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## International Law as “Intimate Enemy”

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[T]hrough a curious transposition peculiar to our times—it is  
 innocence that is called upon to justify itself.

Albert Camus<sup>1</sup>

**INTRODUCTION**

The metaphor “intimate enemy” best captures the changing nature  
 of international law vis-à-vis nations. “Intimate enemy” is a useful  
 heuristic device that could be deployed to capture legal concepts of  
 indeterminacy, dialectics, and reformulation within international law.  
 The United Nations Charter of 1945 aims primarily at saving,

succeeding generations from the scourge of war . . . reaffirm[ing]  
 faith in fundamental human rights, in the dignity and worth of the  
 human person, in the equal rights of men and women and of nations  
 large and small, and to establish conditions under which justice and  
 respect for the obligations arising from treaties and other sources of  
 international law can be maintained, and to promote social progress  
 and better standards of life in larger freedom.<sup>2</sup>

Developing countries since then have mostly been backbenchers  
 within the international legal system given their dismal compliance  
 with human rights norms and high protectionism in international  
 trade. Furthermore, since the formation of the United Nations,  
 international organizations have taken form in a myriad of  
 memberships such as the World Trade Organization (WTO), the  
 European Union (EU), the African Union (AU), the Association of  
 South East Asian Nations (ASEAN), African, Caribbean and Pacific  
 Group of States (ACP), Asociación Latinoamericana de Integración,  
 and the South Asian Association for Regional Cooperation.  
 Empirically, the participation of developing and least developed

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<sup>1</sup> ALBERT CAMUS, *THE REBEL: AN ESSAY ON MAN IN REVOLT* 4 (Anthony Bower  
 trans., 11th ed. 1978) (1951).

<sup>2</sup> U.N. Charter preamble.

countries in international legal systems has increased multi-fold. With the rise in the participation of non-Western nations, international law began to change its overall relationship with nations. There is a gradual but unmistakable swap of positions.

This Article calibrates the relationship of international law vis-à-vis developed, developing, and least developed nations by deploying the metaphor of “intimate enemy.” Given the lack of sufficient non-Western academics and institutions in the field of international law, there exists a less than robust view on the relationship of international law with developing and least developed countries. Thus, this Article deploys the metaphor of “intimate enemy” to:

1. Unpack the non-compliance of international law by Western nations
2. To show that there is a growing trend among non-Western nations towards compliance.

International law—so far as it is a set of legal doctrines animated by the spirit of global solidarity, world peace, and Laissez-faire policy—has begun to threaten the old position of developed countries. In a new environment, BRIC (Brazil, Russia, India, China) countries have taken away part of the influence from the developed countries. This fundamentally alters the relationship of countries with international law. This Article seeks to expose the politics of knowledge production and marketing that hides this dynamic in the service of a perception that non-Western countries are the worst violators of international law. The scale of intimate animosity works both ways; it maps the decline in international law’s compliance by Western nations as well as a growth in its compliance by non-Western nations.

Indian Judge Radhabinod Pal’s dissent<sup>3</sup> that famously absolved all the Japanese defendants in Tokyo Tribunal of all guilt, according to Kirsten Sellars, was an articulation of a “third-worldist sentiment.”<sup>4</sup> Indeed it was also the start of an international legal advocacy in postcolonial ink. The first wave of postcolonialism marked the birth of Third World Approaches to International Law (TWAAIL). However, having transgressed the limits of conditions and riding the wave of globalization today, many see the Arab Spring and other

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<sup>3</sup> See generally International Tribunal for the Far East: Dissenting Opinion of Justice Pal (1953).

<sup>4</sup> Kirsten Sellars, *Imperfect Justice at Nuremberg and Tokyo*, 21 EUR. J. INT’L L. 1085, 1095 (2011).

advancements in developing countries as blowing away postcolonialism.<sup>5</sup> Nonetheless, the first phase of the discovery of self-worth among developing countries came within a postcolonial vocabulary. In fact, within the legal literature postcolonialism is still alive as a methodology of deconstruction.<sup>6</sup>

Nobel laureate V.S. Naipaul pens about Salim—the hero of his novel, *A Bend in the River*—in postcolonial ink.<sup>7</sup> Salim’s background is rather international and interesting. His forefathers came from Gujarat—the home province of Gandhi. “My family was Muslim,” declares Salim, and “in our customs and attitudes we were closer to the Hindus of northwestern India. . . . All that I know of our history and the history of the Indian Ocean I have got from books written by Europeans.”<sup>8</sup>

If I say that our Arabs in their time were great adventurers and writers; that our sailors gave the Mediterranean the lateen sail that made the discovery of the Americas possible; that an Indian pilot led Vasco da Gama from East Africa to Calicut; that the very word *cheque* was first used by our Persian merchants—if I say these things it is because I have got them from European<sup>9</sup> books. [However,] [t]hey formed no part of our knowledge or pride.

And Salim throws the salvo at the politics of knowledge creation rather innocuously: “Without Europeans, I feel, all our past would have been washed away, like the scuff marks of fishermen on the

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<sup>5</sup> See HAMID DABASHI, *THE ARAB SPRING: THE END OF POSTCOLONIALISM* xvii (2012) (“We have now entered the phase of documenting in what particular terms that world is transcending itself, overcoming the mystified consciousness into which it was colonially cast and postcolonially fixated.”). Shashi Tharoor makes similar claims in his book, *PAX INDICA: INDIA AND THE WORLD OF THE TWENTY-FIRST CENTURY* 15 (2012). Post-1991, Tharoor says, “the post-colonial chip has fallen off” India’s shoulder. *Id.*

<sup>6</sup> Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 *THIRD WORLD Q.* 739 (2006) (“The colonial and postcolonial realities of international law have been obscured and misunderstood as a consequence of a persistent and deep seated set of ideas that has structured traditional scholarship on the history and theory of international law. This article seeks to identify these structures, suggesting ways in which they have limited the understanding of the relationship between imperialism and international law.”). Tayyab Mahmud, *Law of Geography and the Geography of Law: A Post-Colonial Mapping*, 3 *WASH. U. JUR. REV.* 64 (2011). James Gathii talks about anti-colonial reconstructions of international legal history. See James Thuo Gathii, *International Law and Eurocentricity*, 9 *EURO. J. INT’L L.* 184, 187 (1998) (“I identify this form of anti-colonial International legal scholarship as strong because of the centrality its analysis places on the claims and role of economic, political, social and cultural superiority/inferiority in the historical relationship of colonized and colonizing countries in the past and the present.”).

<sup>7</sup> V.S. NAIPAUL, *A BEND IN THE RIVER* 11 (1979).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 11–12.

beach outside our town.”<sup>10</sup> Naipaul is very sarcastic in speaking through Salim. At the same time he exposes the problem that international law faces, the problem of the absence of native voices, the enigma of an authentic Other’s worldview. International law today deepens the problem still further; it is about the ability that powerful actors have to co-opt resistance by the Others within international law.<sup>11</sup>

Unfortunately, it is only through borrowed glasses that one begins to see oneself.<sup>12</sup> The postcolonial international law is one such borrowed glass.<sup>13</sup> But then this enemy has become intimate; at the base of this intimacy is a live-in relationship between the developing countries and international law after 1945 that—as Bhabha would say—is an offspring of the productivity of colonial power.

In order to understand the productivity of colonial power it is crucial to construct its regime of ‘truth’, not to subject its representations to a normalising judgement. Only then does it become possible to understand the *productive* ambivalence of the object of colonial discourse; that ‘otherness’ which is at once an object of desire and derision, is an articulation of difference contained within the fantasy of origin and identity. What such a reading reveals are the boundaries of colonial discourse and it enables a transgression of these limits from the space of that otherness.<sup>14</sup>

Decolonization was succeeded by the birth of a “predominant liberal notion of democracy” that “deals with those excluded, but in a radically different mode: it focuses on their inclusion, as minority voices.”<sup>15</sup> Here all minorities “should be heard, all interests taken into account, the human rights of everyone guaranteed, all ways of life, cultures and practices respected, and so on.”<sup>16</sup> In the process, what

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<sup>10</sup> *Id.* at 12.

<sup>11</sup> See B.S. Chimni, *Co-option and Resistance: Two Faces of Global Administrative Law*, 37 N.Y.U. J. INT’L L. & POL. 799, 826 (2006) (“Indeed, GAL [Global Administrative Law] can be co-opted by powerful states to their advantage. While this is no reason for neglecting the development of GAL, it is important to understand the limits of this expanding phenomenon. GAL can, in other words, only act as a *very limited tool of resistance and change*. Even for this to happen, certain conditions must be present.”).

<sup>12</sup> See Prabhakar Singh, *The Scandal of Enlightenment and the Birth of Disciplines: Is International Law a Science?*, 12 INT’L CMTY. L. REV. 5 (2010).

<sup>13</sup> See Frédéric Mégret, *From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Humanitarian Law’s ‘Other’*, in INTERNATIONAL LAW AND ITS OTHERS 265 (Anne Orford ed., 2006).

<sup>14</sup> Homi K. Bhabha, *The Other Question . . . Homi K. Bhabha Considers the Stereotype and Colonial Discourse*, 24 SCREEN 18, 19 (1983).

<sup>15</sup> Slavoj Žižek, *How to Begin from the Beginning*, 57 NEW LEFT REV. 43, 55 (2009).

<sup>16</sup> *Id.*

gets lost is “the position of universality embodied in the excluded. . . . What unites us is that, in contrast to the classic image of proletarians who have ‘nothing to lose but their chains’, we are in danger of losing everything.”<sup>17</sup> While a liberal notion of democracy welcomed decolonization, today neo-colonialism awaits the liberal democratic machine and the demise of postcolonialism. With the new age of the “war on terror” and the rise of nationalism in the Western world, international law is gradually being sidelined in the service of American foreign policy. This rigmarole, this Article emphasizes, could be captured within the epithet of “intimate enemy.” In order to prove this thesis, this Article discusses international humanitarian law, international economic law, and international criminal law. More precisely, this Article will take up “war on terror,” laws of Sovereign Wealth Funds (SWFs), and the law of regional unions such as the EU and the AU to explicate the claims made. Across the board, this Article claims that an intimate animosity is on display.

In what follows, Section I discusses the blatant breach of international law in droning Pakistan. Since the droning is not supported by any UN resolution, it is the United States alone that should offer the legal basis for the exercise. Subsection B, therefore, discusses the role of U.S. courts and scholars vis-à-vis international law. With the background set in this way, Section II discusses the psychological pull of international law, a fact that further stamps the growing affinity of the Third World and international law. Section II focuses on the Third World’s view of international law. Section III discusses the nature of international law vis-à-vis the EU. Section IV discusses the fallacy of the international law of humanitarian intervention using Afghanistan as an example. Western nations are largely interested in the suspension of international law at a time when SWFs are on the rise in non-Western economies. The withdrawal from international law by the Western countries to sabotage SWFs has been brought out in Section V. Section VI discusses the relationship between the AU and international law. Section VII concludes. This Article invites scholars and researchers of international law to use “intimate enemy” as a new hermeneutics to unpack the real relationship of countries and international law.

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<sup>17</sup> *Id.*

## I

## THE HEURISTIC OF “INTIMATE ENEMY”

I borrow the phrase “intimate enemy” from Ashis Nandy.<sup>18</sup> The lens of “intimate enemy” offers an account of the relationship between international law and the Third World as the outcome of what Pahuja and Eslava put as “TWAIL’s characteristic double engagement with the attitudes of both reform and resistance vis-à-vis international law and scholarship.”<sup>19</sup> The aim behind deploying this phrase in this Article is to capture a moment from the international law’s live-in relationship with the Third World. The desire behind importing this new lens of intimate animosity, to borrow Martti Koskenniemi’s words, “is not to write [a] ‘global history’ in which everything is visible—an impossible undertaking—but to diminish the power of blindness,” thereby seeing the future more clearly.<sup>20</sup>

The evaluation of the Third World’s relationship with international law through the lens of intimate animosity, however, is not a value judgement. It is simply an effort at mapping the shifting realities of our times at a given moment, for instance, in 2012. Essentially a love-hate courtship, the bond between international law and the Third World is in a state of constant flux. This affair is akin to the Stockholm syndrome: after a prolonged exposure to the Western technology of culture, Western education, and Western conceptions of international law, the Third World has begun to sympathize with the erstwhile colonizers. It is this Stockholm syndrome of the Third World that has procreated the enigma of intimate animosity. Arguably, international law was the Third World’s enemy because, to deploy TWAIL’s central argument, it was used to justify colonial violence, slavery, and to acquire native land in all of Asia, Africa, and Latin America.<sup>21</sup>

“It is now time,” Nandy wrote some two decades ago, “to turn to the second form of colonization, the one that at least six generations of the Third World have learnt to view as a prerequisite for their liberation.”<sup>22</sup> Here lies the pull for intimate animosity of international

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<sup>18</sup> ASHIS NANDY, *THE INTIMATE ENEMY: LOSS AND RECOVERY OF SELF UNDER COLONIALISM* 72 (1983).

<sup>19</sup> Luis Eslava & Sundhya Pahuja, *Between Resistance and Reform: TWAIL and the Universality of International Law*, 3 *TRADE L. & DEV.* 103, 103 (2011).

<sup>20</sup> Martti Koskenniemi, *Histories of International Law: Dealing with Eurocentrism*, 19 *RECHTSGESCHICHTE* 152, 176 (2011).

<sup>21</sup> Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 *HARV. INT’L L.J.* 5 (1999).

<sup>22</sup> NANDY, *supra* note 18, at xi.

law for the Third World. The lens of intimate animosity, when applied to international law, helps us re-imagine the modern West from a “geographical and temporal entity to a psychological category; in structures and minds.”<sup>23</sup>

Europeans, Camus once remarked, “have preferred the power that apes greatness . . . whom [European] school history books, in an incomparable vulgarity of soul, teach us to admire.”<sup>24</sup> Books are agents of knowledge, and the power that such books wield on the minds of people is all too well known.<sup>25</sup> Colonization cemented the presumption that knowledge only flows eastwards. However, through corrupt science and psychopathic technology, the West has purposefully dissipated only information eastward. For instance, during the colonial rule in India, the British introduced a new system of education to create clerical support. It is doubtful that this system even aimed at arming Indians with the knowledge of science and technology to create scientists. By the time of decolonization, international law had successfully seduced the Third World with concepts like sovereignty. About sovereignty and the primacy of international law, Hans Kelsen says that the theoretical dissolution of the dogma of sovereignty is one of the most substantial achievements of his Pure Theory of Law.<sup>26</sup>

By the 1970s, in the New International Economic Order, oil rich nations furthered their resource nationalism through sovereignty. Notably, however, with its intimate animosity, the Third World also runs the risk of copying the West with all its lacunas. Somehow, international law functions as a software that facilitates this imitation. TWAIL then becomes an exercise in separating knowledge from information and affirming that knowledge could also flow westward. In effect, TWAIL, apart from exposing some of the hypocrisies of international law, calls for a cross-fertilization of knowledge, ideas, and solutions for global problems.

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<sup>23</sup> *Id.*

<sup>24</sup> Albert Camus, *Helen's Exile*, in LYRICAL AND CRITICAL ESSAYS 148, 150 (Philip Thody ed., Ellen Conroy Kennedy trans., 1967).

<sup>25</sup> See Aaron A. Dhir, *The Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice, and Human Rights*, 47 OSGOODE HALL L.J. 47 (2009), for a perspective.

<sup>26</sup> HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 124 (Bonnie Litschewski Paulsen & Stanley L. Paulsen trans., Clarendon Press 2002) (1934).

### A. Droning in International Law

In September 2012, Stanford Law School and NYU School of Law came up with a joint report titled *Living Under Drones*.<sup>27</sup> The report deals primarily with death, injury, and trauma to civilians from U.S. droning in Pakistan.<sup>28</sup> It is the possibility of losing everything—for example, in the war on terror—that begs attention to the nature and effect of international law’s displacement of developing countries such as Pakistan. Droning is a question of *jus ad bellum*, the body of law concerning the recourse of force between two or more nations.<sup>29</sup> In any case, civilians must be protected within *jus ad bellum*.<sup>30</sup>

The legality of droning depends on whether Pakistan has consented to the strikes or whether the United States is lawfully acting in self-defense.<sup>31</sup> Paradoxically, while the liberal texts and documents of international law, including the UN Charter, seek to work towards the inclusion and protection of minority voices,<sup>32</sup> in droning civilians, the United States has been violating those minorities within a foreign state whose consent was not sought.<sup>33</sup> Pakistan’s parliament has long

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<sup>27</sup> INT’L HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC (STANFORD LAW SCHOOL) & GLOBAL JUSTICE CLINIC (NYU SCHOOL OF LAW), *LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM U.S. DRONE PRACTICES IN PAKISTAN* (2012) [hereinafter *LIVING UNDER DRONES*].

<sup>28</sup> *Id.*

<sup>29</sup> See Simon Chesterman, *Just War or Just Peace After September 11: Axes of Evil and Wars Against Terror in Iraq and Beyond*, 37 N.Y.U. J. INT’L L. & POL. 281 (2005); Brian L. Job, *Confronting Terrorism: Dilemmas of Principle and Practice Regarding Sovereignty*, in *RE-ENVISIONING SOVEREIGNTY: THE END OF WESTPHALIA?* 119, 122 (Trudy Jacobsen, Charles Sampford & Ramesh Thakur eds., 2008).

<sup>30</sup> “If the goal of the laws of war is to protect all individuals in armed conflict, can one ever be on the ‘wrong’ side of the laws of war? The answer to that question from many international humanitarian lawyers is an emphatic ‘no.’” Mégret, *supra* note 13, at 265.

<sup>31</sup> *LIVING UNDER DRONES*, *supra* note 27, at 103, 105, 106; 3A C.J.S. *Aliens* § 1133 (2012) (“Designation of foreign terrorist organization—Judicial review”); 74 Am. Jur. 2d *Terrorism* § 8 (2012).

<sup>32</sup> A very seasoned scholar and lawyer, Michael Reisman clearly admits this: “[E]xpectations with respect to the lawfulness of current or projected actions in the contemporary international political system are not necessarily congruent with the stuff with which lawyers ordinarily work, the formal texts of international law.” W. Michael Reisman, *International Legal Dynamics and the Design of Feasible Missions: The Case of Afghanistan*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS* 59, 59–60 (Michael N. Schmitt ed., 2009); see also Yousef T. Jabareen, *Toward Participatory Equality: Protecting Minority Rights Under International Law*, 41 ISR. L. REV. 635 (2008); see generally United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, United Nations, G.A. Res. 47/135, U.N. Doc. A/RES/47/135 (Dec. 18, 1992), available at <http://www.un.org/documents/ga/res/47/a47r135.htm>.

<sup>33</sup> Piotr Balcerowicz, *Afghanistan at the Cross-Roads*, 11/12 DIALOGUE & UNIVERSALISM 97, 98 (2001) (“The call to war against world terrorism should not mean

called for the end of droning.<sup>34</sup> Clearly there is no state consent then.<sup>35</sup> However, droning could still be legal if the United States is found to have acted purely in self-defense as UN Charter 51 stipulates.<sup>36</sup> However, a neutral evaluation of pure self-defense is tough to have, given the pro-government bias of U.S. courts as seen in a streak of new cases.<sup>37</sup> Also such claims of self-defense are not only arbitrary, but they also constitute an invitation to extraterritorial application of one sovereign's laws over another. No doubt, the war on terror has not only stretched the very idea of self-defense—a justification that

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common responsibility of the whole Afghan nation. Would a Parisian during the World War II unhesitatingly approve of American carpet bombing of Paris and Rheims, undertaken in order to expel the Nazis or their Vichy collaborationists under Marshal Pétain? Any civilised European would have shivered with a twinge of resentment at such an action, because the means would have been in stark disproportion to the ends, because the individual lives of civil inhabitants would have been considered too costly, because alternative methods could have been envisaged that would lead to ultimate victory and, lastly, because the cities are considered world cultural heritage.”); *see also* Steven R. Ratner, *Jus Ad Bellum and Jus in Bello After September 11*, 96 AM. J. INT’L L. 905 (2002).

<sup>34</sup> Declan Walsh, *Pakistani Parliament Demands End to U.S. Drone Strikes*, N.Y. TIMES, Mar. 21, 2012, at A8.

<sup>35</sup> The *Living Under Drones* report says:

Some analysts, citing information released by *Wikileaks* maintain that Pakistan had, at some prior point, tacitly supported drone strikes. It is not known whether Pakistan continues to consent privately to the program today. Repeated public statements by Pakistani officials, which intensified in 2012—declaring that US strikes are illegal, counter-productive, and violate the country’s sovereignty—clearly cast doubt on whether Pakistan consents to ongoing operations.

LIVING UNDER DRONES, *supra* note 27, at 106.

<sup>36</sup> *Id.* at 103, 106.

<sup>37</sup> *See, e.g., Designation of Foreign Terrorist Organization*, 13A Fed. Proc., L. Ed. § 36:511 (Sept. 2012); Request for Comments on Effects of Foreign Policy-Based Export Controls, 52 Fed. Reg. 42663-01 (proposed Nov. 6 1987). Some of the cases under Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. §§ 1602-11, are: *Acree v. Republic of Iraq*, 125 S. Ct. 1928 (2005); *Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 129 S. Ct. 2859 (2009); *Republic of Iraq v. Beatty*, 556 U.S. 848 (2009); *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Republic of Sudan v. Rux*, 549 U.S. 1208 (2007); *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012). The spate of cases after the 9/11 incident, such as *Khalid v. Bush*, have upheld the President’s authority to capture and detain persons outside of Afghanistan.” *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.C. Cir. 2005). Invoking the separation of powers doctrine, the court said that it is impermissible to inquire into conditions of detention under international norms given the President’s authorization from Congress to detain combatants. *Id.* The U.S. Constitution was read as ossifying any cognizable constitutional rights of non-resident aliens captured and detained outside the United States in the war on terror. *Id. U.S. v. Hamdan*, 801 F. Supp. 2d 1247 (U.S.C.M.C.R. 2011) (holding that military commissions have subject matter jurisdiction); *see also* *Al-Bihani v. Obama*, 619 F. 3d 1 (D.C. Cir. 2010); Robert J. Delahunty & John Yoo, *Executive Power v. International Law*, 30 HARV. J.L. & PUB. POL’Y 73 (2006); John R. Kennel, *Exceptions to Immunity*, 48 C.J.S. International Law § 45.

exists by virtue of UN Article 51—beyond anyone's imagination, it has also induced a breach of the principles of natural justice.<sup>38</sup> The United States not only defines its reasons of self-defense, but also interprets all tacit talks to the military government of Musharraf after 9/11 and current ductile Pakistani government as a form of legal consent within international law.<sup>39</sup> The United States thus stands in the grave danger of not only undermining democracy as a concept in Pakistan, it also insults the will of the civilians in a foreign country, who often become victims of droning. Either from outside or from within, it is international law that is put to rest.

Today, it is the innocence, alienation, and ignorance of women, men, and children at the Afghanistan-Pakistan boarder that is often called upon to justify itself in a situation where the international community, through NATO, has ensured a rainfall of bombs.<sup>40</sup> Very ironically, while the war on terror in Afghanistan, which has subsequently leaped into Pakistan, has identified its most vulnerable victims—women and children—a senior advisor to Obama blogs about the President's release of "the first ever U.S. National Action Plan on Women, Peace, and Security."<sup>41</sup> The White House has not only identified terrorists—a prerequisite of so-called "signature" droning of locations in Pakistan<sup>42</sup>—in the form of the U.S. National Action Plan on Women, Peace and Security, it dons the garb of a savior of the women and children in these two countries.<sup>43</sup> In his

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<sup>38</sup> Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41, 42 (2002); LIVING UNDER DRONES, *supra* note 28, at 103.

<sup>39</sup> LIVING UNDER DRONES, *supra* note 27, at 106.

<sup>40</sup> J. Ann Tickner, *Feminist Perspectives on 9/11*, 3 INT'L STUD. PERSP. 333, 333 (2002).

The author "demonstrate[s] how gendered discourses are used in this [Afghan war] and other conflict situations to reinforce mutual hostilities, [and] suggest[s] that men's association with war-fighting and national security serves to reinforce their legitimacy in world politics while it acts to create barriers for women. Using the framework of a post-9/11 world, [the author] offer[s] some alternative models of masculinity and some cultural representations less dependent on the subordination of women.

<sup>41</sup> Valerie Jarrett, *Progress Toward a World Without Violence Against Women and Girls*, WHITE HOUSE BLOG (Aug. 10, 2012, 5:06 PM), <http://www.whitehouse.gov/blog/2012/08/10/progress-toward-world-without-violence-against-women-and-girls>.

<sup>42</sup> David Zucchino, *Drone Strikes in Pakistan Have Killed Many Civilians, Study Says*, L.A. TIMES (Sept. 24, 2012), <http://articles.latimes.com/2012/sep/24/world/la-fg-drone-study-20120925>.

<sup>43</sup> Wazhma Frogh, *Is Afghanistan the Worst Place for Women?*, GUARDIAN (London), Jun. 16 2011, <http://www.guardian.co.uk/lifeandstyle/2011/jun/16/afghanistan-worst-for-women> ("What the world forgets is that Afghanistan has been at war, civil war, conflict

*Savages, Victims, and Saviors*, Makau Mutua attacks precisely such attitudes and politics of the United States.<sup>44</sup> Mutua's "savages-victims-saviors" construction enlightens the larger ongoing politics of human rights. For instance, it illuminates the role of the Nobel Peace Prize and what its committee thinks are the victims to not only identify, but also to manufacture and, eventually, award the saviors.

In her Nobel Peace Lecture, Aung San Suu Kyi commented: "When the Nobel Committee awarded the Peace Prize to me they were recognizing that the oppressed and the isolated in Burma were also a part of the world . . . ."<sup>45</sup> Actually, she identifies all three: the savages, the victims, and the savior. It is because of her popularity in the West after her Nobel Prize win that she is being critiqued for her silence on grave human rights violations of Rohingya Muslim minority in Burma.<sup>46</sup> The Rohingya are a stateless and oppressed people, and the government of Burma thinks they have no place in Myanmar and must leave the country.<sup>47</sup> As Suu Kyi's National League for Democracy looks ahead to elections in 2015, analysts feel that expressing support for the Muslim minority would be politically

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for so many years, almost all my life, and that is what has created chaos for women and shrunk women's rights.").

<sup>44</sup> Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001). Mutua evaluates the human rights project as a damning three-dimensional metaphor that exposes multiple complexes. The grand narrative of human rights, for him, contains a subtext which depicts an epochal contest pitting savages, on the one hand, against victims and saviors, on the other. Mutua's savages-victims-saviors construction lays bare some of the hypocrisies of the human rights project questioning the universality and cultural neutrality of the human rights project.

<sup>45</sup> Her speech was remarkable:

So for me receiving the Nobel Peace Prize means personally extending my concerns for democracy and human rights beyond national borders. The Nobel Peace Prize opened up a door in my heart. . . . We are fortunate to be living in an age when social welfare and humanitarian assistance are recognized not only as desirable but necessary. . . . When the Nobel Committee chose to honour me, the road I had chosen of my own free will became a less lonely path to follow.

Aung San Suu Kyi, Nobel Lecture in Oslo City Hall (June 16, 2012), available at [www.nobelprize.org/nobel\\_prizes/peace/laureates/1991/kyi-lecture\\_en.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/1991/kyi-lecture_en.html).

<sup>46</sup> Minorities at Risk Project, *Chronology for Rohingya (Arakanese) in Burma* (2004), <http://www.unhcr.org/refworld/docid/469f3872c.html>; DPA, *About 75,000 Rohingyas in Myanmar Camps: Refugee International*, THE HINDU (Sept. 29, 2012), <http://www.thehindu.com/news/international/about-75000-rohingyas-in-myanmar-camps-refugee-international/article3948606.ece>.

<sup>47</sup> Thomas Fuller, *Internet Unshackled, Burmese Aim Venom at Ethnic Minority*, N.Y. TIMES, June 15, 2012, at A4.

calamitous.<sup>48</sup> Ironically, the same Nobel Peace Prize was awarded to Obama soon after he became the U.S. President on the expectations that the Peace Prize would remind him of his duty as the savior.<sup>49</sup> Just like Suu Kyi’s election in 2015, Obama’s second term in the White House depends upon feeding uncritical nationalism and Islamophobia during the war on terror.<sup>50</sup>

### ***B. American Scholarship and International Law Within U.S. Courts***

In the war on terror, the NATO-led assault has chosen the same social and political location to play the savior. It is in this connection that Salim—Naipaul’s mouthpiece in his postcolonial *A Bend in the River*—talks about the civil violence in Africa: “[I]t was extraordinary to me that some of the newspapers could have found good words for the butchery on the coast. . . . But people are like that about places in which they aren’t really interested and where they don’t have to live.”<sup>51</sup> Clearly, Afghanistan is one such place where humanitarian-minded Westerners either don’t live or don’t have to live.<sup>52</sup> Yet it is this not-so-liked place that has become the goldmine

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<sup>48</sup> Alex Spillius, *Aung San Suu Kyi Facing Backlash for Silence on Abuses*, TELEGRAPH (Eng.) (July 26 2012), [http://www.telegraph.co.uk/news/worldnews/asia/burma\\_myanmar/9430518/Aung-San-Suu-Kyi-facing-backlash-for-silence-on-abuses.html](http://www.telegraph.co.uk/news/worldnews/asia/burma_myanmar/9430518/Aung-San-Suu-Kyi-facing-backlash-for-silence-on-abuses.html).

<sup>49</sup> Though in an apologetic manner, Obama’s Nobel Peace Prize Lecture nonetheless talks of war:

Still, we are at war, and I’m responsible for the deployment of thousands of young Americans to battle in a distant land. Some will kill, and some will be killed. . . . Now these questions are not new. War, in one form or another, appeared with the first man. At the dawn of history, its morality was not questioned; it was simply a fact, like drought or disease—the manner in which tribes and then civilizations sought power and settled their differences.

Barack H. Obama, Nobel Lecture in Oslo City Hall (Dec. 10, 2009), available at [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/2009/obama\\_lecture\\_en.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama_lecture_en.html).

<sup>50</sup> Ron Faucheux, *Obama’s Second-Term Blues*, WASH. TIMES, Sept. 20, 2012, <http://www.washingtontimes.com/news/2012/sep/20/obamas-second-term-blues/>.

<sup>51</sup> *Id.*

<sup>52</sup> Wazhma Frogh, a gender and development specialist and human rights activist from Kabul, says that peace in Afghanistan is only possible through campaigning at the grassroots: “[P]eople have to own it.” But NATO’s policy is not to interfere in matters considered “cultural.” Its failure to acknowledge the rights of women is detrimental to building a stable society in Afghanistan. Pennie Quinton, *Special Report: Why World Peace Needs Women*, CEASEFIRE, Jan. 3, 2012, <http://ceasefiremagazine.co.uk/if-dreams-dont-scare-big-enough/>. For a legal discussion, see John F. Murphy, *Afghanistan: Hard Choices and the Future of International Law*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS* 79 (Michael N. Schmitt ed., 2009).

of victims to ensure the production of saviors.<sup>53</sup> The reality, in the words of Tariq Ali, has been the same all the while:

There is widespread fury among Afghans at the number of civilian casualties, many of them children. There have been numerous incidents of rape and rough treatment of women by ISAF [International Security Assistance Force] soldiers, as well as indiscriminate bombing of villages and house-to-house search-and-arrest missions. The behaviour of the foreign mercenaries backing up the NATO forces is just as bad. Even sympathetic observers admit that ‘their alcohol consumption and patronage of a growing number of brothels in Kabul . . . is arousing public anger and resentment.’ To this could be added the deaths by torture at the US-run Bagram prison and the resuscitation of a Soviet-era security law under which detainees are being sentenced to 20-year jail terms on the basis of summary allegations by US military authorities. All this creates a thirst<sup>54</sup> for dignity that can only be assuaged by genuine independence.

As a consequence, United States courts have to deal with a flurry of cases within its Alien Torts Statute.<sup>55</sup> Since the United States Congress “has yet to state clearly whether tort claims alleging torture in U.S. custody should be allowed to proceed,” in *Ali v. Rumsfeld*,<sup>56</sup> the D.C. Circuit could very well have “arrived at a contrary holding that would have been more likely to elicit congressional input.”<sup>57</sup> But it did not. The court took a textualist approach. Notably, American constitutional scholarship has recently been wielding its pen to arrest international law.<sup>58</sup> Reckoning from the cases cited by scholars who favor the United States President’s and Congress’s unchecked powers in trumping international law, and the scholars cited in the judgments of U.S. courts in cases of detainees—usually foreign nationals—

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<sup>53</sup> My “production of saviors” idea comes from reading Baxi. See UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 96–114 (2002); see also Thomas Poole, *Book Review*, 2 *HUM. RTS. L. REV.* 163 (2002) (reviewing Baxi).

<sup>54</sup> Tariq Ali, *Afghanistan: Mirage of The Good War*, 50 *NEW LEFT REV.* 5, 15 (2008) (footnote omitted).

<sup>55</sup> 28 U.S.C. § 1350 (2006).

<sup>56</sup> Recent Case, *D.C. Circuit Holds that U.S. Officials are Immune from Alien Tort Statute Claims*, 125 *HARV. L. REV.* 1080, 1080 (2012) (discussing *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011)).

<sup>57</sup> *Id.*

<sup>58</sup> See Prabhakar Singh, *Why Wield Constitutions to Arrest International Law*, 2010 *ASIAN Y.B. INT’L L.* 16 (forthcoming 2012), available at <http://ssrn.com/abstract=1719363>.

arrested in relation to the war on terror, there is a strong symbiotic cross feeding to sustain each other.<sup>59</sup>

Not only do the U.S. Congress, the courts, and some academicians today stand together to silence the voice of human rights and trump international law in the war on terror, they have also eliminated the doubts that shrouded the theorization of the world within the “clash of civilizations” epithet.<sup>60</sup> A better example of a growing uncritical unity between academia, politicians, and courts is tough to find in any other country today.<sup>61</sup> In the United States, even sovereign immunity has a more defined statutory basis under the Foreign Sovereign Immunities Act against a blanket immunity that international law mandates.<sup>62</sup> *Yousuf v. Samantar*<sup>63</sup> epitomizes a gradual but unmistakable unwillingness of the U.S. Supreme Court to engage with or even deliberately ignore international legal rules, materials, and cases, which it would ordinarily have.

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<sup>59</sup> For example, most of the U.S. court judgments on the detention of detainees have cited Bradley, Goldsmith, Posner and the like. *See, e.g., Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010); *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008). *See also* Curtis A. Bradley, *Enforcing the Avena Decision in U.S. Courts*, 30 HARV. J.L. & PUB. POL’Y 119 (2006).

<sup>60</sup> *See* the controversial thesis of Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF. 22 (1993).

<sup>61</sup> John Balzano, *A Hidden Compromise: Qualified Immunity in Suits Against Foreign Governmental Officials*, 13 OR. REV. INT’L L. 71, 117 (2011). “The *Samantar* decision [of the U.S. Court] ended the circuit split over the Foreign Sovereign Immunities Act’s coverage of individual officials, and has left the determination of foreign official immunity under the common law in a state of doubt. . . . It does not discuss the extensive amounts of U.S. and international cases potentially related to foreign official immunity that the parties cited in their briefs; indeed, it does not mention a single international law decision.” *Id.* at 97.

<sup>62</sup> *See* 28 U.S.C.A. § 1605(a)(7) (repealed 2008); *see also* Balzano, *supra* note 63, at 77. In 1996, Congress amended 28 U.S.C.A. § 1605(a), in part by adding thereto a new subparagraph (7), which created such an exception with respect to certain suits in which money damages are sought by or on behalf of a U.S. national for certain acts of state-sponsored terrorism. In *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 105–06 (D.C. Cir. 2000), this amendment was applied. It dealt with a wrongful death action against Iran and its intelligence service brought by the brother of an Iranian-born U.S. national who was assassinated by the Iranian intelligence service. The court found that the murder of the decedent constituted an “extra-judicial killing” under the statute. *See* Michael A. Rosenhouse, *State-Sponsored Terrorism Exception to Immunity of Foreign States and their Property Under Foreign Sovereign Immunities Act of 1976*, 28 U.S.C.A. § 1605(a)(7), 176 A.L.R. Fed. 1 (2002).

<sup>63</sup> *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009), *rev’d*, 130 S. Ct. 2278 (2010). “The government has determined that the defendant does not have foreign official immunity. Accordingly, defendant’s common law sovereign immunity defense is no longer before the [District] Court.” *Yousuf v. Samantar*, No. 1:04CV1360, 2011 WL 7445583, at \*1, \*1 (E.D.Va. Feb. 15, 2011).

### C. Comparing American and Indian Positions on the War on Terror

The Western collective, this Article argues, is withdrawing from different types of international law (e.g., the UN and the WTO law) gradually. For instance, the United States wants a diplomatic settlement of anti-dumping cases after a series of losses,<sup>64</sup> and the EU is happy to derogate from Article 103 of the UN Charter if it jeopardizes EU constitutional principles.<sup>65</sup> In what Ben Chigara calls the short-circuiting of international law, as far as laws of war are concerned, powerful states “breach the foremost rules of international law and then claim that they were merely inaugurating new practice in aid of a new nascent norm of customary international law.”<sup>66</sup> Chigara analyzes the 2003 U.S.-led invasion of Iraq against the UN’s prohibition on the use of force.<sup>67</sup> In an attempt to create an exception to the prohibition on the use of force, the United States claimed that they were merely actualizing the new doctrine of pre-emption.<sup>68</sup> Thus, a custom’s potential to short-circuit international law is actualized “when states breach norms *jus cogens* and then plead new State practice.”<sup>69</sup> Furthermore, a significant majority of American constitutional scholarship not only declares the project of international law unconstitutional law, but it is also breaking new ground in how to withdraw from treaty and customary international law.<sup>70</sup>

The courts in developing countries, on the contrary, are groping toward international law in piecemeal ways. For instance, in 2010, the Indian Supreme Court held that India does not have any comprehensive legislation to generally define natural resources and a framework for their protection. Basing its opinion on international

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<sup>64</sup> Sungjoon Cho, *The WTO Appellate Body Strikes Down the U.S. Zeroing Methodology Used in Antidumping Investigations*, ASIL INSIGHTS (May 4, 2006), <http://www.asil.org/insights060504.cfm>.

<sup>65</sup> Cases C-402/05 P & C-415/05 P, *Kadi v. Council of the Eur. Union*, Judgment of The Court (Grand Chamber) Sept. 3, 2008.

<sup>66</sup> Ben Chigara, *Short-Circuiting International Law*, 8 OR. REV. INT’L L. 191, 191 (2006) (italics omitted).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See Curtis A. Bradley & Mitu Gulati, *Customary International Law and Withdrawal Rights in an Age of Treaties*, 21 DUKE J. COMP. & INT’L L. 1 (2010), for a discussion on this issue. See also Anthea Roberts, *Who Killed Article 38(1)(B)? A Reply to Bradley and Gulati*, 21 DUKE J. COMP. & INT’L L. 173 (2010) (“[T]he withdrawal proposal is premised on an analogy between treaties and custom given the apparent anomaly that withdrawal is sometimes permitted from the former but never from the latter.”).

law in the absence of a specific domestic law, the Indian Supreme Court said, "it rests upon the . . . principle of permanent sovereignty (of peoples and nations) over (their) natural resources."<sup>71</sup> In a loosely worded judgment, the Indian Court confessed the Indian intellectual property law to "be an exact copy of GATT and WTO."<sup>72</sup> Thus a genre of textual monism is already taking root in some of the fast-growing developing countries.

As compared to the existing robust debate in Europe and America about their less-than-robust respect for international law, one is then tempted to compare the American and European approach to how Indian police captured Kasab, the terrorist who conducted the infamous "26/11" attacks in Mumbai, and chose to try him before district trial court under Indian criminal law for "murder, conspiracy and of waging war against the nation."<sup>73</sup> From the time of his capture, there was an irrefutable case under the Indian Constitution for Kasab's right to legal assistance and the Indian state's duty to provide it. Kasab's case is important to distinguish between the Indian state and the Indian judiciary. The Indian State (bureaucracy) is dualist.<sup>74</sup> However, since the 1980s, the Indian judiciary, which has the power of judicial review, is gradually moving to monism, as exhibited in over a dozen judgments. Overall, India is moving toward monism as far as terrorism and international human rights are concerned, though much more remains to be done. Thus, between Osama Bin Laden, Kadi, and Kasab, three jurisdictions' real respect for the rule of international law is exposed.

Now this might be counterintuitive to some. Nonetheless, this is the background for this Article; there is a kind of intimacy mixed with animosity that animates the lives of third worlders vis-à-vis the regime of international law. This Article invites scholars and researchers of international law to use "intimate enemy" as a new hermeneutics to unpack the real relationship of countries and international law.

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<sup>71</sup> Centre for Public Interest Litigation v. Union of India, (2012) 3 S.C.C. 1, at ¶ 64 (India).

<sup>72</sup> Tata Consultancy Services v. State of Andhra Pradesh, (2005) 1 S.C.C. 308, at ¶ 45 (India).

<sup>73</sup> *26/11 Mumbai Attack: Kasab's Trial*, NDTV (India) (May 3, 2010, 3:38 PM), <http://www.ndtv.com/article/india/26-11-mumbai-attack-kasab-s-trial-22806>. The *New York Times* reported: "Even by the standards of terrorism in India, which has suffered a rising number of attacks this year, the assaults were particularly brazen in scale and execution." Somini Sengupta, *At Least 100 Dead in India Terror Attacks*, N.Y. TIMES, Nov. 27, 2008, at A1.

<sup>74</sup> See Jolly George Verghese v. Bank of Cochin, A.I.R. 1980 S.C. 470 (India).

## II

### THE WORLD WITHIN AN INTERNATIONAL LEGAL VOCABULARY

Albeit a law of easy virtues, this Article contends that, today, international law has become an “intimate enemy” to the Third World. However, one cannot jump to this conclusion without telling the complete story. Within TWAIL, international law has been perceived as an enemy of the Third World because of, as Anghie observes, international law’s colonial origin.<sup>75</sup> Therefore, this essay will first discuss the nature of the relationship between developing countries and international law after 1945, the year the UN was established.<sup>76</sup>

A comparison between the attitudes of international law and its officials towards the EU and the AU brings out the inherent bias of international law. International law has indeed been promoted as a civilizing force.<sup>77</sup> Because of the abundance of resources, funded projects, and first movers’ advantage, European lawyers have been able to defend the EU’s breaches of international law. The United States clearly admits its breaches of international law as an example of exceptionalism.<sup>78</sup> The American exceptionalism to human rights is also not hidden.<sup>79</sup> However, Bradford and Posner reject the idea of American exceptionalism:

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<sup>75</sup> See Anghie, *supra* note 6, at 739.

<sup>76</sup> The name ‘United Nations,’ coined by United States President Franklin D. Roosevelt was first used in the Declaration by United Nations of 1 January 1942, during the Second World War, when representatives of 26 nations pledged their Governments to continue fighting together against the Axis Powers. . . . In 1945, representatives of 50 countries met in San Francisco at the United Nations Conference on International Organization to draw up the United Nations Charter. Those delegates deliberated on the basis of proposals worked out by the representatives of China, the Soviet Union, the United Kingdom and the United States at Dumbarton Oaks, United States in August-October 1944.

See *History of United Nations*, UN, <http://www.un.org/en/aboutun/history/> (last visited Nov. 19, 2012). Representatives of the fifty countries signed the Charter on June 26, 1945.

Poland, which was not represented at the Conference, signed it later and became one of the original 51 Member States. The United Nations officially came into existence on 24 October 1945, when the Charter had been ratified by China, France, the Soviet Union, the United Kingdom, the United States and by a majority of other signatories.

*Id.*; see also J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 119 (2011).

<sup>77</sup> See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960*, 130 (2001), for an excellent exposition.

<sup>78</sup> See Nadine Strossen, *American Exceptionalism, The War on Terror, and the Rule of Law in the Islamic World*, 32 HARV. J.L. & PUB. POL’Y 495 (2009).

<sup>79</sup> “The idea that the United States is uniquely virtuous may be comforting to Americans. Too bad it’s not true.” Stephen M. Walt, *The Myth of American*

A trope of international law scholarship is that the United States is an "exceptionalist" nation, one that takes a distinctive (frequently hostile, unilateralist, or hypocritical) stance toward international law. However, all major powers are similarly "exceptionalist," in the sense that they take distinctive approaches to international law that reflect their values and interests. We illustrate these arguments with discussions of China, the European Union, and the United States. Charges of international-law exceptionalism betray an undefended assumption that one particular view of international law (for scholars, usually the European view) is universally valid.<sup>80</sup>

Prior to expressing such a view, Goldsmith and Posner have said: "But international law as such has no special importance. . . . [A]s in other settings, Americans and Europeans have more in common than meets the eye."<sup>81</sup> One should not forget that post-1945, international law has always existed within the spirit of solidarity, and by flaunting the breaches of international law, first by the United States and the EU, and then by China, Goldsmith, Posner, and Bradford are only self-excusing breaches of international law by the United States. They seem to advocate that eventually all nations live in a self-contained regime and, depending upon the military might and diplomatic skills of the nations, international law is trimmed or allowed to flower. Basically, Posner and Goldsmith interpret international law in a positive fashion, as law between two or more nations, and not as a universal construct.

In the war on terror, foreign detainees have received little sympathy from American constitutionalists (as well as the American courts), even though some claim that "the use of international law in constitutional interpretation [in American Courts], as one factor among others, is highly traditional and eminently proper."<sup>82</sup> Dennis Jacobs, an American judge, thinks: "International law is not all about

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*Exceptionalism*, FOREIGN POL'Y, Nov. 2011, [http://www.foreignpolicy.com/articles/2011/10/11/the\\_myth\\_of\\_american\\_exceptionalism](http://www.foreignpolicy.com/articles/2011/10/11/the_myth_of_american_exceptionalism). See Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 147 (Michael Ignatieff ed., 2005).

<sup>80</sup> Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT'L L.J. 1, 3 (2011).

<sup>81</sup> Jack Goldsmith & Eric Posner, *Does Europe Believe in International Law?*, WALL ST. J. (Nov. 25, 2008), <http://online.wsj.com/article/SB122757164701554711.html>.

<sup>82</sup> Gerald L. Neuman, *International Law as a Resource in Constitutional Interpretation*, 30 HARV. J.L. & PUB. POL'Y 177, 177 (2006) ("Some international law is too important to the place of the United States in the world for our constitutional jurisprudence to ignore; some international law provides useful functional or normative insights on which constitutional adjudication can draw."); see also William H. Pryor Jr., *Foreign And International Law Sources in Domestic Constitutional Interpretation*, 30 HARV. J.L. & PUB. POL'Y 173 (2006).

human rights, conflict, and the overlaying of international consensus on domestic law.”<sup>83</sup>

A set of nationalist American lawyers interprets the Presidential war powers as arresting international law unconditionally.<sup>84</sup> Rabkin, for instance, opines that “American self-defense should not be too distracted by international law.”<sup>85</sup> Also, the “[United States] Supreme Court has made it clear that both the President and Congress can break free of customary international law by simple decree.”<sup>86</sup> Rabkin challenges the critics’ underlying premise that “international law has the same sort of claim on [the United States] government as domestic law and that war measures abroad can accordingly be judged in the same terms as police abuses at home.”<sup>87</sup> A series of United States Supreme Court cases has also supported this position, more so during the war on terror.<sup>88</sup> United States Presidents have stretched or violated international law at significant moments in American history, and international law has served as a political rallying point against the anti-terrorism policies of the Bush administration regarding the use of force, detention, interrogation, and military trial.<sup>89</sup>

What is worrying in such a development is the dry realism that casts off the ideal kernel of international law, the celebrated value of the equality of mankind trumped by the calibrated approach of the supply and demand and the production and consumption of rules.

### *A. International Law as a Psychological Pull*

The romance between international law and the Third World began with the colonizers’ cultural identification of the non-West as heathen

<sup>83</sup> Dennis Jacobs, *What Is An International Rule of Law?*, 30 HARV. J.L. & PUB. POL’Y 3, 3 (2006).

<sup>84</sup> See Michael S. Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762 (2009); see also Curtis A. Bradley, *The Bush Administration and International Law: Too Much Lawyering and Too Little Diplomacy*, 4 DUKE J. CONST. L. & PUB. POL’Y 57 (2009).

<sup>85</sup> Jeremy Rabkin, *American Self Defense Shouldn’t be Too Distracted by International Law*, HARV. J.L. & PUB. POL’Y 31 (2006).

<sup>86</sup> Saikrishna Prakash, *The Constitutional Status of Customary International Law*, 30 HARV. J.L. & PUB. POL’Y 65, 66 (2006); see also Michael D. Ramsey, *The Textual Basis of the President’s Foreign Affairs Power*, 30 HARV. J.L. & PUB. POL’Y 141 (2006).

<sup>87</sup> Rabkin, *supra* note 85, at 31.

<sup>88</sup> See *United States v. Al Bahlul*, 820 F. Supp. 2d 1141 (C.M.C.R. 2011) (holding that the commission properly exercised jurisdiction over defendant); see also 78 Am. Jur. 2d War § 32 (2012).

<sup>89</sup> See Delahunty & Yoo, *supra* note 37.

and barbaric.<sup>90</sup> According to Nandy, "Colonialism replaced the normal ethnocentric stereotype of the inscrutable Oriental by the pathological stereotype of the strange, primal but predictable Oriental—religious but superstitious, clever but devious, chaotically violent but effeminately cowardly."<sup>91</sup>

Writing in 1951, R.D. Kollewijn provides evidence to Nandy's insights. He writes that, among all French and German colonizers the trend was towards non-recognition of the non-Western legal systems.<sup>92</sup> During the seventeenth century, in the case of *Blankard v. Galdy*, Justice Coke's sentence was mitigated as follows: "Where it is said in Calvin's Case, that the laws of a conquered (non-Christian) country, do immediately cease, that may be true of laws for religion, but it seems otherwise for laws touching the government."<sup>93</sup> In *Campbell v. Hall*,<sup>94</sup> Lord Mansfield expressed his displeasure to the distinction made between "a christian and a heathen kingdom"<sup>95</sup> that Lord Coke had made earlier in *Calvin's Case*.<sup>96</sup> "Don't quote this distinction," Lord Mansfield interrupts the plaintiff's counsel in *Campbell v Hall*, "for the honour of my Lord Coke."<sup>97</sup>

In that sense, modern colonialism, the vehicle of international law, "won its great victories not so much through its military and technological prowess as through its ability to create secular hierarchies incompatible with the traditional order."<sup>98</sup> Thus, international law came to the colonized world, such as India, with a

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<sup>90</sup> See Prabhakar Singh, *From 'Narcissistic' Positive International Law to 'Universal' Natural International Law: The Dialectics of 'Absentee Colonialism'*, 16 AFR. J. INT'L & COMP. L. 56, 62 (2008).

<sup>91</sup> NANDY, *supra* note 18, at 72.

<sup>92</sup> See R.D. Kollewijn, *Conflicts of Western and Non-Western Law*, 4 INT'L L.Q. 307 (1951), for an early essay on this issue. "Without scrutiny of any sort, the laws of a non-Christian State are estimated to be contrary to Christian principles and subject, therefore, to wholesale condemnation." *Id.* at 310.

A modern example of the conception that non-Western law is no law, is given by German colonial theory. When the imperial German Government, in the wake of private merchants and the trading companies, cast covetous eyes upon African territory, extensive estates were already found there, some simply occupied by the German pioneers, others obtained from African chiefs in exchange for cheap circulating mediums.

*Id.*

<sup>93</sup> *Id.* at 310.

<sup>94</sup> *Campbell v. Hall*, (1774) 98 ENG. REP. 848 (K.B.).

<sup>95</sup> *Calvin's Case*, (1608) 77 ENG. REP. 377.

<sup>96</sup> *Id.*

<sup>97</sup> *Campbell*, 98 ENG. REP. 848.

<sup>98</sup> NANDY, *supra* note 18, at ix.

promise of emancipation from the local yolk of caste discriminations and other traditional forms of exploitations.<sup>99</sup> To a very great extent, certain local social evils were uprooted as the British introduced their legal system in India. This promise of a new order ensnared the Third World though a “psychological pull.”<sup>100</sup>

Since then, an internal bifurcation characterizes the lives of Third World states. International law, arguably, was the secular wedge that was put between the Third World and its traditions to allow developmentalism to enter.<sup>101</sup> Here the insightful findings of M. Sornarajah are remarkably useful; in a purely legal critique of international law, Sornarajah establishes that international law is often kidnapped by powerful nations, among other things, through academic writings, which sometimes even trump the sovereign will of weaker nations.<sup>102</sup> Talking about the state of international investment law, he says:

A series of arbitral awards, followed by confirmatory writings of the so called “highly qualified publicists”, all of them coming from the so called “civilised legal systems”, held that . . . a contract was akin to a treaty in that responsibility of the state followed the event of the breach of the contract and failure to amend the breach. The use of awards of tribunals and the writings of “highly qualified publicists”, often mercenary participants in the litigation writing up their opinions or briefs as articles in “learned” journals, resulted in the creation of an international law in the area. The practice still continues. The members of the so called “arbitration fraternity” elevate each other in status, cite each other’s views and create law on the basis that they are “highly qualified publicists”.<sup>103</sup>

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<sup>99</sup> INDIA CONST. art. 51, § 4 (“Promotion of international peace and security. The State shall endeavour to (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and (d) encourage settlement of international disputes by arbitration.”); *see also* V.G. Hegde, *Indian Courts and International Law*, 23 LEIDEN J. INT’L L. 53, 53 (2010) (“For the Indian courts the first substantive encounter with international law emerges in the context of several territorial-related issues. The socio-political context forms the next phase, for the Indian courts to have recourse to diverse international legal norms relating to the environment and human rights and applying them as a persuasive tool. Later, the development context brings a complex array of commercial, environmental, and other related international legal norms into the Indian legal system.”).

<sup>100</sup> NANDY, *supra* note 18, at ix.

<sup>101</sup> *See* Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 TRANSNAT’L L. & CONTEMP. PROBS. 47 (1996).

<sup>102</sup> *See* M. Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 SING. Y.B. INT’L L. 19, 31 (2006).

<sup>103</sup> *Id.* at 31 (footnotes omitted).

No doubt this psychological pull worked well, and even since decolonization, a belief in the West’s inherent secular developmentalism has catapulted many Third World countries into a prosperous state. However, during this time, the West has unexpectedly suffered from a bout of illness: decline in overall prosperity, economic crises, and the loss of international hegemony with the rise of China. In about a century’s time, between October 1911 (the year of the Chinese revolution) and October 2011 (the year of an ever-deteriorating Eurozone crisis), Europe and China have swapped their positions: from being a keen lender, Europe has become a desperate borrower of capital. Consequently, Sornarajah contemplates, developed states might “dismantle to a significant extent the international law they had created to protect foreign investment and retreat into principles of sovereignty earlier advocated by the developing states.”<sup>104</sup>

Thus, today’s cracks seem to have appeared in the secular and developmental wedge itself.<sup>105</sup> Perhaps, therefore, Anghie says, “[t]he role of the Third World or developing country states in relation to the well-being and dignity of their own people is thus a subject that requires ongoing analysis.”<sup>106</sup> Since it is now proven that international law was created to promote European commercial interests, this change in situation warrants an evaluation of the relationship between international law and the Third World and First World. This Article studies this new relationship though the lens of “intimate enemy.”<sup>107</sup>

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<sup>104</sup> M. Sornarajah, *Sovereign Wealth Funds and the Existing Structure of the Regulation of Investments*, 1 ASIAN J. INT’L L. 267, 267 (2011).

<sup>105</sup> Alastair Ager & Joey Ager, *Faith and the Discourse of Secular Humanitarianism*, 24 J. REFUGEE STUD. 456, 456 (2011). The authors argue:

that functional secularism frames the discourse of contemporary humanitarianism. While in principal ‘neutral’ to religion, in practice this framing serves to marginalize religious language, practice and experience in both the global and local conceptualization of humanitarian action. Illustrated with examples from a range of humanitarian contexts, it is argued that the resulting discourse fosters a humanitarian response that is ill-equipped to engage with dynamics of faith within displaced populations. Humanitarianism needs to acknowledge the advent of post-secularism signalled by many social theorists, and engage with greater awareness of the role of faith—both liberal materialist and religious—in addressing a range of issues of core relevance to the field: the clarification of core humanitarian values, the retention of a human rights framework able to define and protect human dignity, and appropriate means of addressing religious experience and well-being in the course of humanitarian programming.

*Id.*

<sup>106</sup> Antony Anghie, *International Law in a Time of Change: Should International Law Lead or Follow?*, 26 AM. U. INT’L L. REV. 1315, 1365 (2011).

<sup>107</sup> Prabhakar Singh, *Macbeth’s Three Witches: Capitalism, Common Good and International Law*, 14 OR. REV. INT’L L. 47, 79 (2012).

### *B. Third World as a Legal System*

It is hypocritical that no text on international law adverts to th[e] practice of lawmaking for so many states and peoples by so few in an age in which there is much talk of democratic legitimacy. These trends were kept in check by the vigorous assertion of competing principles by the developing states in General Assembly resolutions. Yet, such alternative sources were dismissed by members of the “arbitration fraternity” as unable to create international law or as expressing *ex ferenda*. It is strange that the collective wishes of the states of the world solemnly expressed through resolutions of international institutions could not create international law but often uncontested arbitral awards and writings of a few “scholars” could create international law.<sup>108</sup>

Sornarajah’s above views flag the reasons that led to the alternative view on international law from a non-Western perspective. What is a Third World? Baxi thinks, “Third World emerges through practices of resistance and struggle by the colonially constituted subject peoples, practices which offer the best possible readings of the critique of the European Enlightenment and of the universalising form of capitalism.”<sup>109</sup> Offering an historical understanding, Chaliand notes: “The French demographer Alfred Sauvy coined the expression (‘tiers monde’ in French) in 1952 by analogy with the ‘third estate,’ the commoners of France before and during the French Revolution—as opposed to priests and nobles, comprising the first and second estates respectively.”<sup>110</sup> It “therefore implies that the Third World is exploited, much as the third estate was exploited, and that, like the third estate its destiny is a revolutionary one.”<sup>111</sup>

B.S. Chimni, one of the most prominent Third World voices on international law, notes: “It is very often argued that the category ‘third world’ is anachronistic today and without purchase for addressing the concerns of its peoples.”<sup>112</sup> However, “too much is often made of numbers, variations, and differences in the presence of structures and processes of global capitalism that *continue to bind and unite*. It is these structures and processes that produced colonialism

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<sup>108</sup> Sornarajah, *supra* note 102, at 31 (footnotes omitted).

<sup>109</sup> Upendra Baxi, *What May the ‘Third World’ Expect from International Law?*, 27 *THIRD WORLD Q.* 713, 714 (2006).

<sup>110</sup> Gerard Chaliand, *Third World: Definitions and Descriptions*, *THIRD WORLD TRAVELER*, [http://www.thirdworldtraveler.com/General/ThirdWorld\\_def.html](http://www.thirdworldtraveler.com/General/ThirdWorld_def.html) (last visited Nov. 19, 2012).

<sup>111</sup> *Id.*

<sup>112</sup> B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 *INT’L CMTY. L. REV.* 3, 4 (2006).

and have now spawned neo-colonialism."<sup>113</sup> Therefore, he proclaims, "once the common history of subjection to colonialism, and/or the continuing underdevelopment and marginalization of countries of Asia, Africa and Latin America is attached sufficient significance, the category 'third world' assumes life."<sup>114</sup> Thus, he unpacks the politics of vocabulary through which some actors deliberately try to dissolve the category of Third World.

But there is a need to be alert to the politics of critique of the category "third world". To misrepresent and undermine the unity of the Other is a crucial element in any strategy of dominance. From which flows the suggestion that the category "third world" is irrelevant to the era of globalization. It represents the old divide and rule strategy with which third world peoples are exceedingly familiar. Such a policy seeks to prevent a global coalition of subaltern States and peoples from emerging through positing divisions of all kinds. Thereby, the transnational elite seeks to subvert collective modes of reflection on common problems and solutions.<sup>115</sup>

Sornarajah thinks:

China, though not a state created through the processes of self-determination, played a leading role through solidarity with the newly independent states of Africa and Asia in advancing the causes espoused by these states which, together with the developing states of Latin America, collectively came to be described as the Third World.<sup>116</sup>

To me, the Third World is synonymous with destitution, poverty, and lawlessness in the backyard of civilizations, both Eastern and Western. Third World, to me, points to the state of living, material access to resources, political and social conditions of the subaltern groups, and the sluggish traffic of justice to the victims of faceless global capitalism and dictatorial communism. There are many examples of the Third World: the great continent of Africa and the country of Afghanistan are two.<sup>117</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 5.

<sup>115</sup> *Id.* at 6.

<sup>116</sup> Sornarajah, *supra* note 102, at 19.

<sup>117</sup> "Under current [U.S.] law, the legal analysis of targeted killings is straightforward: If we are at war, an American government may target enemy combatants and civilians directly participating in hostilities without running afoul of either domestic or international law." John Fabian Witt, Op-Ed., *The Legal Fog Between War and Peace*, N.Y. TIMES, June 10, 2012, <http://www.nytimes.com/2012/06/11/opinion/the-legal-fog-between-war-and-peace.html>.

Writing in 1987, two years before the fall of the Berlin Wall, Korean lawyer No-hyoung Park said, “[n]o effort, however, has been made to recognize the Third World’s significant contributions to the development of international law.”<sup>118</sup> He argues: “The Third World should be regarded as a single international legal system, separate from the individual laws of Africa, Asia and Latin America.”<sup>119</sup> Several reasons justify the consideration of the Third World as a single international legal system.<sup>120</sup> The universality of international law, according to Park, “should be understood as developing inductively from diverse regional national laws. Thus, considering the international legal system as a three-system group does not undermine the universality of international law.”<sup>121</sup>

Regarding the Third World as an international legal system would enhance the development of contemporary international law. Second, considering the global future, it is necessary to identify the Third World as a separate international legal system. The debate on the global future, whose central issue is to establish effective patterns of order, has been affected by the Superpowers’ fight for hegemony. The Third World should participate in this debate because without Third World input, the Superpowers may establish a world order that ignores the needs of many nations.<sup>122</sup>

What is notable is that soon after the fall of the Berlin Wall, when scholars began to deny the existence of three worlds, Park’s advocacy fell by the side.<sup>123</sup> Perhaps Park’s observations about “Jihad” were to

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Current international law purports to decide the question of war or peace by evaluating the intensity of the conflict. But in an age of mass destruction, when conflicts can go in an instant from zero intensity to unfathomable terror, the intensity measure seems ill suited to the work at hand.

*Id.*

<sup>118</sup> No-hyoung Park, *The Third World as an International Legal System*, 7 B.C. THIRD WORLD L.J. 37, 38 (1987).

<sup>119</sup> *Id.* at 37.

<sup>120</sup> *Id.* at 38. The author says: “First, both underdeveloped and developed nations have neglected the study of the Third World as an international legal system. In the study of international law, ‘Traditional international law,’ ‘Eurocentric international law’ and ‘Soviet international law’ have been recognized.” *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 40 (footnotes omitted). Park observed: “For example, a ‘Jihad’ or holy war is explained, not only by the cultural interests of territorial expansions but by the Islamic philosophy: unity of God, unity of mankind, and, the unity of religion. Hence, it is incorrect to assume that culture is irrelevant in international law and politics.” *Id.* Unfortunately such an example of “Jihad” follows his superb invocation and analysis the ICJ statute. Despite these observations, cultural values are relevant to international law. First, Article 9 of the Statute of the International Court of Justice designates the Court as a “whole representation of the main forms of civilization and the principal legal systems of

be proved historically wrong, as today the war on terror is effectively the war against "Jihad."<sup>124</sup> However, one should note what Chimni has to say about the fall of the Berlin Wall and the subsequent end of the cold war: "Unnecessary importance is often attached to the end of the cold war."<sup>125</sup> The growing north-south divide is sufficient evidence, if any were needed, of the continuing relevance of the category "Third World."<sup>126</sup> Its lasting expediency "lies in pointing to certain structural constraints that the world economy imposes on one set of countries as opposed to others."<sup>127</sup>

Notably, humanitarian intervention in Third World countries, according to Fassin, "is a biopolitics insofar as it sets up and manages refugee camps, establishes protected corridors in order to gain access to war casualties, develops statistical tools to measure malnutrition, and makes use of communication media to bear witness to injustice in the world."<sup>128</sup> And all of this happens at a time the United States has

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the world." *Id.* Article 9 indicates that cultural values are indeed relevant to international law and the ICJ must consider the diverse cultures of nations. Second, the rules which the Court applies are not always, universal or culturally neutral. Often, "the Court . . . consider[s] whether there [is] a special custom in capital states giving states of the shareholders *locus standi* under the circumstances of the particular case." *Id.* Furthermore, it has been suggested that an established custom among a well-defined group of states is binding on all states in that group, except those states who consistently opposed the custom from its inception. Finally, "the premise that state interests which characterize foreign policy are independent of values or culture disregards the fact that state interests are not necessarily value-free." *Id.* (footnotes omitted). However, lawyers are not clairvoyant pundits and wrong examples might succeed right analysis.

<sup>124</sup> Notably, a provocative advertisement—"In any war between the civilized man and the savage, support the civilized man. Support Israel. Defeat Jihad."—that debuted in San Francisco made its way to New York subways in September 2012. *See* Hamid Dabashi, *The War between the Civilised Man and the Savage*, ALJAZEERA (Sept. 24, 2012, 12:19 PM), <http://www.aljazeera.com/indepth/opinion/2012/09/201292464012781613.html>. There cannot be better proof of that fact that the war on terror is seen as the war on Jihad, as the timing of the advertisement points to; a High-level Meeting of the 67th Session of the General Assembly on the Rule of Law at the National and International Levels took place at the United Nations Headquarters in New York on September 24, 2012. The advertisement also has support from a U.S. Federal Court. New York's Metropolitan Transportation Authority initially rejected it, but the Authority's decision was overturned when a federal judge ruled that the ad is protected speech under the First Amendment. *See* Am. Freedom Def. Initiative v. Metro. Transp. Auth., No. 11 Civ. 6774(PAE), 2012 WL 3756270, at \*1 (S.D.N.Y. Aug. 29, 2012).

<sup>125</sup> Chimni, *supra* note 112, at 5.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Didier Fassin, *Humanitarianism as a Politics of Life*, 19 PUB. CULTURE 499, 501 (2007).

been droning parts of Pakistan, which constitutes one of its many breaches of international law.<sup>129</sup>

### *C. The TWAILing of International Law*

This leads us to the question: what is TWAIL? Chimni has written the manifesto of TWAIL that is worth ruminating over and again.<sup>130</sup> He makes six points that speak to “The Road Ahead,” that constitute “[f]urther thoughts on a TWAIL Research Agenda.”<sup>131</sup> Makau Mutua has offered one of its most provocative and powerful definitions.<sup>132</sup> The long and the short of his opinion is that though the acronym TWAIL is new, the idea is not. Historically, international law is a “predatory system,” Mutuwa pens, “that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West.”<sup>133</sup> Thus, TWAIL first resists international law and then converts it into a reformist agenda. Today, TWAIL is on intellectual ascendancy. Using, if you will, a “social conflict” theoretical approach to the study of international law, TWAIL gives fresh ideas and adds new footnotes to the legal scholarship.<sup>134</sup>

In advancing what has been a surprisingly reformist agenda, [TWAIL has] also helped to consolidate and institutionalise [sic] a political avenue that argues for the improvement of international law. Bringing to the forefront of thinking and writing on international law—issues of political economy, the cultural practices of differentiation, the uses of violence or the excessive exploitation of natural resources that have accompanied the expansion of the international legal order—TWAIL has become a virtual site from which scholars and activists can work both to resist, and to transform—or reform—international law.<sup>135</sup>

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<sup>129</sup> See Chris Woods, *CIA Drone Strikes Violate Pakistan's Sovereignty, Says Senior Diplomat*, GUARDIAN (Eng.), Aug. 2, 2012, <http://www.guardian.co.uk/world/2012/aug/03/cia-drone-strikes-violate-pakistan>.

<sup>130</sup> Chimni, *supra* note 112.

<sup>131</sup> They are: Increasing Transparency and Accountability of International Institutions, Increasing Accountability of Transnational Corporations, Conceptualizing Permanent Sovereignty as Right of Peoples and Not States, Making Effective Use of Language of Rights, Injecting Peoples Interests in Non Territorialised Legal Orders, Protect Monetary Sovereignty Through International Law, Ensuring Sustainable Development With Equity, Promoting the Mobility of Human Bodies. *Id.* at 23–26.

<sup>132</sup> Makau Mutua, *What is TWAIL?*, 94 AM. SOC'Y INT'L L. PROC. 31 (2000).

<sup>133</sup> *Id.* at 31.

<sup>134</sup> Moshe Hirsch, *The Sociology of International Law: Invitation to Study International Rules in Their Social Context*, 55 U. TORONTO L.J. 891, 906–09 (2005).

<sup>135</sup> Eslava & Pahuja, *supra* note 19, at 105.

Charged with umpteen counts of such allegations, where does international law stand today vis-à-vis the Third World?

The mainstream international law is about the “state.” A state is assumed to have a sovereign character, meaning it is theoretically free in making its decisions. What does TWAIL have to say about the character of a state? TWAIL begins by asserting quite the opposite: states are inherently promiscuous and not sovereign. Sovereignty, as a concept, was invented within a particular historical environment. For mainstream international law, maintaining the façade of a state’s sovereignty helps to continue the old power structure.

Naturally, then, an alternative conception of state leads to an alternative understanding of international law. Historically speaking, sovereignty was an expression of a political and commercial liberalism of, for, and by the Europeans. But when awarded to the non-Western states, liberalism within sovereignty, as a rule, addresses the individual’s egotistic indifference to other people’s plight. What else does the inherent liberalism of the responsibility to protect mean to the tribal and the rural population that is forced to welcome American drone visits through international law’s mandate?<sup>136</sup> Unfortunately, it is their innocence and disengagement that is unashamedly invited to defend itself. Therefore, TWAIL has provided us with five powerful observations.

- (1) [T]hat colonial patterns of thinking persist and continue to structure our international law sources and foundational concepts;
- (2) that the “civilizing mission” continues . . .
- (3) that racism and misplaced notions of cultural superiority continue to obliterate the contributions of and concerns expressed by non-Europeans;
- (4) that . . . notions of “class,” remain central to understanding our legal regimes; but that
- (5) contemporary forms of globalization have rendered geographically based notions of “imperialism” or “hegemony” overly facile in understanding the Gramscian forms of collaboration that now characterize the “Third World” itself.<sup>137</sup>

The “intimate enemy” lens could very neatly magnify these five insights further. In his last article, the late R.P. Anand wrote:

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<sup>136</sup> See Judy Dempsey, *Europe Stays Quiet Despite Unease About Drones*, N.Y. TIMES, June 11, 2012, <http://www.nytimes.com/2012/06/12/world/europe/12iht-letter12.html> (“Analysts say this approach is short-sighted. The United States intends to arm Italian surveillance drones in Afghanistan beginning next year. France has plans for military drones for reconnaissance and attack missions. NATO is trying to get member states to finance surveillance drones that eventually may also be armed.”).

<sup>137</sup> See J.E. Alvarez, *My Summer Vacation (Part III): Revisiting TWAIL in Paris*, OPINIO JURIS (Sept. 28, 2010, 6:13 AM), <http://opiniojuris.org/2010/09/28/my-summer-vacation-part-iii-revisiting-twail-in-paris/>.

“Although international law is presumed to be applicable among all states, east or west, north or south, big or small, it is only a recent phenomenon, not older than the United Nations itself.”<sup>138</sup> Likewise, Martti Koskenniemi says: “While the legality of the bombing of Afghanistan was still an object of polite disagreement, the occupation of Iraq is almost unanimously seen as illegal—occasioning the response from across the Atlantic that if so, then so much the worse for law.”<sup>139</sup> Not surprisingly, globalization has rendered geographically based notions of “imperialism” or “hegemony” overly facile in understanding the alliance that now typifies the Third World itself. It is because of this that this Article uses the “intimate enemy” lens to see international law.

### III

#### THE EU AND INTERNATIONAL LAW

After the Court of Justice of the European Union provincialized international law in the *Mox Plant* case,<sup>140</sup> it again expressed its preference for dualism in the *Kadi* case.<sup>141</sup> *Kadi*

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<sup>138</sup> See R.P. Anand, *The Formation of International Organizations and India: A Historical Study*, 23 LEIDEN J. INT'L L. 5, 5 (2010).

<sup>139</sup> Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REV. INT'L AFF. 197, 197 (2004).

<sup>140</sup> See *The MOX Plant Case (Ir. v. U.K.)*, Case No. 10, Order of Dec. 3, 2001, INT'L TRIB. L. OF THE SEA, [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_10/Order.03.12.01.E.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.12.01.E.pdf); *Arbitral Tribunal, Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ir. v. U.K. & N. Ir.)*, Final Award of July 2, 2003; ECJ, Case C-459/03, *Comm'n of the Eur. Cmty. v. Ir.* [2006] ECR I-4635. The conflict between Ireland and the United Kingdom about the building and operation of the MOX Plant at Sellafield, on the Irish Sea, dates back to 1993. The plant is designed to recycle the plutonium produced during the reprocessing of nuclear fuel. Ireland contested this project since the beginning and requested access to information from the UK about the plant in order to protect the marine environment of the Irish Sea. Both states are parties to the two treaties addressing the issue of environmental information: the United Nations Convention on the Law of the Sea (UNCLOS) and the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention). In 2001, Ireland commenced dispute settlement proceedings under these treaties. Furthermore, it also applied to the International Tribunal for the Law of the Sea (ITLOS) for provisional measures that would restrain the UK from commissioning the plant. In this context, waiting for the final decision of the Arbitral Tribunal constituted under the UNCLOS, the ITLOS prescribed a provisional measure in December 2001, ordering the parties to cooperate and to engage in consultations, including the exchange of information, without further delay. Ireland formally notified the Arbitral Tribunal of the withdrawal of its claim against the United Kingdom on February 15, 2007. See M. Bruce Volbeda, *The MOX Plant Case: The Question of “Supplemental Jurisdiction” for International Environmental Claims Under UNCLOS*, 42 TEX. INT'L L.J. 211, 218 (2007). On June 6, 2008, the Tribunal issued Order No. 6 terminating proceedings. See *Ireland v. United Kingdom (MOX Plant Case)*, THE HAGUE JUSTICE PORTAL (last visited Oct. 20, 2012),

presented a high-profile and path-determining opportunity for the [European Court of Justice (ECJ)] to make its views felt in the current international debate about the extent to which human rights principles should inform the Security Council’s sanctions regime, as well as to develop its jurisprudence on the relationship between the European Community (EC) and the international legal orders in the novel context of the UN.”<sup>142</sup>

“On both counts,” de Búrca says, “the judgment was a significant disappointment. . . . The result undermines the EU’s aspirations to develop a powerful international role premised on its distinctive commitment to international law.”<sup>143</sup>

EU scholars defended the ECJ’s dualism as pluralism, adding to the recognized American constitutional dualism.<sup>144</sup> Thus, even though

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<http://www.haguejusticeportal.net/index.php?id=6164>. In Case C-459/03, *Comm’n of Eur. Cmty. v. Ireland*, Judgment of the Court of Justice (Grand Chamber) of May 30, 2006, 2006 E.C.R. I-4635. Ireland was condemned for bringing the *MOX Plant* dispute before an arbitral tribunal. See Nikolaos Lavranos, *MOX Plant Dispute—Court of Justice of the European Communities*, 2 EUR. CONST. L. REV. 456 (2006). International Court of Justice Judge Bruno Simma sees the *MOX Plant* case as a problem of parallel proceedings. He notes that in the *MOX Plant* case,

the EU Commission initiated proceedings against Ireland in the European Court of Justice for breach of EU law committed through bringing a case against the United Kingdom under the Law of the Sea Convention. Here, it was not only the parties which initiated parallel proceedings (before ITLOS, an arbitral tribunal under the OSPAR Convention as well as an arbitral tribunal under UNCLOS), but also the organ of a regional organization which tried effectively to prevent the states involved from having their dispute settled by an independent arbitral tribunal outside the EU legal system.

Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EURO. J. INT’L L. 265, 285 (2009).

<sup>141</sup> Cases C-402/05 P & C-415/05 P, *Kadi v. Council of the Eur. Union*, Judgment of the Court of Justice (Grand Chamber) of Sept. 3, 2008, 2008 E.C.R. I-06351.

<sup>142</sup> Gráinne de Búrca, *The European Courts and the Security Council: Between Dédoublment Fonctionnel and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci*, 20 EUR. J. INT’L L. 853, 862 (2009).

<sup>143</sup> *Id.*

<sup>144</sup> According to Gráinne de Búrca, *Kadi* is arguably the ECJ’s

most important judgment to date on the subject of the relationship between the European Community (‘EC’) and the international legal order. This high-profile case involved a challenge by an individual to the EC’s implementation of a U.N. Security Council resolution, which had identified him as being involved with terrorism and mandated that his assets be frozen.

Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT’L L.J. 1, 1 (2010). She examines

the response of European courts—and in particular of the European Court of Justice (‘ECJ’)—to the dramatic challenges to the U.N. Security Council’s anti-terrorist sanctions regime recently brought before the courts. The ECJ in *Kadi* annulled the European Community’s implementation of the Security Council’s asset-freezing

both the EU and the United States keep violating international law, there is an expectation of compliance from the African and the Asian states. This expectation is further forced into compliance through the responsibility to protect, seconded by the threat of force. As the war on terror evinces, to recall Albert Camus, “[i]t is . . . with cannon shots that Europe philosophizes.”<sup>145</sup> In the times of shifting realities, there exists a love-hate relationship between the Third World countries and international law, animosity mixed with intimacy. Depending upon the nature of international concern, the intimate animosity grows or declines. This constitutes a gradual shift of positions between the Western and the non-Western countries in relation to international law.

### *A. Reconciling International Law’s European Experience*

[T]he spread of the nation-state norm beyond its European homeland was . . . the result of coercive imposition by hegemonic western powers as an integral part of colonialism and imperialism . . . The European state ideal and its key concept of sovereignty became a cornerstone of the global interstate system after the Second World War. . . . Furthermore, the Charter of the United Nations and its support for the principle of state sovereignty and territorial integrity confirmed the centrality of the European state ideal.<sup>146</sup>

The postcolonial constitutions have thus been framed in terms of a monist-dualist doctrine. Fresh from the bout of Stockholm syndrome, immediately after decolonization, the Third World states held on to sovereignty. Understandably, it was typical behavior of the newly decolonized non-Western states; sovereignty befell like a new toy in

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resolutions on the ground that they violated ‘EU’ norms of fair procedure and of property protection.

*Id.* She argues

that the robustly pluralist approach of the ECJ to the relationship between EU law and international law in *Kadi* represents a sharp departure from the traditional embrace of international law by the European Union. Paralleling in certain striking ways the language of the U.S. Supreme Court in *Medellin v. Texas*, the approach of the ECJ in *Kadi* carries risks for the EU and for the international legal order in the message it sends to the courts of other states and organizations contemplating the enforcement of Security Council resolutions. More importantly, the ECJ’s approach risks undermining the image the EU has sought to create for itself as a virtuous international actor maintaining a distinctive commitment to international law and institutions.

*Id.*

<sup>145</sup> Camus, *supra* note 24, at 151.

<sup>146</sup> Roland Axtmann, *The State of the State: The Model of the Modern State and Its Contemporary Transformation*, 25 INT’L POL. SCI. REV. 259, 262 (2004).

their hands. A sense of nationalism that emerged from their protracted separation from their traditionalism during colonial intervention swept all of Asia and Africa leading to nationalization of foreign properties and investments. By the 1970s, the New International Economic Order led to a further assertion of sovereignty by non-Western oil rich states. Europe also seemingly has come full circle. In the EU today, dualism has become the sole way to look at international law, though scholars are offering a pluralist defense for eschewing monism.<sup>147</sup>

In 2006, Anne-Marie Slaughter and William Burke-White observed that "[t]he [f]uture of [i]nternational [l]aw is [d]omestic (or, the European [w]ay of [l]aw)."<sup>148</sup> And if we believe Camus, who says that Europe philosophizes with cannon shots, how good is this new European way of law? In the last article that professor R.P. Anand wrote, he observed: "Before the Second World War, international law was supposed to be not only a product of the European states and based on their customs and treaties, but applicable only among them—that is, European states or states of European origin."<sup>149</sup> Are Slaughter and Burke-White asking us to go back to this old position? To be sure, Hersch Lauterpacht, who invested all his life injecting domestic-law-type legality into international law, did not have the European way of law in mind.<sup>150</sup>

When, in *Kadi*,<sup>151</sup> the ECJ claimed to have created a legal order where international law could only enter after the EU's permission,<sup>152</sup> Karl Popper became all the more important for the Third World. Wrapped in parochial nationalism, Europe, like the United States's constitutional version, is offering a pluralist vision of international law that self-excuses both these constituencies for any derogation from international law. International law has thus been reduced to an agent of the West, employed or fired as and when needed.

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<sup>147</sup> Búrca, *supra* note 144.

<sup>148</sup> Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, the European Way of Law)*, 47 HARV. INT'L L.J. 327, 327 (2006).

<sup>149</sup> Anand, *supra* note 138, at 5.

<sup>150</sup> See Philippe Sands, *My Legal Hero: Hersch Lauterpacht*, GUARDIAN (London), Nov. 10, 2010, <http://www.guardian.co.uk/law/2010/nov/10/my-legal-hero-hersch-lauterpacht>.

<sup>151</sup> *Kadi*, 2008 E.C.R. I-06351.

<sup>152</sup> See, e.g., Martti Koskenniemi, *Constitutionalism, Managerialism and the Ethos of Legal Education*, EUR. J. LEGAL STUD. (Apr. 2007), available at <http://www.ejls.eu/1/3UK.pdf>.

### *B. Monism, Dualism and Pluralism: The Kadi Episode*

In its 1988 advisory opinion, the International Court of Justice (ICJ) said, “[i]t would be sufficient to recall the fundamental principle of international law that *international* law prevails over *domestic* law.”<sup>153</sup> This principle, the World Court said, was endorsed by judicial decision as long ago as the arbitral award of September 14, 1872, in the *Alabama* case between Great Britain and the United States, and has frequently been recalled since—for example, in the case concerning the Greco-Bulgarian Communities.<sup>154</sup>

The ICJ strongly affirmed the sole role of states in the *Barcelona Traction* case of 1970.<sup>155</sup> Human rights discourses since then have sought to change that view. In 2011, after the Israeli navy attacked a flotilla of humanitarian aid for Gaza and nine Turkish citizens were killed, Mansfield rightly argued, “[w]here states have failed to comply with international law, private citizens must have the right to instigate transgressors’ arrest.”<sup>156</sup>

No doubt, the conservative statist view, as Kelsen identified in his Pure Theory of Law, is fraught with normative contradictions. Powerful states create more duties for individuals under international law as they offer fewer rights—it was clearly seen in the lack of due process in listing procedure that led to *Kadi*. If we want to empower people and cut down powerful states’ ability to justify violence in terms of inflicting punishment, like how it was done through the UN’s resolution freezing the funds of people without due process, then the ECJ’s *Kadi* decision is certainly welcome.<sup>157</sup>

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<sup>153</sup> Advisory Opinion Concerning the Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, 1988 I.C.J. 12, 34–45 (Apr. 26, 1988).

<sup>154</sup> *Id.*

<sup>155</sup> *Barcelona Traction, Light and Power Co., Ltd., Judgment (Belg. v. Spain)*, 1970 I.C.J. 3, 44.

<sup>156</sup> Michael Mansfield, *Government’s Move to Curb Universal Jurisdiction Sends Wrong Message*, GUARDIAN (Eng.), July 27, 2010, <http://www.guardian.co.uk/law/2010/jul/27/universal-jurisdiction-law>.

<sup>157</sup> Under the terms of General Assembly resolution 65/34 adopted on December 6, 2010, the Ad Hoc Committee met at the United Nations Headquarters from April 11–15, 2011, to continue to elaborate the draft comprehensive convention on international terrorism, and to discuss the item included in its agenda by General Assembly resolution 54/110 concerning the question of convening a high-level conference under the auspices of the United Nations. See *Current Mandate*, UNITED NATIONS (Jan. 19, 2012), <http://www.un.org/law/terrorism/index.html>. Also, there is a study commissioned by the United Nations, Office of Legal Affairs; see Bardo Fassbender, *Targeted Sanctions and Due Process*, UNITED NATIONS (Mar. 20, 2006), [http://www.un.org/law/counsel/Fassbender\\_study.pdf](http://www.un.org/law/counsel/Fassbender_study.pdf).

In *Kadi*, on the one hand, Europe strives to protect the fundamental rights of a Muslim male alleged to have connections with Osama Bin Laden and Al Qaida. On the other hand, it signals to the United States its autonomist aspirations of establishing fair procedures in international law.<sup>158</sup> Europe receives a lot of investment from the nationals of oil rich states, and perhaps in *Kadi* the ECJ sends positive signals to such investors—who have a guaranteed fair trial under the European constitutional scheme—that Security Council resolution 1267 cannot take away.

Under the everyday integrating world, Europe seeks an inversion of Kelsen; it’s the European law that shall guide international law and not the other way around. *Kadi* serves a powerful signal to all three constituencies: (1) to those Europeans who defeated a common Lisbon constitutional treaty, (2) to the Americans that run the show at the Security Council, and (3) to the rest of the world that looks up to Europe on the standards of protecting human and fundamental rights through the powers of a constitution.

### *C. Provincializing International Law*

The ECJ has emerged as the sole generator of EU regional law, as seen in the *Mox Plant* case<sup>159</sup> between Ireland and England.<sup>160</sup> *Mox Plant* has been raised at three different institutions:

1. at the Arbitral Tribunal set up under the United Nations Convention on the Law of the Sea (UNCLOS),
2. another Tribunal under the Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), and
3. within the ECJ under the European Community and Euratom Treaties.<sup>161</sup>

The UNCLOS Arbitral Tribunal held that “according to ‘dictates of mutual respect and comity’ it should defer the treatment of the matter until its implications under EC law had been clarified.”<sup>162</sup> For the first time in the history of international law, a tribunal of higher UN order

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<sup>158</sup> See Christopher Michaelsen, *Kadi and Al Barakaat v. Council of the European Union and Commission of The European Communities*, 10 MELB. J. INT’L L. 329 (2009).

<sup>159</sup> The MOX Plant Case (Ir. v. U.K.), Case No. 10, Order of Dec. 3, 2001, INT’L TRIB. L. OF THE SEA, [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_10/Order.03.12.01.E.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.12.01.E.pdf).

<sup>160</sup> Koskenniemi, *supra* note 152.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* (quoting the statement by the President of the Arbitral Tribunal, 13 June 2003).

waited on a regional European court to take orders.<sup>163</sup> At the ECJ, the Advocate General Maduro found Ireland guilty of having gone to a UN body, and thereby bypassing the European Order. *Mox Plant*, in my view, was a preparation for *Kadi*.<sup>164</sup>

Thus, the idea of international law's interpretation is not a value neutral question, as many in West claim it to be. It is the value neutrality of international law that the United States and developing countries in general seek to question in plurality arguments made about the decisions of the ECJ. *Kadi* is therefore problematic, even though it does create some common good of protecting individual rights from the continuing war on terror.

#### IV THE WAR ON TERROR AS THE TERROR OF WARS

In a fragmented state of international law, Third and First World countries cling to different fragments of the law as the right law. As is well known, Article 1(1) of the UN Charter aims to “take effective collective measures” for the “suppression of acts of aggression or other breaches of the peace.”<sup>165</sup> What is also known is that the Security Council has been busy blueprinting war plans in the “war on terror.” While, on the one hand, NATO, standing true to the United Nations’ spirit of taking “effective collective measures,” assumes the responsibility to protect, on the other hand, in Guantánamo and elsewhere, the United States is outsourcing torture and human rights

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<sup>163</sup> Case C-459/03, *Comm’n of Eur. Cmty. v. Ireland*, Judgment of the Court of Justice (Grand Chamber) of May 30, 2006, 2006 E.C.R. I-4635.

<sup>164</sup> According to a press release: “Hearings in the case took place from 10 June 2003 until 21 June 2003, after which the Tribunal issued, on 24 June 2003, *Order No. 3—Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures*. On 14 November 2003, the Tribunal issued *Order No. 4—Further Suspension of Proceedings on Jurisdiction and Merits*, under which the arbitral proceedings were suspended until the European Court of Justice had given judgment in a related case concerning European Community law issues, or until the Tribunal otherwise determines. The European Court of Justice delivered its judgment on 30 May 2006. The arbitral proceedings remained suspended, with the Parties submitting periodic reports to the Tribunal, in accordance with *Orders No. 3 & 4*. The Tribunal issued *Order No. 5—Suspending Periodic Reports by the Parties* on 21 February 2007. This Order formalised the suspension until further notice of the requirement that the Parties submit periodic reports and information on the provisional measure (prescribed by ITLOS in its Order of 3 December 2001) and the requirement that Ireland submit periodic reports on developments in the proceedings before the European Court of Justice.” See Press Release, Permanent Court of Arbitration, *MOX Plant Arbitral Tribunal Issues Order No. 6 Terminating Proceedings* (June 6, 2008), <http://www.haguejusticeportal.net/index.php?id=6164>.

<sup>165</sup> U.N. Charter art. 1, para. 1.

abuses to dodge legal volley and public protests that such an act would cause if done on the American soil.<sup>166</sup>

The American courts have also moved from their position in 1980, expressed in *Fernandez v. Wilkinson*, that "even though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, it is judicially remedial as a violation of international law."<sup>167</sup> Perhaps the most anti-international law judgment from a U.S. court came in the *Citizens Living in Nicaragua* case where, *inter alia*, the court said judgments of the ICJ "do not fall within the definition of *jus cogens* or peremptory norms of international law."<sup>168</sup>

The spate of cases after the 9/11 incidents, such as *Khalid v. Bush*, led the court to hold that the "[U.S.] President's authority was not confined to capture and detention of persons on or near battlefields of Afghanistan."<sup>169</sup> Invoking the separation of powers doctrine, the court said that "it [is] impermissible to inquire into conditions of detention under international norms given President's authorization from Congress to detain combatants."<sup>170</sup> The United States Constitution was read as ossifying any cognizable constitutional rights of "non-resident aliens captured and detained outside" the United States in the war on terror.<sup>171</sup>

It is this duality of international law that Kelsen attacked in his Pure Theory of Law. He penned: "International law is forced to undergo a complete denaturing in the notion that it is incorporated into the legal system of one's own state."<sup>172</sup> Within the confines of a state legal system, "international law can no longer perform its

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<sup>166</sup> Slavoj Žižek, *Iraq's False Promises*, FOREIGN POL'Y (Jan. 1, 2004), [http://www.foreignpolicy.com/articles/2004/01/01/iraqs\\_false\\_promises](http://www.foreignpolicy.com/articles/2004/01/01/iraqs_false_promises).

<sup>167</sup> Rodriguez Fernandez v. Wilkinson, 505 F. Supp. 787, 798 (D. Kan.1980).

<sup>168</sup> Comm. U.S. Citizens Living Nicar. v. Reagan, 859 F.2d 929, 934 (D.C. Cir. 1988). The court also held that "despite claim that the Contras had begun targeting Americans living in Nicaragua, the funding of the Contras did not constitute a due process violation"; that a statute inconsistent with customary international law modifies or supersedes that law to the extent of inconsistency; and that an article of the U.N. Charter as to respecting judgments of the International Court of Justice does not confer rights on private individuals.

<sup>169</sup> Khalid v. Bush, 355 F. Supp. 2d 311, 311 (D.C. Cir. 2005).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*; see also U.S. v. Hamdan, 801 F. Supp. 2d 1247 (U.S.C.M.R. 2011) (holding that military commission have subject matter jurisdiction); Al-Bihani v. Obama, 619 F. 3d 1 (D.C. Cir. 2010).

<sup>172</sup> KELSEN, *supra* note 26, at 116.

essential function.”<sup>173</sup> This is precisely what we see in the “war on terror.”

American constitutionalists invert Kelsen at this precise point to ensure the continuance of American hegemony and shirking responsibility for the civilian casualties in Iraq, Afghanistan, and Pakistan in the war on terror.<sup>174</sup> It then becomes clear that the critique of international law’s hypocrisy in its useful deployment by the West cannot be done in a legal vocabulary. Only through the lens of political science, sociology, and other disciplines can this injustice be magnified for all to see. TWAIL is a step in that direction.

### *A. The Afghanistan Example*

Post 1989, the world stood witness to the horrors of terrorism, which many argue was the aftermath of the United States’s Cold War policies. This is true to a great extent. In order to avenge the former USSR for the Vietnam defeat, the United States armed the Afghans and bankrolled Pakistan’s military to fight the invasion of the communist USSR. After Russia’s defeat in Afghanistan, a political lull attracted Islamist guerrilla fighters to the struggle for power. America’s modernist intervention in Afghanistan enthroned the medieval ideology of the Taliban in Kabul. Installed indirectly through American liberalism, the Taliban organized a large scale lynching of women, televised evangelization of the administering of death in public places like football fields, banning of media and entertainment, annihilation of secular culture, and other unimaginable illiberalisms.<sup>175</sup> The Taliban later offered hospitality to Osama bin Laden and company, with Pakistan recognizing the Taliban rule. It later became bin Laden’s laboratory and the cause for 9/11.

The problem with today’s United States is not that it is a new global empire, but that, while pretending to be an empire, it continues to act as a nation-state, ruthlessly pursuing its interests.<sup>176</sup> Something analogous to the outsourcing of jobs to Third World countries is taking place with the interrogation of terror suspects. Torture is being “outsourced” to Third World allies (those same countries criticized in

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<sup>173</sup> *Id.* at 117.

<sup>174</sup> Paulsen, *supra* note 84, at 1774.

<sup>175</sup> Tariq Ali says, “[t]o portray the invasion as a ‘war of self-defence’ for NATO makes a mockery of international law, which was perverted to twist a flukishly successful attack by a tiny, terrorist Arab groupuscule into an excuse for an open-ended American military thrust into the Middle East and Central Eurasia.” Ali, *supra* note 54, at 19.

<sup>176</sup> Žižek, *supra* note 166.

the U.S. State Department's annual Country Reports on Human Rights Practices) who can coerce confessions without worrying about legal problems or public protests.<sup>177</sup>

During this growth and nutrition of *Talibani* medievalism through modernist Western intervention, India received its own set of guests, trained on American money and weapons, Pakistan's army establishment sent *mujahids* to fight for Kashmir.<sup>178</sup> This led to the 1999 Kargil War between India and Pakistan.<sup>179</sup> Soon after Pakistan's defeat and its isolation within the international community due to the efforts of Indian diplomacy, Pakistan saw a military coup and the loss of a democratic government. In terrorism, therefore, it can conclusively be said that the United States is fighting the spectres of its cold-war diplomacy; it is a case of the U.S. history run amok.<sup>180</sup> After the September 11, 2001, attacks, the United States declared the war on terrorism without caring much about its legality.<sup>181</sup> India had high hopes from the United States-led campaign against global terrorists that emerged in the wake of the September 11 attacks.<sup>182</sup> From the arming of the Afghans against the former USSR to the efforts at disarming the Afghans in the war on terror, international law stood as a helpless bystander. Iraq need not even be mentioned. Yet many states sought international law's indulgence manifesting an intimate animosity.

Rarely has there been such an enthusiastic display of international unity as that which greeted the invasion of Afghanistan in 2001. Support for the war was universal in the chanceries of the West, even before its aims and parameters had been declared. NATO governments rushed to assert themselves 'all for one'. Blair jetted round the world, proselytizing the 'doctrine of the international

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<sup>177</sup> *Id.*

<sup>178</sup> Jessica Stern, *Pakistan's Jihad Culture*, 79 FOREIGN AFF. 115, 115 (2000).

<sup>179</sup> K. Shankar Bajpai, *Untangling India and Pakistan*, 82 FOREIGN AFF. 112, 124 (2003).

<sup>180</sup> Doug Stokes, *Why the End of the Cold War Doesn't Matter: The US War of Terror in Colombia*, 29 REV. INT'L STUD. 569, 569-70 (2003).

<sup>181</sup> Ali, *supra* note 54, at 17.

The current occupation of Afghanistan naturally recalls colonial operations in the region, not just to Afghans but to some Western myth-makers—usually British, but with a few Subcontinental mimics—who try to draw lessons from the older model; the implication being that the British were 'good imperialists' who have a great deal to teach the brutish, impatient Americans.

*Id.*; see also Christian Tomuschat, (*On the Application of Al-Jedda*) v *Secretary of State for Defence: Human Rights in a Multi-Level System of Governance and the Internment of Suspected Terrorists*, 9 MELBOURNE J. INT'L L. 391 (2008).

<sup>182</sup> Bajpai, *supra* note 179, at 112.

community' and the opportunities for peace-keeping and nation-building in the Hindu Kush. Putin welcomed the extension of American bases along Russia's southern borders. Every mainstream Western party endorsed the war; every media network—with BBC World and CNN in the lead—became its megaphone. For the German Greens, as for Laura Bush and Cherie Blair, it was a war for the liberation of the women of Afghanistan. For the White House, a fight for civilization. For Iran, the impending defeat of the Wahhabi enemy.<sup>183</sup>

The end of the twentieth century has not put wars between nations out of fashion.<sup>184</sup> Wars are businesses of profit and post-war reconstruction attracts investors with profit motives. The United States's rise after Europe's destruction in World War II is a relevant example. A decade into the twenty-first century, with the increase in the number of new sovereign states, the number of wars has only increased. Wars exemplify the symptoms of power with an understanding that every power structure is necessarily split. This crack is constitutive of the power dynamics; wars, as bottle-openers of the power structure, allow the aggressor to consolidate sympathy and thus more power though international solidarity.

Meanwhile, the number of Afghan civilians killed has exceeded many tens of times over the 2,746 who died in Manhattan. Unemployment is around 60 per cent and maternal, infant and child mortality levels are now among the highest in the world. Opium harvests have soared, and the 'Neo-Taliban' is growing stronger year by year. By common consent, Karzai's government does not even control its own capital, let alone provide an example of 'good governance'. Reconstruction funds vanish into cronies' pockets or go to pay short-contract Western consultants. Police are predators rather than protectors. The social crisis is deepening. Increasingly, Western commentators have evoked the spectre of failure—usually in order to spur *encore un effort*.<sup>185</sup>

Such wars are conducted on rules entailed as international humanitarian laws, and they expose nations' intimate animosity with

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<sup>183</sup> Ali, *supra* note 54, at 5.

<sup>184</sup> They are far too many in number to register them all here. Some of them are: the Kosovo-Yugoslavia conflict, which the NATO countries promoted as the first humanitarian war; America's continued war in Afghanistan against Al Qaida; Kenya's occupation of Southern Somalia for Al-Qaida-linked Al-Shabab militants; the African Union's holding of Mogadishu since 2007; NATO's bombing of Libya and killing of colonel Muammar el-Qaddafi; Thailand's occasional exchange of fire with Cambodia for the Preah Vihear temple; Israel's attack on a ship carrying aid to Gaza, killing nine Turkish nationals; continued battles between India-Pakistan in relation to Kashmir; the Israel-Syrian Conflict; the Sri Lankan Civil War; and the Thai-Myanmar (Burma) border conflict.

<sup>185</sup> Ali, *supra* note 54, at 6.

international law. Unfortunately new graveyards continue to spring up around the world, filled with millions of men, women, and children of all nations. We, the people of the world, have not moved away from wars; wars have simply chosen to dig new graveyards to lay to rest people of different ethnicities, races, and nationalities. In their responsibility to protect—while humanitarian wars put an end to life with bullets, bombs, or air strikes—sepulchral trade wars, embargos, and the discontinuation of relief and aid administer gradual death to kids, women, and men.<sup>186</sup>

### ***B. Humanitarian Interventions as a Consoling Myth***

When Roscoe Pound came to deliver the Tagore lecture at the Calcutta University in 1948, perhaps it was with a sense of future that he remarked that international law “has conspicuously failed.”<sup>187</sup> Those were the last days of formal colonialism. Oduntan usefully reminds us that the bulk of African states’ interest in the International Court of Justice arose only as a result of the Democratic Republic of Congo crises—which accounted for six new cases between 1999 and 2004 alone—involving five African states that have never appeared before the court.<sup>188</sup>

All these new states had based their political and social order on constitutions embodying a variety of rights and duties for both states and citizens taken from the so-called international standards. The relationship of these new states with international law, as Paulsen vehemently advocates in respect to the United States, also became a constitutional matter.<sup>189</sup> Decolonization was the historical moment where international law underwent a cosmetic surgery. All along the two Hague Conferences and in the formation of the League of Nations, the primacy of international law over state law was promoted.

Soon after the non-Western states joined the bandwagon of international solidarity, constitutional law’s priority over international law became the new argument. However, we will do well to recall Karl Popper, who exposed Hegel’s double face on his idea of a

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<sup>186</sup> Parvin Huda, *Destined For Terror: Coping With the Most Restrictive of U.S. Export Controls Embargoes, Terrorist-Supporting Countries, Designated Terrorists, and Sanctioned Persons*, in *COPING WITH U.S. EXPORT CONTROLS*, 2011, at 313 (2011).

<sup>187</sup> ROSCOE POUND, *THE IDEAL ELEMENT IN LAW* 54 (Liberty Fund 2002) (1958).

<sup>188</sup> See Gbenga Oduntan, *How International Courts Underdeveloped International Law: Political, Economic and Structural Failings of International Adjudication in Relation to Developing States*, 13 *AFR. J. INT’L & COMP. L.* 262, 265 (2005).

<sup>189</sup> Paulsen, *supra* note 84, at 1774.

constitution quite unmercifully.<sup>190</sup> Ironically, under his Prussian patronage, Hegel transformed the demand for a constitution into one for an absolute monarchy.<sup>191</sup> Some American scholars, such as Paulsen, seek to repeat the same feat by trumping international law using a constitutional vocabulary.

Today, while the Third World shows a growing affinity for international law, the First World has reduced international law to a consoling myth. While speaking about the responsibility to protect, the new avatar of international humanitarian law, Žižek confirms this. According to him, the public message of the responsibility to protect—to provide international security and to save the planet—is supplemented by the obscene message of the unconditional exercise of power: “Laws do not really bind me, I can do to you whatever I want, I can treat you as guilty if I decide to do so, I can destroy you on a whim.”<sup>192</sup> “This obscene excess,” he thinks, “is a necessary constituent of the notion of sovereignty.”<sup>193</sup>

There is also a latent structural asymmetry that the five permanent members of the Security Council seek to promote: “[T]he law can only sustain its authority if subjects hear in it the echo of the obscene, unconditional self-assertion of power.”<sup>194</sup> Sustained by an eminently political choice, America’s less-than-robust affection for international law lies in its enigma of the very presentation of international crises “as ‘humanitarian,’ the very recasting of the political-military conflict into the humanitarian terms.”<sup>195</sup>

Examples abound. As Žižek asks, although all the media were full of pictures and reports, why did the UN forces, NATO, or the United States not accomplish just a small act of breaking the siege of Sarajevo, of imposing a corridor through which people and provisions could circulate freely? “It would have cost nothing,” Žižek says, “with a little bit of serious pressure on the Serb forces, the prolonged spectacle of encircled Sarajevo exposed to ridiculous terror would have been over.”<sup>196</sup>

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<sup>190</sup> See KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES: VOL. 2 THE HIGH TIDE OF PROPHECY* 48 (Harper Torchbooks 1962) (1945).

<sup>191</sup> *Id.* at 47.

<sup>192</sup> Slavoj Žižek, *Against Human Rights*, 34 *NEW LEFT REV.* 115, 123 (2005).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Slavoj Žižek, *The Obscenity of Human Rights: Violence as Symptom*, LACAN.COM (2005), <http://www.lacan.com/zizviol.htm>.

<sup>196</sup> *Id.*

The situation was deliberately allowed to perpetuate a condition of humanitarian intervention. There is nothing human about such humanitarian interventions, then. Arguably then, TWAIL must interrogate the possible inconsistencies and splitting under the body of international law that "allow[s] the edifice of Order to maintain itself" in the guise of humanitarianism.<sup>197</sup>

## V

### THIRD WORLD'S INTIMATE ANIMOSITY AND THE FIRST WORLD'S SUSPENDED ANIMATION

Today many non-Western countries, many of them Arabian, have been trying to invest in Western countries. Given the call for free markets and foreign investments, it is only natural that such investments are allowed. That is how many SWFs have come up. But there is an increased opposition to non-Western investment in the Western world. Most recently, a decision by "the French government to allow Qatar to invest millions of euros in France's depressed and neglected suburbs has prompted concerns across the political spectrum about the motives of the wealthy Arab emirate."<sup>198</sup>

The outcry from the anti-immigrant far right was predictably loud. Marine Le Pen, head of the National Front, in a communique headlined "Islamic Trojan horse," said Qatar's decision was clearly linked to the fact that the majority of the population of the banlieues was Muslim.<sup>199</sup>

Islamophobia, for now, puts international law on the backburner.<sup>200</sup> Even the political left in France is not comfortable with this. Demorand, from the left-leaning *Libération*, suggested the Qatari investment was the latest exercise in "soft power" and far from philanthropic.<sup>201</sup> A similar fever had gripped the United States when a Dubai port wanted to invest in an American port, but it bowed to pressure from the U.S. Congress to sell it another American

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<sup>197</sup> SLAVOJ ŽIŽEK, *THE INDIVISIBLE REMINDER: AN ESSAY ON SCHELLING AND RELATED MATTERS* 3 (2nd ed. 2007).

<sup>198</sup> Harvey Morris, *Qatar's Latest Investment Stirs the French*, INT'L HERALD TRIB., Sept. 25, 2012, <http://rendezvous.blogs.nytimes.com/2012/09/25/qatars-latest-investment-stirs-the-french/>.

<sup>199</sup> *Id.*

<sup>200</sup> See Alexander Lemarié, *Du FN au Front de gauche, le fonds du Qatar suscite le scepticisme*, LE MONDE, Sept. 27, 2012, [http://www.lemonde.fr/proche-orient/article/2012/09/27/de-le-pen-a-melenchon-le-fonds-du-qatar-attire-les-critiques\\_1766842\\_3218.html](http://www.lemonde.fr/proche-orient/article/2012/09/27/de-le-pen-a-melenchon-le-fonds-du-qatar-attire-les-critiques_1766842_3218.html).

<sup>201</sup> Morris, *supra* note 198.

company.<sup>202</sup> In India, on the contrary, the government has announced a bold move to welcome foreign direct investment (FDI)—the FDI in the broadcasting sector is as high as seventy-four percent.<sup>203</sup> The Indian Prime Minister, Man Mohan Singh, has urged Indians not to fear FDI.<sup>204</sup> Quite understandably, due to a protracted fear of terrorism emerging from the Arab world and the feeling in the West about a soft takeover of their economy by Arab countries goes against the very freedom of trade, commerce, and investment that the West has been promoting since 1945.

### A. *The Curious Case of SWFs*

In light of these developments in two important jurisdictions—the EU and the United States—this Article contends that at the start of the twenty-first century’s second decade, international law, to borrow Nandy’s apt idiom, has become an “intimate enemy” to the Third World in particular.<sup>205</sup> The Third World, somehow, appears more inclined in obeying international law. Both the West and the non-West do not fully comply with international law. Even so, while the West is gradually moving away, the non-West is slowly holding on to international law. This counterintuitive psychological evaluation informs a complete role reversal between the West and the non-West vis-à-vis international law today.

The rise of concerns against SWFs is a case in point, as it exhibits the intimate animosity of international investment law vis-à-vis non-Western states.<sup>206</sup> Yvonne Lee argues that the reversal of capital flow from non-Western countries like “China, Russia, Singapore and

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<sup>202</sup> Jonathan Weisman & Bradley Graham, *Dubai Firm to Sell U.S. Port Operations*, WASH. POST, Mar. 10, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/09/AR2006030901124.html>.

<sup>203</sup> *Global Players Can Get Majority Stake in DTH, Cable, Mobile TV*, THE HINDU (Sept. 14, 2012), <http://www.thehindu.com/business/Industry/article3897354.ece>.

<sup>204</sup> Smita Gupta, *Don’t Fear FDI: PM*, THE HINDU (Sept. 21, 2012), <http://www.thehindu.com/news/national/dont-fear-fdi-pm/article3922186.ece>.

<sup>205</sup> See NANDY, *supra* note 18.

<sup>206</sup> The Sovereign Wealth Funds Institute says: “A Sovereign Wealth Fund (SWF) is a state-owned investment fund or entity that is commonly established from balance of payments surpluses, official foreign currency operations, the proceeds of privatizations, government transfer payments, fiscal surpluses, and/or receipts resulting from resource exports.” *What is a SWF?*, SWF INST. (Dec. 9, 2011), <http://www.swfinstitute.org/what-is-a-swf/>.

United Arab Emirates” to Western economies such as America and France, “have raised the spectre of SWFs as smoking guns.”<sup>207</sup>

International law, that has promoted free markets and an undeterred flow of capital as a harbinger of universal common good, has been shifting to statist policies to keep Arabian and other non-Western capital out of their markets. No doubt, there are genuine fears of security and terrorism. What this proves, however, is that primacy of self-interest over such values as freedom of trade and commerce and free flow of capital have long animated international law’s universalism and liberalism.

In this new reversal characterized as intimate animosity, while the capital-exporting, non-Western countries like China, Singapore, and United Arab Emirates are keener on keeping the freedom of international investment law alive, capital importing Western nations now seek to defeat their old arguments of protection of investments, universality of international law, and free trade as a universal value for the common good of mankind.

Žižek urges us to drop the common cliché today about Western cultural imperialism suppressing the globe’s cultural differences.<sup>208</sup> Actually, it is quite the opposite; in the twenty-first century, Western cultural imperialism accentuates the difference since the West lives by promoting cultural relativity.<sup>209</sup> Perhaps this explains why international law has now become intimate to the Third World.

The “intimate enemy” lens also helps us evaluate Third World countries’ love-hate relationship with international law. For example, it explains India’s incoherent reaction to international law’s different regimes: the UN-led security regime, the law of the seas, the WTO-led trade regime, the human rights regime, the climate change regime, etc. Today, not only does India see international law differently, but it is conscious of how it is “perceived by the world compared with 1996, the last time it contested and lost to Japan” for the non-permanent seat in the Security Council.<sup>210</sup>

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<sup>207</sup> Yvonne C.L. Lee, *The Governance of Contemporary Sovereign Wealth Funds*, 6 HASTINGS BUS. L.J. 197, 197 (2010).

<sup>208</sup> ŽIŽEK, *supra* note 197, at 217.

<sup>209</sup> *Id.*

<sup>210</sup> Editorial, *India in the Security Council*, THE HINDU (Oct. 13, 2010), <http://www.thehindu.com/opinion/editorial/article828742.ece>.

### *B. The Suspension of International Law*

In this section, the essay contends that a club of global capitalists are interested in the suspension of international law.<sup>211</sup> In the sections before, it was contended that the European and the American scholars' demand that national law control the international law—a position Kelsen vehemently opposed. Be that as it may, within a state, irrespective of the ruling ideology, there is an inherent urge on the part of the Left, Right, or Center to suspend the law.<sup>212</sup> Since the national policies control the international arguments, naturally the urge to suspend the internal law translates into an urge to suspend the international law. Such ideological spaces thrive on the way the governments of various states connect with the international law regime. *Arguendo*, an evaluation of the role of such ideologies in maintaining the rule of law is a worthy exercise.

Subsequently, importing Žižek to international law becomes necessary. He opines that “the ‘Right’ finds it difficult to conceal its fascination with the myth of a ‘primordial’ act of violence supposed to ground the legal order; the ‘Centre’ counts on innate human egotism . . . ; the ‘Left’, as has long been discerned by perspicacious conservative critics from Nietzsche onwards, manipulates with *ressentiment* and the promise of revenge.”<sup>213</sup> The global Left points to a third domain that belongs “neither to global market-society nor to the new forms of ethnic fundamentalism: the domain of the *political*, the public space of civil society, of active, responsible citizenship—the fight for human rights, ecology and so forth.”<sup>214</sup> However, as TWAIL has often identified the problem, “this very form of political space is more and more threatened by the onslaught of globalization.”<sup>215</sup>

Against the liberal center, “which presents itself as neutral and post-ideological, relying on the rule of the Law, one should reassert the old leftist motif of the necessity to suspend the neutral space of Law.”<sup>216</sup> This means that irrespective of the prevailing ideology—

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<sup>211</sup> See B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004).

<sup>212</sup> See Slavoj Žižek, *Plea for Ethical Violence*, YOUTUBE (Feb. 20, 2008), <http://www.youtube.com/watch?v=1gyEjEh7jIE>. For instance, the Left in both India and France are against FDI.

<sup>213</sup> ŽIŽEK, *supra* note 197, at 3 (italics in original).

<sup>214</sup> SLAVOJ ŽIŽEK, *THE UNIVERSAL EXCEPTION* 176 (2006) (italics in original).

<sup>215</sup> *Id.*

<sup>216</sup> Slavoj Žižek, *Multiculturalism, Or, the Cultural Logic of Multinational Capitalism*, 225 NEW LEFT REV. 28, 49 (1997).

Left, Center or Right—a new group of Third World capitalists would join the club of the global capitalist class.<sup>217</sup> No wonder Žižek finds “multiculturalism” as the new cultural logic of multinational capitalism.<sup>218</sup>

In the legal vocabulary, “multiculturalism” could be replaced by “pluralism.” Thus, scholarly debate around *Kadi* can also be explained as the effort on the part of the EU to avoid its self-destruction and invite capital to financially sustain the EU constitutional project.<sup>219</sup> Even so, most of the transnational capitalists are interested in getting around laws, or even putting them under suspended animation.

## VI

### THE AFRICAN UNION AND INTERNATIONAL LAW: THE CONTINUED PSYCHOLOGICAL PULL

The forces of neocolonialism have constantly underdeveloped the African continent as a whole to ensure its continued Third World status. Ibrahim Gassama quips about the destruction of the post-decolonized African continent in great detail.<sup>220</sup> “It is time for African communities,” he writes, “to reject the perspectives and programs of the past . . . [and] transcend limitations of the past.”<sup>221</sup> It is an apparent call to transcend post-colonialism. Since international law remains the sole way to organize the postcolonial lives of nation-states, we need a lens that first calibrates the very nature of this relationship. The lens of intimate animosity helps us calibrate the precise state of the relationship at a particular moment.

On July 8, 2011, South Sudan became the world’s newest nation, the climax of a process made possible by the 2005 peace deal that ended a long and bloody civil war. On August 27, 2010, North Sudan’s president, Omar Al-Bashir, visited Kenya to attend

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<sup>217</sup> See Chimni, *supra* note 211, at 1; see also B.S. Chimni, *The Past, Present and Future of International Law: A Critical Third World Approach*, 8 MELB. J. INT’L L. 499 (2007); B.S. Chimni, *A Just World Under Law: A View from the South*, 22 AM. U. INT’L L. REV. 199 (2007).

<sup>218</sup> See Žižek, *supra* note 216.

<sup>219</sup> For example, Gráinne de Búrca’s piece describes *Kadi*’s dualism as pluralism or soft-constitutionalism. See Búrca, *supra* note 144, at 28.

<sup>220</sup> See Ibrahim J. Gassama, *Africa and the Politics of Destruction: A Critical Re-examination of Neocolonialism and Its Consequences*, 10 OR. REV. INT’L L. 327 (2008).

<sup>221</sup> *Id.* at 360.

celebrations to promulgate a new constitution.<sup>222</sup> He is facing two arrest warrants by the International Criminal Court (ICC).<sup>223</sup> His visit extenuated international condemnation. As an ICC signatory, Kenya had an obligation to arrest Al-Bashir.

#### A. *Al-Bashir's ICC Arrest Warrant and the ICC*

Kenya's failure to do so drew criticism from both the Court and European governments.<sup>224</sup> However, the Commonwealth Secretariat supported Kenya. Kamlesh Sharma, the Secretary General, said that the ICC must "understand Kenya's multiple international obligations."<sup>225</sup> The Kenyan government argued that arresting the Sudanese president could have an adverse effect on the Sudanese peace process.<sup>226</sup> Officials also said Kenya had a duty to the African Union, which instructed its members to defy the ICC and not apprehend Sudan's president.<sup>227</sup>

Responding to Commonwealth Secretariat, Christian Wenaweser, the President of the ICC assembly of states' parties to the Rome Statute of the ICC, wrote a letter reminding the Commonwealth secretary of the standing of (1) *an ICC arrest warrant in international law*, (2) *backed by treaty* and (3) *a UN Security Council resolution*. Apparently baffled, Wenaweser remarked: "What was alarming to me was that [Sharma's] comments seemed to indicate he agreed with the view expressed by the Kenyan officials that the obligation to the

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<sup>222</sup> Julian Borger, *Commonwealth Chief Admonished by ICC Over 'War Crimes' Remarks*, GUARDIAN (Eng.), Oct. 27, 2010, [www.guardian.co.uk/world/2010/oct/27/commonwealth-international-criminal-court-bashir/print](http://www.guardian.co.uk/world/2010/oct/27/commonwealth-international-criminal-court-bashir/print).

<sup>223</sup> Two arrest warrants have been issued against him by the Chamber I of the ICC. Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest (Mar. 4, 2009); Prosecutor v. Omar Hassan Ahmed Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest (July 12, 2010). The warrants list ten counts on the basis of his individual criminal responsibility under article 25(3)(a) of the Rome Statute as an indirect (co) perpetrator including: five counts of crimes against humanity: murder—article 7(1)(a); extermination—article 7(1)(b); forcible transfer—article 7(1)(d); torture—article 7(1)(f); and rape—article 7(1)(g); two counts of war crimes: intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities—article 8(2)(e)(i); and pillaging—article 8(2)(e)(v). The three counts of genocide included: genocide by killing (article 6-a), genocide by causing serious bodily or mental harm (article 6-b), and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction (article 6-c).

<sup>224</sup> Borger, *supra* note 222.

<sup>225</sup> Walter Menya, *Club Boss Says Kenya in Order Over al-Bashir*, DAILY NATION (Kenya) (Sept. 14, 2010), <http://www.nation.co.ke/News/politics/Club+boss+says+Kenya+in+order+over+al+Bashir+/-/1064/1011186/-/rswse8/-/index.html>.

<sup>226</sup> Borger, *supra* note 222.

<sup>227</sup> *Id.*

African Union overrides the obligation to fully co-operate with the ICC.”<sup>228</sup> The Security Council, Alvarez says is not much of a deterrent for the Sudanese head of state because “[t]he Security Council has, to date, ducked all pleas by the ICC Prosecutor to assist the Court in enforcing its indictments, even though the Council could easily do so under UN Chapter VII authority, including its existing sanctions regime for Sudan under Security Council Resolution 1591 (2005).”<sup>229</sup> Here Alvarez is egging on the Council to intervene in the AU at the cost of undermining an international legal process as enshrined in article 16 of the ICC.<sup>230</sup> This flies in the face of the understanding of some AU members states that the ICC’s Article 16 be used “sparingly and only when a specific threat to international peace and security could be identified under chapter VII of the UN Charter and when action against such a specific threat would be exacerbated by proceedings pending before or contemplated by the ICC.”<sup>231</sup>

***B. ICC Article 16, Security Council and Sudan: The Politics of International Law***

Wenaweser nonetheless needs to consult some of the judgments from the ECJ and the U.S. Supreme Court; many of them discussed the derogation of international law by the EU and the United States before. The question is: what alarms him? Is it the disobedience of international law *per se* or disobedience by an African state? As such, the AU is frustrated over the Security Council’s failure to consider its deferral request.<sup>232</sup> “Less than two weeks after the Rome Statute entered into force on 1 July 2002, . . . article 16 of the Rome Statute was controversially invoked at the behest of the United States”<sup>233</sup> The United States threatened in early June 2002 to veto the renewal of the mandate of the UN mission in Bosnia and Herzegovina, as well as all other future peacekeeping operations, if rticle 16 of the ICC was not amended to its liking.<sup>234</sup>

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<sup>228</sup> *Id.*

<sup>229</sup> Alvarez, *supra* note 137.

<sup>230</sup> *Id.*

<sup>231</sup> DAPO AKANDE, MAX DU PLESSIS & CHARLES CHERNOR JALLOH, INST. FOR SEC. STUDIES, AN AFRICAN EXPERT STUDY ON THE AFRICAN UNION CONCERNS ABOUT ARTICLE 16 OF THE ROME STATUTE OF THE ICC 10 (2010).

<sup>232</sup> *Id.* at 8.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

Usually states party to the ICC self-refer the cases. In the case of Sudan—not a party to ICC, only to the UN—the Security Council, acting under its chapter VII authority, submitted the situation to the ICC prosecutor.<sup>235</sup> As such, as Dapo Akande *et al* argue, “in a treaty-based consensual international judicial institution like the ICC, the Sudanese referral constitutes a coercive and exceptional measure.”<sup>236</sup> Such a measure is justifiable only from the perspective of international treaty law if “it is a measure aimed at the maintenance or restoration of international peace and security under article 39 of the UN Charter.”<sup>237</sup> The Security Council’s invocation at the behest of—and under threat by—the United States points to the highly politicized “nature of article 16” of the ICC.<sup>238</sup> Although article 16 of the ICC allows the Security Council “a limited power of intervention in the workings of the ICC, it was not intended as a means” which the Council might use to undermine the ICC.<sup>239</sup> Such a situation, as Akande reports, has prodded the Assembly of the AU, and the African Commission, “to consider seeking an advisory opinion from the International Court of Justice regarding the immunities of state officials under international law.”<sup>240</sup>

Larger questions emerge. If the EU, as well as the United States, could trump international law, as discussed above, why can’t the African Union rethink its relationship with international law? This is not to justify any kind of genocide by any state machinery, including the State head. The question is about the political nature of conviction within international law.

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<sup>235</sup> *Id.* at 7.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 8.

<sup>239</sup> *Id.* at 10.

<sup>240</sup> Dapo Akande, *The African Union’s Response to the ICC’s Decisions on Bashir’s Immunity: Will the ICJ Get Another Immunity Case?* EJIL: TALK! (Feb 8, 2012), <http://www.ejiltalk.org/the-african-unions-response-to-the-iccs-decisions-on-bashirs-immunity-will-the-icj-get-another-immunity-case/>.

As has been the pattern over the past three or four years, the AU Assembly has, at its biannual meetings, adopted a number of decisions regarding cases at the [ICC]. In the latest meeting, the AU Assembly reiterated its request that the UN Security Council defer the proceedings against Sudanese President Bashir in accordance with Article 16 of the Rome Statute.

*Id.*

After all, whether or not the Kenyan “obligation to the African Union overrides the obligation to fully co-operate with the ICC”<sup>241</sup> is a matter of debate, just as it is within the EU as seen in *Mox Plant* case. As it is, the Sudan-Kenya part of the AU is an extremely fragile zone. When the larger prospect of peace is in deferring the arrest of Al-Bashir, which would be temporary, the Security Council should give peace a chance rather than just call unequivocally for Al-Bashir’s arrest. The exercise in international norm creation, such as the one done through the creation of the ICC, has been the single most important political result of international law’s project, which continues to misread the Third World states’ local needs. If the AU Assembly reiterates its request that the Security Council defer the proceedings against Sudanese President in accordance with article 16 of the Rome Statute, it should draw the attention of international lawyers to a political turmoil that the arrest might unleash in the region. In any case, the United States, which controls the Security Council for all practical purposes, must not act to jeopardize the legal process for political mileage. The AU is doing its best to honor international law; it is the political production of convicts by the Security Council that wrongly portrays the AU as not complying with international law. International law’s intimate animosity continues.

### CONCLUSION

Since the terrorist attacks of September 11, the United States has decided to go it alone. Others are welcome to join in if they wish, and there may be advantages, but very little law, down that road. The Guantanamo base was deliberately chosen to hold al-Qaida suspects in a legal vacuum and has become a symbol of the US opposition to everything that might check its liberty of action—from human rights treaty bodies to the International Criminal Court, multilateral disarmament to the Kyoto Protocol.<sup>242</sup>

International law was never a Third World child. It was thrust upon the Third World through the process of colonization. Sovereignty is central to the understanding of international law. But as Anghie thinks, “sovereignty is, perhaps somehow inherently imperial.”<sup>243</sup> It always seeks to expand its reach and power, whether internally or externally.<sup>244</sup> Thus the “work of TWAIL scholars is indispensable to

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<sup>241</sup> Borger, *supra* note 222 (quoting President of the ICC Assembly of State Parties Christian Wenaweser).

<sup>242</sup> Koskenniemi, *supra* note 139, at 197.

<sup>243</sup> Anghie, *supra* note 106, at 1367.

<sup>244</sup> *Id.*

addressing and comprehending these evolving complexities and shifting realities.”<sup>245</sup> The lens of intimate animosity seeks to capture this shifting reality within the schema of international law.

Today, the Third World has begun to accept the idea of international law. This creates a rather unprecedented situation when the Third World looks more interested in saving the project of international law than the Western collective. Much to the displeasure of Kelsen, both the EU and the United States have something dearer to defend. For the EU it is their yet-to-be-born constitution, and for the United States, it is their Constitution. Putting all speculations about the role of power in international law’s operation to rest, Paulsen reminds us that for the United States, its “Constitution is always supreme over international law.”<sup>246</sup> He maintains: “To the extent that the regime of international law yields determinate commands in conflict with the Constitution’s commands or assignments of power, international law is, precisely to that extent, *unconstitutional*.”<sup>247</sup>

Unfortunately, international lawyers “exist in a tenuous twilight zone between academic homelessness and practical professional insecurity.”<sup>248</sup> While practicing international law, due in part to the discursive nature of law, lawyers do not want to transcend legal thinking. Sovereignty as a concept is also undergoing an unprecedented and severe change. Alas! Under the Western assault, international law is bleeding out its ability to see welfare as a common good at a time when NATO is handing down the responsibility to protect as a new humanitarian aid. If not more, at least in the responsibility to protect, we see the West philosophizing through force.

Referring to Europe fresh from World War II, Albert Camus once wrote: “But the Europe we know, eager for the conquest of totality, is the daughter of excess.”<sup>249</sup> It is no longer with hammer blows, he cautioned “but with cannon shots that Europe philosophizes.”<sup>250</sup> Thus it is important that the norm-creating hypothesis of the international legal system “be reformulated so that support of a nascent norm of

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<sup>245</sup> *Id.* at 1366.

<sup>246</sup> Paulsen, *supra* note 84, at 1762.

<sup>247</sup> *Id.* (italics in original).

<sup>248</sup> Peter Goodrich, *On the Relational Aesthetics of International Law: Philosophy of International Law*, *Anthony Carty*, 10 J. HIST. INT’L L. 321, 322 (2008).

<sup>249</sup> Camus, *supra* note 24, at 149.

<sup>250</sup> *Id.* at 151.

customary international law could never be adduced alone as sufficient justification for breach of the system’s foremost norm.”<sup>251</sup> In other words, international law is waiting to be seen through an “intimate enemy” lens to capture its actual dynamics vis-à-vis developing and developed worlds.

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<sup>251</sup> Chigara, *supra* note 66, at 196.

