intent (or at least knowledge) regarding the harmful activities. Hence the present focus on *jus cogens*, or universally applicable norms, and the appropriateness of *erga omnes* obligations. One such case is the Corfu Channel Case ((Merits) United Kingdom v. Albania 1949) where the court referred to "general principles" and "well recognized principles", and to the "elementary considerations of humanity" (Corfu Channel Case (Merits) United Kingdom v. Albania 1949: para 22).

But the problem is that neither the "general principles" nor any "considerations of humanity" are included in binding agreements or other instruments, as they are—at best—limited to the preambular portions of these documents, so that the harms continue to be imposed as the harmful activities are not explicitly forbidden. Particularly apt is the Reservations to the Genocide Convention, where the IJC's Advisory Opinion (Case Concerning Application of the Convention on the Prevention and Punishment of Genocide; Bosnia Herzegovina v. Yugoslavia 1996; Reservations to the Convention on the prevention and Punishment of the Crime of Genocide 1951) makes clear which principles provide guidance, and we will discuss some aspects of both the case and the Opinion in the next section:

> the principles underlying the Convention are principles which are recognized by civilized nations as binding on States even without any conventional obligation (1951);
> the rights and obligations enshrined by the Convention are rights and obligations *erga omnes* (1996).

Further, we have noted the Advisory Opinion in the Nuclear Weapons Case, above; and, even more significant for the argument of the this work, a similar approach is present in the Advisory Opinion of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, as Salomon points out that "rules of international humanitarian law incorporate obligations which are essentially of an *erga omnes* character (Salomon 2007: 167; Legal Consequences of the Construction of a Walk in the Occupied Palestinian Territory, Adv.Op. 2004).

More examples can be adduced but, as Cassese notes, for a state to invoke *jus cogens*, such state must be a party to the treaty "it intends to have declared contrary to *jus cogens*", as well as being a party to the Vienna Convention (Cassese 2004: 204). In general only exceptional circumstances will permit invoking *jus cogens*, which therefore indicates that such rules today remain only in a state of "potentiality" (Cassese 2004).

Further, given the legal difficulties involved, any state invoking *jus cogens* must be prepared to "submit to arbitral or judicial determination" (Cassese 2004: 205), thus rendering the final arbitration or judicial decision possibly still dependent on the same world order we are asking to alter. Yet peremptory norms are not only binding on states, but also the UN Security Council (SC), which should ensure that current examples of grave human rights breaches should be pursued by the international law instruments that are appropriate (but also by the UN through all its organs). Because this is not what happens today, it is vital to seek radical changes to the international legal order.

Current Use of Jus Cogens*: Advisory Opinion on Genocide and Bosnia-Herzegovina v. Yugoslavia*

> although the concept of *jus cogens* has been in existence for almost fifty years in the world community, so far it has only been invoked in states' pronouncements or upheld in *obiter dicta* of international arbitral or judicial bodies, such as the UN General Assembly or the Commission on Human Rights, as well as in legal arguments of some of the litigants before the ICJ (Cassese 2004: 209).

The most significant of these cases is probably the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, as the use of general principles and the responses of the SC to ongoing activities in the region can be compared to the ongoing events in Israel and Palestine. This comparison might suggest a strong argument for the need of a drastic revision of the *status quo*, starting with the SC itself.

This case concerns the "well-planned and thoroughly executed" military campaign with the intent of annexing as much "strategically important territory" as possible, but it included the aim of eliminating—as much as possible—the Muslim population of the area (Cassese 2004: 94). These aims can be compared with the similar aims and activities described in Chapter 5.

The role of the SC is particularly significant in its responses to the mounting outcry by several states (Hungary: S/23845, 26 April 1992; Venezuela: S/24377, 4 August 1992). The Secretary-General of the UN also noted the use of armed forces against civilians, linking it "with the direct killing of Muslims and the creation of conditions of life calculated to bring about their physical destruction" (3.2.0.2 [S/2400, para 6, 26 May 1992], p.108). In addition, the SC adopted several resolutions, starting with Resolution 752 (1992) of 15 May 1992, demanding that

> all forms of interference from outside Bosnia-Herzegovina, including by units of the Yugoslav People's Army (JNA) as well as elements of the Croatian Army, cease immediately […]

Resolution 752 was also concerned with "any attempts to change the ethnic composition of the population", which the Secretary-General saw as "confirming once more the existence of a genocidal campaign to destroy the mostly Muslim population" (S/2400, para 6, 26 May 1992, p.1000). Resolution 757 (1992) and Resolution 788 (1992) added that "any taking of territory by force or any practice of "ethnic cleansing" is unlawful and unacceptable. The condition of civilians at camps and detention centres were also viewed as unacceptable by the SC, as it

> demanded unimpeded and continuous access to all camps, prisons and detention centres to be granted immediately to humanitarian organizations and humane treatment for detainees, including adequate food, shelter and medical care" (Resolution 798 (1992), of December 21, 1993, 3.2.0.14, p. 104).

In fact, Resolution 770 (1992) even "authorized the use of force for the purpose of delivery of humanitarian assistance", while several representatives of UN member states pointed out that "Article 54 of the 1977 Additional Protocol I to the Geneva Convention" prohibits "the destruction of infrastructures basic to life, such as electricity, drinking water, sewage and other basic public services", and that the Convention includes in the meaning of genocide "inflicting on a group of human beings conditions of life calculated to bring about its physical destruction in whole or in part" (3.2.0.16, p.105).

Yet despite the multiple resolutions, ignored for the most part by the Serbs, the ICJ, with president R. Higgins, discounted many of the accusations alleging genocide, which "could not be proven to the satisfaction of the Court", except for the massacre at Srebrenica, which met all requirements. The main point was the question of "intent" and "ethnic cleansing", which was seen as "distinct from the removal" of the

protected group from the region; genocide was particularly hard to prove because the definition of the group itself was neither clear nor exhaustive.

Lacking the *dolus specialis*, the multiple killings were viewed as "war crimes" and "crimes against humanity", although the court was not asked to judge on that issue. Further, the court found that Serbia had violated the obligation to prevent genocide regarding the massacre at Srebrenica in July 1995 (Summary, 2007).

Thus, in this case, *jus cogens* and *erga omnes* obligations were clearly in evidence in the thinking of the court, as was the use of general principles of law aside from conventional obligations. Especially relevant were the many paragraphs discussing the question of intent, with its high requirements. The involvement of the SC and the draft of many resolutions was also highly significant, particularly when we observe the unfolding of similar events in the conflict between Israel and Palestine, without any specific or forceful UN or NATO intervention to date.

The Reality of International Law v. Cosmopolitanism

> Conceptually, cosmopolitan law should receive its own legitimacy from a worldwide legislative assembly. However, politics does not follow a logical path and it is difficult to imagine the ICC being set up in any other way; no institutions exist for the citizens of the world, and even if they did they would not have sufficient powers to oblige the states to collaborate (Archibugi 2008: 171).

This chapter has traced the presence of general principles, with their natural law antecedents and genealogy, and *jus cogens*, through their strong but limited presence in instruments and jurisprudence. In fact, the previous section noted that even the Bosnia-Herzegovina case and Advisory Opinion cannot support the extension of the charge of genocide to the *same* attacking armies against the *same* "protected group" (apparently not well defined), from the Srebrenica massacre to the rest of the horrors imposed on the Croat/Muslim population of the region.

It seems that the stringent requirements defining the *dolus specialis* of genocide in this case conflict with both common sense and more generally with the usual aspects of racist attacks. No doubt there is a difference between "removing people from a certain area" and deliberately working to exterminate them. Nevertheless, in the case of

Indigenous communities, for instance, the difference is minimal, as the elimination of individual human beings is separate from the elimination of the people as such, but the two converge for the most part, when local or Indigenous communities are at issue.

The advisory opinion referred to the JNA destroying religious and culturally significant buildings belonging to the "protected people"; hence it recognized certain attacks on their existence as a specific community, as a people. In addition, as Robert Bullard clearly saw, racist corporate practices are regularly defended and justified by the pursuit of economic gain, without the specific intent to target areas occupied by certain racial groups (Bullard 2001).

As well, both governments and industries pursue their neoliberal agendas in the interests of their own states and organizations, as happened, for instance, in the case of the Chagos population (Sand 2009: 21), and many other areas and peoples, in cases that involve multinational corporations extracting and mining, especially in the developing world (Seck: 139–221).

When these activities and projects result in the removal of a population whose roots, both religious and cultural, are in the area from which they are forced to flee, it is hard to continue to accept other interests as the basis of activities the results of which affect the existence of a people (Westra, L. 2009). At a minimum, such peoples must be considered less worthy than those who attack them with the intent to remove them from a region. The *knowledge* that their community's traditional life will be severely disrupted, or even terminated, must be clear in the mind of the corporation/government in charge of the policies that cause these effects.

If that awareness does not command immediate restraint, in consideration of their existence as a people and the continuation of their cultural and religious traditions, then the human rights of these peoples are not respected, and the "wilful blindness" (Canadian criminal law) or "depraved indifference" (US criminal law) is a clear proof of blatant racism, if nothing else.

Apart from the "special intent", the result of the chosen policies and activities may be equally genocidal in effect. This fact points to a lacuna in the law, not in the "intent" of specific states or legal persons. As Bullard has argued, there are always "other" motives for racist practices (Bullard 2001), and it is hard, even impossible, to be sure of the intent, especially when the decision is made by more than one specific individual, as is most often the case.

At any rate, the general principles and *jus cogens* norms are not part of binding agreements, and their explicit presence in declarations, *obiter dicta* and preambular sections of treaties indicates the main reason why radical changes are now required.

Both individual governments and multiple alliances (as well as specific multinational corporations) pursue their own interests, barely keeping within the law in most cases, and flaunting international law altogether when their only "punishment" will be the lack of approval from a powerless international community. As an example, consider the legal aspects of the so-called "war on terror"; for instance, the murder of Hamas member Mahmoud al-Mabhouh and the "extent to which basic precepts of international law have been torn up under the 'war on terror' " (O'Connor 2010). As far as the US government and its allies are concerned, extra-judicial executions and so-called targeted killings now constitute a legitimate state activity and do not warrant comment, let alone condemnation.

In contrast, Chaloka Beyani argues for the need to strengthen states, because "the protection of human rights is primarily a function of states" (Beyani 1999: 22). But, as we argued in the previous chapters, "democratic" states give primacy to their economic interest and to the interests of industry, as long as the latter supports them and their aims. Hence, the paragraph cited at the start of this section is problematic: cosmopolitanism does *not* require legitimacy from a world assembly, nor any form of "counting of heads". Whether arising from the Stoics, the specific version of the Roman philosopher/statesman Cicero or Immanuel Kant, cosmopolitanism depends on principles, not votes. Hence, desirable as a democratic state might be, the will of states is for the most part in direct conflict with cosmopolitanism and the rule of law based on fundamental principles and moral values. We shall return to this difficult topic in the final chapter of this work.

It will not be easy to move away from a positivist approach to international law, let alone world governance, given the current weakness of the UN and the generally one-sided approach of the SC. The ICJ should have "powers of judicial review" over the SC, but scholarly opinion is divided on this issue, and on the nature of the relation between the ICJ and the SC:

> If what is meant is an automatic constitutional process of review with compulsory effect, both the UN Charter and the International Court are silent in that respect (Lamb 1999: 363).

This difficulty will be one of the topics of the final chapter. Thus far, the obvious conclusion is that even the existence of democratic states and of eloquent and well-drafted constitutions is insufficient to achieve a just system of governance internationally. The power within the UN is too uneven and the political power is too heavily weighted in favour of the West.

But the problem is not, as some have argued, the lack of democratic states (as currently understood), or the universality of human rights promoted by the West (Baxi 1999: 12; Higgins 1963), which promote unfairness and racist practices, but the lack of implementation and enforcement of these rights within the present globalized world governance. One of the most egregious and ongoing cases of gross human rights violations is the situation of the Palestinian people, where the perpetrators are a democratic state, and their policies are planned with the support and assistance of a democracy "par excellence", with the complicity of most of the "civilized" nations in the world.

CHAPTER FIVE

THE RIGHT TO WATER: ISRAEL V. PALESTINE (A CASE STUDY)

Introduction

This chapter will consider how basic collective rights fare in relation to particularly severe ongoing problems in the Middle East: the situation of the Palestinian people facing the aggression of the state of Israel, combined with the support of the US and the weakness of the UN.

I have defined "basic collective human rights" as those rights that need a collective implantation based on a universal common good, also following Dwight Newman description of the same rights as "moral rights held by collectives" (Newman 2004: 128). It is important to note that, in general, the recent proliferation of individual human rights has not been followed by a comparable international focus on collective rights: even the Declaration on the Rights of Indigenous Peoples needed special UN support in order to counter the resistance of major Western states (especially Canada, Australia, New Zealand and the US). Other collective rights have been equally neglected.

This chapter discusses some of the few collective human rights that have been universally accepted: for instance, the right of peoples not to be colonized or enslaved, as well as the right of people to retain their own resources, in order to ensure their life and dignity. To lend further strength to my argument, the main focus will be an absolutely necessary human right: the right to water, which is even more essential than the right to food or any civil or political right (Dellapenna 2008; Chimni 2006).

The most obvious ongoing case today combines the inhumane treatment of a "colonized" or otherwise unfree people with the deprivation of the basic collective human right to water: the case of the Occupied Palestinian Territories (OPT).

The next section will briefly review the historical background of the formation of the state of Israel and of Palestine, against the background of the development of the UN. The latter's efforts to control and mitigate the ongoing harms to the Palestinians, as we shall see, run against

a solid "wall" of opposition on the part of the US and other Western powers, for the most part.

Self-Determination, State-Making and Collective Rights: Israel and Palestine

> Palestine was in 1914 an undivided part of the Ottoman Empire, without separate status. It was occupied by British troops in 1917 and came to be disposed of as part of a post-war settlement. The difficulty in achieving such a settlement was that by 1917 Britain had incurred conflicting obligations with respect to Palestine (Crawford 1999).

It is worthwhile to attempt a brief discussion of the complexity of the move from the right to self-determination of peoples (the topic of this section) to the actual creating of states, which is quite a different proposition. The history Crawford (1999) details is such an inextricable mixture of politics and law, arguments and counter-arguments, that it is indeed hard for a non-lawyer to follow the complex reasoning that has led to the present impasse.

Yet despite the procedural and legal complexities, it is encouraging to note that the peremptory norm regarding the "right to self-determination of peoples" permits one to understand that "in these respects at least, statehood was a normative concept in the international system and not merely a descriptive one" (Crawford 1999: 95).

In November 1917, Lord Balfour, speaking on behalf of the British War Cabinet, said:

> His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country ("The Balfour Declaration", British government statement of policy from Foreign Secretary Arthur James Balfour, 2 November 1917).

Lord Balfour's somewhat ambiguous statement was eventually to form part of the Mandate for Palestine: the Treaty of Sèvres of 1920 spoke in favour it as well (Crawford 1999: 98; by Article 97 of this document, Turkey agreed, and in 1923 Turkey ratified the Treaty of Lausanne). The question of Palestine was referred to the United Nations in 1947 (GAOR, 1st Special Session, 2 April), and the United Nations adopted Resolution 181(II), which included the division of Palestine into an

Arab and a Jewish State, united by economic concerns, and the international city of Jerusalem.

I consider the latter particularly relevant as the status of Jerusalem is a grave source of contention today. Anecdotally, I can personally attest to the success of such a move: in 1947 my birthplace of Trieste was declared as the Free Territory of Trieste (Crawford 1999: 123), and from then until its dissolution in 1954 represented a period of peace and security after the ongoing disputes between the (then) state of Yugoslavia under Tito, with great influence in the surrounding countryside and the Italian city of Trieste itself. That decision, like the one that should have been reached for Jerusalem, was dictated by numbers and residents' choice.

Decisions regarding Palestine's division were also reached according to population numbers and choice, but in May 1948 "Jews constituted about 42 per cent of the population of Palestine: they were allocated 56 per cent of the area, including the barren area of Negev" (Crawford 1999: 103, n. 39). Crawford examines most possible arguments for and against the creation of the state of Israel, and that wealth of detail cannot be reproduced here.

Several important points emerge: first, "Palestine in 1949 … constituted a self-determination unit in international law"; second, "the Palestine Mandate has been challenged on several grounds", especially as it "constituted a trust over the same territory, the beneficiaries of which were two distinct and predictably antagonistic peoples" (Crawford 1999: 104). Even without the ability to assess the legality of various positions and arguments in the moves and counter-moves Crawford reports, from the point of view of international equity, self-determination appears to be foundational, even if the principle of self-determination was not entrenched in law before 1948. Article 22 of the Covenant of the League of Nations (1919) states that "the well-being and development of such peoples [that is, the inhabitants of the territories concerned] form a sacred trust of civilization" (Crawford 1999: 105). And it seems clear that only the "Arab inhabitants of Palestine" would fit that description, not the "constructive inhabitants" (that is, presumably, immigrants). Another seemingly solid point is the fact that at the time of the ceasefire in 1948, although partly relying upon Resolution 181(II),

> Israel was not created pursuant either to an authoritative disposition of the territory, or to a valid and subsisting authorization (Crawford 1999: 103).

In addition, the territory claimed by Israel was "substantially greater" than the one decided by the "partition resolution", and it did not comply with the required "protection of minorities". As well, the situation of Jerusalem was not solved and no Arab state was created at the time:

> Thus Israel was created by the use of force, without the consent of any previous sovereign and without complying with any valid act of disposition (Crawford 1999).

But there are also a number of legal problems in the creation of the Palestinian state, despite the absence of any particular rule of law that would establish that designation (still, over 100 states had recognized Palestine by 1993; Crawford 1999: 114). At any rate, in 1988 General Assembly Resolution 43/177 was invoked in support of Palestine's statehood.

Clearly much more can and should be said regarding the legality of both Israel and Palestine, but many of the conditions that represent full statehood, especially for Palestine, are subject to continuous obstacles on the ground. However, J. Quigley notes:

> Whether or not Palestine is a state is not a question for Israel to decide. The determination turns on objective criteria, with recognition by states providing significant evidence as to whether these criteria are met … Applying these criteria, Palestine has a plausible claim to statehood because it controls territory, and has the capacity to engage in international relations (Quigley 1997: 724).

The closest to a *terra firma* in the multitude of arguments and counterarguments remains the peremptory norm Crawford cited at the outset—that is, the right to self-determination of peoples (Crawford 1999: 124). At least in that regard, as we shall see below, the United Nations has a strong record of specific collective human rights protection.

The Role of the United Nations and Collective Human Rights

The traditional approach to enforcement in international law has been state-centric (Meron 2006: 270). As Damrosch has written, "states are violators and states are victims of violations of international law" (Damrosch 1997: 2). The mechanisms for remedying such violations are exemplified by UN Charter provisions for ensuring international peace and security, which are similarly state-centric.

The role of the UN in the promotion of human rights is made particularly difficult by the fact that the "nations" that comprise it are not

often in agreement regarding that subject (Meron 2006: 473). The Charter of the UN, established for several purposes, one of which is the promotion of human rights, included few explicit clauses to that effect, other than the prohibition of discrimination (Meron 2006: 483). The earlier doctrine of non-intervention in the domestic affairs of states posed an obstacle to the promotion of human rights, although that emphasis has been undergoing a dramatic transformation (Meron 2006).

The United Nations mandate includes "the promotion of democracy, election monitoring and nation-building", as argued above (Meron 2006: 486). In fact, many regional instruments also see democracy as necessary to qualify a state to participate in regional state meetings, and the provisions demanded are the presence of "periodic elections with universal and equal suffrage" (Meron 2006; see for instance the Charter of the Organization of the American States, Art.2,§b; the 2001 Third Summit of the Americas in Quebec; the InterAmerican Democratic Charter of Lima, 2001, Article 1).

Even if we agree that representative democracy and periodic free elections with universal suffrage are necessary, we need to understand that such civil rights are not sufficient, as they do not specifically include clear principled positions, debate on the issues, nor, most often, the basic collective rights supported by the International Covenant on Economic, Social and Cultural Rights (ICESCR). One could argue that democracy and civil rights are better than the opposite, but the exclusive emphasis on these rights permits other violations to remain unobserved and free from condemnation, as long as the other, procedural conditions appear to have been fulfilled. The roots of the present difficulties and the actual limitations in the UN's promotion and defense of human rights may be found in the origin and early history of that body, which serves to explain much of what has followed, up to the present day.

The Influence of the Early History of the United Nations

> … in this organization a major role was to be given to the most powerful allies fighting against the Axis Powers, namely, the USA, the USSR, as well as Britain and France (which still had huge colonial empires), and China, which was to be associated with them. They were allotted the role of world policemen, responsible for enforcing peace (Cassese 2004: 317).

On the basis of this understanding, the "grand design" (Cassese 2004) of the UN was to include the elimination of the use of force to

resolve international disputes; a universal organization was to regulate "unilateral action" and "military and political alliances"; economic and social cooperation was to be promoted in order to avoid grave inequalities; colonial empires were to be eliminated in favour of the self-determination of peoples; and "free trade" and "world markets", the main goals of the "US neoliberal approach", were to be promoted (Cassese 2004: 317–318).

Although this laundry list of desiderata appears to be supportive of various aspects of collective human rights, some of the main points within it were to instigate many of the future problems of that organization. First among these is the predominance of the US within the structure, because of the unparalleled industrial and military power at the time, as well as the other "great powers" who still—rightly or wrongly—dominate the policies of the UN, starting with the veto power they can exercise within the Security Council (SC).

Particularly problematic was the resistance of the "great powers" to the restraint of law; that is, their refusal to subject disputes on the interpretation of the Charter to the jurisdiction of the ICJ (Cassese 2004: 320). But the US of Roosevelt and the 1945 Yalta meeting is not the US of today, nor is the role of international "policemen" appropriate at this time, if it ever was. The SC is highly selective in what it tolerates and what it condemns, and the domination of the "superpowers" (Cassese 2004: 323) is constantly in evidence.

As well as the specifics of the gross human rights violations of Darfur, the Democratic Republic of the Congo and Palestine, the question of what constitutes "self-defence" is also increasingly unclear. The use of force or aggression to settle interstate disputes was proscribed, but self-defense "was envisaged as an exception to this centralized collective security system" (Cassese 2004: 324). But the doctrine of "pre-emptive" military strikes was viewed by both the UN and the EU as inappropriate and dangerous, although the US and the UK attacked it for this reason in 2003, but without a formal appeal to that doctrine (Cassese 2004: 361).

Peace was and has continued to be viewed as the "supreme value" (note that Article 51 of the UN Charter only permits the use of force in response to an ongoing aggression; Cassese 2004: 362).[1] However, it seems that the UN has not been able to do well in its support of peace,

[1] Cassese suggests several ways to modify the prohibition while retaining the best part of its restraining powers (Cassese 2004: 362–363).

given the numerous internal and external conflicts that plague the world today. It is particularly galling that they are rooted—for the most part—in the recurrence of the "unilateral action" and "military and political alliances" that were intended to be replaced by peace and cooperation at the inception of the United Nations. Similarly, "indirect aggression" (meaning the support for insurgents, rather than a direct military attack), supported by the US, Israel and South Africa, appears to be proscribed by Article 51 as well (Cassese 2004: 365).

Nevertheless, the use of force to stop "atrocities" in another state, or gross violations of collective rights, should be legitimate "in respect to grave circumstance, namely: war crimes, genocide, and crimes against humanity". It may also be permitted for communities and peoples whose self-determination is forcibly denied (Cassese 2004: 374; and I will discuss this later in this chapter).

The other major "plan" supported by the UN has been successfully implemented to a much higher degree: the elimination of colonies. European countries have all lost their dependent peoples, although the results of decolonization have not been uniformly positive. One could view this uneven "success" as yet another result of the power structure underlying the UN. The SC included some colonizers, to be sure, but the most powerful—the US—not only had itself been "freed" from colonial status, but it did not claim dependent nations, with the exception of its native peoples. Hence the First Nations of Canada and the Native Peoples of the US are the main communities whose self-determination is not satisfactory today, for the most part.

In this regard, the UN's record is one of successful achievement of one of its main goals. Yet despite the strong emphasis on the promotion and protection of human rights, the main aspects of basic collective human rights are not faring well in the world today; industrialization and globalization, together with the promotion of economic "development", have proven to be not a panacea but an insidious and to some extent unrecognized threat to the UN program of affirmation of universal human rights, as has been the strong, imperialistic nationalism of Israel.

National Protection and Religious Beliefs: Israeli Policies and the Palestinians

> Every human being has a legitimate claim to respect for his fellow human beings and is in turn bound to respect every other. Humanity itself is a

> dignity; for a human being cannot be used merely as a means by any human being … but must always be used at the same time as an end (Kant 1797: 209).

Israel's rampant nationalism is based on a revisionist religious view of the history of the region, and on Biblical text. The region was colonized and held by many rulers, including the Roman emperors, but it is only the Biblical history that provides the Jews with their ultimate roots: the land is considered to be theirs, given to them by God; hence, no one else, no matter what their history or ethnicity, has the right to occupy that territory. The religious basis of their nationalism, is therefore not open to considerations of humanitarian or human rights law, nor is it open to moral considerations, nor to Kantian respect for human dignity, nor utilitarian concern for the consequences of policies that do not achieve the ostensible aims of self-protection and peace.

Nor are the policies they pursue conducive to the elimination of anti-Semitism. Despite the proposed identification of the Israeli policies with "being Jewish", not only most of the international community, but also many persons of Jewish origin within and outside the state of Israel are increasingly disenchanted with the present government's "party line". The Israeli standard response to all critiques of their policies is that they must be one and all based on anti-Semitic sentiments.

It is amazing to note how many people are cowed and embarrassed by such an illogical accusation. Having grown up in Mussolini's Italy, I am well aware of the strong anti-fascism that prevailed in Italy (and outside it) both during that period and after the termination of that regime. But no one ever suggested that anti-fascism corresponded to a general feeling of hate or disrespect for Italy and Italian people, let alone for their culture or their arts. Similarly, the growing distaste for Israeli policies and actions, especially for their disregard for all international law and for the specific mandates of the United Nations, does not reflect anti-Semitism any more than the earlier international movement against apartheid in South Africa reflected hate and disrespect for South African people.

The reality is that recent Israeli policies seem to manifest a decidedly un-Kantian belief that a strong, unshakeable trust in their own excellence, or the worth of their nation and its future, justify any means, legal or illegal, to achieve the aims of their nation. Thus, before discussing the status of collective rights in the recent war against Gaza, we need to understand what the situation of Palestine was before the war

and what prompted the ongoing token attacks against the occupying force.

It is common knowledge today that Israel led the war that turned Palestinians into a nation of refugees, in 1948. It is also only known that Israel did not respect the "Green Line" (i.e. the boundary set by the United Nations), and they continued to expand not only through natural population growth, but also through ongoing immigration. The United Nations has spoken clearly against this encroachment in occupied territories, as well as on the question of the illegal wall erected by Israel in the West Bank, which

> … has continued despite a ruling by the International Court of Justice (ICJ) that the Wall is illegal and Israel is obliged to cease the construction of the Wall and to dismantle it. Neither the Advisory Opinion of the Court on the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, rendered on 9 July 2004, nor the subsequent resolution of the General Assembly approving the advisory opinion (ED/10-15) have succeeded in curbing Israel's illegal actions (Dugard 2005).[2]

It is important to examine exactly what were the specific conclusions of the International Court of Justice in accepting and responding to the request for an Advisory Opinion. It is remarkable that the Summary of the Advisory Opinion of 9 July 2004 (regarding the Israeli-built wall) notes that

> There have been serious repercussions for agricultural production and increasing difficulties for the population concerned regarding access to health services, education establishments, and primary sources of water (Dugard 2005, "Relevant international humanitarian law and human rights instruments", paras 123–137).

Hence the erection of the wall and other provisions regarding the Occupied Palestinian Territory have led the Court to express the

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[2] In this chapter I rely heavily on a report of the Special Rapporteur of the Commission on Human Rights, John Dugard: *The Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, Report on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967, UN document E/CN.4/2005/29, 7 December 2004; and also on an *Addendum* to the same report, UN document E/CN.4/2005/29/Add.1, 5 March 2005. For convenience, I refer to the original report as Dugard (2004) and the addendum as Dugard (2005). I also refer to a later report by Dugard: *The Human Rights Situation in Palestine and Other Occupied Arab Territories: Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, John Dugard, UN Doc. A/HRC/7/17, 21 January 2008 (henceforth Dugard 2008).

opinion that the wall contributed to a number of breaches of international legal instruments, including:

> … articles of the 1907 Hague Regulations, the Fourth Geneva Convention, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the United Nations Convention on the Rights of the Child … it also refers to the obligations relating to guarantees of access to their Christian, Jewish and Islamic Holy Places (Dugard 2005).

Palestinian refugees escape an intolerable occupation and war situation, only to find themselves in an ongoing situation of violence that includes physical aggression, economic oppression and deprivation of basic rights (including the right to subsistence and the right to survival for themselves and for their families).

The first response of the international community is usually humanitarian relief, as the situation warrants it. But an overly speedy "movement from humanitarian aid to development assistance" (Martin et al 2005: 1472) is not desirable for Palestinian refugees who, despite flight, are still enmeshed in a situation where illegal aggression dominates. This aggression includes the imposition of indiscriminate punitive measures to civilians, and the erection of an illegal wall that divides Palestinian communities (such as those in Eastern Jerusalem, according to Dugard 2005), but that also separates Palestinians from fertile soils closer to the green line (hence to the subsistence to which they have a clear right in international law). These actions and situations imply that the war has not fully abated, as conflict and hostilities remain.

The conflict is not likely to abate in the near future, if one considers the remaining roadblocks to peace and a legal two-state solution. Dugard (2005) explains that the present reforms

> fail to address the principal institutions and instruments that violate human rights and humanitarian law in the Occupied Palestinian Territory—settlements, the Wall, checkpoints and roadblocks, the imprisonment of Gaza, and the continued incarceration of over 7000 Palestinians.

The presence of "closed zones" with only one gate "seriously curtail access to health services, education, basic consumer goods, food and water in the West Bank" (Dugard 2005). Setting up additional annexed territories ("annexation under the guise of security" in the words of Dugard 2004: 8) through the location of the illegal Wall

represents clear evidence of the Israeli plans regarding Palestine, plans that do not appear to include mutual respect between two sovereign states.

The laws regarding permits from Israeli military authorities for movement of Palestinian East Jerusalem residents towards Ramallah, where most of these people have "strong work, family and cultural links" (Dugard 2005: 10), is also representative of a brutally repressive regime, especially when one considers that those in East Jerusalem must choose between maintaining their cultural ties outside of the city or possibly losing their homes there, according to an "absentee property law" that would have enabled Israel to confiscate property in East Jerusalem without compensation, on the grounds that "the owner was not resident in Jerusalem" (Dugard 2005: 10). That law has been halted temporarily, but there is no guarantee that it will not be reinstated at a later time.

These refugees, therefore, often resemble war-zone civilians, rather than conventional refugees or internally displaced persons (IDPs). The international human rights laws that are breached daily are too numerous to list: as Dugard suggests, this is the time to ensure that the UN decisions be respected and implemented without delay. For the rest of the international community, "the time for appeasement has passed" (Dugard 2004).

The current disregard for the refugees' racial, economic, cultural and religious rights may be seen in a passage describing just some of the many such situations encountered by the UN Rapporteur, who

> met with a man in Anata who was compelled to watch a Caterpillar bulldozer destroy his land for the construction of the Wall, despite a Court injunction to stop construction; spoke with a family in Abu Dir whose hotel on the Jerusalem side of the wall had been seized by the IDF as a security outpost and witnessed the monstrous Wall around Rachel's Tomb, that has killed a once vibrant commercial neighbourhood of Bethlehem. Although Rachel's Tomb is a site holy to Jews, Muslims and Christians, it has effectively been closed to Muslims and Christians (Dugard 2005: 10).

The UN reports used here are already somewhat dated. As well, they appear cautiously hopeful about the possibility of change for the better. On 6 March 2008, Amnesty International UK, CARE International UK, CAFOD, Christian Aid, Médecins du Monde UK, OXFAM, Save The Children and Trócaire issued a new combined report, *The Gaza Strip: A Humanitarian Implosion* (Amnesty International UK et al.

2008). Their press release for the report summarizes key statistics on poverty, health and basic services:

Poverty
- 80% of families in Gaza currently rely on food aid compared to 63% in 2006. This amounts to approximately 1.1 million people.
- In 2007, households were spending approximately 62% of their total income on food compared with 37% in 2004.
- During the period of May–June 2007 alone, commodity prices for wheat flour, baby milk, and rice rose 34%, 30% and 20.5% respectively.
- During the period June–September 2007, the number of households in Gaza earning less than $1.2 per person per day soared from 55% to 70%.

Economic collapse
- In September 2000, some 24,000 Palestinians crossed out of Gaza everyday to work in Israel. Today that figure is zero.
- Unemployment in Gaza is close to 40 per cent in Gaza and is set to rise to 50 per cent.
- In the months before the blockade began around 250 trucks a day entered Gaza through Sufa with supplies, now it is only able to accommodate a maximum of 45 trucks a day. In most cases, this number is barely reached.
- 95% of Gaza's industrial operations are suspended due to the ban on imported raw materials and the block on exports.

Basic services
- 40–50 million litres of sewage continues to pour into the sea daily.
- As a result of fuel and electricity restrictions, hospitals are currently experiencing power cuts lasting for 8–12 hours a day. There is currently a 60–70 per cent shortage reported in the diesel required for hospital power generators.

Health
- 18.5% of patients seeking emergency treatment in hospitals outside Gaza in 2007 were refused permits to leave.
- The proportion of patients given permits to exit Gaza for medical care decreased from 89.3% in January 2007 to 64.3% in December 2007, an unprecedented low.
- During the period October–December 2007, WHO has confirmed the deaths of 20 patients, including 5 children (among people awaiting visas) ('Media briefing: Key Gaza statistics', press release for Amnesty International UK et al. 2008).

All in all, the situation of Palestinian refugees in the illegally occupied lands is worsening, not improving, and the occupation and the collective "punishment" of such communities as the approximately

1.5 million people inside the Gaza Strip are both illegal and immoral. The need for prompt intervention by the international community appears urgently needed. The unique position of Palestinians, refugees or IDPs seems to require a strong and novel approach, beyond the present attempts at "peace-building". Dugard puts it well:

> In the opinion of the Special Rapporteur negotiations should take place within a normative framework, with the guiding norms to be found in international law, particularly international humanitarian law and human rights law, the Advisory Opinion of the International Court of Justice, and Security Council Resolutions. Negotiations on issues such as boundaries, settlements, East Jerusalem, the return of refugees and the isolation of Gaza should be informed by such norms and not by political horse-trading (Dugard 2008: para 58).

"National Protection" and the Case of Operation Cast Lead

> The struggle for hegemony in the world is decided for Europe by the possession of Russian territory; it makes Europe the place in the world most secure from blockade … The Slavic people on the other hand, are not destined for their own life … the Russian Territory is our India and, just as the English rule India with a handful of people, so will we govern this our colonial territory. We will supply the Ukrainians with headscarves, glass chains as jewelry, and whatever else colonial people like. My goals are not immoderate; basically these are all areas where Germans (Germanen) were previously settled. The German Volk will grow into this territory (Hitler, 1941: 60–64).

The racist disregard for the rights of peoples is evident in the above passage, and Hitler articulated clearly this disregard: expansionist/imperialist goals are only sought where weak, impoverished or otherwise vulnerable people stand in the way. Although Hitler treated the Jewish people with unspeakable inhumanity (far beyond the "headscarves and glass chains" awaiting the Ukrainians), perhaps the final sentence of this paragraph offers the best and clearest response to the Israeli reliance on the Biblical King's statement to the effect that "he was taking no man's land, only taking back what had been before in the hands of the enemy".

The latter is a statement that could also have been uttered by Greek rulers regarding the *magna grecia* regions of Italy, by Phoenicians about Tuscany, or Germans about Lombardy, and so on. Essentially, "nationalism" can and does eventually end in imperialism, as the nation's growth dictates it (or did, when the practice was tolerated—even

encouraged—by European rulers, kings and queens). In current times, the economic imperialism of globalization bypasses the structures of the United Nations, while still permitting (and in fact fostering) unfair and often violent control of regions, peoples and resources. We will return to this issue below.

At any rate, Israel does not choose to trade with Palestine, as it would first have to recognize it as another state, an equal in the international community, something it is clearly not prepared to do (Neumann 2005; Dershowitz 2003). What Israel chooses to do is to eliminate Palestinians by constant expansion, by restrictive and harmful practices intended to reduce their population as much as possible, and by ruthlessly eliminating any chance Palestine might have of a dignified nation or an economy that would permit their survival.

The recent war on Gaza is an example of this approach. The facts of the recent Israeli war against Gaza are well known, and the detailed case study by Amnesty International is as thorough on all aspects of the issues involved as it is on the legal breaches it demonstrates:

> At 11:30 a.m. on 27 December 2008, without warning, Israeli forces began a devastating campaign on the Gaza strip codenamed Operation "Cast Lead". Its stated aim was to end rocket attacks into Israel by armed groups affiliated with Hamas and other Palestinian factions. By 18 January 2009, when unilateral ceasefires were announced by both Israel and Hamas, some 1,400 Palestinians had been killed, including some 300 children and hundreds of other unarmed civilians, and large areas of Gaza had been razed to the ground, leaving many thousands of homeless and the already dire economy in ruins (Amnesty International 2009a: 1).

Some of the most disturbing effects of this offensive are:

- The wanton destruction of civilians and civilian objects, violating the "principle of distinction", as international humanitarian law prohibits indiscriminate or disproportionate attacks, as well as "collective punishment".
- The shooting of women and children who posed no threat to Israeli soldiers, either at short range or with high-precision weaponry, whose operators "can see even small details of their target and even strike moving vehicles" (these weapons included US-made "hellfire missiles").
- The use of "highly incendiary substances", such as white phosphorus, which burns on contact and continues burning. These weapons should never be used in highly populated areas, yet they were repeatedly used by Israeli forces in the worst offensive against Palestinians to date.

Both these weapons and the tactics cited in the previous point were used throughout the operation, despite international protests.
- During the offensive, the Israelis obstructed access to medical care and humanitarian aid, and prevented ambulances and rescue teams from completing their work, impeding their progress and at times even attacking them directly.
- "Israel and Egypt kept Gaza's borders sealed through Operation Cast Lead, and its 1.5 million inhabitants could neither leave nor find a place in Gaza where their safety could be assured. Unlike in southern Israel, where the Israeli authorities have built bomb shelters to protect local residents from rocket attacks by Palestinian armed groups, in Gaza there are no bomb shelters and none can be built because Israel has long forbidden the entry of construction material into Gaza" (Amnesty International 2009a: 3).
- Throughout the war, several weeks prior to its start, and for several months after the ceasefire, no independent observers, international human rights monitors, journalists or humanitarian workers were allowed to enter Gaza.

In contrast, the rockets fired by Palestinians killed three civilians, injured dozens and also killed six Israeli soldiers; several civilian structures were also damaged by the rockets.

The breach of international human rights instruments was pervasive throughout the hostilities: homes and public buildings were destroyed with neither military necessity nor any other justification. Warning leaflets were dropped by Israeli planes prior to some attacks, but as civilians had no refuge to seek and were often shot when leaving their homes, the "warning" simply intensified the panic and terror, but served no useful purpose; the already fragile infrastructure and economy of Gaza was destroyed, as was whatever little remained of their once-thriving agriculture.

Israel's rationale that "militants" could be hiding anywhere in homes or other buildings was too generalized to provide a reasonable justification. International human rights law—including the "law of occupation", and well-entrenched rules of *jus ad bellum* (war was not officially declared, and reasonable attempts to seek peace were not done) and *jus in bello* (including safeguarding civilians, observing the rule against inflicting collective punishment, forced relocations and evictions, as well as disregard for the rights of medical personnel and UN officials and buildings) —shows that Operation Cast Lead ran the whole gamut of war crimes, crimes against humanity and breaches of all rules on the conduct of hostilities. From the standpoint of the topic of this work, the operation is an irrefutable example of violent, lawless and criminal

aspects of nationalist policies driven to extreme lengths and treated as absolutely primary, against all aspects of human rights.

"Water is a Human Right": International Law v. Policies of Denial

> The human right to water is indispensable for leading a life in human dignity (UN Committee on Economic, Social and Cultural Rights, General Comment No. 15, para 1).

There are at least three areas linking the right to water to basic collective human rights:

1. safe drinking water for personal and family use;
2. water for agriculture in local communities, in order to protect the right to food and one's own resources; and
3. the right to safe, efficient waste disposal.

In this section all these issues will be discussed, using information from another report of Amnesty International (2009b). There are also several legal and moral issues that emerge from the problem areas listed above. These include:

(a) the Oslo Accords, institutionalizing Israeli over-exploitation of shared resources and "unsafe water supplies";
(b) unequal access to water;
(c) the ongoing Israeli "military orders" regarding such resources;
(d) the practice of restricting access to water as a means of expulsion;
(e) the wall barring access to water;
(f) the ongoing growth in numbers of settlers, further limiting the availability of water; and
(g) malpractice affecting sewage/disposal facilities.

It would be easy to characterize all these problems and issues simply as the immoral effects of immoral practices; that is, of aggression, colonization, racial discrimination and apartheid. Nevertheless, moral condemnation alone is not likely to produce any lasting effects, although there is a growing international movement, primarily among academics and other professional persons, to boycott and penalize Israel by circulating petitions, organizing meetings and conferences, and attempting in all possible ways to bring these issues to the attention of the general public, but most of all to the attention of the international legal community of nations.

This is an important aspect of the thrust to restore justice and respect for human rights to the region. It is unfortunate that the leaders of most Western countries have less interest in listening to civil society than in cementing their economic and power alliances. The issues listed above will be discussed in turn below.

(a) *The Oslo Accords and their Consequences*

> Contrary to Palestinian expectations, the Oslo Accords did not result in greater access for Palestinians to the water resources of the OPT (Amnesty International 2009b: 21).

Israel argues that all issues related to water and sewage will only be settled "in permanent status negotiations" (Interim Agreement, Annex 3, Article 40(5)). Essentially, the Palestinian Authority (PA) acquired only "the responsibility for managing the supply of the insufficient quantity of water allocated for use by the Palestinian population", without acquiring the control of either quantity or mode of delivery of water. In fact, water is still extracted by Israel from the shared aquifer, then sold to the Palestinians (Cairo Agreement of May 4, 1994).

In addition, the Israeli authorities continue to monitor and control the amount of water extracted from Palestinian wells and springs in the West Bank while, under the Oslo Accords, the PA has no authority to drill wells or to implement projects related to water.

(b) *Unequal Access to Water According to the Oslo Accords*

> Crucially, these [water] rights were not defined and the inequitable division of the shared ground resources—the Mountain Aquifer—was maintained, with some 80 per cent allocated to Israel and just 20 per cent to the Palestinians (Amnesty International 2009b: 24).

This inequity must be understood against the background of the facts: the Palestinians' 20 per cent allocation of the Mountain Aquifer represents their only source of water, while Israel enjoys several other water sources, as well as restricting any other Palestinian options.[3]

[3] For example, the most productive locations for drilling wells are located on the lower flanks of the West Bank mountains, but restrictions imposed by the Israeli army have delayed or prevented the drilling of even those wells approved by the Joint Water Committee (JWC) under the Oslo Accords. Similarly, Israel has consistently refused to allow Palestinians to locate sewage treatment facilities and solid waste dumps in the only areas where there is land available for such facilities. These arrangements have curtailed or prevented Palestinian development, including the development of much-needed water and sanitation infrastructure.

Over 15 years after the Oslo Accords, both current and future needs allocations had not been finalized, because any final decision was to be tied to the final accord between Israel and Palestine, which has not been reached thus far. The over-extraction on the part of Israel renders any future just assessment nothing by an empty promise.

(c) *The Ongoing Israeli "Military Orders" and the Water Crisis in Gaza*

> The deterioration and breakdown of water and sanitation facilities in Gaza is compounding an already severe and protracted denial of human dignity in the Gaza Strip. At the heart of this crisis is a steep decline in standards of living for the people of Gaza, characterized by erosion of livelihoods, destruction and degradation of basic infrastructure, and a marked downturn in the delivery and quality of vital services in health, water, and sanitation (Gaylard 2009).

The only freshwater resource in Gaza, the Coastal Aquifer, is polluted by raw sewage and salination, and degraded by over-extraction. The toxic environment to which citizens are exposed results in the "blue babies" in the Gaza Strip (that is, babies suffering from methemoglobinemia, a blood condition that fosters anemia and results in their exhibiting "blueness around the mouth, hands and feet"). Eventually infants "express a marked lethargy, excessive salivation and loss of consciousness. Convulsions and death can occur when methemoglobin levels are extremely high".

Although the West Bank and Gaza comprise a single territory under the Oslo Accords (Israel–PLO Declaration of Principles, 1993, Article 4), there is no allowance for the transfer of water from the West Bank to Gaza, despite the dire situation in the Gaza Strip.

A further insurmountable problem is posed by the fact that any effort to dig wells by the Palestinians is blocked or unreasonably delayed by the necessity for permits from Israel for their construction. The UN Office for the Coordination of Humanitarian Affairs (OCHA) stated on 3 September 2009 that "equipment and supplies needed for the construction, maintenance and operation of water and sanitation facilities have been denied entry to Gaza". Against this background, it is important to note that the UN General Comment 15, on the "Right to Water" (2002), states that

> States … should refrain at all times from imposing embargoes or similar measures that prevent the supply of water, as well as goods and services essential for securing the right to water. Water should never be used as an instrument of political and economic pressure.

Yet it is commonplace to find water cisterns that were intended to collect and use rain water and wells destroyed by the Israeli army "for the lack of permit". Israel not only controls the quantity of water Palestinians may have but also monitors and enforces Palestinian compliance, whereas the PA has neither the means nor the power to control the amount of water Israel continues to extract anywhere, including the new Israeli settlements and "settlement outposts" (these are settlements established without official Israeli permission, but supported by army and government officials nevertheless).

Permits for Palestinian wells are "elusive"; some have been pending since 2000, and the Amnesty International (2009b) report lists a number of such stalled permits, refused or pending for a variety of reasons, including requests for alternate sites, especially when the site proposed is close to the wall. Similarly, sewage treatment plants encounter "never-ending delays".

(d) *Restricting Access to Water as Means to Expulsion*

> Israel has expropriated large areas of land in OPT by using an old Ottoman land law, which defined the miri class of ownership, under which most Palestinian agricultural land is held, by virtue of use: according to this law, miri land that had not been cultivated for three years could be auctioned off to villagers willing to cultivate it … Using this law, Israel has expropriated large areas of land which Palestinians are prevented from accessing and/or cannot cultivate because of lack of water, but which Israeli settlers can access and cultivate because they have access to ample water supplies (Amnesty International 2009b: 41).

In addition, water cisterns (collecting rain water) have been an important means of locating water supplies for both drinking and agricultural needs. When such cisterns run out of water, villagers are forced to rely on tanker-delivered water, which is becoming increasingly expensive because of Israeli army checkpoints that can increase travel time as much as tenfold. As a result of Israel destroying the cisterns and the high cost of securing water, Palestinians have had to spend as much as a quarter or even a third of their income on water.

The expansion of illegal Israeli settlements increase Palestinians' difficulties: the little water they have in cisterns is often deliberately soiled by Israelis. Aisha Hereni, a mother of five young children who lives in Tuwani, describes her situation thus:

> … we need water for drinking, for cooking, for our personal hygiene, to wash the clothes, to clean the house, and for the goats. We save every

> drop but it's never enough. It is a daily struggle. And in addition, with the little water we have, we are constantly worried about Israeli settlers soiling the cisterns; it has happened many times. They have thrown soiled diapers, dead chickens and all sorts of garbage into our water cisterns. Also, many times we cannot get water from our cisterns because when we go to them to get water the settlers or the soldiers come and make problems for us (Amnesty International 2009b: 52).

The Israeli army also confiscates water tankers and destroys homes, as well as the tractor and trailer a community used to fetch water. Some of these "raids" are conducted in the hottest times of the year. The villagers must eventually pay hefty fines for retrieving their property.

Most villagers survive on "no more than 20 litres of water per person per day", compared to the minimum of 100 litres recommended by the WHO. The regular destruction of agricultural water cisterns and orchards on the part of Israeli soldiers aggravates the problem:

> Bulldozers had been used to churn up the land, the fencing around the fields had been torn down, and even old live trees, planted many years before, had been uprooted and crushed. It was a scene of devastation (Amnesty International 2009b: 48).

While these attacks occur, nearby Israeli settlements not only have running water but also enjoy swimming pools, and even fish farms (using water from a local spring).

(e) *The Wall Barring Access to Water*

The illegal 700 km wall/fence has been under construction since 2002. Its route has been planned in such a way that it prevents access of Palestinians to areas of the West Bank that include some of the best access to water, notably the Western Aquifer. Some of the other problems arising from the illegal wall, include the following:

- Farmers with land on the other side from the wall need special permits to water their crops. These permits routinely take months to obtain with no regard for the seasons and the crucial needs of Palestinians.
- The operation and maintenance of wells has become increasingly challenging, because of permits and other restrictions, such as those on allowing spare parts across the walls.
- A 2004 Application for a permit to build pipelines under the wall to bring water to Palestinians was approved only "conditionally" in 2005. In 2006, the Supreme Court requested a change to the wall's route; eventually, in 2009, Israel moved only a fraction of the wall (given that, as it stood, it enclosed a large amount of land around an Israeli settlement), so that "half of the village land and all the village

> wells remain on the far side of the fence/wall and most villagers are unable to obtain permits to access them" (Amnesty International 2009b: 56).

Other examples could be given, and many more issues cited, but the general tone and the obviously discriminatory treatment meted out to the Palestinians cannot be ignored and we will return to this topic in the conclusion.

(f) *Ongoing Growth of Settlements and Movement Restrictions*

> In addition to the fence/wall more than 500 military checkpoints, barriers and obstacles of various kinds—most commonly cement blocks, earth mounds and gates—block access to roads for Palestinians throughout the West Bank (Amnesty International 2009b: 59).

Because of the many blocked roads, water tankers, as mentioned above, have to travel longer over unimproved roads as the better roads are restricted, so that the cost of water to Palestinian families becomes exorbitant. In September 2009, Israeli armed forces set up roadblocks to stop a convoy including Israeli, Palestinian and international peace activists who were attempting to deliver water to various villages in the area. Eventually the activists were able to deliver the water, but only after a long delay.

Another village located between two Israeli settlements (Eli and Shilo) did not fare well. Despite the fact that the villagers had secured funding from the government of Finland in 2006, they were unable to secure the permit to enable them to complete the work. The Israeli settlers eventually set fire to the land belonging to the Palestinian village as well.

In fact, one of the major aggravating factors, is the increasing occurrence of attacks by Israeli settlers:

> Indeed, settler attacks on Palestinians or their property have often been perpetrated in the presence or with the knowledge or tacit consent of Israeli soldiers, and in some cases, with their active participation. Even when physical injuries or deaths have occurred, settler attacks have usually gone unpunished (Amnesty International 2009b: 70).

Reporting settlers' abuse and attacks results in no redress; it only exposes Palestinians to possible retaliation. Even human rights activists (including delegates of Amnesty International) have been assaulted.

Amnesty International also collected samples around the main water reservoir in the Tuwani villagers' fields and those of two other

Palestinian villages nearby. These samples were found to contain 2-fluoacetamide, banned in Israel and most other countries, as well as brodifacoum, "an anti-coagulant used for killing rodents". Sheep and other animals died from the water in the reservoir.

The UN Committee on Economic, Social and Cultural Rights, General Comment No.15, para 44(b), however, states:

> Violations of the obligation to protect follow from the failure of a state to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to water by third parties. This includes, *inter alia*: (i) failure to enact or enforce laws to prevent the contamination and inequitable extraction of water; (ii) failure to effectively regulate and control water services providers; (iv) [sic] failure to protect water distributions systems (e.g. piped networks and wells) from interference, damage or destruction. […]

(g) *Malpractice Affecting Sewage and Disposal Facilities*

> For years studies have found nitrate levels well above those deemed acceptable by the WHO, as well as coliform bacteria in the groundwater in several parts of the OPT, indicating contamination from untreated sewage and fertilizers (Amnesty International 2009b: 76).

It is these conditions that provoked outbreaks of several diseases (mostly among children), including diarrhea and other water-borne diseases, especially in Gaza. The Palestinian Water Authority (PWA) has also failed to set up the appropriate infrastructure for the treatment of sewage for their West Bank population. But Israel is even more at fault because of the neglect of various areas under their control, including the Jordan River, which now is only a contaminated trickle of mud in some places.

In fact, most of the pollution of the Mountain Aquifer and Jordan River predates the establishment of the PA in 1996. In addition, more than 200 unlawful Israeli settlements and "outposts" in the West Bank discharge large quantities of untreated industrial waste and domestic sewage in the fields and streams of the area. For several decades, Israel has placed industrial waste and other hazardous substances in the OPT in unlined dumping sites; even when these sites are no longer in use, there has been no effort on Israel's part to clean and restore these locations in order to render them safe.

The refusal of Israel to grant permits and the imposing of unreasonable conditions (such as the request that Palestinian projects should also connect unlawful Israeli settlements to proposed water treatment

facilities) has further exacerbated the situation. For their part, the lack of appropriate action on the part of the PA and the PWA can be partially blamed on the fact that "the 450,000 Israeli settlers in the West Bank—including East Jerusalem—produce almost as much waste water as the almost 2.5 million Palestinian residents" (Amnesty International 2009b: 80).

This brief overview of only some of the worse water-related problems faced by Palestine cannot begin to do justice to the wealth of detail, including first-person accounts of the situation, contained in the Amnesty International report on which this section draws heavily (Amnesty International 2009b). This report should be read carefully in its entirety.

The aim of this chapter is to relate some representative examples of the factual consequences of the illegalities on the ground. These examples bear witness to the knowledge and intent aspects in evidence in all related Israeli activities. This aspect of the inhumane conditions imposed upon Palestinians must be considered and emphasized (as it is normally in the consideration of any illegal act, in any legal regime, and in any region of the world). Thus it is not only *what* happens, but also *why* it happens that truly defines the gravity of the situation, as will emerge as we turn to international law as applicable to these issues.

International Law in Palestine and the Implications of the Right to Water

> The Israeli government stands alone in contending that the international human rights treaties it has ratified and the Fourth Geneva Convention to which it is a party, do not apply to the OPT (Amnesty International 2009b: 75; see also the Concluding Observations of the Committee on Economic Social and Cultural Rights, UN Doc.E/C.12/1/Add.90, paras. 15 and 31; and also the Advisory Opinion of the International Court of Justice on Legal Consequences of the Construction of a Wall in the Occupied Territory of Palestine, para.112).

The most obviously applicable document to the issue under consideration is the General Comment No. 15 (UN Committee on Economic, Social and Cultural Rights 2003), as well as Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and that document has been cited throughout previous sections. But the breaches of international human rights and humanitarian law are far more extensive.

Right at the start, UN General Assembly Resolution 181 of 29 November 1947, ordering the partition of the Mandate of Palestine and the establishment of the State of Israel, provides for "access for both States and for the city of Jerusalem on a non-discriminatory basis to water and power facilities" (4.D.2.e).

The Amnesty International (2009b) report on the water situation proposes the following international legal instruments as relevant to the water issues affecting the Palestinian population: International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination, the UN Convention on the Rights of the Child (CRC), and the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Still within the realms of applicable instruments, I would like to add the ILO Convention No.169 (1989) and the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (Commission on Human Rights, Resolution 2002); also the UN Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987); the 1967 Protocol Relating to the Status of Refugees (UN Doc. HCR/IP/Eng.Rev.1); the 1951 Convention on the Status of Refugees (CSR; 189 UNTS 150, into force April 1854); the UN Declaration on the Rights of Indigenous Peoples (2007); and finally, and perhaps most controversially, the Convention on the Prevention and Punishment of the Crime of Genocide (78 UNTS 277, into force 12 January 1951).

In order to apply the additional instruments I propose, we need to recall not only the events reported by Amnesty International but also the circumstances in which they occurred. Thus, for instance, not only the presence of contaminated water in several villages, but the deliberate befouling of the water on the part of illegal Israeli settlers; or not only the construction of an illegal wall, but the placing of the wall in such a way as to separate Palestinians from water and/or the farming land necessary for their survival.

All these events represent the imposition of "inhuman, degrading treatment", but they also indicate the practice of apartheid and (more generally) of discrimination in their approach to Palestinians. The Declaration of the Rights of Indigenous Peoples, as well as the ILO Convention No. 169, mandate that the resources of Indigenous and local communities may not be taken by others, but must be reserved for their sole use. Any activity or project that separates such

communities from their water or other resources for whatever reason must therefore be considered illegal.

Similarly, the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, a responsibility of the occupying power to ensure the human and respectful treatment of refugees (particularly of the most vulnerable among them, that is, the children), cannot be ignored as we attempt to assess the specific illegality of the treatment of the Palestinian people. However, before turning to the final aspect of their plight and the instrument I have proposed as most appropriate to judge the actions of the Israelis—that is, the assessment of the policies that affect them as genocidal—we need to consider whether clear knowledge of the conditions on the ground was (and is) available to the Israeli government officials and the military.

It seems clear that the consequences of Israeli policies are well known to those who originate such policies; it seems reasonable to add that the results that ensue are deliberately planned. Before turning to this specific aspect of the "rule of law" that is applicable to the case of Palestine, it might be useful to place this particular case in the general context of the present and ongoing geo-politics.

The Politics of "Plunder"

> The construction of a neocolonial scheme is quite simple: rather than warships and an openly discriminatory legal system, it is the mirage of efficiency (Mattei and Nader 2008: 25).

When we consider the information provided by the media in the recent past (and even before that) regarding Palestine, it is easy to see that this basic description of the neoliberal, globalizing project does not truly represent the whole motivation of the Israeli activities, although it comes quite close to a faithful description of the intent of their strongest ally, the US. But before we venture further along this route, we should understand the basic meaning of "plunder" in this context. Mattei and Nader cite the *American Heritage Dictionary*'s definition:

> to rob of goods by force, especially in times of war; "pillage", and "plunder" (the noun) a "property stolen by fraud or force" (Mattei and Nader 2008: 11).

The removal of others' property "by fraud or force" fits well the project of Western hegemony, especially if we include in "fraud" public misinformation campaigns and the deliberate promotion of national

interests as attempts to implement the "public good". But economic activity, even such that it might defraud the Palestinians to promote Israel's interest, is by no means the whole story of their motivation, nor even the greatest part of it.

In addition, while I concur fully with Mattei and Nader's evaluation of neoliberalism, the subtitle of their work ("when the rule of law is illegal") goes further than I would; it describes well the neoliberal policies, the promotion of the market and the "self-enforcing" logic of the World Trade Organization (WTO), and strong economic and political retaliation that meets any attempt to "close the market", but it ignores counter-forces present in international *erga omnes* obligations and existence of *jus cogens* norms (Mattei and Nader 2008: 50).

The authors correctly note the "highly simplistic but highly interventionist legal formulations" that lead to the constitutionalization of the neoliberal order by claiming "sovereignty over local politics" (Mattei and Nader 2008: 51). Thus, by privileging the market over local needs, Western powers impose the preference of Western financial institutions and Western multinational bodies over the needs and choices of local (poorer) populations. They do so, Mattei and Nader explain, by promoting the intrusion into the governance of weaker local communities, using the law itself to support the plunder, through "structural adjustment programs" and the thrust to "comprehensive development" (Mattei and Nader 2008: 53).

> Neoliberalism is thus an aggregate of social, political, economic, legal and ideological practices, carried out by a variety of actors that respond to what we consider the formidable logic of plunder. The reduction of the public sphere, and the large extension of the private sector, to the exclusive advantage of the stronger, and the corporate actors, is the thrust of such policy (Mattei and Nader 2008).

Yet despite the accuracy of most aspects of this position (and the accurate recognition of the superiority of the WTO, for instance), there are some components of the international law regimes (such as natural law principles, principles of justice and of moral fairness) that are resistant to the overwhelming wave of neoliberalism that we face today. These universal principles are strongly opposed to neoliberalism, and they are upheld by many and diverse legal scholars, philosophers, economists and political scientists. Legal scholars such as Hersch Lauterpacht, Richard Falk, Margot Salomon, Maurizio Ragazzi, Dwight Newman, Upendra Baxi and Christian Tomuschat, for instance; philosophers

and political scientists such as Will Kymlicka, Arne Naess and Richard Westra; or economists such as Herman Daly and William Rees, to name but a few; all clearly see and indict the present global situation, and defend principles and policies in direct conflict with the "rule of plunder" Mattei and Nader describe (examples include Salomon 2007; Ragazzi 1998; Newman 2004; Baxi 1999; Westra, R. 2009; Kymlicka 1999).

It would be naïve to say that these forces can prevail, let alone that they surely will, any more than it would be impossible to predict that the worldwide protests we have seen since Seattle in 1999 will make a difference, other than to render meetings of the G8 a travesty:

> beginning in Seattle in 1999 … there have been no meetings of the so-called "free world" leaders … that did not happen behind an iron curtain of police aimed at excluding participation, silencing opposition, and repressing protests (Mattei and Nader 2008: 52).

But it is worthy of note that whole legal school programs numerous scholarly writings today defend the "legal" rule of law and strongly oppose the neoliberal paradigm. Yet despite the hope that such legal scholarship and related jurisprudence will prevail and effect changes, it is important to understand the plunder of Palestine's resources, including water, against this very background, as it represents the basis of the US imperialistic policies in the region.

Hence, the touted "biblical" precedent of Israel's territorial policies, its insistence on the religious/cultural aspects of its motivation, and its discriminatory and criminal actions and policies are all based on the support of many consecutive US administrations, and they exist and continue to operate with the same hegemonic or imperialistic purpose as Israel's main supporter, the US.

However, their explicit rejection of the universal principles of law, the opinions of the international community and the resolutions and decisions of the UN clearly separate Israel from other market-oriented "democracies" whose main reason for oppression and discrimination are purely economic. These other states at least attempt to push their agenda within the limits of at least some of the existing legal infrastructures.

The situation of Palestine combines a deceptive respect for the "democracy" of Israel, the characterization of the victims as "terrorists" (despite the democratic elections that brought Hamas to power) and the general attempts to whitewash Israeli aggression as "self-defense": all

aspects of the "plunder" Mattei and Nader describe. What this analysis leaves out is perhaps the most important aspect of the situation: Israel's belief in the historical basis of their claims in the Bible itself; thus their belief in their absolute rights, no matter what the moral and legal rights of the existing local populations.

In that case, the plunder or appropriation of Palestinian resources is not an aspect of the quest for trade advantage or for the economic benefits such trade would bring. Trading with a country or a people requires that the latter be treated with a modicum of respect. But this is not the case in Palestine, as we saw: the "normal" quest for free markets and profits is replaced by a far more sinister aim: the elimination of the Palestinians as competitors for the position of legitimate occupiers of their own age-old territory. In addition, the goal seems to be the elimination of the individuals living there. But the deliberate intent to eliminate a people, as a whole or in part, corresponds to the definition of what William Schabas terms "the crime of crimes", genocide (Schabas 2000). That will be the topic of the next section.

Genocide or Crimes Against Humanity?

> International crimes derive mainly from international criminal law and sometimes treaties … Genocide, however, encapsulated in the Genocide Convention of 1948, has remained textually static and excruciatingly slowly ratified over the next 50 years, though interpretively somewhat fluid. Unlike national criminal codes, international crimes do not lend themselves so easily to periodic re-examination and codification under the goal of establishing an integrated body of law (Wald 2007: 621).

The Genocide Convention of 1948 defined that crime as requiring "an intent to destroy in whole or in part a religious, racial, national or ethnic group as such". However, it is arguable that to cause the destruction of a community "in whole or in part" through wilful blindness, recklessness or negligence, or as the crime defined in US law as "depraved indifference" (Corpus Juris Secondum, 2008), should not define a lower level of offence, one that might merit less disapprobation or punishment. Deliberate hatred sees the "other" as hateful, but as existing and real. The mental element and the act of the crime of genocide, taken together, are viewed as the grave act. But, in some sense, the cruel and inhumane indifference to their plight considers racial or ethnic groups as simply "in the way" of a proposed plan or project; as a faceless and correspondingly invisible obstacle.

Ratner's Approach: Comparing "Evils"

> The [Genocide] Convention was the first treaty since those of slavery and the "white slave traffic" to criminalize peacetime actions by a government against its citizens. Since that time, customary international law has recognized the decoupling of crimes against humanity from wartime (Ratner 2007).

In his timely discussion of this problem, Ratner observes that the general public views genocide as the worse crime in comparison with crimes against humanity, and that in response to this public perception governments prefer not to speak of genocide since they are aware that there will be an outcry for the punishment of that crime once its presence is acknowledged. However, not all legal scholars and philosophers embrace that view.

William Schabas (2000) applies carefully the definition of genocide, with its emphasis on the *dolus specialis* (the special intent that characterizes the crime), so that it will be applicable only to a "small set of atrocities" (Ratner 2007: 584; Schabas 2000: 80–90). The *ad hoc* tribunals such as the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia take a similarly uncompromising position (Prosecutor v. Akayesu, 1998; Prosecutor v. Jelisic 1999).

Ratner suggests that, because of the position taken by the *ad hoc* tribunals (that is, that the intent requirement can also include the will to destroy "groups" who are "perceived as such" by the perpetrator(s) of the crime), this is an additional understanding beyond the sense of "groups" as understood in a general sense.

Hence, David Luban argues that the definition of genocide should also include the crime against humanity of "extermination", in order to render the crime's definition closer to our present understanding (Luban 2006: 303; Ratner 2007: 585). The crime of "extermination", however, is not based upon a special intent; thus it would seem as though the incorporation of this change to the Genocide Convention would represent an excellent "step forward" from our standpoint, especially when the perpetrators, as well as the victims, represent groups where individual intent might be less than clear-cut. In addition, the perception of a community as a group to be exterminated may not be obvious to an outsider.

Finally, Ratner lists, but is not prepared to consider, yet another possibility: the position that "all evil acts against civilians are genocide". He says:

> Under this view, genocide means many acts beyond physical extermination, such as the destruction of culture and environmental degradation. I will not discuss this position further because the view moves genocide too far about its core, which is -cide, from the Latin *caedere*, "to cut (down), strike, beat … to kill" (Ratner 2007: 585).

Ratner's explanation for the rejection of this option is flawed. While "to kill" obviously envisions the possibility of exposing a population to harmful activities that will (or may?) result in death, neither "cutting down" nor "striking" is necessarily an act that results in death. Nevertheless, some environmental degradations or exposure to industrial toxins may kill slowly, yet just as inexorably as a gun or a bomb. One is reminded of the classic Agatha Christie mysteries, where poison is administered a little at a time to the intended victim, but it results in murder nevertheless. Indeed, Ratner's position does not reflect the current understanding of the effects of "ecocide", a term used by Ken Saro-Wiwa in his 1994 Right Livelihood Award acceptance speech, referring to conditions in his country, Ogoniland, following Royal Dutch Shell's operations in the area (Westra 2007, Appendix 2). Because of the oil extraction operations, the whole area of Ogoniland in Nigeria became so polluted that the local population could no longer survive, as neither agriculture nor fisheries could take place. Eventually Saro-Wiwa referred to the results of those extractive operations as producing "omnicide".

The most telling evidence that an understanding of genocide must involve intentional killing, but without any specific time-frame, is that the example that prompted the drafting of the Genocide Convention itself also involved a definite time lag between the initial intentional acts leading to the killing and the killing itself. During the Nazi regime, Jewish people, Roma people and many others were picked up and put on trains that took them to concentration camps. It might have been a matter of weeks or months before they were actually killed. Hence, there was no requirement that the persecuted people had to die immediately after they had been targeted: the time element was therefore *not* an integral aspect of the crime of genocide.

When the victimized community is a "people", distinct from the society in the country where they reside, their forced displacement from their traditional territories represents a form of "cultural genocide", or in other words their elimination as a "people". This occurs regularly when climate change or other hazardous conditions force the exodus of whole communities (or, in the case of partial groups of the

community, require them to seek asylum elsewhere, perhaps as IDPs). Those who might remain, because unable or unwilling to leave, may *also* be incapable of functioning as a "people" as they did before their climate was changed or their land was exposed to hazardous effluents. This situation applies to all land-based minorities. Hence, while Ratner is correct in assuming that there is no jurisprudence at this time to support the extension of "genocide" to ecological and cultural categories, one ought not to dismiss too hastily the possibility that a revision of that original definition (now 60 years old), or at least the addition of "extermination" to it, would render it more flexible, and perhaps even able to accommodate present-day mass atrocities.

Crimes Against Humanity Reconsidered

As long as definitional changes are not even envisaged for the Genocide Convention, the category of crimes against humanity appears to be the best category to fit what is happening to thousands of people who form the mass of today's refugees.

Patricia Wald notes that the Rome Statute of the International Criminal Court "includes murder, extermination, deportation (all derived from Nuremberg), but also forcible transfer of population (internal to a country)" (Wald 2007: 625). Other "inhumane acts of a similar character" include "persecution", but also "apartheid" and "acts intentionally causing great suffering or serious injury to body or mental health". Reference to intent is present, but the intentionality aspect does not seem to be necessary, either logically or morally, because:

> As a *jus cogens* crime, crimes against humanity carry an obligation on the part of states to prosecute or extradite perpetrators found within their borders, regardless of where the crime was committed, or who the immediate victims were (Wald 2007: 624; see also Bassiouni 1998: 201–202).

Not all *jus cogens* norms have a *mens rea* requirement, and the crime of persecution needs to be re-examined as reaching beyond "the territory of the former Yugoslavia", as Wald recognizes:

> Because of its breadth of coverage, crimes against humanity had become the growth stock of Tribunal jurisprudence. Except for the ICTY [International Criminal Tribunal for the former Yugoslavia], crimes against humanity no longer requires any nexus with armed conflict, it encompasses discriminatory acts against a much wider range of groups than genocide, and many more kinds of acts than the five listed in the

> Genocide Convention and charters, and it carries with it still a heavier component of international shame than war crimes (Wald 2007: 625–626).

Conclusion

It would be easier to reach a conclusion if one were to include Operation Cast Lead and the military activities of the last several years, culminating in Israel's attack on Gaza. But what can be said about the water situation, if we just consider the living conditions that follow upon the military invasion, but not the conduct of the war itself? We have noted several international legal instruments that have been ignored or contravened by the ongoing activities of Israel, aside from the latest war itself.

It is equally clear that the UN is not prepared to act in defense of the Palestinians simply on the grounds that appear to be so obvious to the media and to most people in the international community, if we follow all the protests and demonstrations that occur on a regular basis in most Western countries. In contrast, the very composition of the UN Security Council militates against the possibility of an unbiased, even-handed approach to the situation, given the tentative, half-hearted condemnation of Israeli policies on the part of present (and previous) US administrations.

For that reason, it seems that the only possible way forward—the only approach that might force an appropriate reaction on the part of the UN and the European Union, at least—would be to better understand the level of the ongoing human rights violations. The several attacks on the Palestinians' rights to life, to health, to family life, to their own resources, to freedom of movement, may be considered separately, each as one breach of their basic human rights, but they never succeed to raise the whole situation to the level of grave crime that it merits.

Each "ingredient" of the whole contributes to a detailed picture of inhuman living conditions and deprivations for each individual, man, woman and child. In addition, the whole community is under attack: their rights as a "people" are equally affected. But when each component of their situation is viewed as part of a whole that appears to be deliberately and carefully planned, at that point the situation can be viewed from a more comprehensible perspective.

The questions that need to be asked include:

1. What is the end result of the several breaches of human rights to which the Palestinians are exposed?
2. Is there an element of coherence among the various human rights breaches we have seen enumerated by the Amnesty International (2009a,b) reports?
3. What are the ultimate aims of the Israeli government, and are such aims fostered and supported by their treatment of the Palestinians?

And finally, most importantly:

4. Is it possible that a well-organized, democratic nation with strong supporters in the international community would enact policies and initiate projects without a fully articulated understanding of the eventual results of its actions and policies?

I believe that the answers to all four questions are clear and unavoidable. Such answers ought to provide the basis required for a better understanding of the reasons why the international community as a whole, and the world's nations singly and collectively, should not only have the option to intervene, but have the actual obligation to do so, or be complicit in the ongoing harms.

The first question considers what the human rights violations we have recorded and discussed have actually led to. It seems clear that, minimally, and particularly with regard to water, they have made life in Palestine extremely difficult. They have made it almost impossible for Palestinians to earn a living wage, to ensure the education of their children and to maintain a reasonable standard of health. Their right to family life has been equally impaired, as the wall that separates Palestinian villagers from their water sources and from the cultivation of their fields also separates them from other family members and friends.

These circumstances do not support the existence of Palestinians as trading partners and neighbours, as even "plunder" requires an area and population with some desirable resources. Moreover, these same conditions are not conducive to help to develop another functioning state beyond the borders of Israel. The only result is the increasing destruction of the Palestinian state and infrastructure, coupled with the ongoing elimination of individuals and communities.

This result (to address the second question above) is the effect of the coherent human rights violations detailed by Amnesty International, some examples of which have been discussed. It bears repeating: it is the way each violation "works" together with the others that represents the most important aspect of the Palestinian case. Similarly, one may recall that in South Africa people of colour were treated as second-class citizens in many different ways, from restrictions on their freedom of movement to the kind of employment they could seek and the kind of housing they could occupy. One by one these forms of discriminatory treatment may have been highly undesirable and unfair. But when they were all combined and viewed as integral aspects of *one* policy, their treatment was acknowledged as apartheid, a crime against humanity that is explicitly proscribed by international law, although each single component of that treatment did not rise to that high level.

The next question (3) raises the issue of what the ultimate aims of the Israeli government are, as these emerge from their treatment of the Palestinians and all their other activities. The Israeli government seeks to expand its territory, as much as possible, through the presence of ever-increasing illegal settlements and "settlement outposts", well beyond the original "Green Line". By playing and replaying the "anti-Semitism" card, they continue to practice their racist, discriminatory and illegal policies, which amount, at the very least, to a clear form of apartheid.

However, even this designation is too generous as a description of the treatment meted out to the Palestinians: white people in South Africa still wanted to use other Africans in some way, even if simply as labourers or household workers. To my knowledge, there was no deliberate attempt to eliminate all people of colour, thus leaving white settlers without a labour force upon which they depended.

The fourth question addresses the issue of knowledge and intent. First, the Israelis are familiar with their own history, notably including the Holocaust. Thus, there is no possibility that Israel would not be fully aware of what constitutes the practice of racial discrimination. In fact, the policies of systematic exclusion and maltreatment, much of which they suffered in Germany and elsewhere, are clearly reproduced against the Palestinians now. Second, a "democratic" country, which is part of the community of nations, must be not only fully aware of the impact of its own practices and their results, but also be fully organized to implement its goals in the most efficient manner possible.

Even worse, Israel enjoys the financial support of many nations, and its military power is supported by the US and others. These countries are therefore complicit with Israeli policies and choices, and that is another topic well worth researching, while it cannot be fully explored at this time.

What emerges, then, is that Israel wants more than just to subdue the Palestinians and take their resources; uprooting old olive trees and bulldozing fields and homes result in weakening and demoralizing Palestinian citizens, while denying them the most basic human rights. This does not constitute treating people simply as second-class citizens under apartheid; clear knowledge of the effects of their policies, even beyond the probability of claiming "negligence" or "wilful blindness", raises the totality of basic human rights violations at least to the level of crimes against humanity. Finally, the presence of deliberate intent, which appears undeniable, raises the actions and the motives of Israel to an even higher (criminal) level: in fact, to the level of genocidal intent. The language of the Genocide Convention discussed above appears to fit well.

In conclusion, the government of Israel should be indicted at The Hague in the International Court of Justice. This is not just an option, if the UN is to retain the respect due its status, and if the regime of international legal instruments is to be viewed as law. Because of the ongoing breaches of *jus cogens* norms, halting and redressing the situation of the Palestinians becomes everybody's obligation, and no country should allow sympathy for past history or friendship with such a government to obscure their own clear and non-derogable obligations.

CHAPTER SIX

THE UNITED NATIONS AND INTERNATIONAL LAW: IS WORLD GOVERNANCE THE WAY FORWARD?

Introduction: Globalization and Legal Violence—A Review of Some Problems

> If the daunting challenges now facing the world are to be overcome, it must be in important part through the medium of rules, internationally agreed, internationally implemented and, if necessary, internationally enforced. That is what the rule of law requires in the international order (Bingham 2010: 128–129).

In stark contrast with some of the arguments of the earlier chapters, here the "rule of law" is presented as the only medium capable of solving the grave problems we face. Stephen Hockman cites Lord Bingham's strongly held belief in international law's power, while at the same time advocating institutional reforms for the present organizations and legal regimes (Hockman 2010: 2). For instance, he cites the recent request (before the December 2009 COP15 meeting in Copenhagen) by Chancellor Merkel of Germany and President Sarkozy of France to the UN, calling for "an overhaul of environmental governance" and for the "creation of a World Environment Organization (WEO)". As well, Achim Steiner, Executive Director of the UNEP, recently stated at a meeting of his organization that "the status quo is no longer an option" (Hockman 2010: 3–4).

The conference here referred to took place in Rome, Italy on 20–21 May 2010. It included many judges, lawyers and legal scholars and its findings supported the creation of both a World Law Organization or WEO, and of a specialized environmental court, strong enough to support the defence of the basic rights advocated in this work. Similarly, Francesco Francioni and Federico Lenzerini add:

> International environmental law is characterized at present by a hypertrophic development of treaties and international normative instruments, and by extreme institutional weakness due to the lack of compulsory mechanisms of dispute settlement and insufficiency of administrative bodies for oversight and monitoring of environmental compliance (Francioni and Lenzerini 2010).

These difficulties are particularly glaring when international environment law is compared with the far better developed "international economic law" (Francioni and Lenzerini 2010). In fact, the latter (that is, the laws enforced by the institutions for international trade such as the WTO and NAFTA) require specialized economists in its organizations and tribunals, whereas environmental governance (as the best defender of basic human rights) has no such requirements of preparation and competence for either legislators or judges. Thus a fully reformed WEO or UNEO (UN Environment Organization), as the conference consensus appeared to prefer, might ensure the presence of such experts, and it would be particularly desirable to include medical and public health specialists, in order to render explicit the interface between environmental and human rights defended in these pages.

The possible objections to such organizations as a WEO or UNEO include 'the complete absence of an organized external force" (Hockman 2010: 4; Starke 1963: 28–29). Starke proposed that since both international law and "the law of the Catholic church" are based to some extent on natural law, the Catholic church could be considered a model, because its binding (and largely observed) rules persist despite its lack of an "organized external force" (Starke 1963).

This argument runs parallel to the one proposed in this work, to the effect that, whatever form world governance might take, and whatever institution might eventually be its focal point, the most important basis of its legitimacy will have to be the universal principles upon which it rests. The economic preferences of certain states and alliances simply do not have the persuasive force of universal principles that resonate equally for all individuals and peoples. Even closer to our own approach is that of Alfred Rest, another speaker at the Rome conference:

> … but the application of the rule of law—embedded in the principles of international law—and its special elements of state responsibility and liability, obligations *erga omnes* and judicial control, the protection of the environment could be enhanced (Rest 2010: 1).

In fact, we have argued above for the importance of *erga omnes* obligations and discussed state responsibility and responsibility to protect (RtoP) in previous chapters. Our focus has been the protection of basic rights: the rights to the physical integrity of the person, to life, to normal development, as well as the right to a safe habitat, and the survival of communities and cultures.

However, the violent conditions imposed by globalization and by some of the practices of today's legal institutions are not limited to the

attacks on basic rights: increasingly, civil rights are at stake as well. For some, that argument will be at least as convincing as the one linking environmental/ecological issues with public health/human rights, if not even more so.

As we are seeking a universal world law to support a principled world governance, we must first debunk the myths that accompany the present forms of global governance, which have replaced the power of sovereign states:

> Since the Nuremberg trials, Western notions of legality have characterized international law. In the building of Western legal dominance, international law has slowly and incrementally developed a decentralized system of sovereign nations into a more centralized system where the Security Council of the United Nations claimed some steering role (Mattei and Nader 2008: 150).

The present system has helped to convince global society that "violence over innocent people can be 'legal' ", that a war of destruction can be "fair", or even that "there is such a thing as a 'peacekeeping operation' " (Mattei and Nader 2008). Perhaps the most significant difficulty needing radical change is the present "world law"—that is, the rapid and ubiquitous spread of the global legal power of the West, particularly that of the US.

The kind of "world law" we are seeking instead presents the greatest possible contrast to the existing institutions; in fact, the contrast is so great that it seems as though any possible "tidying up" or adjustment of today's international organizations is not worthy of consideration. What is needed is a total replacement and a radical reordering of regimes and institutions. This reordering should be based on universal principles rather than political goals.

The next question that arises is: what aspects of this "reordering" appear to be most urgent? In this section we will briefly list some of the major issues we have discussed as the most important and intractable aspects of the present situation. Of course, those would come after the gravest difficulty—that is, the very structure of the UN—culminating in the power of the Security Council (SC), whose failure is demonstrated by the inaction of the UN in Palestine, for instance.

The fundamental issue is the loss of respect for human rights, which appears to follow upon an international (in fact, a transnational) legal system that prioritizes power alliances and economic interests over human life: what is absent from current global governance is "the universal principles to respect and observe human rights"; although Salomon, for instance, does not see the situation as quite as hopeless

as Mattei and Nader do (Salomon 2007: 165). In fact, she emphasizes the need to move from international rights, to transnational ones (Salomon 2007; Grahl-Madsen and Toman 1984; Delbrück 2002: 415–417).

The emphasis on the "world community" indicates that the basic rights must be collective rights within this context as, despite the proliferation of human rights instruments addressing individual choice, the harms arising from the present system are not individual but collective (Westra 2011): Climate change is perhaps the most obvious example of a collective harm demanding collective redress. Another such example discussed in these pages is the present and ongoing push toward "development". The legitimacy, even the desirability, of development, as Mattei recognizes (Mattei and Nader 2008: 42–63), is a major source of harms and even disasters, as it is ecologically unsustainable and often supports racist practices (Mickelson and Rees 2003; Westra and Lawson 2001). Hence it is a source of violent upheavals, especially for poor and vulnerable communities in the so-called developing nations.

What is most important is that the rights of collectivities are not respected in either case by conventional legal agreements, hence the quest for world law grounded on principles appears the only possible way to secure their protection. Individual states, especially in Europe, had been improving their human rights records for decades (Mattei and Nader 2008: 148), but, as the states in the rest of the world have been losing their own sovereign power, the current "privatized model of global litigation" (as well as the general forms of global governance) lack "a monopolistic sovereign state to take care of justice, equal opportunities, and imbalances of power" (Mattei and Nader 2008: 146).

This is precisely what we are proposing as an alternative, as the previous chapters have indicated that the present centralized "power" that is the United Nations lacks the power or the will to remain true to its mandates. Neither peace nor the primacy of human rights can prevail over the political composition of the present UN and its SC. But in order to move forward and to return—in some sense—to the historical basis that gave rise and meaning to the United Nations, we need to set aside the interests of the present political alliances, clearly a far from easy radical change in policy.

Yet "universal jurisdiction" exists, at least in principle (Goodwin-Gill 1999: 204):

> "Universal jurisdiction" is the term which describes the competence of the state, both to define and prescribe punishment for certain offences,

> even in the absence of any of the traditional links, such as territory, nationality, or local effects (American Law Institute, 1998).

The Third Restatement of United States Foreign Relations Law actually proposes definitions of the basic rights that, according to the ICJ, require "the interest of all states", although that document is quite dated. At any rate it tends to echo the Barcelona Traction dictum, affirming that violations of human rights are the responsibility of all states, as follows:

> The Restatement refers specifically to (a) genocide; (b) slavery or slave trade; (c) the murder or causing the disappearance of individuals; (d) torture or other cruel, inhuman or degrading treatment; (e) prolonged arbitrary detention; (f) systematic racial discrimination, or (g) *a consistent pattern of gross violations of internationally recognized human rights* (Salomon 2007: 173).

Even a cursory reading of the previous chapter indicates that (d) to (g) are clearly present in the Palestinian territory, as well as some other violations discussed in the "Commentary" to the Third Restatement, such as the "denial of the right to return to one's own country"; or "mass uprooting of a country's population"; or "individious racial or religious discrimination" (Salomon 2007). Thus, despite the enormous difficulties involved in attempting a radical change of present institutions, the lack of consistency or equality of peoples and situations in front of the law is too grave to ignore. It indicates that the total disregard not only on the part of the US but also on the part of the whole international community for their own principles, their own mandates and proclaimed priorities are such that no other possible solution comes to mind.

Nor are these minor violations: they fall under the heading of "international crimes" or "serious crimes of international concern" (Goodwin-Gill 1999: 205).[1] Further, Article 7 of the 1998 ICC Statute specifically flags "murder persecution" when committed as part of the widespread or systematic attack directed against any civilian population "pursuant to or in furtherance of a State or organizational policy" (Goodwin-Gill 1999: 207; ICC Statute, Art. 7(1)(2), 1998; ICTY, Prosecutor v. Tadic, Opinion 1997).

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[1] Goodwin-Gill however argues that "This distinction is not drawn in the 1998 Rome Statute of the International Criminal Court, UN Doc.A/CONF.183/9, 17 July 1998 … where the Preamble and article 1 and 5 … use serious crimes of international concern".

The final sentence, it would seem, adds a direction, or deliberate intent, to the commission of crimes against humanity, as described in the "case" in the previous chapter. It brings the activities enumerated in that case very close to being driven by a "special intent"; that is, close to the description of the attempt to commit genocide. We will return to this theme in discussing the recommendations of UN rapporteurs in the final section of this chapter, as whatever could and should be brought to bear in the effort to redress the ongoing gross violations in Palestine would be instructive for the rest of the human rights violations tolerated and fostered by the present systems of governance. At any rate:

> An international crime is indeed distinguished by its foundation in a rule of *jus cogens*, and in the importance and universality of its basic moral content (Goodwin-Gill 1999: 213; see also Ragazzi 1998).

Hence, the prevailing failure to accept *erga omnes* obligations to respond singly and collectively to such international crimes indicates the very necessity for radical change for which this work has argued. Nevertheless, rather than rely entirely on *erga omnes* obligations, in the next section we will briefly review the existing instruments of conventional law, and their requirements regarding the contracting parties and their commitment to the principles present in those legal regimes.

Neoliberal Democracies and Human Rights: Neglected Customary Law Requirements

> Crimes against humanity are a concept of customary international law. They are offences which may be committed in armed conflict or time of peace. What makes them a distinct type of international crime is, first of all, the fact that they are committed for non-military purposes … Second, they are committed against civilians, who may have the same nationality as the offenders. Third, they are offences shockingly inhumane and cruel, in defiance of all recognized values of humanity. Fourth, they may be committed on a widespread basis or in an organized form, or be guided by political/religious or ethnic hostility and hatred (Jia 1999: 270).

The argument of the previous chapters, and of the first section of this chapter, tends towards replacing the present insufficient global governance with the principles and moral norms that at this time only appear as *erga omnes* obligation and are seldom, if ever, used in current jurisprudence. Although states give respect to peremptory norms and

obligations in their domestic constitutions and charters, they tend to follow the instruments they have formally ratified, and even then the main focus of domestic policies often rests on a state's specific interests and those of its allies.

Thus it is important to briefly review positive law instruments that may be found to embody some of the principles and norms we consider to be primary. This is necessary because the problems we have enumerated are not entirely based on the lack of appropriate legal instruments but on the lack of implementation and enforcement endemic to such instruments. The protection of human rights, in general, is a "positive" obligation of states in the "progressively expansive interpretation of human rights" some believe is in evidence international jurisprudence:

> in this context, the term positive obligations covers only those obligations which have been implied into provisions that on their face appear to contain essentially negative obligations or duties of abstention (Borrelli 2006: 102).

This interpretation is evidenced in the current jurisprudence appealing to the European Convention of Human Rights and the American Convention of Human Rights, for instance, in the European Court of Human Rights. In fact, beyond the presence of non-derogable norms, Salomon for instance argues that

> there has been a discemible shift in international law towards the idea of community interests in human rights protection, as well as the mutual responsibility of states to secure compliance by other states with their human rights obligations (Salomon 2006: 176).

As well, most states have ratified the two 1966 covenants (155 states are parties at this time), and the Convention on the Rights of the Child (CRC) has now achieved "almost universal ratification" (Salomon 2006: 169; see n.49, "193 state parties as of 6 December 2006, with Somalia and the United States as signatories").

The Article on State Responsibility adopted by the International Law Commission in 2001 also prescribes the lawful measures that may be employed to comply with those requirements. The RtoP was discussed in Chapter 3, but the main question remains: what can be done, lawfully, by any state that accepts its responsibility to move against gross violations of human rights by any state or states?

It is encouraging to note, for instance, the language of the ICJ Advisory Opinion regarding the wall in Palestine (Legal Consequences

of the construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, July 2004; Crawford and Olleson 2005: 959):

> Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that an impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.

In 2005, the UN Secretary-General issued a report, In Larger Freedom: Towards Development, Security and Human Rights for All, of which more below. The important point in support of the present argument is that neither the ICJ's Advisory Opinion of 2004 nor the Secretary-General's report appears to have made a dent in the practice of extraordinary renditions and in the situation in Palestine, where both the wall and illegal settlements continue unabated; nor have they had any effect against the unlawful imprisonments at Guantanamo, nor the torture evidence from Abu-Ghraib, nor that apparently sanctioned by Canada in recent cases, or in cases brought to the House of Lords (Jones v. Saudi Arabia 2006).

None of these issues have come to a just resolution at the time of writing in 2010, many years after the robust and uncompromising pronouncement of the UN. The violations of human rights are ongoing and *collective*, but the individual responsibility of each state cannot be shirked (Duffy 2006).

The Current Responsibility of States for Human Rights

> Public international law can be described as being composed of two layers: the first is the traditional layer consisting of the law regulating coexistence and cooperation between members of the international society, essentially the states; and the second is a new layer consisting of the law of the community of six billion human beings (Sassoli 2002: 401).

It is clear that the concern of this work is with the second aspect of public international law, hence the quest for some alternative measure of collective protection, given the non-compliance of the community of states. Our main concerns have been the mounting collective harms

and the ongoing reluctance on the part of states to fulfill their obligations, combined with the UN's lack of forceful participation to ensure protection. These lacks are particularly grave as they encompass both breaches of humanitarian law and the law regarding human rights for the protection of physical harms, and deprivations imposed by globalization, as discussed above. Most important is the ubiquitous presence of these harms within states and beyond borders, affecting primarily the most vulnerable people.

Returning to international law, the elements of the ILC Convention's work on legal transboundary environmental harm were "prevention, cooperation, and strict liability for harm", but they were considered "too controversial" (Birnie and Boyle 2002: 105). The 2001 amended draft of this convention (Report of the International Law Commission 2001) divided the topic into two parts: prevention and liability. The main concern remained the former (Birnie and Boyle 2002: 106). Although the latest draft prescribes "all appropriate measures that must be taken to prevent or minimize the risk", it does nothing to prohibit the activities that give rise to transboundary harm (Birnie and Boyle 2002: 107).

Risk itself is defined to encompass both "a low probability of causing disastrous harm" and "a high probability of causing significant harm" (Birnie and Boyle 2002: 115). However, neither "disastrous" nor "significant" are defined, and neither international lawyers nor judges, nor even scientists, can hope to express with any certainty what might constitute the desired "clear and convincing" scientific proof of possible harm.

In addition, the standard of due care or due diligence must be proportional to "the degree of risk of transboundary harm in the particular instance" and can be expected to change with time, and must also take into consideration location, special climate conditions, materials used in the activity, and so on. Rosalynn Higgins, who analyses state responsibility rather than liability, states that "the only requirement is causality", which entails that "responsibility is based on result, not fault" (Higgins 1994: 161). Special Rapporteur James Crawford explains:

> In particular article [1] stated that every internationally wrongful act of a State entails its responsibility, and article [3] identified two and two only elements of an internationally wrongful act, (a) conduct attributable to a State which (b) is inconsistent with its international obligations. There was no *distinct or separate requirement of fault or wrongful*

> *intent for an internationally wrongful act to be held* to exist (Crawford 2002: 12).

Hence, even in the latest iteration of the ILC, international law does not require intent for the commission of a "crime" (although this language is no longer part of the ILC), and Higgins's point stands. Thus, the common argument of corporate or institutional wrongdoers, adducing lack of intent as exonerating (or at least mitigating) their responsibility, cannot be defended as even the due diligence defense is not allowed internationally.

In contrast, the problem of defining a state or institutional wrongdoing as crime, hence different in kind from other delicts, is no longer as clearly stated as when Article 19 of the ILC (1996) was in existence. Crawford admits that regimes appropriate to corporate crime could apply to state crime, but he views the absence of (1) precise definition, (2) "adequate investigative procedures", (3) due process, (4) appropriate sanctions and (5) "some method by which the state can, as it were, come clean, expunge the record" as providing definitive arguments against the use of the concept of crime in regard to the state (Crawford 2002); thus the necessity to focus on state liability for now, without losing sight of the desirability to appeal to more serious charges in the future.

One wonders whether the same five elements could not be raised in regard to the accepted crimes of genocide and crimes against humanity, all of which cannot truly be perpetrated without a state's acceptance or participation, and which cannot simply be described as "a pejorative way of describing serious breaches of certain norms", as Crawford thinks other possible state crimes might more appropriately be termed (Crawford 2002). We might ask: if genocide and the like are still considered crimes, why are environmental offenses (previously an example of crimes in Article 19) left out, despite the immense damages to human life and habitat? Crawford's analysis states that Article 19 had been viewed as "divisive" and that states could not agree on the language most appropriate to express Article 19 in a better way.

It is wrong that these self-interested objections, aiming not at better expression of commonly held values but at the protection of self-interest on the part of powerful countries, were viewed as more significant than the solid arguments provided by a majority of publicists who wrote to defend the principles behind Article 19, whatever the flaws of its presentation. It would seem that without the problem of intent the consequences following environmentally hazardous activities should

align these activities with other crimes against humanity, although the consequences are not always clear and dramatic.

The claim that there is no specific intent to produce that result in an identifiable person, as Crawford pointed out, cannot be sufficient to absolve the causative agent(s) of any wrongdoing. Nor is it sufficient to claim that the activities giving rise to the described consequences were legal at the time they occurred, and might even be legal today. In fact, Article 3 of the International Law Commission (1988) is short and to the point on this issue: "*Prevention*. States shall take all appropriate measures to prevent, or to minimize the risk of, significant transboundary harm." Special Rapporteur Srenivasa Rao (8 May 1998) says:

> The objective of prevention of transboundary damages arising from hazardous activities had been emphasized in principle 2 of the Rio Declaration … and confirmed by ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, as forming part of the corpus of international law (*Yearbook of the International Law Commission* 1998).

Rao adds that the European Commission had drawn up various schemes to prevent transboundary damages, and that its work emphasized that, because of scientific developments, there was an "enhanced ability to trace the chains of causation, that is to say, the physical links between the cause (the activity) and the effect (the harm)". That prevention, therefore, was indeed the key (*Yearbook of the International Law Commission* 1998: para 25).

Mr Barboza, another Special Rapporteur, also indicated that "the duty of prevention should continue to be treated as an obligation of conduct and not one of result" (*Yearbook of the International Law Commission* 1998: para 29). On this topic, Alain Pellet added that "the statement that only significant harm or damages was required to be prevented by States was most inappropriate" (*Yearbook of the International Law Commission* 1998: para 41).

Pellet's point especially supports the claim here advanced that visible (or otherwise detectable) grave harms are only part of the kind of harms that ought to be proscribed. Even an otherwise moderate hazard may become part of a cumulative or synergistic scenario that eventually transforms it into a severe harm.

It is also useful to consider this document's efforts at defining due diligence. For instance in the Commentary following Article 3 (Prevention):

> (6) The obligation of States to take preventive or minimization measures is one of due diligence, requiring States to take certain unilateral

> measures to prevent or to minimize a risk of significant transboundary harm. The obligation imposed by this article is not an obligation of result. It is the conduct of a State that will determine whether the State has complied under the present articles.

Note that this commentary may conflate prevention with minimization, two quite disparate concepts. Are we to prevent harm, or simply to accept that it will occur and attempt to minimize it? A comparison with assaults is in order: the criminal code does not make allowances for an attack attempting to minimize the harm inflicted, although the resulting harm, as well as the measure of awareness or intention, will make a difference in how the case is considered, tried and punished.

In fact, because the notions of responsibility and fault are closely related in international law, the whole regulatory infrastructure should be questioned. Gehring and Jactenfuchs (1990) say:

> However, highly complex industrial activities create risks which can be minimized but not completely eliminated. The concept of state responsibility does not foresee any duty to compensate for damage due to activities which are not prohibited by international law. Furthermore, according to traditional international law, established legal wrongfulness of any activity having caused transboundary harm entails the obligation to cease its operation.

It appears logical that if a similar factual harm is produced by a legal activity, a similar obligation to cease should prevail. But at the present time no prohibition is codified in international law to stop "lawful" hazardous activities, and for the most part states have a strong interest in continuing and even promoting many of these activities. In addition:

> establishing too close a link between fault and the obligation to compensate for damage frequently does not result in an internationally accepted ban of a particular dangerous activity, but rather in a refusal by the source state to compensate, since any acceptance of the duty to compensate would imply acknowledgement of a violation of international law and thus endanger the future operation of the activity in question (Gehrig and Jachtenfuchs 1990).

The present "juridical deficit" is even more obvious when the question of the "actors involved in an equitable balance of interests" is considered:

> *Article 12*. In order to achieve an equitable balance of interest as referred to in paragraph 2 of Article 11, the State concerned shall take into account all relevant factors and circumstances, including: (a) the degree of

> risk of significant boundary harm and of the availability of means of preventing such harm, or minimizing the risk thereof or repairing the harm; (b) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected (International Law Commission, Article 12).

Subsections (c) and (e) also emphasize the "availability of means" to prevent the harms, and the "possibility of carrying out the activity elsewhere or by other means or replacing with an alternative activity". The repeated reference to "economics" introduces a disanalogy into the discourse: economic losses or harms cannot be compared with losses of life or physical integrity (Guerra v. Italy 1998). Although the precautionary principle is recognized, subsection (f) refers to "the standard of prevention"; the number of factors to be taken into account demonstrates the problem of weighing factors that are neither equal in gravity nor comparable.

The right to life is basic in law and, for instance, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) has that right in its Article 2, and throughout the article, by juridical extension, the right is coupled with that of "physical integrity". Hence an activity that has even the potential to expose us to grave risks to life and "physical integrity" means that the state is allowing a corporate entity to use present and future generations as guinea pigs to test the result of their activities, and this practice should be eliminated. Further support can be found in Article 8(2) under "Right to respect for private and family life". Subsection (2) proscribes "interference by a public authority with the exercise of this right", except, *inter alia*, "*for the protection of health* or morals" (Council of Europe Publishing, 1999: 13).

In the next section we will turn to the UN's most recent report regarding the advancement of human rights, in order to compare its mandates with the 2001 ILC articles on the responsibility of states.

"In Larger Freedom: Towards Development, Security and Human Rights for All"

> The proposals contained in the present report are designed to strengthen states and enable them to serve their peoples better by working together on the basis of shared principles and priorities—which are, after all, the very reasons the United Nations exists. Sovereign States are the basic and

> indispensable building blocks of the international system (UN General Assembly, 59th Session, Report of the Secretary-General, 21 March, 2005, "The Imperative of Collective Action", no. 19).

The report continues by stating that "to ensure that all states are strong enough to meet the main challenges they face" is one of the greatest challenges today; hence the need for collaborative and concerted action, and the centralized role of the UN. There is a clear acknowledgement, however, of the weakness and present failures of implementation, for instance, of the Millennium Development Goals, which does not bode well for the goal of inducing "a decisive victory in the global battle against poverty by 2015" (UN General Assembly, 59th Session, Report of the Secretary-General, 21 March, 2005, "Time to Decide", no.23).

As well, much of this document continues in this vein: purely aspirational, admitting the impact of grinding poverty and hunger, disease and "environmental hazards", but concluding that "poverty kills", without any acknowledgement of the impact of the neoliberal agenda and the neoliberal aspects of "development" it promotes (Mattei and Nader 2008). For instance, the "environmental sustainability" the document promotes (Goal 7, Targets 9,10,11) only expresses a concern for the "loss of environmental resources", and proposes to "halve by 2015" the proportion of people without "safe drinking water" as it also suggests to improve significantly the lives of "100 million slum dwellers" by 2020. Worthy as such goals may be, they are not, as defined by the document, "environmental sustainability goals".

The interface between ecological degradation, unchecked industrial practices and human health and survival is not part of these goals, nor is the protection of biodiversity and ecological integrity, although in Box 2, detailing the "progress" achieved on the "goals", the last lines state that "environmental degradation is an extreme concern in all developing regions" (Mattei and Nader 2008: 11), without acknowledging the same grave problems in developed regions as well.

The "promise" of development, however, has not been "delivered" (Mattei and Nader 2008: 12), and the pious exhortation to "developing countries with extreme poverty" to adopt and begin to implement strategies by 2006 does not appear to have met with success today. "Desertification", "biodiversity" and "climate change" each merit a short paragraph, and there is a longer one on climate, but still only proposing "technological innovations" as the source of solutions (Mattei and Nader 2008: 19–20). Similarly, the paragraph on "natural

disasters" brings us the suggestion of a "worldwide early warning system" (Mattei and Nader 2008: 21), without any explicit awareness of the reasons why extreme weather events happen with increasing frequency and severity, and of what needs to be eliminated in order to hope for some reduction of these events.

Finally, the problem of forced migrations is also acknowledged in one paragraph (Mattei and Nader 2008: 22), suggesting that a General Assembly "high level dialogue" in 2006 would provide the opportunity to "tackle the hard questions" (Mattei and Nader 2008)—another hope that has clearly not been actualized, at least to date (2010). In the first chapter we addressed the question of causality, the impact of which ought to be present in all such documents. Instead, each problem is listed as though it is a natural happening, there to stay, without any explicit awareness of the multiple causes that created it. This flat, one-dimensional causality is a major problem: as long as the *reasons why* problems arise and events happen is not clearly addressed, no solution can be found.

This is especially true of the only place where a somewhat innovative question is raised in the document: no. 84 (Mattei and Nader 2008: 25), which proposes that Member States should agree on a "definition of terrorism". That would include, one hopes, a consideration of the causality of these acts (and we will address this issue below, separately). Several other aspects of UN activities are also listed, including the role of the Secretary-General in providing mediation, the use of sanctions as a tool, and deploying peacekeeping operations in "zones of conflict", primarily in Africa (Panel on United Nations Peace Operation, Annex).

On these and all other issues, the report describes symptoms without ever attempting to reach the "root causes" of all major problems from climate change to abject poverty.[2] The language of the report is vague, for the most part. On the "use of force"; nos. 124 and 125 are particularly disappointing:

> 124. Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign states to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened.

[2] See the discussion of "symptoms v. root causes" in relation to the flaws in Canadian environmental law in Boyd (2003: 276–280).

> 125. Where threats are imminent but latent, the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security (Boyd 2003: 33).

Nevertheless, at no. 129 the report states that "no legal principles—not even sovereignty—should ever be allowed to shield genocide, crimes against humanity and mass human suffering"; a laudable principle, but one which we have not seen implemented, especially in regard to the situation discussed in the previous chapter. The report recognizes the problems faced by the UN, without however proposing a practical solution or a change in policies:

> 130. But without implementation, our declarations ring hollow. Without action, our promises are meaningless … treaties prohibiting torture are cold comfort to prisoners abused by their captors, particularly if the human rights machinery enables the responsible to hide behind friends in high places (Boyd 2003: 134).

Hence the reality captured in these remarks prompts the question that the UN must answer: *whose* "larger freedom" is at stake and must be protected, when limits are neither recognized by, nor applied to, the most powerful countries in the West? The report does acknowledge that the "High Commissioner must play a more active role in the deliberations of the Security Council" (Boyd 2003: 37). As well, it acknowledges that "human rights treaty bodies, too, need to be much more effective and more responsive to violations of the rights they are mandated to uphold" (Boyd 2003: 38, no. 147).

The proposed strengthening of the United Nations acknowledges that, while "the principles and purposes" are enduring, the "practices and organization" need to be adapted to current needs; in fact, "it is time to breathe new life into the intergovernmental organs of the United Nations" (Boyd 2003: 40, no. 157). Finally, the SC has "seen its authority questioned on the grounds that its composition is anachronistic or insufficiently representative" (Boyd 2003: 4, no. 165) and the Economic and Social Council "has too often been relegated to the margins of global economic and social governance" (Boyd 2003).

In the reform models proposed and adopted, the five permanent members are still the only ones with veto powers, and the number of non-permanent members, increased from six to ten in 1965 by Charter

Amendment, are still obviously second-class citizens.[3] The functioning of the SC, whatever its "changed" composition, is problematic to say the least.

For example, I have argued that attacks perpetrated through the environment, or any chemical or industrial substances, are to be considered crimes, even without an acknowledged "weapon". As an example, the emergent information about the use of so-called "spent" uranium weapons in Afghanistan is now such that the horrible crimes against humanity committed within the "war crimes" there are coming to light:

> Forget about oil, occupation, terrorism or even Al-Qaeda. The real hazard for Iraqis these days is cancer. Cancer is spreading like wildfire in Iraq. Thousands of infants are being born with deformities. Doctors say they are struggling to cope with the rise of cancer and birth defects, especially in cities subjected to heavy American and British bombardment (Ghazi 2010).

"Depleted" uranium is a "public relation spin" (Ghazi 2010); it is low-level nuclear waste, and the conditions of too many children in Falluja attest to its effects. What is the status of the ICJ Advisory Opinion against the use or threat of nuclear weapons, unless a country's very survival is at stake? As well, no convention in defense of human rights ought to allow such exposures, nor the ensuing gross violations of all fundamental principles of law and morality.

According to Amnesty International (2009a) and the Goldstone Report, these weapons (manufactured in the US) were also used by Israel in the "Cast Lead" operation against Gaza, so that comparable deformities may well emerge soon from that area as well.[4]

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[3] See www.un.org/sc/members.asp. The presidency of the Security Council is held in turn by the members of the Security Council in the English alphabetical order of their names, and each president holds office for one calendar month. The number of non-permanent members was increased from six to ten by an amendment of the Charter which came into force in 1965. Each council member has one vote. Decisions on procedural matters are made by an affirmative vote of at least nine of the fifteen members. Decisions on substantive matters require nine votes, including the concurring votes of all five permanent members. This is the rule of "great power unanimity", often referred to as the "veto" power.

[4] This is already in evidence in Gaza, according to the "Eyewitness Report" of the European Campaign to End the Siege in Gaza (ECESG), Delegation, January 2010.

The use of these substances should elevate all attacks that employ them to the level of crimes against humanity and war crimes, to say the least. Sadly, preborn exposure of this sort is not recognized as criminal, despite the solid evidence on which it is based (Tamburlini et al. 2002; Grandjean and Landrigan 2006; Westra 2006). I have termed all such attacks practiced in and through the environment "ecocrimes" (Westra 2004), and this appears to be a glaring example where "genocidal" attacks against a people coincide with crimes against humanity.

One must be cautious about using the term genocide (Schabas 2000), but one cannot deny (1) *full knowledge* of the effects of uranium (or of radioactive waste in general) on the part of those who deploy such weapons; and (2) that although special intent may be absent, criminal law categories such as "wilful blindness" (Canada) or "depraved indifference" (US) surely fit well. The ongoing advancement of scientific information regarding the effects of exposures amounting to "ecocrimes" should make the use of criminal law language and categories mandatory, rather than relying on the present lack of robust action on the part of the UN (and, in general, the ongoing methods of addressing exposures through environmental regimes—that is, through mediations, arbitration, exhortation and suggestions, rather than the use of peremptory language; Boyd 2003; Westra 2006).

Before turning to our conclusion, we will review briefly the ongoing civil rights breaches that are part of the "violence" we are seeking to eliminate, at least in two specific areas: (1) the new forms of aggression and state terrorism engendered by the so-called "war on terror"; and (2) the imposition of "external constitutions" on states.

Aggression and Terrorism in International Law: Violence Beyond Plunder

> Since a comprehensive convention with a legal definition of terrorism would have limited the discretion of the United States to determine the international public enemy on a case-by-case basis, the United States has been acting according to an old motto coined by a Roman lawyer, "*omnis definitio in jure periculosa*" (Friedrichs 2004: 89).

This topic may appear to be—to say the least—peripheral to the main focus of this work. Nevertheless, what I have attempted to do is to show why it is necessary to seek a radical overhaul of present global governance institutions and instruments; the ongoing unchecked violence against the most basic human rights is deplored by the UN, but not

curtailed. And it is this approach that indicates the importance of our quest. As well, the reasons for that imminent need cannot fully emerge unless the causes that give rise to the human rights breaches we have outlined are fully clarified (see Chapter 1).

Thus far, we have pointed to the social/economic immoralities and illegalities supported by the political power structures that are part of the global governance affecting the UN, and we will return to that issue below. For now, we should also examine whether the same power structures tend to support, or at least condone, unspeakable crimes against humanity, committed against the most vulnerable of humankind.

The same dominant political structures affect not only the increasing presence of terrorism, but also the very absence of a legal definition of that phenomenon, in the stance parallel to the one we noted as part of the neoliberal economic agenda regarding the ambiguity of "development". The gravity of the situation adds to, and provides further evidence for, the conclusions of the previous analysis.

Essentially, when a certain coalition, led by the "hegemon", controls for decades the efforts of most countries to reach a definition of what constitutes illegal violence (just as it effectively controls globalized trade and economics), then the time has come to find ways to check a power that increasingly exceeds the bounds of legality. In order to better understand what has led to the present international impasse regarding a definition, we should review briefly the history of the international efforts to reach a definition and the various players who participated.

From 1972 to 2005: Working on an Impossible Definition

> For more than thirty years states have debated in the UN the question of punishing terrorism. However, they have been unable to agree upon a definition of this crime. Third World countries staunchly clung to their view that the notion could not cover acts of violence perpetrated by so-called freedom fighters, that is individuals and groups struggling for the realization of self-determination (Cassese 2004: 449).

According to Article 44.3 of the First Additional Protocol (UNGA Resolution 49/60, adopted 9 December 1994), some persons could be considered "freedom fighters", although they had no uniforms or openly carried arms, so that they would have prisoner of war status if captured. The annexed Declaration (para 3) contains the following provision as a definition of terrorism:

> Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.

The UN has been attempting to grapple with the question of terrorism since 1972 (Friedrichs 2006: 71; Peterson 2004: 173). After the 1972 attacks on the Olympic Village in Munich, terrorism was placed on the agenda of the General Assembly, while the US submitted a "Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism" (UN Doc. A/C.6/L.850, 25 September 1972). The US draft was limited to "certain acts of terrorism", without attempting a thorough definition. The main problem was that many Arab and African states wanted (1) an in-depth discussion of the root causes of terrorism, (2) a differentiation between terrorists and freedom fighters, and (3) the inclusion of state terrorism as "the most harmful and deadly form of terrorism" (Friedrichs 2006: 72–73; Report of the Ad Hoc Committee, UN Doc. A/9028, 1973, annex 7). The "Non-Aligned Group" was adamant on the inclusion of state terrorism under the mandate of the Ad Hoc Committee:

> acts of violence by colonial, racist, and alien regimes, they maintained, constituted the cruelest and most pernicious form of international terrorism and therefore had to be given the highest priority during the deliberations (Freiderichs 2006: 74; Report of the Ad Hoc Committee, UN Doc. A/32/37, 28 April 1977).

As no consensus was forthcoming, only conventions against specific acts were enacted, and no further effort emerged towards a definition of terrorism in general. In 1999 the United Nations adopted a "convention on the financing of terrorism" (Friedrichs 2006: 74), and after 2000 further discussions took place on the basis of another draft submitted by India (Friedrichs 2006; UN Doc. A/c,6/55/I, 28 August 2000,; see also UN Doc. A/C.6/51/6, 11 November 1996, original version). A tentative definition was also proposed in 2005. According to this definition, serious offences against persons or heavy damage to private or public property qualify as offences within the meaning of the Convention "where the purpose of the conduct, by its nature or contact, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act" (Friedrichs 2006; UN Doc. A/59/894, 12 August 2005; Comprehensive Convention on International Terrorism).

The main problems, however, remained unsolved; for instance, according to the Organization of the Islamic Conference (OIC), the question of groups' struggles against "foreign occupation, aggression, colonialism and hegemony" aimed at achieving their own self-determination, as well as the problem of state terrorism (with special consideration of the situation in Palestine), had not been resolved (Friedrichs 2006; UN Doc. A/C.6/55/L.2, 19 October 2000; UN Doc. A/57/730-5/2003/178, 13 February 2003—the former proposed by Malaysia, the latter by Syria). Thus, until 2006, the aim of reconciling the parties to achieve a comprehensive, binding definition had failed; both the history of the issue and the stumbling blocks that effectively ensured that no agreement could be reached reproduce the similar, politically motivated perversions of important human rights issues.

Like trade and "development" issues, the UN was unable to resolve the situation on the side of principles, morality, or even the binding legality of its own mandates, against the effects of Western political power.

The Issues: Terrorism and Collective Rights

> People who have been disposed, degraded, humiliated, but whose spirit has not been broken, understandably want to proclaim their grievances, whether or not they expect their proclamation to advance their cause (Baier 1988: 7).

Long before terrorism became an important and debated legal issue, philosophers were debating the important topic of violence as a political tool. Paul Gilbert, for instance, was clear on the position that

> terrorism can be neither murder, which is purely private and has no political significance, nor war, which is entirely public and overt, but which the terrorist's party would be incapable of winning (Gilbert 1994).

However, what we need to achieve in order to reduce or even eliminate terrorism is a comprehensive understanding of the phenomenon, beyond a purely philosophical analysis of its nature. Perhaps the best starting point is precisely an understanding of the "hegemon's" objections: the US and the UK (but not Germany or France, for instance) do not want a precise definition, as they prefer to retain their "right" to call terrorists those they perceive as enemies, and clear of that taint those they consider friends or allies.

The nations that prefer not to define terrorism also emphasize that terrorists attack those who should not be attacked (Gilbert 1994), or the "innocents" (that is, civilians). So we can start by raising the first question in regard to terrorism: are all *civilians* morally blameless (that is, "innocents" in this sense)? Without going as far as Osama bin Laden, who claimed that full complicity with the imperialistic, racist practices supported by the US government rendered the "civilians" killed in the 9/11 attacks "non-innocents" because of their votes in support of their own government,[5] we must consider this question seriously today.

For instance, some argue that not all civilians are blameless, given certain specific circumstances. In fact, perhaps "the citizens of a state with universal conscription", such as Israeli settlers,

> are thus active participants in the theft of the Palestinian lands … not just conscious and willing participants but enthusiastic and indeed fanatical instigators and perpetrators of the strategy by which the theft is being accomplished (McMahan 2009: 223).

These "civilians" appear to be complicit in the "international crime of aggression, a crime that, when committed by soldiers, justifies defensive war" (McMahan 2009). We can thus conclude (with McMahan) that "civilian immunity is contingent, rather than absolute" (McMahan 2009: 231).

Further, there is a question of self-defense, a topic I considered some years ago regarding terrorism. It is acceptable and legal to defend one's own life and physical integrity, as well as one's dignity as a human being, or the life and dignity of near family members (Westra 1989, 46–58). There are other values beyond the immediate defense of our own physical integrity, such as: (1) the immediate prevention of injury to others; (2) long-range or indirect defense of self or others;

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[5] A letter supposedly from Osama bin Laden "to the American people" in 2002 makes this clear: "The American people are the ones who pay the taxes which fund the planes that bomb us in Afghanistan, the tanks that strike and destroy our homes in Palestine, the armies which occupy our lands in the Arabian Gulf, and the fleets which ensure the blockade of Iraq. These tax dollars are given to Israel for it to continue to attack us and penetrate our lands. So the American people are the ones who fund the attacks against us, and they are the ones who oversee the expenditure of these monies in the way they wish, through their elected candidates. … This is why the American people cannot be not innocent of all the crimes committed by the Americans and Jews against us." For full text of this letter, see www.guardian.co.uk/world/2002/nov/24/theobserver.

(3) securing the necessary conditions of minimally acceptable life, when no other possibility to achieve this goal is available (Westra 1989: 51).

Possibly, some limited form of violence might also be acceptable if the common good of humanity is at stake (Westra 2004). A somewhat Kantian defense of terrorism as "self-defense"—that is, as a form of defense of one's personal integrity (autonomy/dignity), and that of one's family and community—might represent an acceptable extension of the traditional concept of self-defense. In fact, this might be one which, from the logical as well as the moral point of view, is far more defensible than pre-emptive strikes against the possibility of future violent attacks.

This point brings us back to the question of "freedom fighters", which is one more issue that requires a thorough discussion of the motivations of the so-called terrorists (Friedrichs 2006: 71–72). The "US and Western countries" opposed the quest for the (possibly) "legitimate reasons behind the grievances raised by international terrorists", stating that they did not "wait for the underlying causes of crime to be identified before enacting penal laws against criminals" (Friedrichs 2006: 73; Report of the Ad Hoc Committee, UN Doc. A/9028, 1973, annex 7b; verbatim records of the Sixth Committee, UN Doc. A/C.6/SR.1355-1374, November 1972).

But, as noted above, terrorists are not criminals, although that designation is often used by governments who do not abide by the legal regimes that prescribe the treatment of criminals (e.g. immediate access to legal advice and to their country representatives if they are foreign nationals, reasonably speedy trials, humane treatment in jails, and so on). Nor do the same governments treat them as combatants in armed conflict, with all the rights pertaining to that designation.

Hence it becomes even more imperative to define the acts that are or are not terrorism. This requires a full understanding of the motives, the root causes that propel even young, educated people of either gender to commit suicide as part of their acts of terrorism, for their deeply held beliefs and to bring the world's attention to the gross human rights violations their groups and communities are suffering.

Their position is akin to the one of the whistleblower, in the sense of a person pursuing activities harmful to herself but especially damaging to the guilty party (industry or corporation for the most part) —without, however, engaging in violent attacks. The whistleblower engages in a form of self-defense; that is, she is calling attention to the breaches

of human rights that follow upon certain corporate practices. She harms her own position by so doing, but the final goal is the defense of affected stakeholders and, in the case of grave environmental cases, perhaps the defense of humanity itself.

The whistleblower also acts from a justifiable desire to see universalizable principles upheld, and to continue to live in a way which is consonant with her personal integrity and which permits the exercise of her autonomy. Of course, for the most part, the whistleblower only uses her knowledge to stop certain practices, and perhaps to harm the financial outlook of the targeted enterprise at most. Instead, the terrorist does much more to bring the world's attention to the grave conditions her group or community have to bear. Her acts—even her suicide—bring home once again the powerlessness of individuals and minority groups even in so-called democratic and just societies, or in a world where principles have apparently been replaced by political expediency.

Given this attempt to place an understanding of terrorism in a somewhat Kantian context, it is important to recall that Kant forbids suicide generally, and offers the single example of a morally correct one as that of Seneca, dying to defend freedom and autonomy in the hope that his death may encourage others to overcome oppression (Westra 1989: 56). Of course Kant is addressing self-violence, not violence directed at others, even to achieve laudable aims, as in the example he adduces.

In conclusion, all three main "issues" we have discussed *start* with the sincere and respectful attempt to understand the causes and reasons that may be the basic causes of terrorism. If such a course of action were to be pursued, the result may well go far beyond the understanding of terrorism we are advocating. In fact, respectful dialogue and the return to the strict limits of international law might mean the mitigation or even the cessation of the conditions that lead to the violent protests we are considering.

After all, freedom fighters should be supported and protected, as they are attempting to actualize the UN mandate to eliminate colonialism and racial discrimination, and to defend the self-government of peoples (McMahan 2009: 26).

This discussion was intended primarily to show how the skewed national priorities and power alliances that prevail today end by thwarting the very aims of the United Nations and of the institutions they support. In the next section, we will return to one more aspect of this flawed global governance: the question of procedural, political and civil rights under globalization.

Global Governance and the Imposition of "External Constitutions" on States

> When legislatures amend their statutes they can subsequently amend or revoke their acts in response to changing conditions. But statutory amendments incorporating international trade norms can only be amended if the external regime changes its rules by international agreement (Clarkson 2002: 202).

In Chapter 2 we discussed the harmful role of economic and trade institutional governance under the categories of "plunder", "exploitation" and "ecoviolence", all of which refer to the social, economic and biological/basic rights of collectives. But there is another important (though often neglected) aspect of the primacy of the rules of trade organizations, which affects the civil and political rights of peoples as well as their physical existence.

This situation might be considered almost as grave as the attacks on the physical integrity of individuals, or the territorial integrity of states, because—for better or worse—civil and political rights are considered to be an especially fundamental kind of rights, as the more robust language of the International Covenant on Civil and Political Rights (ICCPR) indicates. This argument applies particularly to North America, and perhaps to all states other than those of the European Union, which represent instead a *sui generis* situation and a case apart.

Generally, for democratic states, their constitutions form the basis of governance, as they are intended to express the will of each separate national community as it prescribes the limits of legality, the rights of its citizens, and the norms according to which the administrative, legislative and judicial institutions of each nation will operate (Clarkson 2003: 1999). For the most part, constitutions can only be amended by specific international legal procedures. Yet, taking the example of Canada (a democratic country, but subject to the mandates of both NAFTA and the WTO), the structure of that country no longer depends on its constitution for its ultimate authority, in direct contrast with the autonomy rights of its citizens and its sovereign rights as a State.

However, the terms of NAFTA and of the WTO impose drastic limitations on the powers of member states through their own norms, which, as we have noted throughout this work, are intended to support the interests of the most powerful among the signatories: Clarkson terms those institutions "such intrusive manifestations of global governance that they constitute the country's *supraconstitution*" (Clarkson 2003: 199).

The life and the security of citizens is the basic reason for the existence of states and their governing institutions, so that the state has an obligation to protect these. Yet either NAFTA or the WTO can (and do) attack the legal terms of that protection on the grounds that it may represent an attack on the "freedom" of trade, or "protectionism" of a country's own industries.[6] If the state does take action to protect its citizens' health and security there is the possibility of appeal for the so-called "discrimination" suffered by the firm whose products the government has deemed unsafe for use within the country. These are unacceptable limits imposed on a government such as that of Canada, whose "protective" laws are already far weaker and less peremptory than would be appropriate for the grave harms citizens may encounter (Boyd 2003: Chapter 12). NAFTA and WTO effectively place a legal person's right to profit from their operations above those of a natural person's right to life, health and what the Canadian Charter of Human Freedoms and Rights terms "the right to security of persons", where the latter is well entrenched not only in domestic instruments but also in international law, and the former is not.

In fact, this is "the constitutional significance of free trade discourse about NAFTA 'locking in' neoconservative values, making them immune from partisan politics" (Clarkson 2003: 2002). The end result is that not only the present citizens of a "democratic" country like Canada are essentially "disenfranchised", but that even future generations will suffer from the same effective disempowerment because of the strong limits imposed on the democratic process and state sovereignty, whereas the legal persons (corporate entities within Mexico and the US, for NAFTA) would arrogate to themselves the privilege to redirect the public policy of a country and their constitutional law.

Nor is Canada's government fighting the situation: following the same flawed mindset, Canada views its own "loss of *internal* autonomy" as "offset by the capacity to exercise power outside the national boundaries" (Clarkson 2003: 220). A clear example of this mindset is indicated by Canada's efforts to overturn the European Union's ban on the import of beef raised in North America with the use of growth hormones, or its forceful support (luckily unsuccessful) to force asbestos products upon France and other states in the European Union

[6] See, for instance, Ethyl Corporation v. Canada (Notice of Arbitration under the Arbitration Rules of the UNCITRAL and the NAFTA, April 14, 1997), discussed in Chapter 4. See also Vladi (2010).

(EC Measures Concerning Meat and Meat Products (Hormones)). Any effort to ensure "constitutional change" on the global agenda will therefore need to consider carefully the effects of the policies of non-state, transnational actors.

In conclusion, we can add limitation and restriction on the civil and political rights of citizens to the breaches of economic, social and cultural rights we have detailed earlier (see Chapter 2). For both kinds of rights, the breaches of the basic human rights to life and health are as inseparable as the human rights themselves. In addition, even the fundamental meaning of democracy is thwarted, as citizens cannot choose a form of governance that will ensure the presence of the most important values held by democratic constitutions.

Perhaps even the growing apathy of voters in most electoral contexts may be traced to the ongoing realization that, no matter what form of governance may be "chosen", no major change will emerge, except for a routine "rubber-stamping" of the hegemonic power that prevails (unelected) today.

Global Governance for Collective Security

> With all the convulsions of global society, only one power is left that can impose order on incipient chaos. It is the power of principles transcending changing perceptions of expediency (UN Secretary-General Boutros Boutros-Ghali, Statement at Security Council Summit Meeting, SC/5360/Rev.1, 31 January 1992).

Secretary-General Boutros Boutros-Ghali was indeed prophetic in his words to the SC. Today's situation, combining multiple unjust and unprincipled ongoing conflicts, is a clear demonstration that, failing the imposition of principled restrains, the alternative is a violent and lawless world. Yet the SC, even after its recent restructuring in 2005, is still firmly bound by the "expediency" of interests of its own major powers, with no regard for the moral or philosophical basis that should govern its activities, or even by the basic principles and foundational aims of the UN.

Global security and the very aims of the United Nations, for instance, are totally dependent on the return to the principles of *jus ad bellum* and *jus in bello*, and the peremptory norms governing human rights (Franck 1995: 218–244, 245–283; Lamb 1999: 361–388).

We are seeking a "world law" capable of redressing the present "unfairness" and illegalities, as well as the lack of principled action

globally. The United Nations appears to be the most likely candidate to provide a centralized focus for such principled action. But the SC clearly has the final word on any practical application of any UN declaration, instrument or report.

Fairness in Institutions and the Role of the Security Council

Many different conclusions have been reached as to whether the ICJ has powers of judicial review over acts of the SC. If what is meant is an automatic constitutional process review with compulsory effect, both the UN Charter and the Statue of the International Court are silent in this respect.[7] Thus, although our argument leads to the need for a centralized organization, with ultimate powers as the locus for a "world law", and suggests that the UN is the only present actor able to fulfill that role, the organ with overarching authority (that is, the SC) is not subject to final review of its decisions, nor is its power based on the will of a strong majority of states. However, the fact that there is no "automatic review" of its decisions, together with its limited "democratic" presence, renders such an authority suspect as the ultimate locus of power. As well, the SC may reach decisions beyond its procedural limits:

> The Security Council is an organ of an international organization, established by a treaty which serves as constitutional framework for that organization. The Security Council is thus subject to certain constitutional limitations, and neither the text nor the spirit of the Charter conceives of the Security Council as unbound by law (Prosecutor v. Dusko Tadic (Jurisdiction) 1995).

Another important aspect of SC powers can be found in Articles 24–26 of the UN Charter. Article 25, for instance, functions to give Chapter VII resolutions their binding force; however, the SC is "bound by the Purposes and Principles of the Organization, so that it cannot, in principle, act arbitrarily and unfettered by any restraints" (Lamb 1999: 366; Bowett 1982: 33). Article 25 explicitly states that "Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." But the

[7] Lamb (1999: 363) adds: "from the *travaux préparatoires*, 'Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted … As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction' ".

language here is somewhat ambiguous, as it may imply the primacy of the Charter principles regarding the mandates of the SC, or it may simply refer to the obligations of the member states of the UN.

One would think that as the UN is the matrix of the SC, the UN principles ought to prevail. Yet there is no specific mechanism, to my knowledge, to either support the decision of the SC to confirm it or to challenge it. This lack of supervisory authority appears to apply to what the SC does and what it does not do, and it is the latter aspect of the exercise of its powers that can be found to be most at fault. In fact, despite the language of Article 2 of the Charter, which states that the "purposes and principles of the UN Charter shall bind the Organization and its Members", the omissions of the SC often contrast with the UN purposes and principles.

The primacy of the Charter includes the "principles of justice and international law", according to Article 1; hence, the SC should be obliged to prescribe and enforce certain measures in response to any instance of aggression on the part of a state, something that does not appear to occur in all cases. But the SC "discretionary powers" are not unlimited, at least according to Ian Brownlie (1995: 216–217). The determination that there is a "threat of aggression" must therefore still remain "within the broad framework of the UN Charter" (Lamb 1999: 375–376). *A fortiori*, then, all the determinations of the SC, including the decisions that certain situations do not, of themselves, constitute a threat to peace, must (or should) observe closely the Charter articles that refer to such situations. So it is hard to understand why so many ongoing conflicts, as well as other obvious breaches of *jus cogens* norms (such as the prohibition of the practice of apartheid for instance), remain unremarked and unpunished for years, even when condemned by advisory opinions or other UN declarations.

The principal organs of the UN "are empowered under the Charter, to establish subsidiary organs which then, both by design and in practice, possess a high degree of autonomy from the parent bodies" (Lamb 1999: 377). Thus the International Criminal Tribunal for the former Yugoslavia (ICTY) could exercise its judicial functions after having been established by the SC (SC Res. S/RES/827, 1993; Res.S/RES/808, 1993).

At any rate, the possible misuse of the powers of the SC have been acknowledged by scholars. For instance, speaking of possible limitations to SC powers, Judge Fitzmaurice said:

> Without these limitations, the functions of the Security Council could be used for purposes never originally intended … [such as where] there was

> no threat to peace and security other than such as might be artificially created as a pretext for the realization of ulterior purposes (Fitzmaurice J, Separate Opinion in *Legal Consequences of the Continued Presence of South Africa in Namibia* (South West Africa) notwithstanding *Security Council Resolution* 276 (1970), Advisory Opinion, ICJ Rep.1971).

The argument of this work has tended to focus on the opposite danger—that is, the possibility of special "purposes" that might produce the opposite result of convincing the SC not to recognize a "threat to peace and security" that is obvious, or even an ongoing situation of conflict, for political motives. To my knowledge, the SC has not been formally questioned for its omissions. Lamb recognizes that for states and organizations, and even for UN organs, "the legal regime is primarily one of self-limitations" (Lamb 1999: 387). She adds:

> the inherent and fundamental difficulties in subjecting the Security Council to legal controls are not diminished and in this regard … the identification of the problem is easier than the prescription of a cure (Lamb 1999; see also Brownlie 1995: 26).

A World State? The Possibility of Global Change in Governance

> It remains … to stress that legitimacy as process fairness and distributive justice as moral fairness are different aspects of fairness … In a critique of an existing or proposed rule, they may coincide or not. However, while a rule may be legitimate and yet distributively unjust (and thus only imperfectly or contingently fair) and *vice versa*, there is much overlap between legitimacy and justice (Franck 1995: 22).

Throughout this work we have considered both distributive justice and moral fairness issues, as well as the legitimacy of international institutions that do not appear to respond adequately, if at all, to unfairness and injustice today. Our starting point was to note the role that globalization plays in that regard, as the organizations that support it and the pressure of neoliberalism (as the source of its main principles) stand in stark contrast with most principles of moral fairness or just distribution.

Lamb said it well (citing Brownlie in the previous section): it is easier to identify the problem than to prescribe a cure. The only reason to press on seeking a "cure" is that the present combination of illegality and immorality in global governance is becoming truly intolerable. Franck sees the present situation as providing both "opportunity and

challenge" (Franck 1995: 4) as he details the role of the IMF, allocating "quotas" regarding the successors to the assets and liability of the former Social Federal Republic of Yugoslavia. In so doing, the International Monetary Fund (IMF) decision indicated its "sovereign" powers regarding this (limited) jurisdiction where new "states" had no recourse against the system's decisions (Franck 1995: 3–4).

In contrast, the almost inviolable "sovereignty" of states, as formerly taken for granted, represents a clear indicator of the changes that have occurred in international law, which has now acquired a degree of complexity that did not exist in earlier times. This complexity is an indicator that international law has reached its "post-ontological stage"—that is, the questions that need to be answered go beyond the initial question about its very existence (Franck 1995: 6–7).

Franck sees the most important question as whether international law is fair, but he understands fairness itself as incorporating both "legitimacy" and "justice" (Franck 1995). In the previous chapters, our discussion has questioned both aspects of international law in the era of globalized neoliberalism, fifteen years after Franck's analysis. The community's support for its fairness, which Franck views as necessary, goes well beyond self-interest:

> Unlike legitimacy, however, distributive justice is rooted in the moral values of the community in which the legal system operates. The law promotes distributive justice not merely to secure greater compliance, but primarily because most people think it is *right* to act justly (Franck 1995: 8).

We too have argued for a principled position in order to overcome the aspect of expediency that appears to rule the *application* of legal regimes, if not the Declarations and Major Conventions on which they are based. The principles we have appealed to are to be neither debated nor negotiated: they are viewed as peremptory as the norms we consider *jus cogens*.

However it is true that, at this time, "what is considered allocationally fair has varied across time and still varies across cultures" (Franck 1995: 14). But if one follows Franck to contrast subjective social notions of fairness with the immutability of principles one may find in natural law (or in a Kantian/Stoic cosmopolitanism), rejecting inalterable principles (*not* possible nuanced applications changing with the age),

one might be left with no ground from which to condemn gross human rights violations.

These violations may well be part of "accepted" social mores, and we have noted in the previous chapters some examples of societies allowing (even supporting) disregard for the human rights of Indigenous communities, or practicing neocolonial aggression, or even apartheid. Thus, unless the centralized "supraconstitutional authority" we are seeking embodies both principles and power, and unless these are based on morality rather than economics and the quest for power of neoliberal alliances, we will remain in the same unacceptable situation, with weakened states that are unable to ensure that even their best laws will protect their citizens and beyond.

Hence the world state must rest primarily on moral principles beyond the relativity of societal preferences. This position need not represent a return to feudalism or to the imposition of a dictatorship. In fact the best available model of multiple societies—each living within their own cultural traditions, but all subscribing to common basic principles as the accepted parameter within which to exercise their own autonomy—remains the European Union today. What are the requirements for states to join, beyond the economic aspects? They must necessarily be:

1. democracies;
2. they must regularly hold free elections by secret ballot;
3. they must respect the rule of law; and
4. they must have signed the European Convention on Human Rights and Fundamental Freedoms (Hans van den Broek, European Commissioner for Foreign Relations, 1990).

In order to apply similar requirements to States attempting to unite under a world law, there would have to be a full commitment to the main principles, declarations and conventions of the UN, and the promise to abide by the "international rule of law", particularly mandates supported by *jus cogens* norms. This wholehearted support for principles is the most important ingredient that is missing today from present governance. A consideration of whether the use of the European Union as a model might be useful should start with some of the structural details of EU governance.

The European Union: A Model for a World State?

Under the terms of the Maastricht Treaty on European Union (TEU), the second pillar on the Common Foreign and Security Policy (CFSP) and

> the third pillar on Justice and Home Affairs (JHA) were more like familiar creations of international law, not sharing the institutional structure of law-making processes, or legal instruments of the Community pillar, largely beyond the jurisdiction of the European Court of Justice and lacking the key community characteristics of supremacy and direct effect (Craig and de Búrca 2003: 4; Laffan 2001: 701).

The strong supranationalism that, together with intergovernmentalism, distinguishes the European Union from the UN and its organs might give us some possible avenues for change. In fact, the EU institutions include both "national and supranational actors", as well as other "subnational, infranational, public and private entities", all of which participate in its governance (Craig and de Búrca 2003: 6). The "common provisions" of the Maastricht Treaty include "respect for national identities and human rights, as well as a provision to safeguard the *acquis communautaire*, the body of community law built up over the years" (Craig and de Búrca 2007: 15–16).

This provision alone clearly shows the distance between the EU and the current supranational (world) institutions such as the WTO and NAFTA, with their disregard for individual state constitutions (and even for human rights), should either conflict with trade objectives as noted above. In fact, the aims of the community, as defined in Article 2EC of the Maastricht Treaty, included:

> environmental concerns, convergence of economic policies, social protection … also "sustainable" growth "and "quality of life" in addition to a "raised standard of living" (Craig and de Búrca 2003).

These inclusions indicate a balanced and progressive approach to supranational governance. This approach includes respect for collective, basic human rights, as well as an obvious openness to scientific knowledge and applications regarding ecological sustainability, all of which appear to be absent from both the present instances of global governance institutions, and even the UN itself.

As for intergovernmental matters, the CFSP ensures unity in national policies (Treaty establishing the European Community, Articles 11–23). Also, because of the procedures followed for a "possible future common defence policy" (Craig and de Búrca 2007), such as the role of the Council of Ministers and that of the president (representing the Union), and the role of the Political Committee to monitor the implementation of common policies—it seems that the possibility of a "hegemon" overwhelming the required procedures with its own viewpoints and interests would be remote indeed.

The same community position appears to underlie the policies of Articles K.1–K.9 of the Maastricht Treaty, which include such issues as "asylum, immigration … third country nationals … international crime issues … and police cooperation" (Craig and de Búrca 2007: 18). Again, the Council of Ministers and the commission are fully involved in all these areas and the Parliament's views must be taken into consideration as well. Hence the authority to steer policies appears to be apportioned across various institutions, without the possibility of a single power arrogating for itself the right to dominate positions and policies.

The Treaty of Amsterdam was signed in 1997 and came into effect on 1 May 1999 (Craig and de Búrca 2003: 30). From our point of view, it is important to note that the normative foundations of the European Union explicitly refer to "human rights, democracy and the rule of law", so that a Member State who was found by the Council to be in "serious and persistent breach" of the principles listed in Article 6 could be suspended (though not expelled) from the union. Hence there should not be any state remaining a member, with all the rights and privileges implied by that status, if that state were to be found to have committed a "serious and persistent breach" of the main principles of the EU as listed above.

In contrast, despite the authority of the UN and its explicitly worded mandates, many powerful Western states today commit the same breaches repeatedly and routinely, under such categories as trade rights, to implement the so-called "right" to development in poor countries, or even to ensure their own growth through aggression.

Of course this brief and superficial overview of EU governance and institutions could not possibly be sufficient to provide either a convincing argument that such governance might provide a model for the operation of the organizations required to support a world state, or that the EU's supranational institutions can remain resistant to the sort of hegemonic dominance that has violated the UN's institutional operations, thereby diminishing that institution from the initial principles committed to peace and justice to the level of inefficiency in that regard found today.

Nevertheless, even acknowledging the superficiality and incompleteness of this brief analysis, we have moved beyond the simple affirmation of Alexander Wendt cited in Chapter 1. Wendt simply suggested that an ongoing example of a world state already existed in the EU. We can now add that even a cursory overlook of the administration and

organization of this example offers several aspects of better, more principled governance than the best UN organs can offer today. More detailed and careful analysis is needed to establish whether the initial impressions we have listed can be sustained.

Still, it is important to acknowledge that there are great differences between a group of states that, while different in many ways, are still generally similar to one another (because of their traditions, religions and ethnic background, at least for the most part), and states comprising several continents, with vastly differing backgrounds and traditions. Also, the common philosophical background found in Europe—starting from the classical tradition of Greece and Rome and continuing through the evolution of Christian thought—leads to a specific understanding of human rights, both individual and collective (see for instance the very roots of cosmopolitanism and its historical elaborations; Westra, L. 2010b: 8–25), which is now accepted worldwide.

In contrast, some have argued that such European concepts as those establishing human rights cannot necessarily be acceptable to the citizens of all other nations, for whom the very frame of reference of such rights is alien to their traditions and beliefs (Baxi 1999: 125). Yet Rosalyn Higgins has taken the opposite position; that is, she emphasizes the universality of the individual biological composition of human beings, and hence the very foundation of basic human rights, whatever the nationality or ethnic background of each human being (Higgins 1994). Her argument is also supported by the observable commonality of protesters everywhere as they unite against the present "lawless" and immoral practices that pit trade and economics against human life.

It would be impossible to reach a solid conclusion on these immensely complex issues at this time. But it seems that, after achieving some measure of success in showing why current global governance regimes are unacceptable on a number of grounds (the easiest part of our task), at least some light can now be shed on the next steps required. At least we have been able to propose a possible path to be followed to replace the present flawed institutions with a regime that might offer some hope to help us reach a more acceptable form of community.

It might then be possible to achieve universal protection for the life and dignity of all humans, whatever their background and traditions, their locations or ethnicity. These easy words belie the immense difficulties of transforming the present regimes into something resembling a morally just, supranational world state. Those difficult details will have to be researched and proposed at a later time.

Cosmopolitanism and Global Change: The Need for "Dual Democracy"?

> Numerous international legal institutions, such as collective security in the UN Charter, collective self-defence, *erga omnes* norms, the obligations to admit humanitarian assistance in armed conflict, the system of refugee law or the environmental law principle of common but differentiated responsibility, can be reconstructed as manifestations and emanations of an emerging global constitutional principle of solidarity (Peters 2009: 311, n. 184).

In conclusion, as we attempt to trace the first steps toward a morally just and legitimate form of global governance, we should perhaps clarify what is not and has not been the object of this work; the effort to establish "democracy as a principle of the global constitutional order", as Peters would have it (Peters 2009: 263). She views the "democratic deficit of international law and global governance" as "the central question in both governance and world politics (Peters 2009).

In contrast, we have argued that today's democratic states use their choices (singly and through various alliances) for the sole purpose of advancing their power and their economic interests. Whether a careful examination of these states' policies and activities would disclose their citizenry to be of the "thin" or "thick" variety (Peters 2009: 311–312), the effects of these democratic choices no longer simply reflect the will of their own citizens, so that whatever the results that ensue, the citizens would not be the only ones to bear the consequences of their own choices.

Instead, the whole world, no matter what each citizenry has willed, is forced to suffer from the results of the "free" and "democratic" choices of powerful nations. We need but consider the lack of decisive binding goals resulting from the COP15 conference, or the ongoing and increasing number of "terrorist" attacks:

> the murderous events of 11 September 2001 have made it blindingly clear that peace is indivisible, that poverty and injustice in one part of the world profoundly affect the security and well-being of others, and that no country, however powerful, can treat with impunity the poor and vulnerable people in backward parts of the world as mere pawns in an international game (Parekh 2003: 13).

Essentially, the surge of anti-Islamism, the perceived dangers of travel and the terrible events in the Middle East all have their remote and formal causality originating in the decisions of democratically elected US administrations, with their narrow and self-interested

understanding of human rights, their support of state terrorism by the Zionist government in Israel, and, more generally, their ongoing pursuit of economic interests in the Middle East.

Global "solidarity" (Peters 2009: 311) is limited by whatever international instruments are judged to be compatible with the pursuit of the national interests of the hegemon, and of other powerful countries, all of which pursue their "constitutional patriotism" with its "tendencies of aggression and exclusion" (Peters 2009: 310). Peters argues that such tendencies "must be curbed" as "globalized identities" are pursued instead, while attempting to preserve only the "best" in the cultural identities in national democracies (Peters 2009). No suggestions are offered as to how such results could be achieved.

Throughout our examination of the practices and effects of globalization, we have not perceived any movement in that direction; hence our lack of reliance on democratic practices, whether national or transnational, to pull themselves out of the present disastrous collective situation "by their bootstraps". We have appealed to the most universal and abstract principles of cosmopolitanism instead. However, some view cosmopolitanism (and even the possibility of a world state) as "bound to be remote, bureaucratic, oppressive and culturally bland. If global citizenship means being a citizen of the world, it is neither practicable nor desirable (Parekh 2003: 12).

In its stead, Parekh proposes that "we should aim to become … a globally oriented citizen", as that approach recognizes both the reality and value of political communities, "not necessarily in their current forms, but at least in some suitable revised form" (Parekh 2003). This is not the appropriate locus for an in-depth discussion of cosmopolitanism, but the emphasis on "internationalism" and on becoming a "globally oriented citizen" comes much closer to the argument we have proposed in this work than the quest for a "double democracy" (Peters 2009), which would seem to spread even wider the unprincipled, globalized politics we have described in these pages.

Parekh (2003: 14) writes that:

> No country can ensure order and protect its borders on its own again from the internationally linked terrorist movements. And nor can it deal on its own with the problems of pollution, drug trafficking, climate change, global warming, and the spread of contagious disease.

It is true that the conditions cited in the above paragraph are both known and accepted today by most people. What is *not* acknowledged,

however, is the seminal, causative role of free democratic states in the generation of all the conditions listed above. Even well-respected, scholarly work such as that of Anne Peters neither recognizes nor attempts to propose any redress other than better-nuanced, global democracies: essentially, more of the same.

The only saving grace of such proposals is the appeal to some of the EU institutions, where cultural identity and national traditions are supported by the moral "pillars" that enrich individual state democracies. They include collective regional concerns, without forcing any of the constituent states to give up their primary concerns for local obligations (which Parekh seems to anticipate as the necessary concomitant result of cosmopolitanism; Parekh 2003: 13). Democracies—no doubt—are necessary. But without a radically changed global order, it would seem that democracies, whether national or global, are no longer sufficient.

APPENDIX I

LIST OF CASES

Aguasanta Arias et al. v. DynCorp, Class Action Complaint for Equitable Relief and Damages, Filed in the US District Court, District of Columbia, September 11, 2001

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APPENDIX II

LIST OF DOCUMENTS

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Convention on the Rights of the Child, 20 November 1989, GA44/25

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