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SPECIAL ISSUE

GLOBALIZATION AND THE RE-CONSTITUTION OF SECURITY

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INTRODUCTION

Janine Brodie and Joanne Wright- Issue Editors

This special issue of the Review of Constitutional Studies, entitled Globalization and the Re-Constitution of Security, is the outcome of two years of collaboration between researchers at the University of Alberta and Royal Holloway, University of London. This collaboration began in the fall of 2003 when the Centre for Constitutional Studies at the University of Alberta sponsored a workshop on the reconstitution of security, specifically comparing the North American and European experiences.

The articles in this volume understand the concept of reconstitution in three distinct but interrelated ways. The first focuses on the idea of reconstitution as redefining and breathing new meaning and importance into an existing term. As the articles by Wright and Judson describe, the very meaning of security has undergone several transformations since the end of the Cold War. Prior to the collapse of the Berlin Wall, the term "security" generally referred to the security of national states, especially superpowers that were locked in the gaze of mutually assured destruction. With the apparent end of the antagonisms between the two great ideological camps of the twentieth century, the idea of security was increasingly detached from nation-states and reattached to human beings, regardless of their national or political location. The so-called "human security agenda," advanced by UN agencies and, indeed, the Government of Canada, promoted the idea that peace would elude the world unless and until people everywhere achieved freedom from danger, fear, want, and deprivation. The tragic events of 11 September 2001, and their ongoing reverberations in domestic politics brought new understandings of security that, in many ways, threaten the fundamental tenets of the human security agenda.

This brings us to a second understanding of the reconstitution of security as the recomposing or remaking of the subjects and objects of security. As each of the contributions in this special issue

differently describe, contemporary security discourses have reconfigured the answers to questions such as: Who is insecure? What is the threat? And, where does the threat come from? McMahon's examination of anti-terrorist legislation in Canada and the United States reveals that ordinary citizens have been reconstituted as potential terrorists and, in the process, their citizenship rights are often left hanging in the balance. Smith's article similarly demonstrates that the entire African continent is consistently depicted as a breeding ground for all kinds of threats against the West and western values.

The third meaning of reconstitution explored in these pages – the rewriting of fundamental laws, rights, and institutional responsibilities – is perhaps a more familiar one for readers of this journal. While anti-terrorist legislation, in many ways, reconstitutes the rights and guarantees of citizenship, the articles by Abu-Laban and Seglow suggest that the weight of this type of legislation often falls on the most vulnerable – immigrants and displaced people. Edwards suggests that this consequence may be unavoidable, arguing that we should rethink our commitment to universal human rights and, instead, prioritize some rights guarantees over others. Farrow, however, responds with a spirited defence of universal human rights, and particularly their aspirational value in an era of global terrorism. Finally, Miskimmon and Wright and Knight advance another interpretation of the reconstitution of security, arguing respectively that security in the current era may be best achieved through the creation and elaboration of new regional or, indeed, global fundamental laws and institutions.

Many people have contributed to the realization of this special issue. Joanne Wright, Dean of the Faculty of History and Social Sciences at Royal Holloway, University of London, co-edited the papers in this volume with Janine Brodie, Canada Research Chair and Professor of Political Science at the University of Alberta. The project was initially supported by Dr. Tsvi Kahana, then Executive Director of the Centre for Constitutional Studies. The current Executive Director, Janna Promislow, generously undertook the arduous task of editing this special issue with the help of University

of Alberta law students Lorne Randa, Adina Preda, Nonnie Jackson, Sarah Weingarten, Darin McKinley, and Allyson Jeffs. And last, but not least, Jennine Foulds, Administrator and Typesetter at the Centre for Constitutional Studies, guided the journal through the various stages of production.

RECONCEPTUALIZING SECURITY – A EUROPEAN PERSPECTIVE

Joanne Wright*

This article provides a brief outline of historical conceptions of security around the world as well as international and national reaction to the current global threat of terrorism. The author investigates different methods and mechanisms established to respond to the threat of terrorism after 9/11. Particular emphasis is placed on the actions of the United States and its unilateralist approach to the war on terrorism. The author compares U.S. and European security measures and outlines the linkage and distinctions between individual and state security and state and international security.

Cet article donne un bref aperçu des conceptions historiques de la sécurité dans le monde et des réactions internationales et nationales aux menaces actuelles de terrorisme mondial. L'auteur examine diverses méthodes et mécanismes établis pour réagir à la menace de terrorisme après le 11 septembre. Une attention spéciale est accordée aux États-Unis et à leur démarche unilatéraliste envers la guerre contre le terrorisme. L'auteur compare les mesures de sécurité des États-Unis à celles de l'Europe et énonce le couplage et les distinctions existant entre la sécurité des personnes et de l'État et entre la sécurité de l'État et la sécurité internationale.

I. INTRODUCTION

Many reactions to the shocking events of 9/11 suggested that there was a new and imminent security problem that demanded immediate responses. International organizations introduced a raft of anti-terrorist action plans. The United Nations Security Council passed Resolution 1373, which obliged states to take certain actions and left them vulnerable to sanctions if they did not. Resolution 1373 also established a Counter Terrorism Committee with compliance mechanisms and powers rarely found in international law. NATO invoked for the first time its collective defence article 5 provision and moved quickly to define terrorism as one of its two primary *raisons d'être* – the other being weapons of mass destruction.

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ANZUS also invoked its collective defence clause. The G8, OSCE, the EU, ASEAN, the OAU, the Latin American states, and many other regional and functional organizations pushed countering terrorism to the top of their agendas.

Individual countries also reacted strongly, none more so than the United States, which declared "war" on terrorism and, by many accounts, re-wrote its national security strategy. It put much more emphasis on doctrines of pre-emption and unilateralism and made significant adjustments to its domestic legislation.[1] Other countries also made adjustments to existing anti-terrorism legislation or introduced new legislation. While there are small variations, in general all countries' legislation aimed to deny terrorists legal sanctuary by adopting common definitions, refuse terrorists access to logistical or recruitment centres, strengthen information exchanges between national and international law enforcement agencies, enhance physical security, and control the flow of people.

Despite these resources devoted to the international campaign, it seems to be a widespread perception that the risk from terrorism has actually become greater and that the general security environment is less stable now than it was before 9/11. The military supremacy of the United States is often singled out as a causal factor in this instability. The Americans have aimed for military supremacy and no country or group of countries has chosen to or is able to compete (or even play meaningful parts in U.S. led coalitions). In conjunction with this there are severe reservations about the behaviour of the United States. Even among the strongest of historical allies there are criticisms of U.S. unilateralism and its tendency to over-militarize security and ignore international organizations, as the 2003 invasion of Iraq so clearly demonstrates.[2]

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1 See "The National Security Strategy of the United States of America" (17 September 2002), online: The White House <http://www.whitehouse.gov/nsc/nssall.html>. See also Michael Clarke & Paul Cornish, "The European defence project and the Prague summit" (2002) 78:4 International Affairs 777 at 783.

2 Stanley Hoffmann, "US-European relations: past and future" (2003) 79:5 International Affairs 1029 at 1032.

The Europeans' contribution to international security, whether through NATO or through the EU, also can be seen as problematic. Most fundamentally, both NATO and the Common Security and Defence Policy (CSDP) are in trouble. Despite NATO's grand gestures, the U.S. effectively sidelined it during the Afghanistan and Iraq campaigns. The EU's CSDP lacks strategic vision, physical resources and leadership to the extent that the Europeans still rely on the Americans to solve even a dispute between Spain and Morocco over a small Mediterranean rocky outlet. This suggests that it would not be prudent to rely on the Europeans to exercise effective international leadership.[3] Internally too, the Europeans are less confident about security than they were pre-9/11. The Madrid bombings of March 2004 heralded much soul-searching about the relationship with the U.S. in the light of the Iraqi invasion and the Spanish Socialist Party's pledge to remove Spanish troops from Iraq played a part in its unexpected election victory just days after the bombs. Within days the EU also moved to refine and strengthen its post-9/11 counterterrorism Action Plan (see below).

Elsewhere in the world, there is not a great deal that looks like enhanced international security. South West Asia is, if anything, in a worse situation than it was before 9/11. Central Asia, South Asia, North East Asia, and North Africa continue to have problems that have been accentuated by the fall-out from 9/11 and the U.S.-led invasion of Iraq. At the domestic level too, there is little to suggest enhanced perceptions of security. Governments all over the world have introduced legislation that fuels fears, encourages xenophobia, and suspends basic civil and human rights.

So where have we gone wrong? Do we have fundamental problems with both our conceptions of security and instruments of security? The biggest problem is not particularly new. It remains finding adequate ways for conceptualizing and managing the links between international security and state security and between state security and individual security. Since the end of the Cold War, there

[3] For a critical overview see Julian Lindley-French, "In the shade of Locarno? Why European defence is failing" (2002) 78:4 International Affairs 789.

has been a general recognition that there are links, but when states and even international organizations try to operationalize these links, they often revert to older conceptions of security and even older instruments of security. Terrorism is a prime example of this.

This article will begin with a short and admittedly very generalized view of how conceptions of security have changed and not changed over the past few decades. This will also be used to illustrate some of the differences that have emerged between the United States and its European (and Canadian) allies. The emphasis will then shift to terrorism, which reveals some of the links between international, state security, and individual security. The European response to 9/11 is somewhat different to the American one – especially at the international level. It is both multifaceted and multilateral and targeted at the level of state capacity and the link between state and international security. At the same time however, terrorism has shifted the domestic security agenda in Europe in ways that are not very new at all, and this link between individual and state security remains a weakness in our conceptions of security.

II. SHIFTING DEFINITIONS OF SECURITY

We can begin this brief survey of changing conceptions of security in the mid-1960s as it is then that we can see the first real post-World War II efforts to operationalize a conception of security that was not based solely on a zero-sum game between the superpowers. Through a combination of Khrushchev's conception of peaceful co-existence, Henry Kissinger's *détente* and especially Willy Brandt's *ostpolitik*, policy-makers and strategists in the Soviet Union, the U.S., and Western Europe developed a conception of security that accepted that security was both relative and mutual. We can see this conception operationalized in a whole series of arms control and other agreements, but apart from a small element within what was then the Conference on Security and Cooperation, which focussed on human rights, security was still overwhelmingly conceived as existing at the defence level and with the state as the

sole or primary object and subject of security.[4]

This conception began to be challenged in the 1970s, with three important factors pushing towards change. The first was the oil crisis of the early 1970s, which prompted both governments and security analysts to talk of economic security and the need to "secure" access to vital resources. The second factor, which was somewhat related to the first, was the recognition that all natural resources were finite and this led to talk of environmental security. Finally, there were growing demands from what was then called the third world for development assistance in order to improve its economic, environmental and internal security. So by the end of the 1980s, notions of comprehensive security dominated international fora and some national policy circles. These notions of comprehensive security had three key elements:

1) a continuing recognition that security was both relative and mutual,
2) security risks were not confined to the military sphere; and,
3) collectives other than states could be the subject of security.

This sort of conception was operationalized (although imperfectly) in things like the Brandt and Palme Commissions.[5]

The end of the Cold War led to another reassessment of the things that could cause a threat to security. From the collapse of communism in Eastern Europe and the Soviet Union, governments,

[4] The most influential academic text discussing these ideas is Robert O. Keohane & Joseph S. Nye, *Power and Interdependence: World Politics in Transition* (Boston: Little Brown, 1977). See also Robert Jervis, "Cooperation under the Security Dilemma" (1978) 30 World Politics 167.

[5] Independent Commission on International Development Issues (Brandt), *North-South, A Programme For Survival: Report of the Independent Commission in International Development Issues,* (London: Pan Books, 1980); and Independent Commission on Disarmament and Security Issues (Palme), *Common Security: A Programme For Disarmament* (London: Pan Books, 1982).

think tanks, and academic journals emphasized all sorts of threats relating to failed or weak states, ranging from the control of arms and nuclear materials all the way through to the people and drug trafficking of organized crime groups based in Russia and the Balkans. Threats from uncontrolled financial flows, threats to indigenous cultures, and threats to gender also were regular topics, at least on the academic security agenda. But there were two related aspects of security that were to stand out in the 1990s. The first of these was uncontrolled migration flows and the second was a notion that human rights superseded notions of state sovereignty.

It is possible to observe imperfect, and certainly inconsistent, attempts to operationalize this wider conception of security in the expanded mandates that security organizations gave themselves in the 1990s. For example, from the early 1990s, NATO saw itself undertaking a much wider role than just collective defence and became involved outside Europe. The EU has taken on an explicit security role and has set up military structures even though they remain somewhat ill-defined.[6] It is also worth noting that during the 1990s the UN adopted the term "human security" to guide its development policies, its peace-building activities, and its consolidation activities. So, there was a clear belief that internal and external security were linked and that interdependence between nation-states and peoples was high.[7]

However, these wider conceptions of security are problematic, which can clearly be seen in state attempts to operationalize them. During the 1990s, writers such as Barry Buzan, Ole Weaver, and David Campbell began to draw our attention to what can be called

[6] See Alister Miskimmon & JoanneWright, "The Changing Constitution of Security in Europe" (2005) 10 Rev. of Constitutional Studies 207.

[7] See *e.g.* Dharam Ghai, *Economic Globalization, Institutional Change and Human Security* (Geneva: United Nations Research Institute for Social Development, 1997); Bertrand G. Ramcharan, *Human Rights and Human Security* (The Hague: Martinus Nijhoff, 2002); P. R. Chari & Sonika Gupta, eds., *Human Security in South Asia: Energy, Gender, Migration and Globalisation* (New Deli: Social Science Press, 2003); and, Edward Newman & Oliver P. Richmond, eds., *The United Nations and Human Security* (New York: Palgrave, 2001).

the "procedure of securitization," whereby if an issue is presented as a security problem, particularly if it triggers a sense of imminent danger, then it is likely to attract extraordinary, that is, military resources to counter it.[8] This is of course most evident in the U.S. and especially in relation to terrorism.

So even in the early 1990s many state decision-makers and bureaucracies in the U.S. and Europe believed that they were surrounded by a host of imminent and real threats that required urgent and forceful responses. In line with bureaucratic explanations of politics, it is perhaps not surprising that a kind of hierarchy of problems arose that were to some extent suited to the use of "old" instruments. And during the 1990s, military force was used to deal, mostly unsuccessfully, with problems associated with drugs, illegal migration and human rights.

Coinciding with this was what has been termed a revolution in military affairs, which was about applying technological advances not only to weapons but also to command, control, communications, and intelligence systems.[9] The U.S. administration was also beginning to interpret the international system in a very different way to the early days of the Clinton administration. Rather than see the international system as constraining, think tanks were urging Americans to see it as an opportunity to expand American power. The best-known exponent of this type of thinking, at least in Europe, is Robert Kagan who in his book, *Of Paradise and Power*, advocates that the U.S. use its economic, technological, and military advantage without being constrained by the sensitivities of allies.[10] This

[8] Barry Buzan, *People, States, and Fear: The National Security Problem in International Relations* (London: Wheatsheaf, 1983); Barry Buzan, Ole Waever & Jaap de Wilde, *Security: A New Framework for Analysis* (London: Lynne Rienner, 1998); and, David Campbell, *Writing Security: United States Foreign Policy and the Politics of Identity* (Minneapolis: University of Minnesota Press, 1998).

[9] See Andrew Dorman, Mike Smith & Matthew Uttley, eds., *The Changing Face of Military Power: Joint Warfare in an Expeditionary Era* (Basingstoke: Palgrave, 2002).

[10] *Of Paradise and Power: America and Europe in the New World Order* (London: Atlantic, 2003).

mapped well with the views of the neo-conservative faction in the Bush administration.

And it was in this sort of general environment that 9/11 happened. September 11 then, was a conduit for a very aggressive military policy, which although it was based on new notions like asymmetric warfare, capabilities based, and network centric warfare was also presented within a very unilateralist zero-sum Cold War – imminent threat type framework. For example, in a speech to the Council on Foreign Relations in Washington on 10 February 2003, then U.S. Attorney General John Ashcroft said:

> When enemies of liberty struck this nation seventeen months ago, we had two choices: either succumb to fanatics or fight in defense of freedom. America has made the choice to fight terrorism, not just for ourselves but for all freedom-loving people. And all across the world, freedom-loving people have joined the side of liberty, justice, and respect for the rule of law.[11]

According to Mary Kaldor "against these new and unknown enemies, the United States has developed new doctrines of 'pre-emption' in place of deterrence and 'pro-active counter-proliferation' instead of non-proliferation."[12] John Ashcroft talks of a similar shift when he talks of "our new international goal of terrorism prevention … involves anticipation and imagination about emerging scenarios, the puzzle pieces of which have yet to come into alignment."[13] And Paul Wolfowitz has made it abundantly clear that it will be the mission, not shared values that determines any coalition that the U.S. will lead.[14]

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[11] John Ashcroft, "Prepared Remarks of Attorney General John Ashcroft Council on Foreign Relations" (10 February 2003), online: United States Department of Justice <http://www.usdoj.gov/ag/speeches/2003/021003agcouncilonforeignrelation.htm>.

[12] "American power: from 'compellance' to cosmopolitism?" (2003) 79:1 International Affairs 1 at 13.

[13] Ashcroft, *supra* note 11.

[14] See Steve Larabee & François Heisbourg, "How global a role can and should NATO play?"*NATO Review* (Spring 2003) 13, online: NATO <http://www.nato.int/docs/review/pdf/i1_en_review2003.pdf>.

Somewhat understandably, this policy direction makes the Europeans (and others) nervous. Partly through choice and partly because there is no other real option, the Europeans have developed a different model of security that its critics would say is as civilianized as the American one is militarized. There is no doubt that generally the Europeans do have a multilateral outlook and a security agenda that does give more prominence to issues of "human security," including development assistance and conflict prevention mechanisms. To back this up, the Europeans have developed quite complex civilian-based instruments such as a rapidly deployable multilateral police capability.

However, the Europeans have not matched this with either a conceptual or physical investment in the military aspects of security. There is quite widespread criticism of the Europeans for being more interested in qualified majority voting, subsidiarity, and committee procedures than they are in developing strategic vision for the current environment. The Europeans have not invested in military resources in any substantial way either in the framework of the CSDP or NATO. The CSDP is already being compared with the West European Union of the 1980s; that is, as an institution that exists on paper but is not equipped to act.[15] In a capabilities sense, if not rhetorical, NATO continues to find it difficult to move away from old Cold War conceptions of territorial defence.

The result of this is a bit of a mismatch between conceptions and instruments of security among key players in the international system. To put it crudely, the Americans may indeed be over-militarized and the Europeans over civilianized. The Europeans have to accept that there will continue to be a need for military force and that if they choose not to make an appropriate investment, they cannot complain about American unilateralism. Even if the Americans want to include the Europeans in any future operation, the technological gap will be too great. The Americans, in contrast, need to accept that civilian instruments are often more suitable to many threats than military action and certainly military action alone.

[15] Lindley-French, *supra* note 3 at 791.

Terrorism is a prime example.

III. INTERNATIONAL TERRORISM

International terrorism is an international security problem but it is very rare for individual acts of terrorism to be classed as such. September 11 revealed what many of us had known for a long time – that countering terrorism is a complex and long haul task. There are no quick fixes. The key task is building individual state capacity to deal with terrorism on a local basis. There are two main reasons for this. First, the international legal system still places obligations on states. The international criminal court notwithstanding, terrorism and terrorists will have to be dealt with by states. And second, we are all vulnerable to lax, inadequate, or weak internal security systems. It is no accident that over the past two decades, there has been a shift in terrorist activity away from Western Europe towards weak states in South, Central, South Western, and South East Asia and North, Central, and East Africa. These are weak states with respect to either economic stability or political legitimacy, or both. And the weaker these states are, the more vulnerable we all are to terrorism.

So how great is the terrorist threat? Obviously to some extent this depends on who you are and where you are. What concerns most governments in Europe post-9/11 is "new" terrorism, which equates to highly decentralised trans-national entities that are motivated by religious fundamentalism and symbolised by al Qaeda. And it is apparent that many parts of the world have seen this type of terrorist activity both in terms of being a target and in terms of "hosting" terrorist recruitment, planning, communications, and financing. In Europe, for example, many states including Belgium, France, Germany, Italy, Spain, the U.K., Turkey, and Bosnia have all uncovered terrorist activity related to al Qaeda.

Much of the academic thinking surrounding "new" terrorism has been driven by a group of RAND researchers.[16] They point out that

[16] Ian O. Lesser *et al.*, eds., *Countering the New Terrorism* (Santa Monica: RAND, 1999).

even in very flat hierarchies, there has to be some sort of intermediate level of leadership, which can be termed "nodes." These nodes serve three basic functions. First, they provide assembly points for radicals and thus a pool for potential recruits. Second, they represent agents who perform the recruitment process. And third, nodes comprise the logistical managers who pass messages and transfer technical and financial resources. One of the key points to note about such nodes is that they have to operate in a semi-public manner and are therefore amenable to some sort of identification and penetration by intelligence and law enforcement officials.[17]

Some analysts suggest that the radical mosques in London, particularly Finsbury and Regent's Park, are serving such functions. The arrest of Sheikh Omar Mahmood Abu Omar provides some substantiating evidence. There are also suggestions of key nodes in Indonesia and Pakistan.[18] However, one thing about these nodes is that actually they are not radically dissimilar to the type of cellular structure adopted by the Provisional IRA in the mid-1970s. While cultural and language factors did make it easier for British intelligence to penetrate IRA cells than it will be to penetrate al Qaeda nodes, what might be instructive here is that the British government coupled security strategies with political and economic ones that aimed to give political and economic outlets to potential IRA supporters. It is especially noteworthy that since the early 1980s, the British carefully combined this strategy with both the Irish Republic and the U.S. So there was a multifaceted, and where appropriate, multilateral strategy.

Some recognition that this is the right approach can be found in European responses to 9/11. Arguably, the Europeans are both strategically and financially well placed to make this contribution to the global campaign against terrorism and thus enhance international security while also making appropriate links between the international and state levels of security. Strategically, the Europeans

[17] Thérèse Delpech, "International Terrorism and Europe" *Chaillot Papers No. 56* (December 2002), online: EU, Institute for Security Studies <http://www.iss-eu.org/chaillot/chai56e.pdf>.

[18] *Ibid*. at 16.

are well placed both because of their geography and because of their membership in key international organizations, especially the EU Most obvious in this respect is the EU's enlargement in 2004 to include ten new countries, which has considerably extended its borders to the south and east – even closer to the trouble spots of the Mediterranean and Central Asia. As a condition of entry, these countries have had to accept the decisions that the EU has already made in relation to terrorism (see below). This means that they accept a common definition of terrorism, are locked into intelligence sharing arrangements and have access to structural funds to help build their own internal capacity.

The EU made reaching out to third countries a central part of its contribution to the international coalition against terrorism. At its June 2002 summit in Seville, the EU declared that it would, among other things:

- focus on political dialogue with third countries in the fight against terrorism as well as on non-proliferation and arms control;
- provide technical assistance to third countries in order to reinforce their capacity to respond effectively to the international threat of terrorism; and,
- include anti-terrorism clauses in EU agreements with third countries.[19]

By 2003, the EU was reporting good progress and the review of the EU's Action Plan, which was provoked by the Madrid bombings, confirmed this reaching out to third countries as a key component in the EU strategy.

The European Commission has established a strategy for providing third countries with technical assistance. In consultation with the UN, the EU has established Indonesia, Pakistan, and the

[19] EU, *Draft Declaration of the European Council on the Contribution of CFSP, Including ESDP, in the Fight Against Terrorism*, Presidency Conclusions, Seville European Council, 21-22 June 2002, Annex V.

Philippines as priority countries and work has already begun. The EU also reported that anti-terrorism clauses had been included in agreements with Chile, Algeria, Egypt, and Lebanon, and that negotiations were ongoing with Syria, Iran, and the Gulf Cooperation Council. In addition to this, the EU has completed threat assessments for nine regions and fifty-five countries, which contain recommendations for the EU strategy towards them. Providing assistance to other regional organizations has been another priority of the EU and it has done so *via* the OSCE, ASEAN, ASEM, the African Union, the Barcelona states and entities, and in Latin America and the Caribbean.[20]

This strategy promises to lock a growing number of countries into an international counter-terrorism regime of laws, technical requirements, and training assistance. It also helps build state capacity on a global, rather than just a regional basis. And it is based on a conception of security that both links foreign and domestic security, overtly recognizing mutual vulnerabilities. It is less certain, however, that the same can be said about some of the EU's internal responses to terrorism, both collective and individual, which can be interpreted as classifying whole classes of people as enemies or potential enemies of the state. These responses, by contrast, are informed by one of the oldest conceptions of security around.

IV. TERRORISM FROM WITHIN

Within days of the 9/11 attacks, the member states of the EU had formulated a common Action Plan. It has since made some progress implementing this plan. One of the most significant advances was the Council Framework Decision of 13 June 2002. This decision requires member states to take any necessary actions at the domestic level to bring about a common definition of terrorism, common sentencing for terrorist offences to prevent any member state from being perceived by terrorists as a soft option and a common jurisdiction.

[20] EU, *Presidency Report to the European Council on EU External Action in the Fight Against Terrorism (Including CFCP/ESDP)*, Presidency Conclusions, Thessaloniki European Council, 19-20 June 2003, Annex I.

The EU's definition of terrorism has been widely criticized by non-governmental organizations such as Amnesty International and Statewatch as well as other civil groups for being much too wide and thereby encompassing legitimate protest activity by trade union groups, anti-globalization protestors and Greenpeace.[21]

To back up its common definition of terrorism, the EU has developed a common list of terrorist organizations and individuals, as well as the Euro-arrest warrant, which also has drawn criticism. Europol, which has had a counter-terrorism mandate since 1998, has had its role expanded to include investigations and especially information gathering and sharing. This expansion, along with the Schengen data system, has also attracted much criticism from civil liberties groups on the basis that the "war on terrorism" atmosphere has allowed governments to label legitimate political opposition as a threat to the state.[22] Despite these concerns, in its review of the Action Plan in the wake of the Madrid bombings, the EU expressed disappointment that several states, including Germany, Italy, Austria, Greece, and the Netherlands, had failed to meet deadlines relating to the Euro-arrest warrant and other enabling legislation linked to the proceeds of crime. It also stated that the exchange of communication traffic data was a priority area.

Data collection, monitoring and sharing has been a consistent theme in the reaction of individual European countries too. In France for example, the *Law on Everyday Security*,[23] introduced in November 2001, provides for wider access to police databases and introduced measures to monitor email and internet traffic. In Germany, the Erstes and Zweites Anti-Terror Paketes[24] also allowed

[21] There is certainly cause for concern here. The British police admitted recently that they had used anti-terrorism legislation to arrest protesters demonstrating against an arms fair in London in September 2003. One of the protest groups, Liberty, is taking the police to court over the validity of this action; see online: Liberty <http://www.liberty-human-rights.org.uk/issues/right-to-protest.shtml>

[22] See *e.g.* online: Statewatch <http://www.statewatch.org/news/2003/oct/22swsub.htm>.

[23] *Loi n⁰ 2001-1062 du 15 novembre 2001*, J.O., 16 November 2001, 18215.

[24] (First and Second Anti-terror Packages), passed into law in October 2001 and January 2002 respectively.

for expanded powers to gather and share financial and other data, such as biometric sources of identification. In the U.K., the *Anti-terrorism, Crime and Security Act 2001*[25] also allowed law enforcement agencies enhanced powers to collect, access, and share information and also required communications providers to maintain databases of cell-phone calls made.

The measures that have been introduced to tighten immigration flows and arrest or detain terrorist suspects have caused even more controversy. In the German context, the most sensitive measures introduced were restrictions put on the protection of religious groups and to allow for the prosecution in Germany for membership in terrorist organizations overseas. Given the very considered and considerable protection given to the individual in Germany's Basic Law, these measures have caused much consternation among both civil liberties groups and some *Laender*.

But perhaps the most controversial measure was that which operated briefly in the U.K. whereby the Home Secretary had the power to detain people indefinitely without trial when tey could not ne deported to 'safe' countries. Sixteen individuals were held in high security prisons under this provision. After protests from civil liberties groups and British judges, the Law Lords ruled that such detentions breached human rights and they have been discontinued. The Home Secretary, however, can still require such individuals to be electronically tagged and can restrict their access to communications. This leads us into one of the most difficult aspects of devising new conceptions of security- how to balance threat and response?

Post-Madrid, it is interesting to note that the EU inserted a "solidarity clause" to the draft constitution currently undergoing a difficult and uncertain process. This commits all member states to come to the assistance of another if it is the subject of a terrorist attack. Member states are free to determine the exact nature of this assistance, but it includes the possibility of military action. Two

[25] (U.K.), 2001, c.24.

further innovations were made to the EU's counter-terrorism strategy in the light of Madrid. In recognition that the EU's counter-terrorism policies covered many of the EU's different institutions, often with different decision making systems, the need for overall coordination was high. To meet this need, the position of overall counter-terrorism "tsar" was created and Gijs de Vries has been appointed. Secondly, the EU's Situation Centre, designed to share intelligence assessments of threats originating from outside the EU, has had its mandate extended to include intelligence sharing on threats originating from inside the EU. While these measures make important linkages between external and internal security, the distrust that still exists between EU members makes the necessary level of coordination very difficult to operationalize.[26]

V. CONCLUSIONS

Earlier in this article it was stated that from the late 1960s or so, there has been a general acceptance that security between states is both relative and mutual. In other words, absolute security is impossible and states cannot be secure unless others feel themselves to be secure too. Many states have tried to construct their foreign policies around notions of complex interdependence and mutual vulnerabilities. Put simply, actions in one state can have positive or negative effects in others and actors other than states can be both the objects and subjects of security. There are plenty of theories and evidence to tell us that weak and/or illegitimate states cause problems for others, both directly or indirectly. The international community has a growing body of international law and norms that there are some human rights that transcend notions of state sovereignty. And as Thomas Schelling warned us a long time ago, even the greatest power does not necessarily bring about compellence.[27] But we have not been entirely successful in operation-

[26] For example, the British authorities failed to act on information that they had been supplied by France, Germany, Italy, the U.S., Jordan and Spain about a man named Abu Qatada as they were trying to run him as an MI-5 informer. The Spanish authorities have hinted that the British failure to take action facilitated planning for the Madrid bombings.

[27] *Arms and Influence* (New Haven: Yale University Press, 1966).

alizing these concepts and developing appropriate security instruments either through our international organizations or through individual nation states.

At the level of international security and its link with state security, there are a number of issues that need to be re-conceptualized in some way. Somehow or other we are all going to have to come to terms with U.S. military hegemony. This has implications for the defence policies of individual states and collectives of states as well as more generally for international organizations at the global and regional level. In defence terms, many of the U.S.'s allies are having to make difficult and costly decisions about the structure and mission of their armed forces. For allies such as the Europeans and Australia – less so for Japan – there are decisions to be made about expeditionary types of defence structures versus territorial types of defence structures.

Specifically in relation to terrorism, the international community and its members have taken a number of steps to protect their societies, including new legislation, enhanced border security, enhanced travel security, improved intelligence sharing, and a harmonization of policies in relation to defining, responding, and sentencing terrorists. This has the potential to improve security for all of us, and it reveals two important points. Interdependence in the security sphere is high, largely because 9/11 has blurred even further distinctions between internal and external security. The second point is that despite their immense power, the Americans (and others) are dependent on the Europeans to improve their own security in order to improve American (and others') security and vice-versa. We are all only as secure as the weakest points.

What are the weakest points? Generally there are two. One is the inability of states that are weak – whether that be because of poverty, corruption or lack of popular legitimacy – to remove or at least diminish the seeds and manifestations of terrorism in their own territory. Since 9/11 we have seen some action in this arena, much of it positive and helpful. But it is far from complete. The inability of the international community to address world trade imbalances

remains a constant sore spot and capable of generating large numbers of very alienated people. The lack of progress on the Palestinian state is also very problematic as is the lack of enlightened leadership in the Arab world. European efforts to exercise effective international leadership have been pitiful, but it is the American intervention in Iraq that is the most damning. This leads to the second weak point.

The main reason why terrorism was able to flourish in the 1960s, 70s and 80s was due to a lack of international consensus and a bipolar international system that allowed the two superpowers to use terrorism both directly and indirectly as a tool of foreign policy. The 9/11 attacks brought an opportunity to change this. There was genuine international consensus that international cooperation was needed to counter terrorism, and again, great progress has been made in some areas. In Resolution 1373, the United Nations set out a strong international framework through which the Security Council's Counter Terrorism Committee has received reports from the overwhelming majority of members and is busy analyzing these and helping to identify and spread good practice. Other international organizations have also moved countering terrorism to prominent positions in their agenda and have started to create what could be called a counter-terrorism regime. These steps are also far from perfect or complete. There are many Action Plans, which are not always well resourced. There is a fair bit of duplication and inefficiency. But the big problem here is the Americans. By conflating Saddam Hussein and weapons of mass destruction proliferation with al Qaeda and the "war" against terrorism, the Americans have put this international consensus in jeopardy.

For international cooperation to work, the U.S. must be reconciled with at least its major partners on the UN Security Council. The re-election of George Bush and the movement of Condoleeza Rice to the State Department do not signal any sort of softening of the U.S. attitude towards multilateralism. It remains to be seen how the key European countries of France and Germany attempt to reconsolidate their relations with the second Bush administration, but it does appear that patching up relations even between the U.S. and its closest allies in Europe will require more visionary leadership than

is immediately apparent. But it is also doubtful that any other individual nation or group of nations other than the Europeans can either constructively engage with the U.S. or exercise real international leadership. Without this, the campaign against international terrorism will surely fail and that it is one of the reasons why recasting the transatlantic bargain is so important.

And finally, there is the relationship between the state and the individual, another area in which there is still a lot of work to be done. The 2001 terrorist attacks on the U.S. focussed our attention on the devastation that a group of individuals can cause. But it is important not to lose sight of the fact that for many of the world's individuals, the biggest threat to their security still comes from their own state. Our instruments to deal with this fact remain very weak, and while they remain weak, we all remain vulnerable. In sum, we have to look a little more closely at making our instruments of security match our conceptions. We are geared to firefighting security problems; we are less well geared towards sustaining security. What we need to concentrate on is how we can build sustainability into both our conceptions and, perhaps even more importantly, into our instruments of security.

COMPONENTS OF THE EMERGENT GLOBAL SECURITY REGIME

Fred Judson*

This article argues that there is an emerging "global security regime" in the post-September 11 world. This new global security regime, which resulted from a reconsideration of the international security regime and changes in global security following the Cold War, conveys the idea that there is an emergent planetary governance system providing the public good of security. The author brings forth an analytical discussion by examining four clusters of components in this new regime: the conjunctural, the immanent, the structural, and the emergent. This involves a discussion of the United States' security actions since September 11, a theoretical examination of security needs and of various structural changes such as the polarity of superpowers, regional block formation, and a globalizing economy. The article ends with a discussion of the emergent components of the global security regime. It argues that these components are shaped by globalization and the United States' hegemony. The author then concludes with a brief discussion of the U.S. and whether this hegemony is capable of meeting the needs of the global security regime.

Cet article soutient qu'un « régime de sécurité mondiale » a émergé dans le monde après le 11 septembre. Ce nouveau régime de sécurité mondiale, né d'un réexamen du régime de sécurité internationale et des changements ayant eu lieu au chapitre de la sécurité mondiale après la Guerre froide, donne l'impression d'un système de gouvernance planétaire émergeant assurant la sécurité en tant que bien public. L'auteur avance une discussion analytique en examinant quatre groupes d'éléments dans ce nouveau régime, à savoir les groupes conjoncturel, immanent, structural et émergent. Ceci exige une discussion sur les mesures de sécurité prises par les États-Unis depuis le 11 septembre, un examen théorique des besoins en sécurité des divers changements structuraux comme la polarité des superpuissances, la formation de blocs régionaux et la mondialisation de l'économie. L'article se termine sur une discussion des éléments émergents du régime de sécurité mondiale et l'argument que ces éléments sont façonnés par la mondialisation et l'hégémonie des États-Unis. L'auteur conclut ensuite par une brève discussion sur les États-Unis et si cette hégémonie peut répondre aux besoins du régime de sécurité mondiale.

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I. INTRODUCTION

Typically, political science treats "regimes" as systems of governance, whether in reference to states or interstate relationships. The dynamics and discourses of globalization, along with structural developments in world affairs since the end of the Cold War, have privileged the notion of "global security" over the prior concept of "international security." There is no dispute that the Cold War's superpower bipolarity has receded from its structural determination of the corresponding "international security regime." The expression "global security regime" conveys the idea that there is an emergent planetary governance system providing the public good of security. As such, that emergent regime defines the reconstitution of security in a global era. The objective of this article is to consider the components of that emergent security regime from the perspective of a critical and eclectic "materialist wholism."[1] Four clusters of components are discussed: the *conjunctural*, the *immanent*, the *structural*, and the *emergent*. These are not fixed categories; they overlap and exhibit their relational character within the complex global security regime.

II. CONJUNCTURAL COMPONENTS

In this section, I comment on the conception, discourse, and practice of global security in the context of the 9/11 events. It is not surprising that the September 11 attack has dominated the universe of conjunctural components. Effectively, the significant dominion of 9/ll sweeps aside, obscures or diminishes the importance to the global security regime of a range of situations and circumstances, from the HIV/AIDS crisis (especially in Africa) and the complex

[1] Of course, the Hegelian-Marxist traditions embrace that approach: Karl Marx & Friedrich Engels, *The Marx-Engels Readers*, ed. by Robert C. Tucker (New York: Norton, 1972). As well, Karl Polanyi and Fernand Braudel are non-Marxist examples: Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 1957 [1944]) and Fernand Braudel, *On History*, trans. by Sarah Matthew (Chicago: University of Chicago Press, 1980). A discussion of "critical and eclectic" approaches is in Fred Judson, "For an Eclectic and Critical Political Economy Perspective on Canadian Foreign Economic Policy" (2003/2004) 71/72 Studies in Political Economy 109.

wars of the Sudan-Congo-Rwanda belt to the 2003 nuclear standoff between India and Pakistan and the entrenched Israel-Palestine conflict. This was strikingly evident in the centrality of security discourses in the 2004 U.S. presidential election.

What strikes the observer, in contemplating the discourses and practices of global security since 9/11, is the near-monopoly and the one-dimensionality of the official security discourse of the United States. Suddenly, virtually without any historical reference and despite official disclaimers, an entire religious culture (Islam) was demonized, a country (Afghanistan) indiscriminately labeled "terrorist" (followed by Iraq), and a unilateral right to "remove" political regimes that did not proclaim themselves anti-terrorist (and even if they did) was announced. Insecurity was identified with terrorism, coupled to an institutionalized and simplified "realist" naming of an "enemy." This discourse of security mobilized the passions and patriotism of U.S. citizens, generating acceptance of domestic and international security measures patently contrary to democratic and human rights principles and legal due process. Security vaulted to unquestioned priority among public policies for the U.S. (which explicitly expected the same of other states). It unleashed massive expenditures, concentrated executive powers, and raised a President from limited popular acceptance and approval to the peak of popularity and legitimacy. Paraphrasing a slogan of the Cuban Revolution, "within the campaign against terrorism, all is possible; outside that campaign, all is the enemy."

"From 9/11 absolutely everything has changed": such an apocryphal phrase captures the *hubris* present in the discourse on security occasioned by the conjuncture of 9/11. Such *hubris* is understandable, in a global security regime with a single hyper-power genuinely "globalist" in its interests and capacities. Who was going to deny the hyper-power its rage, pain, and desire for vengeance, manifested in the wars waged in Afghanistan and Iraq? In any case, what real weight would critical and contrary commentary have in this conjuncture? With the symbolic power of 9/11, the appearance and the conviction was that the national interests of the U.S. were global interests.

Conjunctures may be determinant for some time; more frequently they are subsumed, either by more dramatic moments or by the structural components of a particular regime (in this case that of global security). The discursive art of a hegemon may well reside in the capacity to elide perceived threats; for example 9/11 terrorism equalled Iraq's presumed possession of, and propensity to employ, weapons of mass destruction. The policies arising from conjunctures tend to be one-dimensional, that is they lack subtlety and flexibility, and they depend upon ad hoc consensus and association (for example the "coalition of the willing"). As well, they carry a heavy cargo of risks. In the present conjuncture of the fraught and likely protracted occupation of Iraq, and with the discourse equating all security priorities with terrorism, for example, the risks are visible and palpable. These include the restrictions of civil rights and the concentration of executive power in the U.S., the alienation of many Muslims around the world, as well as Arab populations, and a semi-official U.S. popular culture of ultra-patriotism, interventionism, and chauvinism. The temptation to pronounce in simplistic (and often *macho*) language on complex international relations issues and the disposition to pursue military "solutions" to problems categorized as "security threats" or related discursively to terrorism can themselves generate insecurity.

III. IMMANENT COMPONENTS

Security has long been considered a "public good" in the sense of being a necessary condition for society itself to exist. Classical European political theorists, Rousseau for example, thought the "social contract" among citizens to form a state would provide the security necessary for the exercise of rights.[2] Later, Max Weber theorized the modern state as the provider of security.[3] If in the era of absolutist monarchy security was a "private good" of the ruler, political modernity supposedly made it a public good. For

[2] Jean-Jacques Rousseau, *A Discourse on the Origins of Inequality* (New York: St. Martin's Press, 1964).

[3] Max Weber, *The Theory of Social and Economic Organizations* (New York: Free Press, 1947).

individuals, most would agree, security permits and favors the complete development of the child, youth, and adult personality. In classic liberal democratic theory, security promotes freedom, guarantees property, and unleashes economic productivity and efficiency.[4]

This positive conception of security has its twin: *in*security. Machiavelli has company in noting political uses and socially integrative attributes of insecurity.[5] The intellectual descendants of Machiavelli, Thomas Hobbes and Edmund Burke constructed theories of the modern state as strong and even authoritarian, from their preoccupation with insecurity.[6] The duality of security/in-security expresses itself in realism,[7] one of the most entrenched postures in the social sciences. The primacy of security in the agenda of the modern state certainly owes something to lived experiences of insecurity as well as to the socially produced ontology of a universe of threats. This insecure universe is equally so for individuals, societies, and states. Many currents of modern thought have posited the "human condition" as defined by insecurity. Among them, realism holds that aggression is derived from the givens of insecurity, scarcity, and inequity, which *a priori* produce the

[4] It is worth noting that other currents of modern, but anti-liberal thought celebrate values embedded in insecurity: obedience, bravery, passion, group solidarity, bellicosity, *etc*. Among such currents fascist thought stands out, of course. See the controversial work of Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. by George Schwab (Cambridge: MIT Press, 1985).

[5] In this regard, see the work of U.S. sociologist Lewis A. Coser, *The Function of Social Conflict* (Glencoe, Ill.: The Free Press, 1956) and Niccolo Machiavelli, *The Prince: A New Translation, Backgrounds,* Interpretation, ed. & trans. by Robert M. Adams (New York: Norton, 1977).

[6] Thomas Hobbes, *Leviathan*, ed. by C.B. Macpherson (Baltimore: Penguin Books, 1968); Edmund Burke, *The Portable Edmund Burke*, ed. by Isaac Kramnick (New York: Penguin, 1999).

[7] See Michael Joseph Smith, *Realist Thought from Weber to Kissinger* (Baton Rouge: Louisiana State University Press, 1986); E.H. Carr, *The Twenty Years' Crisis 1919-1939: An Introduction to the Study of International Relations* (London: Macmillan, 1946); and Tim Dunne & Brian C. Schmidt, "Realism" in John Baylis & Steve Smith, eds., *The Globalization of World Politics: An Introduction to International Relations*, 2d ed. (New York: Oxford University Press, 2001) 161.

competition necessary to survive and prosper. The model of human behaviour as a "natural" or "rational choice" response to scarcity, inequity, and insecurity becomes the "zero-sum game" shaping the conduct of states and individuals alike.[8]

Modernism, as a collection of values and attitudes, privileges stability, certainty and predictability. It fears chaos, uncertainty, and lack of control, associating them with insecurity. Under the realist perception that the fundamental social condition is insecurity, the focus is on present and potential threats and fear is institutionalized. The world of states, that is to say "international relations" in the realist ontology, is a world insecure by nature. The perspicacity of Max Weber produced his brusque definition of the modern state: a legitimate monopoly over the use of force.[9] According to realist theorists of international relations,[10] a legitimate monopoly over the use of force is desirable for the international state system, but practically impossible.[11] Hence theoretically, security is acquired by each according to their sovereign capacity.

In the academic realm, the debate among realists, their progeny the "neorealists" and the rest has yet to conclude.[12] There is little probability that it will be resolved. But the debate registers two points relevant to thinking about the global security regime: each

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8 See *e.g.* Hayward Alker & Roger Hurwitz, *Resolving Prisoner's Dilemmas* (Washington, D.C.: American Political Science Association, 1980) and Anatol Rapoport, *Fights, Games, and Debates* (Ann Arbour: University of Michigan Press, 1960).

9 *Supra* note 3 at 156.

10 See *e.g.* Carr, *supra* note 7 and Kjell J. Holsti, *International Politics: A Framework for Analysis*, 7th ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1995).

11 The Hedley Bull expression, "The Anarchic Society" effectively captures this conception: Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977).

12 See Robert O. Keohane, ed., *Neorealism and Its Critics* (New York: Columbia University Press, 1986) and David A. Baldwin, ed., *Neorealism and Neoliberalism: The Contemporary Debate* (New York: Columbia University Press, 1993).

instance of security is marked by its insecurity;[13] and ideas can be manifestations of power.[14] Based on those observations, we ought to re-examine and deconstruct what we consider immanent, that is inherent, in the global security regime (a political universe shaped by insecurity, a fearful, and aggressive human nature, the predominance of the "zero-sum game" in the conduct of social actors, *etc*). If the discourse of security produces the skewed strengthening of the political class and of the military/police/intelligence apparatuses; if it produces disproportionate benefits for private defense enterprises; if it advances the agendas of the most powerful actors in a situation of inequality or injustice; and if the practice realized on the basis of that discourse creates more insecurity, in those instances it is the discourse that produces the security regime and not the objective circumstances of insecurity, threats, and real enemies.[15]

The constructivist critical perspective applies equally to a hegemonic security discourse that identifies an "enemy." Deconstruction suggests that *othering*, the demonization that permits barbarities, is embedded in the discourse. *Othering* generates political support for security practices that blur or erase democratic principles, even the very ends of security: civilization and humanitarian values. With the "war on terrorism," for example, deconstructionists ask if the discourse functions to veil another set

[13] There is a certain expression of that duality in the model "prisoner's dilemma" and in more sophisticated forms of "game theory."

[14] "Constructivism" within international relations theory shares with the "neo-Gramscians" and with students of ideology a concentration on the "discourse of security." On international relations theory see Nicholas Greenwood Onuf, *A World of our Making: Rules and Rule in Social Theory and International Relations* (Columbia: University of Carolina Press, 1989) and Steve Smith, "Reflectivist and Constructivist Approaches to International Theory" in Baylis & Smith, *supra* note 7, 224. On neo-Gramscians, see *e.g.* Stephen Gill, ed., *Gramsci, Historical Materialism and International Relations* (Cambridge: Cambridge University Press, 1993) and Robert W. Cox, *Production, Power, and World Order: Social Forces in the Making of History* (New York: Columbia University Press, 1987).

[15] I am mindful that this contrast reflects the confrontation of two views of insecurity: the position that insecurity is the real condition of international relations and the position that insecurity is a discursive construction of particular interests for particular ends.

of motives in operations against al-Qaeda, the Taliban, and Saddam Hussein: a geopolitics of hegemony, access to the hydrocarbons of the Caspian Basin-Central Asia region, and a "Wag the Dog"[16] strategy within the administration of U.S. President George W. Bush.

IV. STRUCTURAL COMPONENTS

On two occasions, separated by scarcely ten years, it was announced that the world has changed irrevocably; henceforth nothing will be the same. In 1991 President George Bush announced that the "New World Order" had superceded the Cold War and its bipolarity. President George W. Bush declared that the events of 9/11 totally changed the world in which we live and that what now prevailed was insecurity. Terrorism had restructured the international political system in a new bipolarity: those with the terrorists and those with the U.S. No other category or location within this new bipolarity was either possible or tolerable.

The centrality of the structural dimension of the current global security regime should not be underestimated; neither should the pronouncements of the two U.S. presidents be discounted, particularly if the arguments of the deconstructionists on the discursive power of "master concepts" like *security* are to be taken seriously. In the following sections I discuss several structural components of the global security regime, suggesting that their dynamics generate insecurity.

A. Between Global Structures and Globalizing Structures?

It has been thirty years since world systems theory, with its origins in the work of Immanuel Wallerstein,[17] denoted the two

[16] Taken from a Hollywood film that postulates the creation of a fictitious international crisis by a U.S. administration to divert public and political attention from some scandalous personal behaviours of the president.

[17] Immanuel Wallerstein, *The Modern World System* (New York: Academic Press, 1974).

principal axes of socio-economic and political location of the peoples of the world. These are the international states system (sovereign *nation-states*, mostly) and a global capitalist market economy. This schema contributes to a structural analysis of the global security regime. Several aspects of these two axes merit comment. A focus on the states system foregrounds issues of polarity, regional bloc formation, the nature of hegemony, comparability among states and their power capacities, international/global institutions, and the character of conflicts and wars. And the axis of the global economy highlights the dynamics of globalization, principal actors, the hegemony of neoliberalism, economic regionalism and blocs, the volatility and interdependence of stock markets, financial architecture, and firms' behaviour.

B. Polarity

During the Cold War, especially in the early decades, bipolarity defined the security regime of the states system. The term "superpower" was assigned to the U.S. and the Soviet Union. It focused attention on their superior war-making and hyper-destructive capacities, evinced by the numbers and strategic deployments of nuclear weapons, the size, organizational and technological sophistication, and the global projection of their armed forces. To be a superpower meant to have interests without geographic or political limits, to be engaged with the entirety of the planet.[18] Looking back, it makes sense to qualify that bipolarity as "asymmetrical" with a strong bias in favor of the U.S. Notwithstanding, this bipolarity has disappeared along with the "balance of terror" immanent in the deterrence structure of "mutually assured destruction." In effect, the Cold War global security regime ended.

In exchange, we presently have three structural tendencies of polarity in the state system, with inferences for the global security regime. First, there is a tendency towards multipolarity, characterized by uneven formation of regional blocs, consolidation of nuclear arsenals in East Asia, South Asia, the Middle East, Europe

[18] Some humorists said that to be a superpower was "never having to say you're sorry."

(both West and East), and North America, and with the insistence of states like China and India that "neither bipolarity nor unipolarity" is acceptable. Second, there is the tendency towards a mediated unipolarity of the U.S. It remains the lone superpower[19] and pursues a unilateral or an ad hoc multilateral conduct in the regional and global security arenas.[20] The U.S. counted much less on the agency of the NATO alliance, for example, in dealing with post-Cold War security matters in southeastern Europe. The Persian Gulf (1990-1991), Afghanistan (2001-) and Iraq (2003-) conflicts are the outstanding examples of asymmetric multilateralism outside/alongside international organizations.

The third tendency resides mostly in the discourses of United Nations functionaries, academic "neo-idealists," and a wide variety of non-governmental organizations (NGOs). It promotes "alternative security discourses," categories of humanitarian intervention,[21] a global human rights regime,[22] general disarmament,[23] global justice institutions, and other elements of a preferred global governance.[24] Its partisans possess little material or constructivist capacity to impose such a post-polarity globalist structure and are often compelled to support ad hoc multipolarity in the global and regional security regimes.[25]

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19 Presently the U.S. may be characterized as enjoying "hyper-power" status.

20 See William Blum, *Rogue State: A Guide to the World's Only Superpower* (Monroe, Me.: Common Courage Press, 2000).

21 Francis Kofi Abiew, "Assessing Humanitarian Intervention in the Post-Cold War Period: Sources of Consensus" (1998) 14 International Relations 61.

22 Tony Evans, ed., *Human Rights Fifty Years On: A Reappraisal* (New York: Manchester University Press, 1998).

23 Jeffery A. Larsen, ed., *Arms Control: Cooperative Security in a Changing Environment* (Boulder: Lynne Rienner, 2002).

24 W. Andy Knight, *A Changing United Nations: Multilateral Evolution and the Quest for Global Governance* (New York: St. Martin's Press, 2000).

25 See Steward Patrick & Shepard Forman, eds., *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement* (Boulder: Lynn Rienner, 2002).

C. Bloc Formation

To date, the formation of regional blocs has been quite uneven. Moreover, their record as structures providing regional security, during and after the Cold War, is not impressive. It has been very selective (the cases of Rwanda and the Balkans are illustrative), intermittent (West Africa), and influenced by the interests of the most powerful actors, either within the respective region or from beyond. The agency of the U.S. in the former Yugoslavia, Britain in the Persian Gulf and Afghanistan, France in central, west and northwest Africa, and Russia in former Soviet republics are examples. Nonetheless, regional security arrangements, particularly in the context of the European Union, have the potential to affect the structure of the international states system and the global security regime.

D. Hegemony and the "New Imperialism"

Most realist discourses on global security have a normative dimension, presenting the liberal democracy of the U.S. as appropriate for virtually the entire world and applauding "the leader of the free world" and its behaviors in international politics for over fifty years.[26] Now, facing a hegemonic (and hegemonizing?) discourse about what constitutes security and insecurity, realism offers almost no critical perspectives on the conduct or the discourse of the U.S. One articulation reprises *imperialism* as a desirable hegemonic conduct in a global security regime.[27] This new form of imperialism is seen as beneficent, responsible, and global. It echoes classic imperialist discourses such as the French *mission civilisatrice*, Spencerian positivism, the "white man's burden" of

[26] See *e.g.* Zbigniew K. Brzezinski, *The Grand Chessboard: American Primacy and Its Geostrategic Imperatives* (New York: Basic Books, 1997); Henry Kissinger, *Does America Need a Foreign Policy? Towards a Diplomacy for the 21st Century* (New York: Simon and Schuster, 2001); and, Stephen G. Brooks & William C. Wohlforth, "American Primacy in Perspective" (2002) 81:4 Foreign Affairs 20.

[27] See Robert Cooper, "The Postmodern State" in Mark Leonard, ed., *Reordering the World: The Long Term Implications of September 11th* (London: Foreign Policy Centre, 2002)11.

Rudyard Kipling and Cecil Rhodes, and the "tutelary democracy" U.S. President Woodrow Wilson wished to bring to the "revolting little countries" of Latin America.[28]

The "new imperialism" is considered by its neo-realist and liberal discursive champions, for the moment, only as a means to achieve security, where security is defined as global rather than national. Do you think that was the case with the election? To me Bush argued for national security that was to be achieved by extra-national intervention. The goal of global security, broadly defined to include everyone's security, not simply the U.S. or the West, was not high on the agenda. What the new conception emphasizes is the leadership of the U.S. in pursuit of that security. Singly and solely the U.S. has the right to pronounce on matters of security and insecurity, of course. Integral to this conception of imperialism as the mechanism guaranteeing global security, the U.S.'s definitions of insecurity make almost exclusive reference to terrorism. The U.S.'s discourses have near exclusive authority to name enemies, that is terrorists, whether groups and individuals (al-Qaeda, Osama Bin Laden, and Saddam Hussein, primarily), states (Afghanistan, Iraq, Iran, North Korea, *et al.*) or assumed associations of states (the "axis of evil").

The structural reality of the international state system approximates the discourse traced here. One power alone possesses the capacity and the license to project military force anywhere in the world. One power alone is in a condition to deliver total and virtually unanswerable destruction. One power alone exercises the political influence to summon "coalitions of the willing" to mount multilateral military operations of "regime removal." The U.S. disposes of power in the international system like no other in the history of the "world system."[29] While it may be that the prevalent

[28] William A. Williams, *The Tragedy of American Diplomacy*, 2d ed. (New York: Dell Publishing, 1972) at 70.

[29] A generation ago, the U.S. historian Stephen Ambrose characterized the diplomatic history of the U.S. as a "rise to globalism," but he was essentially discussing global engagement rather than global domination: Stephen Ambrose, *Rise to Globalism: American Foreign Policy, 1938-1976*, rev. ed.

tendency in the global security regime is imperialist, it is incomplete and partial. It is a selectively transnationalized regime. It is an imperialism that represents itself as establishing a *global* security regime. But this regime is derived from the *national* interests and perspectives of a superpower whose governing elites consider it charged with global responsibility.[30] The primacy of the U.S. becomes a discursive interpreter: the security discourse, articulated in the classically realist terms of "national interests," converts the latter into the general interests of the entire world. Other interests are less important and are discounted or may belong "with the terrorists." In the abstract, the national interests of the superpower, and hence those general interests, appropriately have no limits. Needless to say, the interests agenda of the superpower do not always (or even often) coincide with the interests of other actors or of the world in general.

E. Other States

The nearly two hundred states that make up the world system differ on almost all-imaginable and measurable axes.[31] By the classic measures of power, such as size of economy, population, geopolitical location, natural resource endowment, size and quality of military forces, morale, and the will to use force, many states scarcely merit the appellation.[32] Reality marginalizes them as actors in the global security regime. Their role is often conceived as potential victims of terrorist activity or as locales where internal conflicts could be "internationalized."[33] This marked differentiation

(New York: Penguin, 1976).

30 James F. Petras & Henry Veltmeyer, *Globalization Unmasked: Imperialism in the 21st Century* (Halifax: Fernwood Books, 2001).

31 See *e.g. Jane's Defense Weekly* (London) and *World Development Report* (New York: United Nations/Oxford University Press, 2002).

32 See Osvaldo De Rivero, *The Myth of Development: The Non-Viable Economies of the 21st Century* (Halifax: Fernwood Books, 2001)

33 See Robert D. Kaplan, *The Coming Anarchy: Shattering the Dreams of the Post-Cold War World* (New York: Random House, 2000); William Shawcross, *Deliver Us From Evil: Peacekeepers, Warlords, and a World of Endless Conflict* (New York: Simon and Schuster, 2000); and, Donald M. Snow, *Distant Thunder: Third World Conflict and the New International*

highlights the contradictory structural role of sovereignty in the global security regime. Presently there is much discussion of the supposed contradiction between sovereignty and globalization.[34] With attention focused on the spectacular terrorist attacks, the "pre-emptive interventions" and "regime removal" projects of recent years, theoretical discussions of the limits to sovereignty in the global security regime have a striking empirical and conjunctural basis. Limited or absent sovereignty is as integral and as necessary for the current global security regime as is fuller sovereignty. Sovereign states continue to constitute the global security regime, as they did the international security regime, but to the degree that the attributes of sovereignty exhibit a polarized distribution, fewer states are pertinent to the regime's construction.

In the current global security regime, the superpower fluidly arranges and organizes a quasi-replica of the Cold War NATO alliance, more or less consisting of the European Union, Canada and Japan, with the so-far enthusiastic participation of Australia. Treaties, alliances, and bilateral security arrangements between the U.S. and a wide variety of states in every continent are in place. There remain not even the shards of the old Warsaw Pact among Russia and its neighbours. India and China apparently pursue their own paths, which from time to time run parallel with the agendas of the U.S. and the temporary coalitions it constructs to manage security crises.

The universe of post-colonial states is diverse, from East Timor to Brazil, from Ghana to Egypt, and from India to Surinam. In the 1980s and 1990s several theorists sought to identify common post-colonial security characteristics.[35] They wrote of the "search for

Order (New York: St. Martin's Press, 1993).

[34] See *e.g.* Ian Clark, *Globalization and International Relations Theory* (Oxford: Oxford University Press, 1999) and David Held *et al.*, *Global Transformations: Politics, Economics and Culture* (Cambridge: Polity Press, 1999).

[35] See *e.g.* Caroline Thomas, *In Search of Security: The Third World in International Relations* (Brighton: Harvester Wheatsheaf, 1986); Bahgat Korany *et al.*, *How Foreign Policy Decisions are Made in the Third World: A Comparative Analysis* (Boulder: Westview, 1987); and, Mohammed Ayoob, *The Third World Security Predicament: State Making Regional Conflict, and*

security," defined in domestic terms (governance capacity, provision of basic needs, economic development, institutionality, rule of law, construction of national citizenship, transcendence of ethnic/cultural/ religious divisions, *etc*.). Theorists like Hoogvelt have undertaken to theorize the vulnerability of post-colonial states, including the relatively powerful such as Indonesia, Nigeria, and Brazil, in the context of economic globalization.[36] There are some forty states considered "unviable" and a dozen "in collapse" (such as Somalia and Sierra Leone). That relative and in some cases absolute debility marginalizes many states from the discourse and practice of global security. Structurally, they do not count for much in the global regime.

F. The Character of Conflict and War

For nearly sixty years internal conflicts, rather than interstate wars, have produced the majority of casualties – civilian and combatant.[37] The intrinsic weakness of many states, and the tremendous imbalance between the military capabilities of a handful and the majority, join other factors in making it impossible to control, much less to eliminate internal conflicts. The proliferation of light arms and medium-sophistication weapons systems, which in themselves may not spread such conflicts, certainly contributes to their militarization. Writers like Mary Kaldor,[38] Michael Klare,[39] and Michael Ignatieff[40] have examined the prevalence of internal conflict in the post-Cold War era. Together such conflicts present a protean

the International System (Boulder: Lynne Rienner, 1995).

36 Ankie Hoogvelt, *Globalization and the Postcolonial World: The New Political Economy of Development*, 2d ed. (Baltimore: John Hopkins University Press, 2001).

37 See Patrick Brogan, *The Fighting Never Stopped: A Comprehensive Guide to World Conflict Since 1945* (New York: Vintage, 1990); E.J. Hobsbawn, *The Age of Extremes: The Short Twentieth Century, 1914-1991* (London: Michael Joseph, 1994); and, Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Stanford: Stanford University Press, 1999).

38 Kaldor, *ibid*.

39 Michael T. Klare with Daniel C. Thomas, *World Security: Challenges for a New Century*, 2d ed. (New York: St. Martin's Press, 1994).

40 Michael Ignatieff, *The Warrior's Honor: Ethnic War and the Modern Conscience* (Toronto: Viking Press, 1998).

universe of insecurity and constitute a major structural component of the global security regime. While not strictly conflicts between states, they frequently transcend borders and challenge the capacities of states to control them.[41] Neither the states in which they occur nor their neighbours or regional coalitions are able to control them, as was the case in most of the "ex-Yugoslavia" wars. Notwithstanding, many conflicts do not involve or significantly affect the interests of actors with a global reach, especially the U.S. In other cases, the political dynamics of the United Nations or respective regional organizations render them ineffectual.[42] Through neglect or design of "the international community," the global security regime features extensive zones of continuous and sporadic conflict. They constitute some of the insecurities that are structurally integral to the regime.

Both abstractly and concretely, the presence of insecurity in the global security regime links the conception of security as a public good with its commodification in the global political economy and in the global market. In the global market, money permits access to commodities and consumer goods. Security, being a public good in some instances of the global security regime, behaves like any other commodity in other instances. Those who can pay have access to the security-commodity; those who cannot do not. And if security in the zones of conflict is of little value to actors endowed with money, it becomes supply with limited demand – a devalued public good in the global security regime.

[41] The well-known works of Samuel Huntington and Benjamin Barber extends the argumentation and preoccupation of global security studies with the cultural dimensions of actual and future conflict: Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Touchstone, 1997); and Benjamin R. Barber, *Jihad Versus McWorld: How Globalism and Tribalism are Reshaping the World* (New York: Time Books, 1995). Tariq Ali offers a further perspective on such dimensions: Tariq Ali, *The Clash of Fundamentalisms: Crusades, Jihads and Modernity* (London: Verso, 2002).

[42] Examples are numerous in Africa: Sierra Leone, Uganda, Sudan, Somalia, *inter alia*.

G. The Globalizing Economy as Structural Component

One of the foundational ideas of the critical perspective in political economy is that the state seeks always to establish and protect the conditions for the "expanded reproduction" of the economic system that prevails on its territory.[43] This function links the state's domain of public policy (fiscal and monetary management, policies of stimulus, subsidy and regulation, and direct economic activity) with defense and national security. It is assumed by critical materialists and realists alike that the condition of the national economy is central to a viable security practice. And the literature on the hegemonies experienced in the global capitalist economy (for example that of Britain in the nineteenth century) emphasizes the state's role in setting conditions for the "expanded reproduction" of capitalism as a transnational system of accumulation.[44] The Bretton Woods institutions, and other arenas of American activity in the post-1945 era, manifest that same state-generated dynamic of system security.[45]

With this background, linkages among the structural components of the international states system with those of the global economy acquire significance for understanding the composition and practice of the global security regime. The agency of a hegemonic power seems necessary to fill the breach between the universe of sovereign and autonomous states, exclusively responsible for what occurs within their territories, and the fact that national capitalist economies are elements of something grander that transcends borders, the global capitalist economy. In certain historical periods there has been more, and in other periods less, cooperation among states, more and less cooperation with a hegemon, better and worse hegemonic

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43 Michel Beaud, *Historie du capitalisme, 1500-1980* (Paris: Editions du Seuil, 1981) and Cox, *supra* note 14.

44 See Samir Amin, *Capitalism in the Age of Globalization: The Management of Contemporary Society* (London: Zed Books, 1997).

45 See Eric Helleiner, *States and the Reemergence of Global Finance: From Bretton Woods to the 1990s* (Ithica, N.Y.: Cornell University Press, 1994) and Michel Chossudovsky, *The Globalisation of Poverty: Impacts of the IMF and World Bank Reforms* (Penang, Malaysia: Third World Network, 1997).

performance in generating the "expanded reproduction" of accumulation.

It is a truism that economic globalization affects the regime, discourse and practice of global security. Various nexuses of economic globalization and the global security regime can be identified. First, the intensification of financial transactions has demonstrated the sensitivity and vulnerability[46] of national economies in the context of a global capital market. The business and commodity cycles appear as a random series of cascades and their crises leap instantaneously from continent to continent.[47] Economic security can be ephemeral; the consequences and effects of cycles and crises seem unforeseen, even unforeseeable. Needless to say, states' sovereignty, already uneven in its distribution in the state system, becomes a more volatile and dependent structural variable.

Second, globalization's exponential expansion of the production of commodities and wealth in the world capitalist economy has been incapable of avoiding the contradictory dynamics of capitalism's prior history.[48] Newspapers, academic journals, international organizations' and NGOs' reports are replete with the details of global socio-economic polarization. The figures on income, wealth, and consumption distribution/concentration indicate polarization advancing within, as well as among countries. Globalization makes stark the juxtaposition of opulence and immiseration, the hyper-development, and marginalizing *de*-development, respectively, of the North and the South. Its multiple dynamics have shrunk their prior social distances and increased their encounters, with implications for the global security regime.

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[46] These concepts were developed in the 1970s-1980s literature on "interdependence." See Robert O. Keohane & Joseph S. Nye, *Power and Interdependence: World Politics in Transition* (Boston: Little, Brown, 1977).

[47] See Mitchell Bernard, "East Asia's Tumbling Dominoes: Financial Crises and the Myth of the Regional Model" in Leo Panitch & Colin Leys, eds., *Global Capitalism Versus Democracy: Socialist Register 1999* (New York: Monthly Review Press, 1999) 178.

[48] See William Greider, *One World, Ready or Not: The Manic Logic of Global Capitalism* (New York: Simon and Schuster, 1997).

Third, the centrality of technology to globalization, especially in electronic communications and transportation, has not only facilitated the activities of investment, production, and distribution. This technology also has been adopted by non-state social and political forces that pursue their agendas violently. Groups ranging from al-Qaeda to private security and intelligence corporations operating on contract to the U.S. government in Iraq or on contract to various companies with natural resource interests in Africa are using both sophisticated communications and weapons technologies. As well, organized criminal activity, from drugs and arms smuggling to money laundering and traffic in human beings, has appropriated these technologies. Globalizing criminal, terrorist and "out-sourced" security and intelligence operations together constitute further dimensions of insecurity.

Fourth, the integration or "re-insertion" of the "peripheries" and "semi-peripheries" in the globalizing world economy of recent decades has created an expanded universe of vulnerability and dependency. Recessions are transportable, if not exported. The financial and stock markets' volatility has thrashed the "emerging markets" of Latin America, Asia, and Africa, not to speak of Eastern Europe and post-Soviet states. Even the Asian "Tigers" and other NICs (newly industrialized countries) have experienced economic devastation akin to the 1930s Great Depression. The cycles of debt, added to the many failures of structural adjustment programs, have placed scores of countries in untenable financial circumstances.

In sum, poverty, marginalization and polarization have expanded and globalized in a dynamic and dialectical relation with wealth. Structurally, this produces instability, imbalance, a systemic unsustainability, and, ultimately, insecurity. The great contradiction resides in a kind of prisoner's dilemma: the more globalized capitalist accumulation and the greater its wealth-creation, the greater the socio-economic polarization that can generate insecurity. The powerful and influential states that guide or channel the flows of economic globalization in their interests also exert power over the composition and practices of the global security regime. The phenomenon of "blowback" (noxious and unforeseen consequences

of a policy applied to confront a particular security problematic) frequently occurs.[49] An obvious example was the encouragement of the fundamentalist Islamist resistance against the Soviet occupation of Afghanistan, which resulted in the Taliban regime and the strengthening of al-Qaeda. As the most powerful and influential states seek to advance their interests in the context of capitalist globalization, in one way or another they may well be contributing to their own insecurity and that of the broader global security regime.

V. THE EMERGENT COMPONENTS OF THE GLOBAL SECURITY REGIME

In this section the tendencies arising from the dynamics generated by the structural components of the global security regime are highlighted. Structurally significant tendencies fall into two general categories: those of globalization, in its multiple dimensions, and those of the U.S.'s hegemony. In keeping with this article's epistemological stance of "materialist wholism," the two categories are derived from the totality of the global security regime. In that respect, this analysis imitates the synthesis of Buzan *et al*.,[50] which combines the traditions of security studies with contemporary texts on international political economy, particularly those aligned with the work of Susan Strange.[51] Another shared terrain is the critical spirit of the Frankfurt School, as deployed by Richard Wyn Jones[52] and the neo-Gramscians.[53] The resulting perspective could be called "critical and eclectic global political economy."[54]

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[49] See Chalmers A. Johnson, *Blowback: The Costs and Consequences of American Empire* (New York: Metropolitan Books, 2000).

[50] Barry Buzan, Ole Waever & Jaap de Wilde, *Security: A New Framework for Analysis* (Boulder: Lynne Rienner, 1998).

[51] Susan Strange, *States and Markets*, 2d ed. (London: Pinter, 1994).

[52] Richard Wyn Jones, *Security, Strategy, and Critical Theory* (Boulder: Lynne Rienner, 1999).

[53] Robert W. Cox, "Critical Political Economy" in Björn Hettne, ed., *International Political Economy: Understanding Global Disorder* (London: Zed Books, 1995) at 31; Gill, *supra* note 14.

[54] See Judson, *supra* note 1, for a discussion of such a perspective.

The basis of globalization is the global and globalizing capitalist economy, in which global patterns of accumulation have surpassed those of national accumulation as determinant for the world system, though the latter have not disappeared. The most profitable and sensitive accumulation dynamics (production, distribution, finance) are located for the most part in economic *globality*. The importance of productivity and competitiveness, then, is projected by and within globalization, which challenges the state as the historical *locus* of decision-making power.[55] Similarly, globalization deepens the dynamics of "integration and frag-mentation"[56] across dimensions such as the global labour market, the "archipelagos" of transnationalized production sites,[57] supra-national financial regimes,[58] and the World Trade Organization (WTO). As indicated in the previous section, the global and globalizing dynamics of the capitalist economy, especially its most neo-liberalized parts, exhibit extremes of socio-economic polarization. The financial crises of the global economy do not respect borders nor the systematic application of neoliberal policies by states. The volatility of capital markets can precipitously drive national economies into trade imbalances, massive deficits and debt default. A significant recent example is Argentina, previously viewed as a showcase of neoliberal orthodoxy. Economic volatility and unpredictability can quickly become vulnerability and insecurity.

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55 See Philip G. Cerny, *The Changing Architecture of Politics: Structure, Agency, and the Future of the State* (London: Sage, 1999); Philip G. Cerny, "Political Globalization and the Competition State" in Richard Stubbs & Geoffery R.D. Underhill, eds., *Political Economy and the Changing Global Order*, 2d ed. (Don Mills, Ont.: Oxford University Press, 2000) 300 [Cerny, "The Competition State"]; Susan Strange, "World Order, Non-State Actors, and the Global Casino: The Retreat of the State?" in Stubbs & Underhill, *ibid.*, 82 [Strange, "World Order"]; and, David C. Korten, *When Corporations Rule the World*, 2d ed. (Bloomfield, Conn.: Kumarian Press, 2004).

56 See Ian Clark, *Globalization and Fragmentation: International Relations in the Twentieth Century* (Oxford: Oxford University Press, 1997).

57 This concept is developed by Greider, *supra* note 48

58 See Helleiner, *supra* note 45; and Susanne Soederberg, "The New International Financial Architecture: Imposed Leadership and Emerging Markets" in Leo Panitch & Colin Leys, eds., *A World of Contradicitons: Socialist Register 2002* (London: Merlin Press, 2002) 175.

Such dynamics of integration and fragmentation have widened the gaps and distances within and among countries, societies and social classes in the globalizing capitalist political economy.[59] They produce and deepen extremes of luxury and poverty, leaving global society ever more hierarchized and *apartheid*-ized. Many states dispose of minimal resources with which to mitigate either the internal or the transnationalized polarization. Many populations, their penury apparently institutionalized, find themselves in situations of crude survival, without the possibility of departing the "realm of necessity" for the "realm of choice." In the eras of national and international accumulation the social dynamic of capitalist growth was largely inclusive, albeit with a high quotient of exploitation, skewed distribution and inequality. But to a system-characterizing degree globalizing accumulation excludes, with populations and states becoming surplus. Their labour power is not required, because it lacks training and productivity. Their natural resources are not required, either no longer competitive/profitable or replaced by synthetics. And these populations are marginal consumers, incapable of the levels of consumption globalizing accumulation requires.

This set of capitalist globalization's economic and social facets affects states in a contradictory manner. On the one hand, states continue to ensure conditions for the expanded reproduction of capital, to the degree that they conform to the neoliberal model of the "competition state."[60] On the other, neoliberal deregulation militates against the historic role of the liberal democratic state in representing the interests of civil society in regulating capital, not to speak of the potential to carry out socialist or social democratic redistribution. The more globalization's polarizations generate socio-political insecurity, the less capable of mitigating nefarious effects states become. Many states find themselves in a crisis of legitimacy and capacity. Playing central roles in "the first movement" of deregulating and accelerating global capitalist accumulation, they

[59] For a discussion of the "world political economy" as both object of analysis and approach, see Joyce Kolko, *Restructuring the World Economy* (New York: Pantheon, 1988).

[60] See Cerny, "The Competition State," *supra* note 55.

divested themselves of capacities to regulate and control the polarizations and extremes of that same regime of accumulation, now that many sectors of civil society are demanding a "second movement."[61] Meanwhile, non-state actors (transnational enterprises, financial organizations, banks, non-governmental organizations, mercenaries, *inter alia*) often dispose of more capacity than states.

While the structural economic instances of globalizing accumulation reviewed in these paragraphs may well comprise a realm of emergent insecurity that a global security regime will have to manage, there are two other interacting elements with even greater security portent. The first is what John McMurtry terms the "mutated money-sequence," in which money as a commodity *per se* has displaced its other functions (as means of exchange, as means of acquiring consumer goods, and as financing of concrete production). In this commodity form, "capital in its cancer form" is neither capable of respecting "the civil commons," nor the limits and integrity of nature, nor citizens' expectations that the state will protect society against the depredations and volatility of capital. Mutated capital's social and ecological blindness and autism convert it into a general menace, an inherent source of insecurity.[62] The second is the rapidly emerging global natural resource deficit produced by exploding demand and a century of unprecedented population growth. Not only is the earth's "carrying capacity" alarmingly overstretched, the vulnerability of complex systems based on that "carrying capacity" (for example water, arable land, hydrocarbons) is mounting.[63] Both "resource wars"[64] and eco-

[61] The language and conceptualization of "double movement" is from Karl Polanyi, *supra* note 1.

[62] In both his works, *Unequal Freedoms: The Global market as an Ethical System* (Toronto: Garamond, 1998) and *The Cancer Stage of Capitalism* (London: Pluto Press, 1999), McMurtry develops these concepts and arguments.

[63] See David Suzuki, *From Naked Ape to Superspecies: Humanity and the Global Eco-crisis*, rev. ed. (Vancouver: Harvester Wheatsheaf, 2004) and Ronald Wright, *A Short History of Progress* (Toronto: House of Anansi, 2004).

[64] See Michael T. Klare, *Resource Wars: The New Landscape of Global Conflict* (New York: Metropolitan Books, 2001).

catastrophes are likely to have prominence within the emerging global security regime.

What is evident in a rapid survey of global accumulation dynamics is that the political and economic instances of a global social formation are in a dialectical relationship. This relationship, in keeping with the epistemological precepts of a human and global "materialist wholism," could be termed social *globality*. And it is social globality that is the human material base of a global security regime. Analytically, it is necessary *not* to separate the political and economic instances of that security globality (were there an enduring penchant for such separation, the precipitous decline in market values after the World Trade Center attacks of 11 September 2001 ought to belie it).

VI. CONCLUSION

The objective in this article has been to establish some broad analytical panoramas for considering the global security regime, where global security is defined as the public good of security at the planetary level. The presentation and exploration of the genesis and relationships of the global security regime's components has been, hopefully, multi-faceted and dynamic in the tradition of "materialist wholism." The perspective elaborated to treat the conjunctural, immanent, structural, and emergent components of the global security regime combined traditions from the analysis of international relations with others from political science and social science in general: critical realism, critical and materialist international political economy. That synthesized perspective was identified as "critical and eclectic" and I have argued implicitly that it lends itself to the analysis of globalization, governance, and the global security regime. What that analysis generates is the argument that the international security regime is currently reconstituting as a particular global security regime.

A. Hegemony "Lite"?

The particular character of the reconstituting global security regime is a matter of speculation. As discussed above, from a variety of perspectives[65] it can be argued that globalizing capital accumulation determines the economic instances of social globality. In considering the political and security instances of that globality, the primacy of the U.S. is actually less definitive. The military supremacy of the U.S. appears unquestionable and incontestable. Nonetheless, its vulnerability was dramatically and tragically highlighted in the terrorist attacks of September 2001 and currently is being demonstrated in the problematic occupations of Iraq and Afghanistan, as well as in expressions of U.S. concern about the regional intentions of China. The scholarly experts on security argue that the U.S. cannot control the many global arms regimes and hence the acquisition of the full gamut of arms by a multiplicity of actors (legitimate, criminal, terrorist, allied and rival states).[66] Neither does the U.S. possess the physical means and the political disposition to project overwhelming force wherever, however, and whenever it wishes, nor does it have the capacity (despite assertions to the contrary) to mount multiple major military expeditions at the same time.

The orthodox manner of calculating the hegemony of the U.S. in the global security regime is to focus on its capacities to: a) confront and unilaterally eliminate threats to the "collective security" of the international community; b) influence allies and other powers to forcefully confront such threats; and, c) bear the central costs of global security. Frequently in such calculus there is no distinction between the interests of the U.S. and collective interests. A symmetry is presumed or openly articulated, as when President George W. Bush famously said "either you are with us, or you are with the terrorists." The power of the U.S., then, resides in its arms

[65] See *e.g.* Greider, *supra* note 48; Korten, *supra* note 55; Amin, *supra* note 44; and Strange, "World Order," *supra* note 55.

[66] See *e.g.* Barry Buzan & Eric Herring, *The Arms Dynamic in World Politics* (Boulder: Lynne Rienner, 1998) and Michael T. Klare, "The New Geography of Conflict" (2001) 80:3 Foreign Affairs 49.

and its political will to use them, in its capacity to exert political and economic pressures, and in the hegemonization of global security regime discourses.

In the half-century after the Second World War, U.S. force projection was customarily limited. Cases of invasions and deployments of giant armies and armadas (Korean War, Vietnam War, Gulf War) were few. Preferred were "Low Intensity Conflict," counter-insurgency, client states and anti-communist dictatorships, covert operations, military/police/intelligence training programs, chains of politico-military alliances for containment of Cold War threats, trade embargoes, *etc*. As corollaries of the massive expenditures on the nuclear arsenal and sophisticated weapons systems at the disposal of its own forces, such activities and commitments on the part of the U.S. produced much in the way of security at much lower costs. The dialectical irony was that many innocent lives lost, economic development, social progress and democracy foregone or de-railed often constituted high cost "collateral damage." Such a "low-intensity" international security regime was differentially experienced.

The post-Cold War world has complicated matters for the strategists of the U.S. government. While there are indications that the U.S. has the will and the means to deploy a macro-strategy of global military hegemony within the global security regime, it is too early to conclude that is the definitive tendency, or whether it would be effective in delivering security. As well, there remain many economic variables, including allies' economic health, processes of regionalization and bloc formation, vulnerability of the U.S. in areas of fiscal deficit, public and private debt, the dollar's market value, the delinquency and criminality of "leading" firms (Enron, World.com, *inter alia*), and the will and capacity of U.S. voters to finance the responsibilities of hegemony and super-power unilateralism. Finally, the possibility that the actions of the hegemon in the current global security regime, as in the last one, may create insecurity, and not just for its enemies, but for many innocents, allies, and its own citizens, should be considered.

WE ARE ALL POTENTIAL TERRORISTS NOW: THE RECONSTITUITIVE EFFECTS OF THE *ANTI-TERRORIM ACT* AND THE *USA PATRIOT ACT*

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Since the September 11 attacks, Canada and the United States have implemented anti-terrorism legislation that has been widely criticized for targeting members of groups associated with specific ethnic, religious and immigrant communities. Much of this discussion has centred on the balancing of individual rights and collective security. This article argues that the impact of these legislative measures reaches beyond the tensions between these competing interests. By examining the political implications from the Foucauldian concept of panopticonism, the author argues that expanded surveillance mechanisms reinvent all citizens as potential terrorists. As in the panopticon, where inmates are exposed to penetrating surveillance and punishment for transgressions, citizens in a post-9/11 world are expected to self-discipline with ominous consequences.

Depuis les attentats du 11 septembre 2001, le Canada et les États-Unis ont adopté une législation antiterroriste qui a été largement critiquée parce qu'elle cible les membres de groupes associés à des communautés ethniques, religieuses et immigrantes précises. La plus grande partie de la discussion a porté sur l'équilibre entre les intérêts des droits individuels et ceux de la sécurité collective. Cet article fait valoir que les effets de ces mesures s'étendent au-delà des tensions régnant entre les intérêts opposés. En examinant les implications politiques du concept panoptique de Foucault, l'auteur prétend que les mécanismes de surveillance accrue réinventent les citoyens en tant que terroristes potentiels. Tout comme les détenus d'une prison panoptique sont exposés à une surveillance pénétrante et des mesures disciplinaires pour les transgressions, on s'attend à ce que les citoyens de l'après 11 septembre fassent preuve d'autodiscipline avec conséquences graves. Une fois reconstitués en tant que terroristes potentiels, les Canadiens et les Américains doivent apprécier le maintien du statu quo en ce qui concerne l'expression de préoccupations de justice pour d'éviter d'intensifier la surveillance d'État.

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> *"The theme of the Panopticon – at once surveillance and observation, security and knowledge, individualization and totalization, isolation and transparency."*[1]

I. INTRODUCTION

The chronology is now well known. On 11 September 2001 civilian airliners were crashed into the World Trade Center, the Pentagon and a field in Pennsylvania. International condemnation and expressions of empathy followed immediately. The international community most clearly articulated these sentiments in United Nations Security Council Resolutions 1368 (12 September 2001) and 1373 (28 September 2001).[2] Following on the heels of these resolutions, individual states drafted and passed into domestic law all manner of anti-terrorism legislation.

Significantly less well known are the political implications of this domestic legislation. My paper examines these implications in the Canadian and U.S. contexts from a critical perspective. The question guiding the examination is: what are the power effects of Canada's *Anti-terrorism Act* and the *USA PATRIOT Act*?[3] More exactly, in what specific manner do these acts of governing reconstitute Canadians and Americans as subjects of their respective states? Answering this question provides insights into, *inter alia*, the interests served by this particular subjectification and possible

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1 Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1979) at 249 [Foucault, *Discipline and Punish*].

2 *Threats to international peace and security caused by terrorist acts*, SC Res. 1368, UN SCOR, UN Doc. S/RES/1368 (2001), online: United Nations <http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82 /PDF/N0153382.pdf?OpenElement>; *Threats to international peace and security caused by terrorist acts*, SC Res. 1373, UN SCOR, UN Doc. S/RES/1373 (2001), online: United Nations <http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>.

3 *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism*, S.C. 2001, c. 41[*Anti-terrorism Act*]; *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001) [*USA PATRIOT Act*].

strategies to be deployed to resist this specific type of individualization.

Now, some might interject that the political effects of this legislation are already well known. Namely, that the legislation 1) targets members of, and groups associated with, specific ethnic, religious, and immigrant communities, and 2) publicizes and criminalizes the actions of these individuals and groups. I would not contest these assertions. However, they do not tell the whole story of the *Anti-terrorism Act* and the *USA PATRIOT Act*. In fact, such assertions obscure a less overt political effect of the legislation: it remakes and marks subjects of these states who are otherwise disconnected from the individuals and groups that are the more obvious target.

My thesis is that these legislative acts, as exercises of power, remake all Canadians and Americans into potential terrorists. Moreover, these reconstituted potential terrorists must privilege the preservation of the status quo over concerns for justice. Building on Foucault's concept of panopticonism, I argue that the *Anti-terrorism Act* and the *USA PATRIOT Act* simultaneously individualize and totalize the Canadian and American citizenry. This individualizing and totalizing constitutes each individual member of the two polities as a potential security threat. Accordingly, *everyone* is constituted as potential objects of surveillance and discipline. The chief effect of this constant and conscious surveillance is self-disciplining subjects; self-disciplining subjects for whom the preservation of the current order must take precedence over all other normative concerns.

I develop my argument in three stages. First, I explain Foucault's concept of panopticonism. My point of departure is to reject the liberal conception that posits a balance to mitigate tension between individual rights on the one hand and state security on the other. Instead, I adumbrate such Foucauldian concepts as power, surveillance, governing and the political double-bind to expound the disciplinary society. Second, I examine how the *USA PATRIOT Act* and Canada's *Anti-terrorism Act* define terrorism. I deploy examples to elucidate the manner in which the application of the definitions mobilize surveillance mechanisms that penetrate deeply each of the bodies politic. Third, I explore the manner in which the legislation individualizes and totalizes Canadians and Americans, and subjects

them to constant and conscious surveillance, consequently prompting self-discipline. Further, I describe how the legislation structures the field of possible actions of Canadian and American subjects, thereby promoting a new subjectivity that subordinates considerations of justice to the maintenance of extant power relations.

II. PANOPTICONISM

The standard or orthodox readings of the anti-terrorism legislation are liberal in nature.[4] According to liberal interpretation, governing is an art of balancing the prerogatives of the individual with the interests of society as arbitrated by the state. Mill's questions — "What is the rightful limit to the sovereignty of the individual over himself? Where does the authority of society begin?"[5] — encapsulate the liberal problem of properly locating the threshold between individual liberty and larger social considerations. For liberals, this threshold is the point at which the individual exercise of liberty imperils fellow members of society. Asserts Mill:

> …[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.[6]

Effectively, liberals conceive of a shifting counterpoise between individual liberty and social security guaranteed by the state.

This liberal conception of equilibrium is evident in the text of the *Anti-terrorism Act* as well as in commentaries on the Canadian and American legislation. The preamble of the *Anti-terrorism Act* is unequivocal in this regard: "the Parliament of Canada . . . is committed to taking comprehensive measures to protect Canadians against terrorist activity while continuing to respect and promote the values reflected in, and the rights and freedoms guaranteed by, the

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4 Eric Broxmeyer, "The Problems of Security and Freedom: Procedural Due Process and The Designation of Foreign Terrorist Organizations Under the Anti-Terrorism and Effective Death Penalty Act" (2004) 22:3 Berkeley J. of International Law 439.

5 John Stuart Mill, *On Liberty* (New York: Prometheus Books, 1986) at 85.

6 *Ibid*. at 16.

Canadian Charter of Rights and Freedoms."[7] Equally unequivocal was the Canadian Bar Association (CBA). In its submission on the proposed *Anti-terrorism Act*, Bill C-36, the CBA recommended "that the federal government's response to recent terrorist attacks balance collective security with individual liberties, with minimal impairment to those liberties in the context of the rule of law and our existing legal and democratic framework."[8] The American Civil Liberties Union (ACLU) also read the *USA PATRIOT Act* in a liberal fashion, saying that the legislation "expanded federal law enforcement and intelligence powers at the expense of civil liberties and meaningful judicial oversight."[9] In both Canada and the U.S., anti-terrorism legislation was cast and has been read as establishing a new balance between individual liberties and the security concerns of society.

Mine is not a liberal critique of this legislation. As a result, I will not engage in an obvious and already tired liberal debate surrounding the legitimacy or efficacy of preventive arrest and non-disclosure of security information in Canada, or of single jurisdiction search warrants and mandatory detention of suspected terrorists in the U.S. Rather, my concern with the legislation is the manner in which these exercises of power structure social and political relations in Canada and the U.S. in accordance with what Foucault called panopticonism.

Any discussion of panopticonism must start with the Foucauldian conception of power. This conception has three facets: 1) power is relational; 2) power is productive and positive; and, 3) power is diffuse.

First, for Foucault, power is not a *thing* that belongs to an agent, class, state, or sovereign. Instead, power is a web or network of social relations linking all bodies in the network. Power is a relation. In fact, when he speaks of power he is more specifically speaking of

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7 *Anti-terrorism Act*, *supra* note 3, preamble.

8 Canadian Bar Association, "Submission on Bill C-36 – Anti-terrorism Act" (October 2001), online: Canadian Bar Association <http://www.cba.org/cba/pdf/submission.pdf> at 7-8 [CBA, "Submission on Bill C-36"].

9 American Civil Liberties Union, "ACLU Interested Persons Memo Updating the Status of 'Pieces of Patriot II' Proposals" (8 October 2003), online: American Civil Liberties Union <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=14000&c=206> [ACLU, "Interested Persons Memo"].

power relations. According to Dreyfus and Rabinow: "Power is a general matrix of force relations at a given time, in a given society."[10]

Power is a force that exists among political actors. It is the exercise of power in this matrix, through different techniques, tactics and instruments, which has political effects. Because power is a force that surrounds all actors while belonging to none, power is never acquired indefinitely or exclusively by an actor. Power is a force that is exercised, to varying degrees, by all actors.

Second, for Foucault, power is positive and productive. Foucault categorically rejects what he calls the "repressive hypothesis" of power.[11] This view describes the "effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'."[12] It sees only the negativity of power, power as prohibition, as pure violence. Instead, "power produces reality," it produces subjects, knowledge, domains of objects and "rituals of truth."[13] Foucault is very clear on this point:

> What makes power hold good, what makes it accepted, is simply the fact that it doesn't only weigh on us as a force that says no; it also traverses and produces things, it induces pleasure, forms of knowledge, produces discourse. It needs to be considered as a productive network that runs through the whole social body, much more than as a negative instance whose function is repression.[14]

This is a clear repudiation of the view that sees power as prohibitive and negative. In this sense power makes, it constitutes.

Third, Foucault's conception of relational, productive power is contrasted by the Leviathan conception. This latter conception understands power as a top down force. Foucault states that while power is nonegalitarian and mobile, it also comes from everywhere.[15] Dreyfus and Rabinow explain that "[power] is multidirectional,

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10 Hubert L. Dreyfus & Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (Chicago: University of Chicago Press, 1983) at 186.

11 *Ibid.* at 127.

12 Foucault, *Discipline and Punish, supra* note 1 at 194.

13 *Ibid.*

14 James D. Faubion, ed., *Michel Foucault: Power*, 2d ed. (New York: The New Press, 2000) at 120.

15 Michel Foucault, *History of Sexuality: An Introduction* (New York: Vintage Books, 1990) at 93.

operating from the top down and also from the bottom up."[16] Power is ascending, descending, and diffuse. Thus, force relations exist everywhere – in institutions such as families, teams, community groups. Moreover, "power relations are rooted deep in the social nexus, not reconstituted 'above' society as a supplementary structure."[17] Conceptually this means that the modern state (or other hegemonies) is not super-structural to power relations; "the state can only operate on the basis of other, already-existing power relations."[18] More immediate power configurations produce and sustain larger power relations.

So, Foucault's power is relational, positive and productive. Furthermore, Foucault conceives of the state, or more accurately the power structures associated with the state, as embedded in the matrix of social relations. It is not an institution that hovers, disconnected, above society. The issue of governing is closely related to conceptions of power and the state.

In his afterword to Dreyfus and Rabinow's *Michel Foucault: Beyond Structuralism and Hermeneutics*, Foucault suggests that the exercise of power is a question of government defined broadly.[19] In this conceptualization, power is a way of modifying the actions of others; power relations are a set of actions upon other actions.[20] This is not to be confused with action directly and immediately on others. This is not a power exercised on a subject. Rather, it is the bringing to bear of actions upon the possible actions of others.[21] The nature of power is to direct or guide conduct and order potential outcomes.[22] More than institutions or structures, the exercise of power means to lead or direct the behaviour of others. To exercise power is to structure "the possible field of actions of others."[23] It is to govern.

These conceptualizations come together in Foucault's idea of panopticonism, of disciplinary society. Bentham designed the

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16 *Supra* note 10 at 185.
17 *Ibid*. at 222.
18 Faubion, *supra* note 14 at 123.
19 Dreyfus & Rabinow, *supra* note 10 at 221.
20 *Ibid*. at 220.
21 *Ibid*.
22 *Ibid*. at 221.
23 *Ibid*.

panopticon as the perfect prison.[24] The panopticon was a circular building with a tower in the centre. The outer ring was divided into cells, each lodging one prisoner. The tower was windowed and home to the surveillant of the apparatus. By design the surveillant was able to see what was going on in any one cell at any time. Concomitantly, the prisoners in the cells were unable to see the tower. They were also unable to see the other prisoners. In the panopticon, the segregated individuals are seen but cannot see; the surveillant can see, but is not seen.

The panopticon is the ideal disciplinary mechanism. First, the surveillance is both individualizing and totalizing. Through the use of cellular space, the objects of power are at the same time each visible and all visible. Every action can be watched as can all actions. It is important to note that this is more than simply surveillance of an amorphous whole. Rather than observation of a group or crowd, the constituent elements of which are not known, this is surveillance of the group or crowd, which also penetrates to the level of each of the elements. This is much more exacting observation. This surveillance is concomitantly both individualizing and totalizing, or what Foucault identifies as the "political double-bind."[25]

Second, in the panopticon the subject of power is invisible while the objects of power are made visible. Because they are located in a matrix of power relations centred on the gaze of the surveillant, the inmates are constituted as objects of study. They are numbered, ordered, located, and, most importantly, studied. A corpus of knowledge concerning the object's body is produced and the object's activity is observed and chronicled. Moreover, any unacceptable behaviour is readily identifiable and subject to discipline by the surveillant.

More important to the nature of my examination, however, is the invisibility of the subject of power. In the panopticon the object is never sure if (s)he is under surveillance, if unacceptable behaviour will be observed and subsequently punished. Provided the object has been punished previously for recalcitrant behaviour, and/or the object believes that the inappropriate behaviour of other objects is always

[24] Jeremy Bentham (and John Bowring), *The Works of Jeremy Bentham*, Vol. 4 (New York: Russel & Russell, 1962).

[25] Drefus & Rabinow, *supra* note 10 at 216.

seen and disciplined, (s)he will not engage in inappropriate behaviour for fear of automatic disciplining. The object will self-police its behaviour, it will self-discipline. In other words, the effect of constant surveillance, real or perceived, is self-disciplining of behaviour on the part of the object.

This, in turn, is connected to the functioning of power. Foucault explains that the major effect of the panopticon was "to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power."[26] In the panopticon, control is continuous and automatic. As a result, no deviant behaviour would occur that would require disciplinary punishment. Power is so well exercised that self-policing is assured, and this self-disciplining is so thorough that a surveillant is not actually required. The prevalence of power in the panopticon makes the exercise of power obsolete.

This is the most efficient and economic use of power. The perception of constant and exacting surveillance prompts objects to discipline themselves. Self-discipline, in turn, renders the surveillant unnecessary (objects must only believe themselves to be objects of surveillance and they will modify their behaviour). Power need not even inhabit the tower, because the objects have internalized the gaze of the subject of power. Moreover, power need not even be exercised. There must merely be the intimation that disciplinary power will be exercised in order to control the objects.

Foucault saw the mechanism of the panopticon spreading throughout the social body, thereby constituting the disciplinary society.[27] One did not have to go to prison to be an object of surveillance and disciplinary power. In fact, the number of disciplinary institutions proliferated and diffused throughout society. The same techniques of power applied in the panopticon were deployed in institutions as varied as the factory, the army, the hospital, and the school.

Located in particular matrixes of power relations, the objects of power are constituted as workers, soldiers, patients, and/or students. These constituted objects are then organized in accordance with the double-bind. They are individualized in the larger totality – specific

[26] Foucault, *Discipline and Punish, supra* note 1 at 201.
[27] *Ibid.* at 209.

labourers within the factory's work force (worker number), specific soldiers within the military's ranks (serial number), specific individuals seeking treatment within the hospital population (patient number), specific scholars within the class (student number). Concomitantly, all have been under surveillance and studied as objects of knowledge. Like inmates, labourers, soldiers, patients, and students are registered upon entering the institution, and they are observed, ordered, classified, assessed, and hierarchicalized while in the institution. As a result, these objects have internalized what is acceptable to power. They self-discipline. There need not be any actual exercise of power by a subject. There need not even be a subject, yet workers will produce, soldiers will drill, patients will rest and recuperate and students will study and recite.

Disciplinary mechanisms have proliferated and diffused through society. Panopticonism has constituted a trained, docile, obedient society characterized by the double-bind, surveillance, omnipresent, occulted power, and self-discipline. It has produced the disciplinary society.

III. THE *USA PATRIOT ACT* AND THE *ANTI-TERRORISM ACT*

In this section I highlight the salient aspects of the *USA PATRIOT Act* and the Canadian *Anti-terrorism Act*. More specifically, I examine the manner in which each of these statutes defines terrorism and, more importantly, select instances of the expansion of state surveillance mechanisms.

One remark must be made at the outset. Referring to these two pieces of legislation as primarily concerned with terrorism misplaces the emphases of the acts. Even the titles of the acts themselves carry the wrong connotation – the *Anti-terrorism Act* and the *PATRIOT Act* are significantly more about expanding the state's disciplinary power and significantly less about combating terrorism. These two acts should not be read as legislative discontinuities. They should not be regarded as original legislative attempts to address the issue of terrorism. Instead, they should be recognized as continuations of the persistent state practice of penetrating the body politic deeper and more completely with surveillance.

The ACLU makes this point. Commenting on section 215 of the

USA PATRIOT Act, regarding the accessing of records and other items under the *Foreign Intelligence Surveillance Act* (an act which allows the CIA to gather information on American citizens),[28] the ACLU states that:

> The government already has the authority to prosecute anyone whom it has probable cause to believe has committed or is planning to commit a crime. It also has the authority to engage in surveillance of anyone whom it has probable cause to believe is a foreign power or spy – whether or not the person is suspected of any crime.[29]

The legislation is not a discontinuity. The state could already observe and discipline those who violated the law. Section 215 of the *USA PATRIOT Act* expanded the scope of an existing surveillance mechanism. In a similar comment on section 215 the ACLU offers an even more important point:

> Although the Patriot Act was rushed into law just weeks after 9/11, Congress's later investigation into the attacks did *not* find that the former limits on FISA powers had contributed to the government's failure to prevent the attacks. The investigation did point to fundamental organizational breakdowns in the intelligence community, and the government's failure to make effective use of the surveillance powers it already had.[30]

Again, the surveillance mechanisms were in place before the passage of the *USA PATRIOT Act*. Additionally, the phrase "former limits" indicates that the mechanisms have been expanded with the adoption of the legislation.

The ACLU offers its most telling commentary on the *USA PATRIOT Act* as continuity while updating the status of draft legislation known as the *USA PATRIOT Act II*.[31] Observes the

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[28] *Foreign Intelligence Surveillance Act*, U.S.C. tit. 50 (2003).

[29] American Civil Liberties Union, "Section 215 FAQ" (24 October 2002), online: American Civil Liberties Union <http://www.aclu.org/Privacy/Privacy.cfm?ID=11054&c=130> [ACLU, "Section 215 FAQ"].

[30] American Civil Liberties Union, "FISA End-Run Around the Fourth Amendment," online: American Civil Liberties Union <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12290&c=206> [emphasis on original].

[31] In 2003, the American Department of Justice proposed the *Domestic Security Enhancement Act*, which became known as the *USA PATRIOT Act II*. Although this draft legislation was never introduced to Congress as a comprehensive piece of legislation, pieces of the legislative agenda it set out

ACLU: "The government has not explained why it has not used some existing Patriot Act powers."[32] It continues: "The most logical explanation is that they were not needed – that the government could and did obtain the information it sought in its wide-ranging post-9/11 terrorism investigations through its pre-existing intelligence and law enforcement powers."[33] Evidently, the state controlled a penetrating web of surveillance mechanisms before September 11. While these surveillance mechanisms did not need to be augmented, it must be noted that they nevertheless were. Moreover, the Bush administration has since sought even further expansion of these mechanisms.

The Canadian case illustrates a similar continuity in expanding surveillance mechanisms. In its response to Justice Canada's first annual report on the application of the *Anti-terrorism Act*, the International Civil Liberties Monitoring Group (ICLMG) connects the *Anti-terrorism Act* to pre-existing legislation. For example, the ICLMG notes that the Financial Analysis and Transaction Reporting Centre, an agency mentioned repeatedly in the *Act* as a means of detecting and tracking financing of terrorist activities, was created by Bill C-22 in 2000.[34] Thus, the mechanism already existed before September 11, with more surveillance functions morphed onto it after the passage of the *Anti-terrorism Act*. The ICLMG further connects the Canada Customs and Revenue Agency database of the *Anti-terrorism Act* to Bill S-23, which received royal assent on 25 October 2001.[35] This legislation amended the *Customs Act* to authorize an airline-compiled database that collects information on airline passengers.[36] Again, the surveillance mechanism existed before the *Anti-terrorism Act*, and its scope was expanded with the

were. For a discussion of this draft legislation, see ACLU, "Interested Persons Memo," *supra* note 9.

32 *Ibid.*

33 *Ibid.*

34 International Civil Liberties Monitoring Group, "In the Shadow of the Law" (14 May 2003), online: The Temple of Freedom <http://216.239.57.104/search?q=cache:jP1EB8vXOwQJ:www.devp.org/pdf/shadow.pdf+%22In+the+Shadow+of+the+Law%22+and+%22Canadian+Bar+Association%22&hl=en> at 2 [ICLMG]. The relevant provisions from Bill C-22 were enacted as the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, ss. 40ff [*Proceeds of Crime Act*].

35 Bill S-23, *An Act to amend the Customs Act and to make related amendments to other Acts*, 1st Sess., 37th Parl., 2001.

36 *Ibid.*, s. 61.

passage of this *Act* later that same year.

In its commentary on the *Anti-terrorism Act* before the *Act* was passed, the CBA notes that "the government currently has many legal tools to combat a terrorist threat."[37] The CBA then goes on to cite some sixteen existing provisions of the *Criminal Code*[38] to buttress this claim. Included in this list are "the particularly invasive procedures of Part IV – Invasion of Privacy – dealing with the detection and prevention of all crime."[39] This is a direct reference to extant surveillance powers. More telling is the CBA's concluding recommendation for this section of the commentary. The CBA "recommends that the federal government make a concerted commitment to funding law enforcement agencies, intelligence gathering agencies and the military to levels that allow full use of *existing* law enforcement tools for the protection of national security and public safety."[40] The CBA, like the ACLU, sees the existing web of surveillance mechanisms as sufficient. The *Anti-terrorism Act* is an expansion of those mechanisms. As such it conforms to the pattern set by legislation such as Bills C-22 of 2000 and S-23 of 2001, both of which had nothing to do with terrorism and everything to do with surveillance.

A. Definitions

The CBA notes correctly that the definition of terrorist activity is the "threshold for the application of all the expanded powers and penalties" in the Canadian legislation.[41] This is also true for the American legislation.

Congress passed the *USA PATRIOT Act* on 24 October 2001. Two days later the Bill was signed into law by President Bush. This legislation defines domestic terrorism in section 802 as activities that:

> (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;

[37] CBA, "Submission on Bill C-36," *supra* note 8 at 10.
[38] R.S.C. 1985, c. C-46 [*Criminal Code*].
[39] CBA, "Submission on Bill C-36," *supra* note 8 at 10.
[40] *Ibid*. at 13 [emphasis added].
[41] *Ibid*. at 16.

(B) appear to be intended

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and,

(C) occur primarily within the territorial jurisdiction of the United States.[42]

Interestingly, the ACLU notes that "Section 802 does not create a new crime of domestic terrorism. However, it does expand the type of conduct that the government can investigate when it is investigating 'terrorism'."[43] What is the nature of this expanded investigative authority? Phrased differently, how has the *Act* penetrated the social body more deeply with state surveillance mechanisms?

An ACLU example should suffice in this instance. This example involves protests at the U.S. military base at Vieques Island:

> The protesters illegally entered the military base and tried to obstruct the bombing exercises. This conduct would fall within the definition of domestic terrorism because the protesters broke federal law by unlawfully entering the airbase and their acts were for the purpose of influencing a government policy by intimidation or coercion. The act of trying to disrupt bombing exercises arguably created a danger to human life - their own and those of military personnel.[44]

The actions of the protesters fit the definition of domestic terrorism, broadly read. What surveillance follows from this definition? As part of a domestic terrorism investigation the attorney general could obtain the educational records of any students involved (the judge would be *required* to issue this order). Specifically, this could mean obtaining work submitted

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[42] *USA PATRIOT Act, supra* note 3.

[43] American Civil Liberties Union, "How the USA PATRIOT Act redefines 'Domestic Terrorism'" (6 December 2002), online: American Civil Liberties Union <http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=11437&c=111>.

[44] *Ibid.*

for grade, transcripts, medical information, and family income. As part of the same investigation the attorney general could also obtain information regarding the phone conversations, financial transactions, internet activity, and email correspondence of anyone who participated in the protests or provided assistance to the protesters. The provision of assistance mushrooms the expansion of surveillance because its definition can range from the lending of monies to the provision of housing.[45]

Also of note is that an investigation proceeding under the guise of section 215 – any investigation to protect against terrorism – carries with it a gag order. So as regards the Vieques Island example, educational institutions and internet service providers that are compelled to surrender the educational records or internet activity of protesters are prohibited from disclosing, even to the protesters, the fact that this information was accessed by the state. Thus surveillance and information gathering is always possible, but not necessarily verified.

Having examined the *USA PATRIOT Act's* definition of terrorism and explained the manner in which this definition mobilizes a set of state surveillance mechanisms that penetrates deeply into the body politic, I will now turn to Canada's *Anti-terrorism Act*.

The *Anti-terrorism Act* was assented to 18 December 2001. This legislation defines terrorist activity in what is now section 83.01 of the *Criminal Code*. It does so in two parts. First, terrorist activity means an act or omission committed in or outside Canada which violates any of ten international conventions and protocols including the *International Convention against the Taking of Hostages* and the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*.[46] Second, terrorist activity is:

> (b) an act or omission, in or outside Canada,
>
> (i) that is committed

[45] See *ibid*. for a more complete treatment of this example.

[46] *Criminal Code, supra* note 38, ss. 83.01(1)"terrorist activity"(a)(i)-(x).

(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada.[47]

Furthermore, terrorist activity is activity:

(ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,

(B) endangers a person's life,

(C) causes a serious risk to the health or safety of the public or any segment of the public,

(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C).[48]

In this instance, two Canadian examples will serve the same purpose as the Vieques Island example from the American case. Namely, they will elucidate the new powers of surveillance that can be applied to protesters or entities whose actions fit the definition of terrorism.

Environmental activists spike trees in British Columbia's Kootenay Mountains as well as the Elaho and Slocan Valleys. Such acts are, by the new definition, terrorist activity. The trees are spiked to serve a political cause – environmentalism – and the spiking

[47] *Ibid.*, ss. 83.01(1)"terrorist activity"(b)(i)(A)-(B).
[48] *Ibid.*, ss. 83.01(1)"terrorist activity"(ii)(A)-(E).

compels a person to refrain from doing an act; i.e., the logger will not cut down the trees because the act of spiking endangers the logger's and/or mill workers' lives.

What surveillance mechanisms are mobilized as a result of this terrorist activity? One mechanism is the investigative hearing, as laid out in *Criminal Code* sections 83.28 and 83.29. This mechanism allows a peace officer to apply *ex parte* to a judge for an order to gather information on a suspected or committed terrorist activity. In the case of the environmental protesters, mere suspicion of involvement on the part of a peace officer could result in a protester or a protester's friend or relative being subjected to an investigative hearing. At this hearing the protester or friend or relative would be required to answer a judge's questions (matters of non-disclosure and privilege notwithstanding).

An investigative hearing is more an interrogation than the ambient surveillance of wire-tapping, for instance. Both mechanisms are, however, state means of gathering information on subjects. Because the hearing compels the testimony of the subject, rather than allowing the subject to unconsciously volunteer it during a phone call, it is a more direct mechanism.

In the same manner that the gag order of section 215 of the *USA PATRIOT Act* occults the functioning of surveillance mechanisms in the U.S., the secrecy of the *Anti-terrorism Act*'s investigative hearings makes the exercise of disciplinary power in Canada similarly invisible.

The passage of the *Anti-terrorism Act* also enacted the *Charities Registration (Security Information) Act*.[49] The *Charities Registration Act* enables the Canadian state to maintain a list of banned terrorist entities. If a charity, recognized under the *Income Tax Act*[50] is placed on this list, its charitable status is revoked. If already listed, an organization applying for charitable status will be deemed ineligible.

[49] *An Act respecting the registration of charities having regard to security and criminal intelligence information*, S.C. 2001, c. 41, Part 6 [*Charities Registration Act*].

[50] R.S.C. 1985, (5th Supp.) c. 1.

It was in accordance with this legislation that the Canadian state listed Hezbullah as a terrorist entity in December 2002. The listing process is politicized and recondite – Hezbullah's listing was highly dubious.[51] More important, however, are the surveillance mechanisms the act of listing brings to bear on the listed entity.

Financial institutions are at the centre of these mechanisms. In fact, the Canadian state can be said to have enlisted financial institutions as surveillants. The Public Safety and Emergency Preparedness department explains that while it is not a crime to be listed as a terrorist entity, "one of the consequences of being listed is that the entity's property can be the subject of seizure/restraint and/or forfeiture."[52] More importantly as regards surveillance, the department also explains that "institutions such as banks, brokerages, etc. are subject to reporting requirements with respect to an entity's property and must not allow those entities to access the property nor may these institutions deal or otherwise dispose of the property."[53] So, for example, financial institutions gather information regarding Hezbollah and furnish it to the state. Furthermore, the institutions now track Hezbollah's property and produce information

[51] See *e.g.* Paul Martin, "Hezbollah calls for global attacks" *Washington Times* (4 December 2002); Tom Regan, "Hezbollah story likely 'invented'" *The Christian Science Monitor* (13 December 2002), online: The Christian Science Monitor <http://www.csmonitor.com/2002/ 213/dailyUpdate.html>; Antonia Zerbisias, "Curious silence greets discredited Hezbollah tale" *Toronto Star* (13 December 2002); Cilina Nasser, "Hizbullah – Media Misquoted Our Leader" *Daily Star (Lebanon)* (16 December 2002), online: Global Vision News Network <http://www.gvnews.net/html/Crisis/alert059.html>; "Hezbollah says Canada was duped into calling them terrorists" CBC News (17 February 2003), online: CBC News <http://www.cbc.ca/tory/canada/national/2002/12/12/hezbollah_rxn021212.html>; "Ottawa relents, orders complete ban on Hezbollah" CBC News (13 December 2002), online: CBC News <http://www.cbc.ca/stories/2002/12/11/hezbollah021211>; Nigel Parry, "False Washington Times report convinces Canada to ban Hizbullah" *The Electronic Intifada* (13 December 2002), online: Palestine Media Watch <http://www.pmwatch.org/pmw/manager/features/display_message.asp?mid=644L>.

[52] Public Safety and Emergency Preparedness Canada, "Backgrounder on the Listing Process" (2002), online: Public Safety and Emergency Preparedness Canada <http://www.psepc-sppcc.gc.ca/national_security/counter-terrorism/ListingBackgrounder_e.asp>.

[53] *Ibid*.

regarding individuals and other groups which may share its property or try to access its property.

While it is not a crime to be listed, it is a crime to knowingly participate in, contribute to, or assist a listed entity or members of a listed entity. Such involvement exposes anyone associated with the group to all of the *Anti-terrorism Act*'s assorted surveillance and/or punitive measures. For instance, following the same example, members of or contributors to Hezbollah, as well as those associated with these associates, can be compelled to testify in an investigative hearing.

It is not only listed entities such as Hezbollah, or people associated with banned entities, which come under the scrutiny of financial institutions *qua* surveillants. The *Proceeds of Crime Act* states:

> [E]very person or entity shall report to the Centre [Financial Transactions and Report Analysis Centre authorized by the *Custom Act* amendments of 2001] . . . every financial transaction that occurs in the course of their activities and in respect of which there are reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence or a terrorist activity financing offence.[54]

Subjects of the Canadian state need not be associated with a listed entity in order for financial institutions to be reporting their behaviour to the state. Provided the institution's functionary has reasonable grounds for suspicion, the subjects' actions will be recorded and reported. In other words, a proxy surveillant studies the subjects' behaviour, produces a corpus of knowledge, and conveys that corpus to the state. We are left to wonder what constitutes reasonable grounds of suspicion for these surrogate agents of the state surveillance apparatus. The size of the transaction? The origin of the financial transaction? The transaction's destination? The last names of the persons involved in the transaction?

The point of departure for this section was my claim that the *PATRIOT Act* and *Anti-terrorism Act* are not legislative discontinuities. I argued that both pieces of legislation accord with the established state pattern of more deeply penetrating the body politic with mechanisms of surveillance. Next, I explained the manner in

[54] *Supra* note 34, s.7.

which each piece of legislation defines domestic terrorism and terrorist activity. I then deployed specific examples to elucidate the expansion of disciplinary power that attends the application of this definition. I now move to an examination of the reconstitutive effects of the *USA PATRIOT Act* and the *Anti-terrorism Act*.

IV. SELF-DISCIPLINING AND RECONSTITUTION

In this section I explore the manner in which the *USA PATRIOT Act* and the *Anti-terrorism Act* individualize and totalize Americans and Canadians and subject them to constant and conscious surveillance, consequently prompting self-discipline on the part of the remade potential terrorists. I also describe how the legislation, as acts of governing, structure the field of possible actions of the states' subjects, thereby promoting a new subjectivity that subordinates considerations of justice to the maintenance of extant power relations. Methodologically, this section will not treat the legislation individually or separately. This is because the reconsititutive effect of the act of governing is the same regardless whether it is the product of the *USA PATRIOT Act* or the *Anti-terrorism Act*.

Recall that self-discipline in the panopticon is an effect of the political double-bind, omnipresent, occulted power and surveillance. How do the two pieces of legislation realize the political double-bind? Phrased differently, how do the *USA PATRIOT Act* and the *Anti-terrorism Act* individualize and totalize the subject populations? In both cases the double-bind is realized because the legislation applies to *everyone*.

The term "everyone" reveals the execution of the political double-bind. "Every" indicates the totality and the "one" indicates the individual. In the case of the totality, no one in the polity is outside the scope of this legislation. In the case of the individual, the law singles out people as (potential) perpetrators of the terrorist activities (even if they are not members of a terrorist entity in the Canadian case). The legislation encompasses the whole of the social body and applies to every individual member constituting the body. The concomitant individualizing and totalizing of everyone by the legislation realizes the political double-bind.

Now, what of the omnipresent, occulted power? The gag order that attends section 215 investigations in the U.S. and financial

institutions as surrogates of the state surveillance apparatus in Canada are obvious examples. In both cases power is obscured, but still capable of being exercised. The surveillant is invisible but can nonetheless gather information on and produce knowledge about the observed object. Like the guard in the panopticon's tower, the state sees but is not seen. And like inmates in the panopticon, the Canadian and American subject populations are seen but do not see.

How do these two factors – the double-bind and occulted power – come together with constant and conscious surveillance to remake Canadian and American subjects as potential terrorists? In this explanation I will treat the two facets of surveillance in reverse order, beginning with the conscious nature of surveillance.

While power is occulted, the subject populations are not unconscious of state surveillance. The relative transparency of the Canadian and American states produces a consciousness of surveillance on the part of the subject populations. The *PATRIOT Act* and the *Anti-terrorism Act* are not secret diktats of some Stalinist authority. Quite the contrary. They are well publicized and much discussed acts of governing. The fact that they are well publicized and much discussed ensures that the subjects are aware of them as acts of governing, even if remotely. In other words, the objects of surveillance are aware that they are objects of surveillance because the state has made no secret of its surveillance mechanisms. Admittedly, most of these objects are probably not cognizant that their financial transactions might be reported to the CIA or the Financial Transactions and Reports Analysis Centre, but most are at least dimly aware that the state has more deeply penetrated the social body with surveillance as a result of September 11. The objects are conscious of the surveillance, even if they believe that it is focused on others.

The belief on the part of some subjects of the states that surveillance is directed at others brings us to the issue of constant surveillance and reconstitution of all Canadians and Americans as potential terrorists. The belief that surveillance is targeted at others is erroneous. Foucault observes that "the guilty person is only one of the targets of punishment."[55] He continues: "For punishment is

[55] Foucault, *Discipline and Punish*, *supra* note 1 at 108.

directed above all at others, at all the potentially guilty."[56] The same can be said of state surveillance as it regards prevention of acts injurious to security. Preventive state surveillance is directed at all the potentially guilty.

The *USA PATRIOT Act* and the *Anti-terrorism Act* both include aspects of prevention/protection and prosecution of terrorists and terrorist activities. The prosecution aspect is straightforward – an act or omission is committed, the state compiles information in order to prosecute and guilty parties are subject to punitive measures. This is not, however, the surveillance and reconstitutive aspect of the legislation. For that we must emphasize the preventive aspect of the acts.

Recall that power is constitutive. Like gravity, power is a force that constitutes (social) bodies. Recall further that constitutive power is exercised through mechanisms such as surveillance. Now, terrorists are terrorists because of an act or omission that they commit. Before this act or omission they are only potential terrorists. In order to prevent acts of terrorism, everyone must be reconstituted as objects of state surveillance. In other words, preventing potential terrorists from being realized as terrorists requires that the state reconstitute everyone as a potential terrorist. This is identical to the process in the panopticon – the surveillant in the tower reconstitutes all the inmates as potential transgressors so as to preclude their realization as actual transgressors. The surveillant does not only watch some inmates for signs of transgressions, the surveillant watches all the inmates for signs of wrongdoing. Similarly, the state will not watch only a select few subjects for signs of terrorist activity. It will watch all subjects for such signs. Admittedly, some objects of surveillance, whether in the prison or the state, will be studied more closely than others. This does not, however, abrogate the fact that some degree of surveillance will still be applied to all.

To gather preventive knowledge about potential terrorists requires that the state leave no area shaded from the penetrating gaze of surveillance. Otherwise, the state only knows of terrorists once the act or omission has been committed. The knowledge can then be used to prosecute but the fact that the act or omission has been committed nullifies the idea of prevention. Pre-emptive knowledge

[56] *Ibid.*

can only be produced by constant surveillance of everyone. The reason everyone is observed is because they are all terrorists *in potentia*.

Prevention strives to stop an act or omission before it is committed. It strives to pre-empt. The most effective and efficient form of pre-emption is self-discipline on the part of the objects of surveillance. The inmate *qua* potential transgressor must be remade to pre-empt inappropriate behaviour and the potential subject of a terrorist act must be remade to pre-empt terrorist activity. Pre-emption has two results: 1) the act or omission is averted, and 2) power is not exercised. Self-discipline on the part of objects of surveillance is both preventive and economical.

In the prison as in the polity, the political double-bind, occulted power, and constant and conscious surveillance produce self-discipline. The more individualizing, totalizing, and occulted the power and the more complete the surveillance, the more assured and rigorous the self-discipline. The more assured the self-discipline, the more economical the functioning of power and the closer the surveillant comes to maintaining a regime that is perfectly preventive.

While not identified as such, the ACLU has already engaged the reconstitutive and self-disciplining effects realized through the *USA PATRIOT Act*:

> There's a real possibility that setting the FBI loose on the American public will have a profound chilling effect on public discourse. If people think that their conversations and their e-mails [and] their reading habits are being monitored, people will inevitably feel less comfortable saying what they think, especially if what they think is not what the government wants them to think.[57]

Stanley and Steinhardt articulate a similar sentiment regarding self-discipline by another name: "It is not just the reality of government surveillance that chills free expression and the freedom that Americans enjoy. The same negative effects come when we are constantly forced to wonder whether we *might* be under observation – whether the person sitting next to us is secretly informing the

[57] ACLU, "Section 215 FAQ," *supra* note 29.

government that we are 'suspicious'."[58] In both cases, the subjects have been reconstituted and self-disciplined. The subjects have been reconstituted as potential terrorists and as such are under surveillance. The subjects recognize that the state may become aware of their (in)actions and utterances through the surveillance and as a result they self-police their own (in)actions and utterances. They police themselves because they are cognizant of the fact that their behaviour and/or ideas might be perceived, interpreted as subversive, and result in closer surveillance and/or punishment.

A particular subjectivity characterizes this newly reconstituted self-disciplining, potential terrorist. This subjectivity subordinates considerations of justice to the maintenance of extant power relations.

Recall that Foucault defines governing as the structuring of the possible field of actions of subjects. Recall further that this is not direct action on others, but rather action on the actions of others which orders potential outcomes. The *USA PATRIOT Act* and the *Anti-terrorism Act* structure the field of possible actions of Americans and Canadians by privileging preservation of the current order over all other values.

The most obvious structuring of the field of possible actions involves support for movements, both foreign and domestic, which pursue just political ends through the use of violence. Both pieces of legislation offer threshold definitions of terrorism. Once this threshold is met, information gathering and punitive measures are activated by the state. In both cases, part of this definition includes the endangering of life in the pursuit of a political purpose. Obviously, movements that deploy violence to serve a just end endanger, if not, take lives. Such movements are now terrorist by definition. More important to the present discussion, however, is that Canadian and American subjects can no longer support such movements. Support for such movements has been criminalized. Through either the *USA PATRIOT Act* or the *Anti-terrorism Act*, the

[58] Jay Stanley & Barry Steinhardt, "Bigger Monster, Weaker Chains: The Growth of the American Surveillance Society" (January 2003), online: American Civil Liberties Union <http://www.aclu.org/Files/OpenFile.cfm?id=11572> at 10 [emphasis in original].

state has denied its subjects the possible action of providing assistance to these movements.

This prohibition has particularly far-ranging effects for those subjects of the states who might support an insurgency in a foreign war of national liberation, of national self-determination, and/or to end racial oppression. Such insurgencies, no matter how just, often make recourse to violence – the Front de Liberation Nationale (FLN) in Algeria in its struggle against French imperialism or the African National Congress (ANC) in its battle against South Africa's apartheid regime, for example. Now, Canadians and Americans can no longer support such movements without fear of criminal investigation and punishment because the aiding and abetting of such just struggles has been criminalized by this legislation. The *USA PATRIOT Act* or the *Anti-terrorism Act* criminalizes the support of just ends pursued through violent means.

Two points bear making at this juncture. First, it is only support for insurgents that is criminalized by these two pieces of legislation. The legislation does not prohibit subjects from contributing to or supporting a recognized state actor, no matter how many lives the state might endanger or take with its policies. This legislation, in fact, gives *a priori* legitimacy to existing state actors while concomitantly de-legitimizing some non-state actors. Native protests at Burnt Church, New Brunswick over the issue of fishing rights elucidate this point. These protests can be read as instances of terrorist activity according to the Canadian legislation. As terrorists, Canadians are prohibited from supporting the natives and their claims. On the other hand, nothing in the legislation prohibits Canadians from contributing to the Canadian state. Second, the only non-state actors not de-legitimized by the legislation are those that practice civil disobedience to effect government policy and do so without endangering human life. American and Canadian subjects can support states and/or peaceful resistance movements without committing a terrorist activity.

These two points, but the second in particular, leave little space for American and Canadians subjects to effect political change, primarily because, as Tilly asserts, "coercion works."[59] Coercion

[59] Charles Tilly, *Coercion, Capital and European States, A.D. 990-1990* (Cambridge, MA.: Basil Blackwell Ltd. 1990) at 70.

works for the state because it is an effective means of maintaining power relations. It works for insurgents because it is an effective means of challenging power relations. Hence, the state's monopolization of violence in the Weberian tradition and insurgents' use of violence. Prohibiting Americans and Canadians from supporting movements that utilize coercion denies them an effective tool for effecting meaningful change in extant power relations. Instead, it leaves them only the option of encouraging incremental reform through the use of non-violent, or more accurately non-life endangering, means sanctified by the state.

Save for a Canadian acknowledgement of legitimate political protests involving domestic work stoppages of essential services, the *USA PATRIOT Act* and the *Anti-terrorism Act* make no allowances for the just nature of a cause served by the endangering of life (much less the use of violence or coercion). As subjects whose actions are acted upon by this legislation, Americans and Canadians are compelled to disavow similar allowances. No matter how just the end, American and Canadian subjects cannot support movements that might endanger human life. This denial, this state acting upon the potential actions of its subjects, produces a subjectivity that privileges the status quo over myriad normative concerns.

V. CONCLUSION

The attacks of 11 September 2001 prompted many states to adopt or adapt domestic anti-terrorism legislation. In particular, Canada and the U.S. adopted the *Anti-terrorism Act* and the *USA PATRIOT Act* respectively. As acts of governing, these laws have political implications. This article examined these political implications from a critical perspective rooted in the Foucauldian concept of panopticonism.

I argued that the legislation remakes all Canadians and Americans as potential terrorists. Furthermore, I contended that as reconstituted potential terrorists Canadians and Americans must privilege the preservation of the status quo over concerns for justice. I did so by explaining that the *Anti-terrorism Act* and the *USA PATRIOT Act* individualize and totalize the Canadian and American citizenry as security threats. As potential security threats, everyone in the two polities is constituted as an object of surveillance and discipline. I

then explicated that the chief effect of constituting these citizenries as objects of surveillance and discipline are self-disciplining Canadians and Americans. The range of actions available to these self-disciplining subjects is highly circumscribed if the subjects do not want to incur the wrath of the surveillant state. More specifically, these subjects cannot support political movements that would challenge extant power relations by possibly endangering, much less taking, human life.

The implications for this new subjectivity are ominous. Canadians and Americans, individually and collectively through different civil societal organizations, have long supported a range of international movements that deployed violence to serve just causes. This support was often furnished to groups deemed illegitimate and even "terrorist" by the Canadian and American state. For example, Canadian and American churches, trade unions, and universities supported the ANC in apartheid South Africa. The political effect of the *Anti-terrorism Act* and the *USA PATRIOT Act* is to criminalize such support contemporarily. No longer can individuals and organized members of civil society support similar movements in their pursuit of just ends. The reconstitution of Canadians and Americans as self-disciplining potential terrorists precludes citizens, unionists, church-goers, and educators from bolstering and encouraging normatively legitimate political movements whose practices might endanger human life.

It is hoped that by identifying the inclusive, all-encompassing nature of this reconstitution that Canadians and Americans will come to resist this new subjectivity. Such resistance is unlikely so long as these citizenries understand the legislation to apply exclusively to specific communities associated with the Other. Only when Canadians and Americans recognize that they are all the potentially guilty objects of these acts of governing, will this new subjectivity, its rejection of normative concerns, and its highly circumscribed range of actions be challenged. And challenged it must be.

SECURITY, ASYLUM, AND RIGHTS. ARE ALL RIGHTS EQUAL?

John Edwards*

This article discusses the effect of globalization and increased security measures on human rights, arguing that the traditional approach to rights, as embodied in documents such as the Universal Declaration of Human Rights, is no longer adequate and requires a re-conception of the standing of rights, their moral content, their authority, in-divisibility and tradability. The author proposes a priority-based approach to human rights that recognizes rights as not equally indivisible, non-derogable and inalienable. Prioritizing rights allows for high-priority rights to be fulfilled and protected while lower priority rights may remain unfulfilled in situations where security concerns make it impossible to fulfill all rights equally. The case for prioritization rests on the idea that some rights, especially those essential to people's existence as morally autonomous agents, are more essential than other rights. The author illustrates his argument by analysing asylum practices in Great Britain and the rights of asylum seekers in that context, and discussing the constraints on rights created by new security measures worldwide.

Cet article porte sur les effets de la mondialisation et des mesures accrues de sécurité en termes de droits de la personne, et fait valoir que la démarche traditionnelle à l'égard des droits, tels qu'ils sont exprimés dans des documents comme la Déclaration sur les droits de l'homme, ne convient plus à la réalité d'aujourd'hui, et que le respect des droits, de leur contenu moral, autorité, indivisibilité et commercialisation mérite une refonte. L'auteur suggère une démarche par priorité à l'égard des droits de l'homme reconnaissant que les droits ne sont pas tous égaux, ni indivisibles, qu'ils peuvent porter atteinte et aliéner. En identifiant les priorités, il est possible d'assurer le respect des droits à grande priorité. Les droits à priorité inférieure peuvent alors être écartés lorsqu'il est impossible, pour des raisons de sécurité, de protéger tous les droits de manière égale. Cette hiérarchisation des priorités repose sur l'idée que certains droits, surtout ceux qui sont essentiels à l'existence de personnes en tant qu'agents moralement autonomes, sont plus essentiels que d'autres. L'auteur illustre cet argument en analysant les pratiques en matière d'asile en Grande-Bretagne et les droits des demandeurs d'asile dans ce contexte ainsi qu'en discutant des contraintes sur les droits créés en raison des nouvelles mesures de sécurité mondiales.

I. INTRODUCTION

When the *Universal Declaration of Human Rights* was promulgated in 1948 under the United Nations General Assembly

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Resolution 217 (III),[1] it was with the general agreement (tacit in some cases, explicit in most) that this was to be no mere exhortatory instrument. Rather, the *Universal Declaration* was understood as foundational principles that were both imperative in their demands and indivisible in their composition. It would take time for the necessary enforcement instrument to be put in place and there were some notable non-signatories to the two covenants,[2] but these difficulties notwithstanding, the *Universal Declaration* was fully intended to display the majesty of a universal and largely unalterable injunction. The thirty articles that make up the *Universal Declaration* were to be the bedrock for guaranteeing the freedoms and welfare of mankind. The Rock of Rights (subsequently further underpinned by UN activity in particular areas such as race, sex, torture, the regional conventions and, outwith the UN, the European Convention)[3] would be unmovable and non-derogable. Moreover, as Donnelly notes, it was "generally agreed that these rights form an interdependent and interactive system of guarantees, rather than a menu from which one may freely pick and choose."[4]

It is not our purpose here to detail the contents of the various rights instruments, but rather to make the case that it is the very solidity and supposed unchangeable-ness of the *Universal Declaration* and its adjuncts that have proved to be one of its main limitations. In short, the *Universal Declaration* was created when the world was a far more static place than today and as a bulwark against

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1 UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

2 There was disagreement among the member states of the UN about whether all the rights included in the draft declaration could be included. The dispute split rights between civil and political rights on the one hand and economic, social and cultural rights on the other. Compromise was reached by the drafting of two separate covenants which members could sign up to separately. The division remains a source of disagreement; see Maurice Cranston, *What Are Human Rights?* (London: Bodley Head, 1973); H.L.A. Hart, "Are There Any Natural Rights?" in A.I. Melden, ed., *Human Rights* (Belmont, CA: Wadsworth, 1970) 61.

3 See *e.g.* Scott Davidson, *Human Rights* (Buckingham: Open University Press, 1993) at 12.

4 Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 1989) at 24.

the obscenities of state actions, which are no longer the main kind of threat to human dignity and autonomy. Clearly, we still need a comprehensive set of human rights instruments but the pattern of human rights abuses today is of a different kind to those of the post-Second World War era and the system of rights contents and enforcement from that time is not best suited to today's requirements.

The case that will be made here is that tinkering with the contents of the *Universal Declaration* and its companion instruments is not the main change that is required. Some alterations are needed but there cannot be changes in the fundamental rights themselves. More important is reconceptualizing the standing of rights, their moral content, their authority, indivisibility, and their tradeability. What we need, at least temporarily, is a less didactic, more morally foundational approach to an understanding of rights. The latter part of this article is devoted to such an analysis.

II. GLOBALIZATION

Many of the changes that have taken place in the past half-century, and which ought at least to give us pause for thought about how we might want a system of human rights to operate, have been subsumed under the sobriquet "globalization."

A brief look through the literature on globalization quickly shows that it can, and does, mean all things to all people.[5] Indeed, it would seem that globalization can occupy a position at any point on a continuum from grand inclusive theory about world change to a portmanteau term to cover whatever changes you want to put in it, but with no intention of theory, cause-effect, taxonomy, or predictiveness. This writer feels more at home at the latter end of the continuum. Globalization has more rhetorical than substantive content. This is not to say, however, that the pace of economic,

[5] See Jan Aart Sholte, *Globalization: A Critical Introduction* (Basingstoke: Palgrave, 2000) and Frank J. Lechner & John Boli, eds., *The Globalization Reader* (Malden, Mass.: Blackwell, 2000) for examples of "globalization" being used so comprehensively as to lose any analytical edge.

political, social and ideological change has not increased or that some patterns of change have not been discernable. Whether these amount to something that may be called "global" seems unlikely however.

Among the most frequently cited components of globalization are economic, political, social and cultural changes which betoken either processes of convergence or subordination.[6] And given the nature of the subject, writings on globalization have a tendency to grandiosity. However, we can extract from these exotica some down-to-earth examples of change that must be components of globalization, if it is to have any firm grounding at all. For the purposes of the present argument, we might identify the following as aspects of globalization – some if not all of which may require us to rethink our conceptions of rights:

- increases in intra- and international movements of population for purposes of work, tourism, flight from oppression or war (refugees, asylum seekers);
- increasing economic and financial interdependence (and dependence) between countries;
- increasingly invasive markets;
- spread of ideas, cultural artifacts and ideologies with a heightened potential for conflict; and,
- independently, or in conjunction with some of the above, increased contact between ideological and other interest groups such as independence, religious, and political groups, not all of whom will use pacifist ways of promoting their cause.

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[6] See Matthew J. Slaughter & Phillip Swagel, *Does Globalization Lower Wages and Export Jobs?* (Washington, D.C.: International Monetary Fund, 1997); Kenichi Ohmae, *The End of the National State: The Rise of Regional Economies* (New York: Free Press, 1995); Leslie Sklair, *Sociology of the Global System* (Baltimore: Johns Hopkins University Press, 1995); and, John Tomlinson, "Cultural Imperialism: A Critical Introduction" in Lechner & Boli, *ibid.*, 307, respectively.

Of these examples of widespread change (global or not), those that threaten rights directly (displaced persons would be a case in point) and those that generate increased security measures that will, in turn, override rights, are of particular concern with respect to human rights. We shall look therefore to the consequences of increased population movement and the growth in numbers of refugees and asylum seekers, and to the growing potential for conflict consequent upon the improved feasibility of networking between groups that constitute or are seen by the West to constitute a security risk. These events may be seen as constituent of globalization and their existence better explained within its orbit, but it is equally plausible that they can be explained independently of any grander scheme.

III. SECURITY AND RIGHTS

Two potential connections between security and rights are noted in the section on globalization. If we include personal security in some form among those assets to which we have a right (a question we examine in more detail in a subsequent section), then population movements, including those of asylum seekers, may well generate circumstances in which this right, and others, will be over-ridden or remain unfulfilled. If, for example, the safety of asylum seekers cannot be guaranteed whilst in transit, or if protection cannot be guaranteed against hostile elements whilst they wait for their cases to be adjudicated, or if their welfare needs remain unmet, then some basic elements of their security will be denied. And the greater the movements and the more numerous the countries of origin and destination, the greater are the dangers of insecurity. Furthermore, in all likelihood there would be consequent effects to other rights components.

Quite distinct from this connection between globalization, rights and security, within which well-being is included, is the case of increased security itself being a threat to some rights. It is important to note therefore that our pursuit of rights and security involves two very different notions of security – individual security and well-being and security measures aimed increasingly at real or supposed

terrorist activity. But as different as these notions may be, the consequences for human (and other) rights, and how we need to view them, are broadly similar. The inroads that security measures make on rights are more likely to be the result of overriding some rights rather than their non-fulfillment, as would be the case with, for example, asylum seekers and other migrants. And the particular rights affected may in some respects be different. For asylum seekers, security measures can entail a loss of welfare, liberty, personal security, and dignity. Where security measures impact on rights, it may be a curtailment of free speech, freedom of movement, habeas corpus, and a loss of privacy.

IV. A RIGHT TO SECURITY

Only two of the thirty articles in the *Universal Declaration* say anything about security though it is implied or called forth obliquely elsewhere in the document. Article 25(I) refers to "the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."[7] Article 3 is concerned with security in its broader sense. It states that "[e]veryone has the right to life, liberty and security of person." We may read this as making a claim not only to social security, which is the purpose of article 25(I), but to a domain of security that includes protection from assault on the person, an absence of arbitrary action by the state, and protection from the consequences of civil strife. It does not refer to rights to protection from the consequences of security measures themselves, which might be subsumed within some of the other threats to rights. Considerations of state security, however, will carry far more weight in any calculus of benefits and costs − assuming as we must that "rights are [no longer] trumps," to paraphrase Dworkin's felicitous phrase.[8]

[7] It is worth noting *en passant*, that the *right* to security is forfeited in cases where dependency is deemed to be self-inflicted. It is a matter of debate whether a right to well-being can be conditional on "responsible action."

[8] Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

Elsewhere, in article 28, the *Universal Declaration* alludes indirectly to the question of security in its broadest sense, stating that "[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised." This may reasonably be read as a claim to an "entitlement" to security in some general form.[9] We can understand why this rather grandiloquent language is used – article 28 begins to complete the *Universal Declaration*. But it does seem unnecessarily vacuous. It simply cannot be realistic to claim that everyone has an entitlement (right) to worldwide security. Such a claim stretches the concept of a right too far. The rights and freedoms of the *Universal Declaration* are there to be protected despite what happens in the social and international order, not contingent on the fulfilment of any entitlement to a stable world order.

So, what are we to make of the relation between the *Universal Declaration* and the question of the individual's right to security? Given the above, two interpretations of the relation between the *Universal Declaration* and security present themselves. First, it is possible to view the entire *Declaration* and its derivatives as being concerned with security in the sense of being the instrument for creating the conditions in which everyone can lead lives free from threat and political instability and be able to pursue their projects as autonomous beings. Such a formulation, however, stops short of asserting an entitlement to global harmony. Such sentiments were no doubt harboured by some of the formulators of the *Universal Declaration*,[10] but the intervening half-century must have taught us that declarations of rights are an unlikely instrument – and an ineffective one – for creating world security. A declaration of the

[9] The meaning of "entitlement" in article 28 is ambiguous. Elsewhere, the *Universal Declaration* does not use "entitlement" as synonymous with "right."

[10] David S. Weissbrodt, "Human Rights: an Historical Perspective" in Peter Davies, ed., *Human Rights* (London: Routledge, 1988) 1; J. G. Starke, "Human Rights and International Law" in Eugene Kamenka & Alice Erh-Soon Tay, eds., *Human Rights* (London: Edward Arnold, 1978) 113; and, John P. Humphrey, *Human Rights & the United Nations: A Great Adventure* (Dobbs Ferry, NY: Transnational Publishers, 1984).

rights of individuals in other words may help to contribute to the conditions for security, but it cannot itself bring that security about.

How else might the *Universal Declaration* be connected to security? Given its historical context, a more likely interpretation is that the nascent United Nations was compelled by the effects of the Second World War, the displacement of populations, the numbers of refugees, the condition of the stateless, and by the all pervading insecurity that is the aftermath of large scale conflict. Read in this way, the *Universal Declaration* is best seen as an attempt to formulate instruments both to help reconstruct a more secure settlement and to build a sounder moral base for the future. In large measure, therefore, we might see in this interpretation the development of a system of rights to ameliorate the consequences of *insecurity*. Though it did not emerge explicitly, it seems reasonable to say that the undercurrent of the *Declaration* was to establish a right to individual security.

A. Asylum Seekers and the Right to Security

A current example of the consequences of inter- and intra-national instability and conflict is the large and increasing numbers of asylum seekers. Both in their country of origin, in transit, and in their destination country, they suffer a derogation of some of their rights and, in a generic sense, of their right to security. For the purposes of the current argument and of examining rights violations, we shall look at the treatment of asylum seekers in one country of destination (Great Britain) during the period they must wait while their asylum claim is being considered. The wait will, in most cases, be a long one and during this time, asylum seekers will be in a kind of limbo, having cut their ties (if only by default) with their homeland and having no proper status in the country in which they seek refuge. It is this non-status that tests not only their human rights standing, but also some of the assumptions underlying human rights doctrine. For

most rights there must be correlative duties and duty-holders.[11] In theory, signatories to the *Universal Declaration* accept the duty to protect the human rights of all rights-holders everywhere. In practice, states (who are the main duty-holders) will not see their duties as extending beyond their own citizens or possibly all those rights-holders who happen to be resident within their boundaries. States are rarely prepared to trespass on the domain of others in pursuit of protecting human rights. This raises the question, which we shall consider in a subsequent section, of the *de facto* parochialism of supposedly universal rights in terms both of states' perceptions of the boundaries of their duties and of the rights for which they accept responsibility.[12] There exists, then, a fundamental mismatch between human rights that are necessarily universal and acknowledged duties that are constrained by geographical boundaries and considerations of citizenship. Asylum seekers find themselves in a geographical location that is not their's and in a state whose citizenship they do not enjoy. Their rights position is highly precarious notwithstanding their (theoretical) possession of all human rights simply in virtue of being humans.[13]

Asylum seekers will have some of their rights abrogated in these circumstances. This is not particularly noteworthy given the millions of people who, for a variety of other reasons (*e.g.* finance, ethnic conflict, despotism) have their rights denied. There is one exception. In many instances the rights of asylum seekers need not be denied.

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[11] John Edwards, "Asylum Seekers and Human Rights" (2001) 7 Res Publica 159 at 174; Joel Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton: Princeton University Press, 1980); Richard Dagger, *Civic Virtues: Rights, Citizenship, and Republican Liberalism*. (New York: Oxford University Press, 1997); and, C.H. Whiteley, "On Duties" in Joel Feinberg, ed., *Moral Concepts* (Oxford: Oxford University Press, 1969) 53.

[12] Edwards, *ibid*. at 166.

[13] Feinberg, *supra* note 11; Raymond Plant, *Modern Political Thought* (Oxford: Blackwell, 1991); L.W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987); Loren Lomasky, "Personal Projects as the Foundation for Basic Rights" (1984) 1 Social Philosophy and Policy 35; and, Allan Gibbard, "Utilitarianism and Human Rights" (1984) 1 Social Philosophy and Policy 92.

It is well within the powers of many "receiving" countries to ensure that rights are fulfilled. It is a matter of choice that they usually are not. These are very different circumstances to those in many Third World countries where the maintenance of human rights and dignity seems impossible to achieve.

In Great Britain, the 1996 *Asylum and Immigration Act*,[14] the 1999 *Immigration and Asylum Act*,[15] and a number of directives and guidance documents from the Home Office Immigration and Nationality Directorate determine the treatment of asylum seekers. The mechanics of the asylum seeking process set out in these legislative and policy instruments need not delay us here. It is sufficient to note some of the derogations from asylum seekers' rights that this process entails. The Home Office guidance document, "Providing Asylum Support,"[16] attempts to reduce the cost of support falling on the state by proposing a number of measures that directly or indirectly place the burden of care on non-state agencies or groups. Asylum seekers are expected to find support and sustenance in their "own means" and in their own circumstances. Effectively, this means that they should look for, locate, and live with groups of their own nationality, ethnicity, race or religious beliefs, wherever they may be and that their compatriots are to take them in and provide the cost of their welfare.

Amongst the cost-reducing measures proposed by the Home Office is the substitution of charitable assistance for welfare and sustenance provided by local authorities wherever possible. Added to this, the Home Office proposes that welfare benefits for asylum seekers be reduced (and made up, if necessary, by the strategies mentioned above) and cash payments replaced by the use of vouchers redeemable at supermarkets.[17] If it so wishes, the Home

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14 *Asylum and Immigration Act 1996* (U.K.), 1996, c. 49.

15 *Immigration and Asylum Act 1999* (U.K.), 1999, c. 33.

16 U.K. Home Office, Immigration and Nationality Division, *Providing Asylum Support* (London: Home Office, 1999).

17 This procedure has now been challenged under the *Human Rights Act 1998* (U.K.), 1998, c. 42.

Office can impose limitations on the freedom of movement of asylum seekers. And finally, there is the increasing use of a "safe third country" option for non-EU nationals. This enables the Home Office to deport an asylum seeker whose credentials seem inadequate to a country (normally an EU member) that he or she has passed through on their journey to Britain, provided it can be reasonably thought that no harm will come to them there. This option introduces, most critically, the danger of *refoulement* or being re-deported to their country of origin where they may face imprisonment and torture. Despite continuous changes to immigration regulations, these regulations remain in force.[18]

In addition to the rights sacrificed through these policies, there remains the question we noted earlier of personal security. This type of security features significantly amongst the rights of asylum seekers that may be at risk. It seems likely that personal security (which for the moment we distinguish from a lack of security resulting from an absence of welfare) will be most threatened at times of transit and thus *outwith* the asylum process itself. Nonetheless, asylum seekers have suffered abuse and may well go in fear and trepidation. To the extent that this is the case, we must add personal safety to the other rights of asylum seekers that might be abused in Britain.

All the asylum practices so far itemized – from seeking support in their "own" community to the "safe third country" – will, in varying degrees, compromise asylum seekers' human rights. In some circumstances, but by no means all, some other rights, such as the right to free education or adequate housing, may remain partially unfulfilled. Where this is the case, it is more likely to be the result of inadequate or faulty practice rather than inherent in the asylum practice itself. The particular practices to which we have drawn attention will suffice to illustrate our theme – that the Rock of

[18] This procedure is not confined to Great Britain and is being used increasingly in the European Union and outside. More detail can be found in European Council on Refugees and Exiles, *Guidelines for Fair and Efficient Procedures for Determining Refugee Status* (London: ELRE, 1999) at 110-112.

Rights, the universality, indivisibility, and equality of all rights is an orthodoxy that may not best serve the interests of those whose rights are threatened.

B. Security Versus Rights

There has been an explosion in the security industry over the past ten years and nowhere has this been more noticeable than in the West, particularly in Great Britain and the United States. Britain has the highest density of closed circuit television cameras in the world.[19] Indeed, it is reasonable to think that London is now saturated with security devices designed to catch miscreants from speeding motorists to suspected terrorists. Limitations on police activity are frequently suspended in the interests of security; security can override most other considerations. It is security, not rights, that now trump. Whether this is all necessary cannot be known because of the nature of the activity itself. Security measures must often, because of their purpose, be secret or at least covert. Their extent cannot be known, nor their impact on third parties caught in the web, and it is for this reason that, although we know in theory what rights might be sacrificed in the interests of security, we rarely know what material impact this represents for individuals. If some of your rights – one's right to privacy, for example – are being damaged by security measures but you remain unaware of the fact, you will presumably not be much troubled. This is the deceptive nature of security: sometimes it is all too present but at other times it goes undetected. Thus, we remain unaware of the erosion of our rights. Of all threats to rights, security is perhaps the most insidious.

Among the rights that might suffer actual or potential derogation as a result of security measures are rights to assembly and free speech, the right to be treated with dignity, and rights of movement and privacy. More extremely, rights of *habeas corpus* are currently

[19] See Liberty, "Privacy: CCTV," online: Liberty <http://www.liberty-human-rights.org.uk/privacy/cctv.shtml>.

being denied extensively, including in Britain.[20] To the extent that these rights are damaged by security measures, which, as we have noted, is largely unquantifiable, it would appear that we might be paying a high price for our security. But, as we have also noted, the goal of security can easily trump most other considerations. Security, it is said, must be our prime concern; without it, we may be at risk of losing our right to life or, at least, having it rendered otiose. Unlike the case of asylum seekers, where the extent of rights violations is at least approximately discoverable, the effects of security measures on our rights must therefore necessarily remain vague. We shall assume for the purposes of argument, however, that some rights violations do occur as a result of security activity and that these will most commonly be rights of free movement, rights of assembly and rights to privacy.[21]

If we combine these with the rights of asylum seekers violated in the vetting process, we have a list of potentially or actually violated rights that looks something like the following:

- an adequate standard of living (dependence on charity and "own community," reduction of benefits);
- dignity (use of vouchers);
- freedom of movement;
- security (use of safe third country, physical safety);
- speech;
- assembly; and,
- privacy.

It is a miscellaneous collection, produced by two particular sets of circumstances (asylum seeking and security measures). There is no calculation involved in which rights might be damaged; they are the product of circumstance. Indeed, there seems to be an air of

[20] Liberty, "Internment Without Trial," online: Liberty <http://www.liberty-human-rights.org.uk/issues/internment.shtml>.

[21] Peter Neyroud & Alan Beckley, *Policing, Ethics, and Human Rights* (Collumpton, Devon: Willan, 2001); Sissela Bok, *Secrets* (Oxford: Oxford University Press, 1986).

casualness that belies the significance and *deonticity* we normally attach to rights and their functions.

But then, how are we to respond if we believe that rights mean little if they can be so casually negated? The usual response, or apologia, from those who do not acknowledge the *apodicity* of rights is, of course, to enter a calculus of consequence. Hence, rights, like anything else, can be subject to a calculus of utility and in both of our examples rights could easily be out-traded.[22] Security trumps, and such rights as asylum seekers might have do not justify more (or any) public expenditure.[23]

A more considered response must surmount two hurdles. The first is the confusion and conflation of declaratory rights on the one hand, and citizenship rights on the other. This occurs not so much in respect of what rights are involved, or the content of rights, as of their foundation. Rights such as those in the *Universal Declaration* are founded in a notion of humanity, or simply in virtue of being human, and in human autonomy. Citizenship rights, which appear often to have the same contents as those articulated in the *Declaration* and other instruments, are possessed simply in virtue of citizenship status and will extend only to the citizens of a state.[24] We shall return to this complication in a later section but, before that, we shall deal with the second, and conceptually more difficult obstacle to defending rights under threat.

Human rights orthodoxy holds strongly to the doctrine of the equality, indivisibility and inviolability of all rights, or all rights

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[22] The face-off between rights and security is a powerful example of the deontic versus the consequential. Space does not allow elaboration, but see Joseph Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994) and George Sher, ed., *Moral Philosophy* (Belmont, CA: Wadsworth, 1991), particularly the readings the latter has included in sections IV and V.

[23] A paraphrase of what is probably the most common view in Great Britain.

[24] See *e.g.* Dilys M. Hill, *Citizens and Cities: Urban Policy in the 1990s* (New York: Harvester-Wheatsheaf, 1994); Fred Twine, *Citizenship and Social Rights* (London: Sage, 1994); and, T.H. Marshall, *Citizenship and Social Class* (Cambridge: Cambridge University Press, 1950).

articulated in human rights instruments. They stand together as a whole and none can be said to be more important than any others.[25] What this means in practice is that if, in a particular set of circumstances (asylum seekers, security measures), a number of rights are being overridden, the prescribed remedy must focus on making good the deficits in those rights so that in theory at least, all rights would be re-established at parity. It is this assumption of parity of all rights that may lay unnecessary constraints on achieving the overall welfare and security of rights-holders.

V. ANOTHER LOOK AT RIGHTS

Human rights are held by all *qua* humans and the correlative duties attach to states and supra-national bodies. In theory, all states (and other bodies) have duties to all humans, not just to their own citizens. Those rights we call "citizen rights" are the rights held by citizens of a state, by virtue of their citizenship, not their common humanity. The duty-holder is the state and the rights and duties involved form a sort of contract between citizen and state, literally so in the case of some welfare provisions. But when we consider the two sets of rights, we find that their content appears to differ very little, the main exceptions being rights of *habeas corpus*, the right to life, the right not to be tortured.[26] Even then, some would argue such rights are at least implicit in some states' charters and constitutions – and explicit in others. Are the abrogated rights of asylum seekers in a particular state human rights or citizen rights? Are the rights overridden by security measures in a particular state human rights or citizen rights? And does it matter?

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[25] Donnelly, *supra* note 4; Henry Shue, "Rights in the Light of Duties" in Peter Brown & Douglas Maclean, eds., *Human Rights and U.S. Foreign Policy* (Lexington, Mass.: D.C. Heath, 1979) 65; Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980); and, Hugo Adam Bedau, "Human Rights and Foreign Assistance Programs" in Peter Brown & Douglas Maclean, *ibid.*, 29.

[26] For examples of citizen rights, see Hill, *supra* note 24; Twine, *supra* note 24; Marshall, *supra* note 24; and, Plant, *supra* note 13.

It must matter so far as putting things right is concerned. States are probably better at righting wrongs within their boundaries but *outwith* their boundaries, they will usually have to be told to do so by courts or other supra-national bodies. Secondly, states can be more flexible in their correlative action. They can pick and choose between violated rights but that is of little value if the choice is based on political expediency or embarrassment. Thirdly, citizen rights are less generous or just do not apply to non-citizens living within the state's boundary. Fourthly, states are much less likely than international courts and councils to take a considered view of the rights they are damaging or to consider their impact. Conversely, international bodies such as the United Nations Commission on Human Rights and the Human Rights Committee, the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (now incorporated in the *Human Rights Act 1998* (UK)), the Inter-American Regime and the African Charter on Human and People's Rights,[27] are slow moving and, in general, reluctant to intervene in a state's affairs except in cases of gross human rights abuses.

Clearly, then, the possibility of rights existing as "global" declaratory rights and simultaneously as citizen rights with closely overlapping content but different duty-holders, can be a recipe for confusion and an opportunity for dissimulation and inaction. When rights are overridden in the cases of asylum seekers, which rights are overridden and which maintained will be the consequence of circumstances and the quixotic decisions of governments. Neither in the case of supra-national bodies nor individual states does there appear to be any considered way of dealing with such circumstances. It is under such confused circumstances that questions such as the rights of asylum seekers can easily fall victim to politics. Such appears to have been the case in Britain for a number of years, where public opinion is likely to see citizen rights as a tax-contract and question why asylum seekers should get the same contractual

[27] See Donnelly, *supra* note 4.

benefits as proper, fully paid up citizens. It is a popular view of rights that political parties cannot dismiss lightly.

VI. PRIORITIZING RIGHTS

We have described a confusing situation, with concepts of rights and duties to uphold them apparently split between states and supra-national agencies, with the rights denied being the result of quixotic processes, and with (apparently) no consistent or strategic view of how to correct matters. These observations bring us back to our opening theme: the insistence in the interpretation of the international declarations, and in international human rights law, that all rights are indivisible, equally non-derogable and inalienable. If asylum processes and security measures damage a set of rights that are identified only by happenstance, then human rights orthodoxy requires that all, if any, must be rectified equally. There can be no prioritization among them; they are all of equal importance and rectification must re-establish parity. However, treating all rights as interdependent in this way, may (and probably will) make it much more difficult to reinstate any of them. Therefore, were we able to identify some rights as more important than others and concentrate our efforts on them, we might make more progress in fulfilling and protecting them. The price for doing so would be to acknowledge that some "lower priority" rights would remain unfulfilled for the time being. This is heresy in many human rights circles but there are some sound reasons, supported by intuition, for saying that some rights are more important than others. Below, we outline two arguments for ranking rights.

A. Declaratory Rights Versus Foundational Rights

The creation of a declaration of human rights was a magnificent achievement and the result of an enormous amount of work by individuals and committees.[28] What it is was not, however, was a set of rights derived from a moral or philosophical foundation. There

[28] Kitty Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights* (Antwerp: Intersentia Hart, 1999).

was no underlying moral logic[29] and were we to ask why we have the rights we do, the only available answer would be "because these are the rights we, or the UN, gave ourselves." It is a system that has worked moderately well for half a century, but it does not allow us to think analytically about rights or to develop theories about their relative moral standing. For this we need a foundational view of rights, one that does tell us why we have the rights we do.

The first foundational derivation of rights rests on the idea of moral autonomy, a Kantian notion that makes individual capacity for moral thought a condition for the existence of moral systems, without which no society with pretensions to distinguishing between right and wrong could exist. If the *sine qua non* of moral systems has morally autonomous agents to occupy them then, so the argument goes, such agents must have rights to all those things that are necessary for moral autonomy. Too much would be at stake if they did not.

Some of the potential criticisms of this approach could be met by a more detailed account for which we do not have the space in this article,[30] but there are two which survive a cursory examination. The first is that the argument from autonomy requires a pre-existing state willing and able to take on the duties of rights-guarantor prior to the formation of its own moral system. The second is that the theory provides no account of what is necessary for moral autonomy and therefore what it is that we have a right to. Clearly we would not think moral autonomy – the unconstrained ability to distinguish right from wrong, to make considered moral judgments and so forth – would be facilitated by threats to life, the fear and reality of torture, an arbitrary and threatening justice system, by dire poverty or ignorance. But there are other rights that the UN and other

[29] However, the list came to be divided into two categories of civil and political on the one hand, and social and economic on the other, given some disagreements about their relative standing.

[30] A more detailed account of this foundational approach to rights can be found in John Edwards, "Collective Rights in the Liberal State" (1999) 17 Netherlands Quarterly of Human Rights 259.

declarations tell us we currently enjoy which we might find more difficult to accept as preconditions for moral autonomy, such as equality before impartial tribunals, the right to a nationality, the right to own property, or the right to rest and leisure.[31] What is clear, therefore, is that if we were to base our rights solely on the preconditions for moral autonomy, some, but far from all rights, would be common with our declaratory rights. We would, no doubt, consider some rights as less important than others. A foundational derivation of this kind would, in other words, make the ranking of rights easier.

In a related but not identical account, Alan Gewirth identifies four components of rights – the right-holder (the subject), the thing to which there is a right (the object), the duty-holder (the respondent), and the grounds on which a right is held (the justification).[32] He observes that the absoluteness or equality of these components differ and absoluteness must hold for all but the object. In other words, the justification of a right and who holds the rights and duties are invariable, but exactly what we have a right to – the content of the right – particularly where it is anything other than desistence from actions on the part of others, may, and does, vary. The right to education or housing or income support will not, therefore, stipulate an absolute quantum of these goods. It may vary with culture or environment or, if we maintain the link to moral autonomy, with that quantum of the object necessary for guaranteeing it. Acknowledging rights therefore, does not require that all rights-holders should get exactly the same quantum of some of the objects of rights. Rights will be satisfied by varying quanta of what it is that there is a right to.

But this variability of quantum does not apply to all of the objects of all rights. Gewirth correctly notes that the objects of rights are not absolute, and that they can be divided into approximately two types:

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31 Indeed, we may feel that a degree of moral autonomy is better fostered by a modicum of hardship or struggle.

32 "The Epistemology of Human Rights" (1984) 1 Social Philosophy and Policy 1 at 2.

those that are ends in themselves, such as liberty, freedom of movement, worship, thought, etc., and those that are more like means to ends, such as education, social security, the right to work, the right to leisure and so on. In practice, every set of declaratory rights has objects that are of both kinds. Whilst it is axiomatic that you cannot achieve ends without the essential means, it would be difficult to maintain that objects that are means are as important as those that are ends, or the right to which they are attached. Some rights are foundational; others are subsidiary.

VII. CONCLUSION

The question that remains is deceptively simple: if a group of rights-holders has a number of its constituent members' rights trammelled by a set of procedures, policies or events, should we and can we be selective in which of these rights we try to reinstate, if trying to reinstate all at the same time would be less effective in correcting any? Can we divide rights that are supposedly indivisible?[33]

Two ideas of relevance have been proposed. First, we have rights to things because they are essential to our existence as morally autonomous agents and some things might be more "essential" than others. Our rights to these would *prima facie* be more important rights. Second, the objects of rights are only one of the four components of rights that are variable. While we hold equal rights, people have rights to differing quanta of whatever constitutes the object of the right. This, as we have noted, is related to the idea that the objects of rights may constitute either means or ends in themselves. In consequence, this leads to a division of many declaratory rights into those that are "end-rights" and those that are "means rights." If the object of every means right were absolutely essential to the fulfilment of an end right, the argument would not

[33] In this concluding analysis we leave aside the practical difficulties involved, such as the discreteness of the groups, policies and procedures concerned, the finiteness of remedial action or its impossibility due to the multiplicity of duty-holders.

help us greatly. But so far as the *Universal Declaration* rights are concerned, this is not the case. They are not all equally essential. Until we have a clearer view of exactly what is and is not required for moral autonomy, however, we can make little progress with prioritizing rights. As with means/ends rights, there is more reason to be optimistic than pessimistic. We shall need a principled set of criteria to judge relevance to moral autonomy and what constitute means/ends rights. Between them, these two sets of ideas ought to provide the means for prioritizing rights. The remaining hurdle to surmount would be entrenched "rights orthodoxy."

SECURITY AND RIGHTS

Trevor C.W. Farrow*

This article explores various approaches to the re-constitution of human rights following 11 September 2001. In contrast to the approaches advocated by Sean McMahon and John Edwards, the author proposes a re-commitment to the core values embodied in the rights enshrined in documents such as the Universal Declaration of Human Rights. The article proposes that re-constituting human rights, either by a process of consequentialist trade-offs or choice-based prioritization, opens the door to naturalizing infringements of rights in the name of fear or security. Both detract from the goals set out in human rights declarations. Even in a security-conscious environment, discussions of rights must recognize and take into account the established and fundamental commitments to universal human rights and freedoms.

Cet article explore les diverses approches de la reconstitution des droits de l'homme suite aux attentats du 11 septembre 2001. Contrairement aux approches préconisées par Sean McMahon et John Edwards, l'auteur propose un nouvel engagement envers les valeurs essentielles incluses dans les droits garantis dans des documents telle que la Déclaration sur les droits de l'homme. L'article suggère que la reconstitution des droits de l'homme, soit au moyen d'un processus de compromis conséquentialistes ou d'une hiérarchisation fondée sur le choix, ouvrirait la voie à une violation naturalisée des droits au nom de la crainte ou de la sécurité. Les deux processus font oublier les objectifs énoncés dans les déclarations sur les droits de l'homme. Même dans un milieu sensible à la sécurité, les discussions sur les droits doivent tenir compte des engagements établis et fondamentaux des droits et libertés universels de la personne.

I. INTRODUCTION

> *There is no easy way to create a world where men and women can live together…*[1]

A number of papers in this special issue contemplate the notion that, in light of globalization, the events of 11 September 2001, and resulting government responses, human rights are in need of re-constitution. One version — a utility-based version — of this re-

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1 Martin Luther King, Jr., "Nonviolence: The Only Road to Freedom" *Ebony* 21 (October 1966) 27 at 30, reprinted in James W. Washington, ed., *A Testament of Hope: The Essential Writing of Martin Luther King, Jr.* (San Francisco: Harper & Row, 1986) 54 at 61.

constitution, represented by current post-September 11 Western anti-terrorism legislative initiatives, sees modern rights as increasingly subordinate to security measures. Sean McMahon, in an article entitled "We Are All Potential Terrorists Now: The Reconstitutive Effects of the *Anti-terrorism Act* and the *Patriot Act*,"[2] critically discusses two of these initiatives and their resulting impact on power relations in society.

Another version of rights re-constitution — a priority-based version — is that proposed by John Edwards in his article "Security, Asylum, and Rights: Are All Rights Equal?"[3] Edwards argues that we should focus our energies, at least for the time being, on a limited number of higher priority rights in order to make better progress in protecting those key rights in an era in which security, not rights, trumps.[4]

In this article, I argue that both the utility and priority-based approaches — each leading ultimately to a limiting of rights — are misguided. In my view, at a time of increased government security initiatives resulting from heightened sensibilities of individual and collective fear,[5] now, more than ever, we need to stay committed to the aspirational model of human rights that was established post-1945 in, for example, the *Charter of the United Nations*[6] and the *Universal Declaration of Human Rights*.[7] Specifically, I make the simple but important point that by re-constituting human rights,

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2 Sean McMahon, "We Are All Potential Terrorists Now: The Reconstitutive Effects of the *Anti-terrorism Act* and the *Patriot Act*" (2005) 10 Rev. of Constitutional Studies 46.

3 John Edwards, "Security, Asylum, and Rights: Are All Rights Equal?" (2005) 10 Rev. of Constitutional Studies 73.

4 I do not purport fully to summarize or explain the arguments of either McMahon or Edwards in this article. For their full arguments and lines of support, see McMahon, *supra* note 2 and Edwards, *ibid*.

5 For a further discussion of our post-September 11 heightened sensibility of fear, see Trevor C.W. Farrow, "Citizen Participation and Peaceful Protest: Let's Not Forget APEC" in Patricia Hughes & Patrick A. Molinari, eds., *Participatory Justice in a Global World: The New Rule of Law* (Montreal: Les Éditions Thémis, 2004) 205 [Farrow, "Citizen Participation and Peaceful Protest"].

6 26 June 1945, Can. T.S. 1945 No. 7.

7 GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

either through a process of consequentialist trade-offs or choice-based prioritization, we open the door to naturalizing infringements on rights, made in the name of fear and security, that push us further back, not further along, the path toward reaching the goals set out in those post-1945 documents designed to "reaffirm faith in fundamental human rights" and promote "social progress and better standards of life in larger freedom … of all peoples."[8] Ultimately, what is needed is not a re-constitution of rights, but rather a re-commitment to the core values embodied in those rights.

II. RE-CONSTITUTING HUMAN RIGHTS

A. Utility-Based Re-Constitution

Two versions of rights re-constitution are discussed in this special issue. One version, under post-September 11 Western anti-terrorism legislative initiatives,[9] provides that the balance between security and freedom must be shifted — away from Mill's preferred vision of minimal liberty impairment[10] — in order to better protect us from current and future terrorist threats.[11] The calculus made here is based

[8] *Charter of the United Nations*, *supra* note 6, preamble.

[9] In Canada, see *e.g. Anti-terrorism Act*, S.C. 2001, c. 41, and *Criminal Code*, R.S.C. 1985, c. C-46, ss. 2, 83.01-83.33. In the U.K., see *e.g. Anti-terrorism, Crime and Security Act 2001* (U.K.), 2001, c. 24. In the U.S., see *e.g. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001) [*Patriot Act*].

[10] See John S. Mill, "On Liberty (1859)" in John Stuart Mill, *Utilitarianism, On Liberty, Essay on Bentham*, ed. by Mary Warnock (New York: New American Library, 1974) 126 at 135. Sean McMahon points to Mill to establish the "liberal problem of properly locating the threshold between individual liberty and larger social considerations" (McMahon, *supra* note 2 at 49).

[11] I do not purport here to document the various reports and commentaries — positive and negative — looking at the trade-offs that have occurred in the area of human rights in light of post-September 11 legislative initiatives. For brief discussions, see Edwards, *supra* note 3 at 84-87, and McMahon, *supra* note 2 at 55-65. For general commentary on the initiatives themselves, see Yonah Alexander & Edgar H. Brenner, eds., *The United Kingdom's Legal Responses to Terrorism* (London: Cavendish Publishing Limited, 2003); Norman Abrams, *Anti-Terrorism and Criminal Enforcement* (St. Paul, MN: West Group, 2003); and, Donald J. Musch, *Balancing Civil Rights and Security: American Judicial Responses Since 9/11* (Dobbs Ferry, NY: Oceana Publications Inc., 2003). For a further discussion of the foreign and domestic

on a consequentialist determination that puts a higher utility value on protecting the security of the majority from threats of terrorism than on the rights of the minority that are potentially infringed because of that utility calculus.[12]

Under this version, rights are purportedly re-constituted, not directly, but rather indirectly through their infringement by security initiatives[13] put in place, ironically, in the name of protecting those rights.[14] In Canada, this security-based utility approach manifests itself in a willingness to allow increased limits on well-established *Charter*[15] rights in the name of security.[16] For example, during an October 2001 interview, Anne McLellan — Canada's deputy prime minister and then minister of justice under whom Canada's *Anti-terrorism Act*[17] was drafted — stated that the notion of "reasonable limit" in section 1 of the *Charter* has shifted since September 11.[18]

responses of the U.S. following the attacks of September 11, see "Responding to Terrorism: Crime, Punishment, and War" Note (2002) 115 Harvard Law Rev. 1217 at 1221-1224. For a more general discussion assessing the aftermath of September 11, see R. Jervis, "An Interim Assessment of September 11: What Has Changed and What Has Not" (2002) 117 Political Science Quarterly 37.

12 For a general background discussion on utilitarianism and rights, see David Lyons, "Utility and Rights" in Jeremy Waldron, ed., *Theories of Rights* (Oxford: Oxford University Press, 1985) 110.

13 See McMahon, *supra* note 2 at 55-65.

14 In my view, this argument obtains notwithstanding the following balancing language contained in Canada's *Anti-terrorism Act*: "the Parliament of Canada, recognizing that terrorism is a matter of national concern that affects the security of the nation, is committed to taking comprehensive measures to protect Canadians against terrorist activity while continuing to respect and promote the values reflected in, and the rights and freedoms guaranteed by, the . . . *Charter*"(*Anti-terrorism Act*, *supra* note 9, preamble). See also *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, 2004 SCC 42 at paras. 5-8, Iacobucci & Arbour JJ.

15 Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

16 Discussed also by Edwards, *supra* note 3 at 84-85.

17 *Supra* note 9.

18 Shawn McCarthy, "The War on Terror: Anne McLellan's New Ideals" *The Globe and Mail* (22 October 2001) A7. Shifting the balance under s. 1 of the *Charter* allows for McLellan's companion view that Canada's anti-terror legislation "fully complies with the Charter of Rights and Freedoms" ("Anti

This limit — seen practically as the "inroads that security measures make on rights" — is likely to result in an overriding of some rights[19] as a result of "a new balance between individual liberties and the security concerns of society."[20]

This first view of rights is discussed, critically, by Sean McMahon. He takes the view that post-September 11 security initiatives — specifically the *Anti-terrorism Act*[21] and the *Patriot Act*[22] — negatively re-create societal power relations. McMahon develops this argument in several steps. First, using Bentham's idea of a panopticon (the "perfect prison"),[23] as re-conceived by Foucault, McMahon argues that post-September 11 security initiatives re-make us as self-disciplining members of society. Second, through this self-disciplining process, control by these initiatives "is continuous and automatic."[24] Third, the process is preventative. According to McMahon, prevention "strives to stop an act or omission before it is committed"; it "strives to pre-empt," and the "most effective and efficient form of pre-emption is self-discipline on the part of the objects of surveillance."[25] Fourth, because of the "prevalence of power" in this panopticon-view of modern society, the exercise of actual power is made "obsolete."[26] Finally, again using a Foucauldian argument, the result of this panopticonism spreads "throughout the social body, thereby

Terrorism Law Complies with the Charter of Rights, McLellan Says" *Toronto Star* (17 October 2001), cited in Kent Roach, "The Dangers of a Charter-Proof and Crime-Based Response to Terrorism" in Ronald J. Daniels, Patrick Macklem & Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 131 at 133). This view also appears to be supported by a recent majority holding of the Supreme Court of Canada that "terrorism necessarily changes the context in which the rule of law must operate" (*Application under s. 83.28 of the Criminal Code (Re)*, *supra* note 14 at para. 6, Iacobucci & Arbour JJ).

19 Edwards, *supra* note 3 at 78. Edwards further argues that this consequentialist, security-based approach poses a potentially "insidious" threat to rights (*ibid*. at 84).

20 McMahon, *supra* note 2 at 50.

21 *Supra* note 9.

22 *Ibid*.

23 McMahon, *supra* note 2 at 52-53.

24 *Ibid*. at 54.

25 *Ibid*. at 68.

26 *Ibid.at 54*.

constituting the disciplinary society."[27] What we are left with, according to McMahon, is a re-made citizen-subject living in a disciplinary society that is individualized and totalized – i.e., under legislation that "encompasses the whole of the social body and applies to every individual member constituting the body."[28]

McMahon identifies four concerns with this post-September 11 utility-based rights discussion. First, the "particular subjectivity" characterizing this "newly reconstituted self-disciplining" society is one that sees us all as "potential terrorists."[29] Second, it is a subjectivity that "subordinates considerations of justice to the maintenance of extant power relations."[30] Third, related to the second point, this subjectivity allows for a "rejection of normative concerns" in the context of human rights protections.[31] Fourth, it also "highly circumscribe[s]" our range of possible options for political dissent.[32] A fifth concern, raised by Edwards, is that the damage caused by this erosion of rights is "largely unquantifiable."[33]

The implications of this utility-based rights discussion, viewed through McMahon's lens of citizen rights-holders as re-made subjects, are "ominous."[34] For McMahon, only when citizens "recognize that they are all the potentially guilty objects of these acts of governing," and not simply "the Other," will "this new subjectivity . . . be challenged."[35] And for McMahon, "challenged it must be."[36]

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27 *Ibid*.
28 *Ibid*. at 65.
29 *Ibid*. at 69.
30 *Ibid*.
31 *Ibid*. at 72.
32 *Ibid*.
33 Edwards, *supra* note 3 at 85.
34 McMahon, *supra* note 2 at 72.
35 *Ibid*.
36 *Ibid*. McMahon's article sparks a further point about this utility-based version of rights re-constitution that should also be mentioned. Legislation in place prior to the passing of these initiatives was likely adequate to deal with the potential security threats at issue (*ibid*. at 55-58). The initiatives should therefore "not be read as legislative discontinuities" or "original . . . attempts to address the issue of terrorism." Rather, they should be "recognized as continuations of the persistent state practice of penetrating the body politic deeper and more completely with surveillance" (*ibid*. at 55). As such, it may

I have discussed elsewhere a number of related concerns about the negative impact that post-September 11 legislative initiatives potentially have on rights.[37] I do not develop those arguments further here. For purposes of this article, I echo McMahon's concerns.

B. Priority-Based Re-Constitution

A second version of rights re-constitution is that proposed by John Edwards. For Edwards, what is needed is a re-conception of "the standing of rights, their moral content, their authority, indivisibility, and their tradeability."[38] This would amount to a "less didactic, more morally foundational approach to an understanding of rights."[39] As such, we should "identify some rights as more important than others," a process that would be facilitated by a "foundational view of rights" that explains "why we have the rights we do."[40] By concentrating "our efforts" on those rights, we "might make more progress in fulfilling and protecting them."[41]

Edwards' argument is motivated by his underlying view that international human rights, discussed primarily using the example of asylum seekers,[42] are not being adequately protected under current rights regimes. This lack of protection is, for Edwards, based on four factors. First, we now live in a very different world than the post-1945 world in which current international human rights regimes were primarily promulgated. Unlike that world, today's world is a far less "static place" in which "the obscenities of state actions" are "no longer the main kind[s] of threat to human dignity and autonomy …

be that concerns with these new initiatives, in the context of rights re-constitution, could have been avoided (or limited) by relying on previous initiatives that were in place to deal with threats that would include current threats of terrorism.

37 See Farrow, "Citizen Participation and Peaceful Protest," *supra* note 5. See also Trevor C.W. Farrow, "Law & Politics after September 11th: Civil Rights & the Rule of Law" (2003) 35 Hosei Riron J. of Law & Politics 163; and, Trevor C.W. Farrow, "Terrorism, Law & Democracy: A Review Essay" 36:1 Ottawa Law Rev. (*forthcoming*).

38 Edwards, *supra* note 3 at 75.

39 *Ibid*.

40 *Ibid*. at89-90. Edwards spends only a short time on this exercise; see *ibid*. at 89-92.

41 *Ibid*. at 89.

42 *Ibid*. at 80.

[T]he pattern of human rights abuses today is of a different kind to those of the post-Second World War era."[43]

Second, because of this modern shift in the locus of threat and abuse, different kinds of security measures are now being instituted. As Edwards comments, "[t]here has been an explosion in the security industry over the past ten years and this has been nowhere more noticeable than in the West."[44] Further, "[l]imitations on police activity are frequently suspended in the interests of security; security can override most other considerations."[45] The result of these new initiatives: "[i]t is security, not rights that now trump[s]."[46]

Third, current international human rights regimes operate as all-or-nothing protections. There is little flexibility in their creation or application. Therefore, for Edwards, treating rights as "imperative," "indivisible," "unmovable" and "non-derogable" — as a "Rock of Rights" — has proven "to be one of its main limitations."[47]

Fourth, confusion and omissions result from distinctions currently made between both human and citizen rights and international and state action. As Edwards explains, states "are . . . better at righting wrongs within their boundaries"; "can be more flexible in their correlative action"; within their boundaries "citizen rights are less generous or just do not apply to non-citizens"; and "are much less likely than international courts and councils to take a considered view of the rights they are damaging or to consider their impact."[48] As a result, "the possibility of rights existing as 'global' declaratory rights and simultaneously as citizen rights with closely overlapping content but different duty-holders, can be a recipe for confusion and an opportunity for dissimulation and inaction."[49]

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43 *Ibid*. at 74-75.

44 *Ibid*. at 84.

45 *Ibid*.

46 *Ibid*.

47 *Ibid*. at 74. See also *ibid*. at 83-84, where Edwards similarly argues that "the 'Rock of Rights' — the universality, indivisibility, and equality of all rights is an orthodoxy that may well not best serve the interests of those whose rights are threatened."

48 *Ibid*. at 88-90.

49 *Ibid*.

These four concerns raised by Edwards are important to our understanding of current rights protection and reform. The potential for progress to which he also points, under his version of rights re-constitution, is appealing. It is also, however, misguided, ultimately resulting in a disservice to his stated project of "serv[ing] the interests of those whose rights are threatened."[50]

I suggest that Edwards' argument is misguided for three reasons.[51] The first deals with his allowance for prioritizing between "more important" and "lower priority" rights.[52] To help facilitate this choice, Edwards makes several distinctions between types of rights: citizen and human; declaratory and foundational; and more and less "essential" (for our "existence as morally autonomous agents"). He also distinguishes between the objects of rights as "means to ends" (such as "education, social security, the right to work, the right to leisure and so on") and "ends in themselves" ("liberty, freedom of movement, worship, [and] thought").[53] Notwithstanding these distinctions, it is unclear exactly what Edwards is ultimately contemplating in this prioritization as rights re-constitution. Given his discussion of globalization,[54] modern security regimes[55] and security trumping rights,[56] he appears to be considering some kind of balancing of rights. If this is correct — if he is considering some kind of balance, similar to what Canadian courts already do under section 1 of the *Charter*[57] — then we have really advanced no further than the version of rights re-constitution contemplated by the utility-based version discussed by McMahon.

If what he means involves the more fundamental issue of

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50 *Ibid*. at 84.

51 I am grateful to Annalise E. Acorn for comments on the development of these arguments.

52 Edwards, *supra* note 3 at 89.

53 *Ibid*. at 91-92.

54 *Ibid*. at 75.

55 *Ibid*. at 84.

56 *Ibid*.

57 In the context of security initiatives, see *e.g. Application under s. 83.28 of the Criminal Code (Re), supra* note 14. In the U.S., see *e.g. Hamdi et al. v. Rumsfeld, Secretary of Defense et al.*, 542 U.S. 507 (2004), No. 03-6696 (28 June 2004), online: Supreme Court of the United States <http://a257.g.akamaitech.net/7/257/2422/28june20041215/www.supremecourtus.gov/opinions/03pdf/03-6696.pdf>.

identifying what rights are necessary for moral autonomy, then it seems to me that he runs into two further problems. The first is that this calculus is really beside the point in the context of how to balance security and rights. Even if we were able to identify a core set of fundamental human rights, and further, if we were willing to say that those rights were more important than (and would trump) a competing right – for example, to be protected from imminent death resulting from a terrorist attack – then we are still going to be left with a balancing of rights and security contemplated under the utility-based version.

The related problem is one of realizability. If we were able to agree fairly on what rights — or what principles of fundamental justice, for that matter — are necessary for moral autonomy, then Edwards' argument might be quite useful. However, such choices are, quite frankly, not easy to make.[58] This problem is not fatal in itself. However, while Edwards gives us some ideas,[59] he does not ultimately provide us with any real assistance in this calculus. He acknowledges that "[u]ntil we have a clearer view of exactly what is and is not required for moral autonomy, however, we can make little progress with prioritizing rights."[60] Thus, even with his means/ends distinction — under which he argues "there is more reason to be optimistic"[61] — Edwards recognizes that we still will "need a principled set of criteria to judge relevance to moral autonomy and what constitute means/ends rights."[62] He concludes that the combination of the moral autonomy and means/ends sets of ideas

[58] One only needs to look as far as John Rawls' project of establishing fundamental principles of justice, and the resulting criticisms of that project, as one example of that difficulty. See John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: The Belknap Press of Harvard University Press, 1999), and John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: The Belknap Press of Harvard University Press, 2001) [Rawls, *Justice as Fairness*]. For criticisms, see *e.g.* Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982); Michael J. Sandel, "Morality and the Liberal Ideal" *New Republic* 190 (7 May 1984) 15; and, Michael J. Sandel, "Political Liberalism" Book Review of *Political Liberalism* by John Rawls (1994) 107 Harvard Law Rev. 1765.

[59] See Edwards, *supra* note 3 at 87-93.

[60] *Ibid*. at 93.

[61] *Ibid*.

[62] *Ibid*.

"ought to provide the means for prioritizing rights."[63] He may well be right. However, again, he does not provide us with anything further on how, as a practical matter, prioritization takes place. So we are left with the direction to prioritize, without any real guidance as to how to do so.

My second criticism of Edwards' project is quite simple. By choosing some rights over others in what appears to be, for Edwards, a zero sum environment, some rights will always be left behind. Edwards himself acknowledges that the "price" for this choice is that "some 'lower priority' rights would remain unfulfilled for the time being."[64] This goes back to the first problem of having to choose which rights will be left behind. It also creates the further problem of sanctioning a system that is necessarily designed to fail in some cases without really telling us what those cases are or how the choices will be made. Again, we seem to be no further ahead than we are under the utility-based version.

My third objection is more fundamental. By allowing for the possibility of prioritizing rights (prior to any discussion of balancing under competing notions of security), even if only "for the time being,"[65] we open the door to consequentialist arguments of utility that will ultimately, it is feared, lead to majority-dominated priority calculations. And it is against unfair determinations and prioritizations by majorities under these calculations that fundamental rights regimes — like the *Universal Declaration of Human Rights* and Canada's *Charter* — are designed to protect.[66] As Ronald Dworkin states,

> [t]he bulk of the law — that part which defines and implements social, economic, and foreign policy — cannot be neutral. It must state, in its greatest part, the majority's view of the common good. The institution of rights is therefore crucial, because it represents the majority's promise to the minorities that their dignity and equality will be respected. When the

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63 *Ibid*.

64 *Ibid*. at 89. I do not argue that a zero-sum environment must (or in fact should) obtain. However, given Edwards' acknowledgment, it is clear that his present argument contemplates such an environment.

65 *Ibid*.

66 In *Taking Rights Seriously* (London: Duckworth, 1977), Ronald Dworkin provides a modern view of this concern in his statement that "utilitarian arguments . . . are ruled out by the concept of rights" (at 203).

> divisions among the groups are most violent, then this gesture, if law is to work, must be most sincere.[67]

Under Edwards' prioritization argument, we are left with little guidance as to how to choose between competing rights when making determinations about which rights should be left behind. And without a principled priority-based theory, we are left vulnerable to the will of the majority, even before we get to any balancing calculations under utility-based security regimes.

III. RE-COMMITTING TO HUMAN RIGHTS

It seems to me that neither the utility-based nor the priority-based rights discussion provides any kind of meaningful change to our current understanding of the nature of rights. As such, what we are really talking about here is not a re-constitution of rights, but rather a need to re-commit to the core values of existing and future human rights regimes.

By arguing for either a utility-based or a priority-based understanding of rights (the latter, as Edwards acknowledges, amounts to "heresy in many human rights circles"),[68] we are resigning ourselves, in either case, to less effective regimes than the aspirations to which we agreed in our post-1945 rights-based documents. Yet, the aspirational nature of those documents is their strength, particularly at a time when rights are under severe strain as a result of modern security concerns. As early as Socrates' defence in his trial in the *Apology* (of himself and the just life) — "O men of Athens, I say to you . . . either acquit me or not; but whichever you do, understand that I shall never alter my ways, not even if I have to die many times"[69] — aspirational approaches to justice have been advocated. More recently, John Rawls identified that, as one of the "roles that political philosophy may have as part of a society's public political culture," political philosophy holds out a "realistically utopian" ideal, thus "probing the limits of practicable political possibility."[70]

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67 *Ibid*. at 205. See also Ronald Dworkin, "Rights as Trumps" in Waldron, ed., *supra* note 12, 153.

68 Edwards, *supra* note 3 at 89.

69 Plato, "Apology" in J.D. Kaplan, ed., *Dialogues of Plato* (New York: Cardinal, 1952) 4 at 24.

70 Rawls, *Justice as Fairness*, *supra* note 58 at 1, 4.

Setting high goals pushes us in a direction designed to better the human condition for all, not to settle for a middle ground that necessarily pays the heavy price of leaving some behind (particularly without a principled basis for doing so). While Edwards is looking to make some positive inroads into bettering "the overall welfare and security of rights-holders," particularly in the context of asylum seekers who he sees as falling through the cracks of our current all-or-nothing system,[71] his priority-based argument, in my view, threatens the goal of universal human rights regimes, a goal that takes all rights and their universality seriously. As the *Vienna Declaration and Programme of Action on Human Rights 1993*, adopted by the Vienna World Conference, provides:

> 1. The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfill their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all . . . The universal nature of these rights and freedoms is beyond question. . . .
>
> 5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[72]

Edwards is right that we are clearly not there yet. And he, supported by McMahon's discussion, is also right that currently, under modern security regimes, "[i]t is security, not rights, that now trump[s]."[73] But that cannot be our endgame; it is certainly not the endgame of our post-1945 human rights regimes. We can and must do better than that. It is for this reason that I am so concerned about

[71] See Edwards, *supra* note 3 at 87.

[72] (1994) 1-1 I.H.R.R. 240, cited in D.J. Harris, *Cases and Materials on International Law*, 5th ed. (London: Sweet & Maxwell, 1998) at 627.

[73] Edwards, *supra* note 3 at 84.

any discussion of rights that allows, as part of its purpose, for the necessary erosion or neglecting of some rights.

Some argue that globalization is, at least in part, responsible for increased pressures on human rights.[74] As I have argued elsewhere,[75] globalization means many things to many people. Of its varied potential aspects, Edwards correctly identifies several central components that may be relevant to human rights considerations, including: "increases in intra- and inter-national movements of population for purposes of work, tourism, [and] flight from oppression or war"; the "spread of ideas, cultural artifacts and ideologies with a heightened potential for conflict"; and, "increased contact between ideological and other interest groups such as independence, religious, and political groups, not all of whom will use pacifist ways of promoting their cause."[76] Fundamental to each of these elements is the movement of humans and ideas. With this increase in movement comes an increase in potential conflict. And with this increase in potential conflict comes a need for increased human rights protections. Utility-based arguments make no apology for overriding some rights in favour of others. Edwards' priority-based solution favours some rights over others, necessarily leaving the latter unprotected.

In my view, any discussion of rights needs to take seriously, as a starting point, all rights of all people. This is what we have agreed to in documents like the *Vienna Declaration and Programme of Action on Human Rights 1993*.[77] The price of leaving some rights

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[74] Edwards, for example, discusses this argument; see *ibid*. at 75-77.

[75] See *e.g.* Trevor C.W. Farrow, "Globalization, International Human Rights, and Civil Procedure" (2003) 41 Alberta Law Rev. 671; Trevor C.W. Farrow & Sheilah L. Martin, "Globalization and the Law: An Introduction" (2003) 41 Alberta Law Rev. 657; Trevor C.W. Farrow, "Negotiation, Mediation, Globalization Protests & Police: Right Processes; Wrong System, Parties, Issues & Time" (2003) 28 Queen's Law J. 665 [Farrow, "Negotiation, Mediation, Globalization Protests & Police"]; Trevor C.W. Farrow, "Reviewing Globalization: Three Competing Stories, Two Emerging Themes, and How Law Schools Can and Must Participate" (2003) 13 Meikei Law Rev. 176, trans. into Japanese by M. Kuwahara (2003) 44 Aichigakuin Law Rev. 29, republished (2004) 5 J. Centre for Int'l Studies 1.

[76] Edwards, *supra* note 3 at 76.

[77] *Supra* note 72.

behind, by design, may simply be too high, particularly without a more principled basis for how to make that calculation.

From this starting point, a discussion of the re-constitution of rights would begin with the acknowledgment that the problem lies not in our understanding of rights, but rather in our ability to, or choice not to, protect those rights. Elements of that discussion would include a commitment, or re-commitment, to the aspirational nature of the post-1945 rights project already in place. However, notwithstanding this commitment, there are clearly going to be challenges and difficult choices to be made between competing rights and interests.

It is for this reason that any discussion of rights needs to emphasize the fundamental need for meaningful civil societies[78] and adequate room for robust political discussion and debate.[79] Equally important is a strong judiciary, empowered to protect the rule of law (that contemplates both domestic and international human rights commitments), particularly when majority rule in times of insecurity threatens the rights of minority groups in society.[80] Further, while globalization puts pressure on rights, it also opens new avenues for awareness, learning and monitoring — through advances in technology and broad, cross-border discussion and international scrutiny — that need to be harnessed for the further advancement and protection of rights.[81] Finally, to the extent that current security concerns place strains on the goals of universal human rights regimes, we need to realize, as Michael Ignatieff has argued, that

[78] See Michael Ignatieff, "Is the Human Rights Era Ending?" *The New York Times* (5 February 2002) A25.

[79] See Farrow, "Negotiation, Mediation, Globalization Protests & Police," *supra* note 75 at 699-703.

[80] See *Application under s. 83.28 of the Criminal Code (Re)*, *supra* note 14 at paras. 5-8, Iacobucci & Arbour JJ. See further Hon. Madame Justice Rosalie S. Abella, "Lawyers, Judges and Rights" (1998) 36 Alberta Law Rev. 1990.

[81] For a useful discussion on the necessary role of "cross-boundary scrutiny" of local rights and ethical practices, making use of Adam Smith's demand that ethical scrutiny requires that moral beliefs should be examined from a distance, see Amartya Sen, "Elements of a Theory of Human Rights" (2004) 32 Philosophy & Public Affairs 315 at 355, and generally at 348-355.

human rights are "the best guarantor of national security."[82] In the specific context of world insecurity as a result of inequality and terrorism, we need to look behind the anger in order to start to understand and address its sources. Here, again, respect for universal human rights and needs is fundamental.

IV. CONCLUSION

King's comment quoted at the outset of this article about the difficulty of creating racial harmony in the 1960s is equally apposite to the difficulty of establishing international civil and political harmony today. Current terrorism is real and in need of prevention and response. One only need look at the recent bombings in London, occuring during the start of the July 2005 G8 Summit in Scotland, to bring home this harsh reality.[83] As such, as a majority of the Supreme Court of Canada recently stated: "The challenge for democracies in the battle against terrorism is not whether to respond, but rather how to do so."[84]

I agree. However, whatever measures are put in place to protect us from current threats must be crafted in such a way that they do not destroy the very rights and freedoms they are designed to protect.[85] And in this security-conscious environment, any discussion of rights — utility-based, priority-based, or other — must accord with our well-established fundamental commitments to universal human rights and freedoms.

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82 *Supra* note 78. See also Tim Dunne & Nicholas J. Wheeler, "'We the Peoples': Contending Discourses of Security in Human Rights Theory and Practice" (2004) 18:1 Int'l Relations 9.

83 For an early report of these tragic bombings, see Alan Cowell, "After Coordinated Bombs, London Is Stunned, Bloodied, and Stoic" *The New York Times* (7 July 2005), online: The New York Times on the Web <http://www.nytimes.com/2005/07/07/international/europe/07cnd-explosion.html?hp&ex=1120795200&en=58771b68dfe53a77&ei=5094&partner=homepage>.

84 *Application under s. 83.28 of the Criminal Code (Re), supra* note 14 at para. 5, Iacobucci & Arbour JJ.

85 For a recent discussion of this balance by the Supreme Court of Canada, see *ibid*. For a recent collection of essays looking at creating a "culture of respect" for human rights through their effective practical implementation, see Colin Harvey, ed., *Human Rights in the Community: Rights as Agents for Change* (Oxford: Hart Publishing, 2005).

Canadian Ronald St. John MacDonald, the first non-European judge on the European Court of Human Rights at Strasbourg, recently stated that "[w]e need to promote the idea that law is liberating instead of constraining"; that it "makes possible the kind of society we want to live in."[86] Human rights regimes — international and domestic — need to be directed at the kind of society we want to live in, not at the kind of society that only some people can live in. Regardless of current security threats, discussions of rights need to take this view seriously. Otherwise, in the fight to protect democracies in the war against terror, we could become our own worst enemy.

[86] Quoted in Andrew Younger, "An Extraordinary Man: Conversing with One of the World's Legal Visionaries" *Dalhousie: The Alumni Magazine* 21:1 (Spring 2004) 14 at 17.

IMMIGRATION, SOVEREIGNTY, AND OPEN BORDERS: FORTRESS EUROPE AND BEYOND

Jonathan Seglow*

This article examines the conflict between the notions of "open borders" and "sovereignty" inherent in immigration policy, as illustrated in the case of the EU. Arguing that immigration policies tend to reflect a state's deepest self-conception, the author contends that immigration into the EU ought to be generous and inclusive in order to reflect the existence of the EU as an ongoing political process rather than as an ethno-cultural unit or an economic association. To this end, the author proposes a constructivist approach that calls for a plurality of political competencies throughout the EU and greatly increased opportunities for political participation by European citizens. Participation, it is argued, promotes a sense of ownership of a Union that transcends national identities. The article further advances a case for common immigration policy, whereby the EU takes in much greater numbers of migrants, ensures an equitable distribution of migrants between different member states and offers a fairly swift acquisition of citizenship for new migrants.

Cet article examine le conflit entre les notions de « frontières ouvertes » et de « souveraineté » inhérentes à la politique sur l'immigration, telle qu'elle existe dans l'UE. Faisant valoir que les politiques sur l'immigration sont le miroir du concept de soi le plus fort, l'auteur soutient que l'immigration dans l'UE devrait être généreuse et inclusive afin de refléter l'existence de l'UE plutôt en tant que processus politique continu que d'unité ethnoculturelle ou association économique. À cette fin, l'auteur suggère une démarche constructiviste nécessitant une pluralité des compétences politiques dans l'UE et une participation politique beaucoup plus importante de la part des citoyens européens. Il est dit que la participation encourage un sentiment d'appartenance à l'Union dépassant les identités nationales. L'article fait ensuite valoir la cause d'une politique d'immigration commune, en vertu de laquelle l'UE accepterait un nombre beaucoup plus élevé de migrants, assurant leur distribution équitable entre les divers États membres et offrant la citoyenneté aux nouveaux migrants dans des délais raisonnablement courts.

I. INTRODUCTION

The *Charter of Fundamental Rights of the European Union*, "solemnly declared" at the Nice Inter-Governmental Conference of 2000, states in its Preamble that "the Union is founded on the

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indivisible, universal values of human dignity, freedom, equality and solidarity [and] places the individual at the heart of its activities."[1] "The Union contributes to the preservation and to the development of these values," the Preamble continues, "while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States."[2] The concessive, "while respecting" in this lofty rhetoric shows that it recognizes two quite different sets of ideas: the liberal values of freedom, equality and the dignity of persons on the one hand, and the more communitarian national cultures and traditions on the other. The qualifier "while respecting" shows that freedom and equality attach to individuals not cultures. Moreover, such individuals are "at the heart of" the Union's activities. In this case the right to protect a national culture means protection from criticism of inequality and restrictions on freedom among its people. While not explicitly stated in the Charter, there is also a tension between the public culture of the EU and the freedom and equality it is prepared to extend to those beyond its borders. Money spent on agricultural subsidies which might be directed towards foreign aid is one example. This tension between European and non-European peoples, which the values of freedom and equality pick up, is separate from the more familiar tension which the Fundamental Charter highlights: the tension between individuals, free and equal, and national cultures that restrict and direct them in manifold ways and maintain barriers to the egalitarian ideal. The modern state has had great success in creating at least formal equality between persons as equal citizens before the law, and clearing a space for personal freedom. If the European project is to create a state, or something that looks very much like it, then there is bound to be conflict between these liberal values mandating uniform treatment and the integrity of national cultures.

The issue of immigration exhibits a conflict between European culture (considered, homogeneously, as such) and the liberal values of freedom and equality. But it also exhibits a conflict between liberal values and national sovereignty. Immigrants are kept out of European states both because they are not French or German or

[1] EC, *Charter of Fundamental Rights of the European Union*, [2000] O.J. c36418 at 8, online: EUROPA (European Commission) <http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/c_364200001218 en00010022.pdf>, cited in Neill Nugent, *The Government and Politics of the European Union*, 5th ed. (Durham: Duke University Press, 2003) at 90.

[2] *Ibid*.

Italian or whatever, *and* because they are not European. (An African or Asian immigrant in Italy, for example, tends to be labelled "extracomunitario.") Interestingly, there is apparently no tension between these two sorts of reasons for exclusion when there is so often a tension between national cultures and the pan-European ideal. The threat of immigrants closing in on "fortress Europe" seems to confirm European citizens in their Europeanness and in their own national identity. It confirms the abstract speculation that the source of identity lies in difference.

Immigration is not just a philosophical puzzle, however. It is not a puzzle for the thousands of illegal migrants desperate to cross the border between Morocco and southern Spain, for example, hundreds of whom drown each year.[3] It is a hugely important political problem. And while we can never solve political problems by speculating about them, theory helps in clarifying issues, producing ideas, comparing options and setting down normative foundations for future policy. With immigration we seem to face a polar choice. One is the utopian ideal of open borders (drawing on that part of the Charter that speaks of the universal values of human dignity, freedom and equality). The other, supported by the need to "protect the national identities of the Member States" is a defence of immigration restrictions and the sovereign prerogative of states to exclude. The moral question is which approach ought to lie behind states' decisions to admit outsiders and it is this question, as applied to the EU, that is the focus of this article.

Immigration policies tend to reflect a state's deepest self-conception. The United States' core self-identity as a land of economic opportunity and melting pot of cultures has informed its relatively open admissions policy, especially in the early years of the twentieth century.[4] By contrast, Germany's predominantly ethno-cultural self-conception has resulted in a fairly closed admissions policy where immigrants have found it hard to gain citizenship.[5] With the EU we encounter a polity whose identity is still being formulated, manufactured and contested. It therefore offers a

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3 See *e.g.* Pascale Harter, "African dying for 'greener' Europe" (5 September 2003), online: BBC News <http://news.bbc.co.uk/2/low/africa/3078776.stm>.

4 Christian Joppke, *Immigration and the Nation-State: The United States, Germany and Great Britain* (Oxford: Oxford University Press, 1999) at 23-61.

5 *Ibid.* at 61-99, 186-222.

particularly interesting case study for the morality of immigration. What view we take of what the Union is and ought to be structures our thinking about constituent states' admissions regimes. I shall argue here that if we conceive of the Union neither as an ethno-cultural unit nor as an economic association, but as an ongoing political process, then immigration into the EU ought to be generous and inclusive. I shall elaborate on this idea at the end of the article. First, however, I shall point out some landmarks in the fairly illiberal history of immigration and the EU, and next consider some of the fundamentals of immigration policy as, in a better world, it ought to be.

II. IMMIGRATION AND THE EU: A BRIEF HISTORY

The central feature of European immigration policy over the past few decades has been the dichotomy between the progressive dismantling of internal frontier controls between member states and the construction of a "fortress Europe" around members' external frontiers so as to exclude third country nationals.[6] Europe has seen the liberalization of immigration policy as well as, with respect to non-EU nationals, its progressive securitization. In fact, though the fortress is a handy metaphor, it is not quite apt since EU countries' policy on immigration has been largely marked by inter-governmental cooperation rather than communitarized provision. Still, the very different treatment that member states display towards non-nationals of other members states and non-EU nationals has been the most striking feature of their policy.

The idea of free internal movement for EU nationals can be traced back to the 1957 Treaty of Rome. Free movement of persons was regarded as an important constituent of an eventual common economic market. The free movement rights of third country

[6] The discussion of the EU and immigration in this section draws principally on T. Kostakopoulou, *Citizenship, Identity and Immigration in the European Union* (Manchester: Manchester University Press, 2001); Andrew Geddes, *Immigration and European Integration: Towards Fortress Europe?* (Manchester: Manchester University Press, 2001); Andrew Geddes, *The Politics of Migration and Immigration in Europe* (London: Sage, 2003); Helga Leitner, "Reconfiguring the Spatiality of Power: The Construction of a Supranational Migration Framework for the European Union" (1997) 16 Political Geography 123; and, Stephen Castles & Mark J. Miller, *The Age of Migration*, 3d ed. (New York: Guilford Press, 2003) at 68-121.

nationals, already becoming a visible part of the populations of several member states, were not covered by the Treaty, however. The key regulation covering inter-European free movement was adopted in 1968 and gave to European nationals "the right to take up activity as an employed person" in another member state, thus ceding competence to regulate access to employment from national to supra-national level.[7] The right to free movement has thus from the start been rooted in an economic conception of citizenship, as more recent provisions enabling the portability of welfare rights across EU boundaries have confirmed. Third country nationals, notwithstanding their possible contribution to a common economic market, continued to be largely excluded from the opportunities Europe might provide. Moreover, the right to police borders and keep out non-EU citizens, continues to be enjoyed by national governments, compounding the sense that this exclusion was for reasons of identity.

The 1986 *Single European Act*[8] expressed a vision of a single market for people, goods and services concretized in the Schengen agreement, originally signed by France, Germany and the Benelux countries, and subsequently expanded to thirteen member states, which wholly abolished frontier controls. These internal measures were the first stage in the construction of a fortress mentality towards those outside the Union. The removal of passport checks, physical obstacles and associated paraphernalia within the Schengen area made, in the eyes of its signatories, more urgent and vital still the construction of relatively impermeable boundaries around the Union. Thus the exclusivity of the single market was retained.

Informal inter-governmental cooperation on immigration continued into the nineties. The 1990 Dublin Convention first brought the harmonization of policies towards asylum seekers and sought to offload the burden of meeting asylum applications to "buffer" countries in Eastern Europe judged safe with respect to the Geneva Convention. The Maastricht Treaty of 1993 assigned immigration policy to the newly created Justice and Home Affairs pillar of the Union and formally recognized that states had a common interest in controlling the entry of third country nationals. The Treaty also established an incipient European citizenship with pan-European rights such as voting and standing in Euro-elections. However, since

[7] Cited in Geddes, *Immigration and European Integration, ibid.* at 45.
[8] [1987] O.J.L. 169.

these rights were derived from the prior possession of a national citizenship they did not offer extra protection to non-Europeans residents within the Union.

The 1997 Treaty of Amsterdam[9] set the EU the objective of developing "an area of freedom, justice and security in which the free movement of persons is assured in conjunction with appropriate measures with respect to external borders, asylum [and] immigration."[10] Freedom within the Union, therefore, was explicitly linked with the securitization of its borders; there was space within the fortress and a moat around it. Amsterdam also formally incorporated the Schengen *acquis* into the EU. It arrived at an action plan on immigration and asylum issues that sought to harmonize standards and procedures. Since then, the idea has gained hold that controlling the entrance of third country nationals must mean some attempt at reducing the source of migratory pressures from developing countries, through development aid, economic assistance, crisis management policies and bilateral agreements. Alongside robust borders, tackling anticipatory migration is now an EU policy theme.

Thus, replacing the simple fortress metaphor a more complex picture of concentric circles has emerged. The innermost circle is the free movement Schengen area. Surrounding that is a second circle consisting of new EU states: a condition of their entry was that they bring immigration and asylum policies up to the standards of current members. The third circle comprises those states in North Africa, the Commonwealth of Independent States (CIS) area and Turkey, where the provision of EU funding is linked to cooperation on transit checks and action against illegal migrants. Finally, in the outermost circle, consisting of the Middle East, China and Africa, the Union seeks to cooperate with states in order to remove the "push factors" of migration.

EU cooperation over immigration over the last forty years has not challenged the sovereignty of the nation-state. On the contrary, it has sought to maintain states' authority to exclude unwanted migrants, principally peoples from outside Europe. Only Europeans have been entitled to receive the benefits of economic association. Neither has

[9] [1997] O.J.C. 340.

[10] Cited in Geddes, *Immigration and European Integration, supra* note 6 at 128.

a more integrationist view of the Union benefited third country nationals. If the widening and deepening of the EU heralds the construction of a new kind of polity (requiring even new categories of political science to study it) the Union remains reassuringly conventional in one respect: it keeps away outsiders.[11] This is unfortunate. Reflection on how the EU could and should regard itself *ought* to prompt reflection on who ought to be in it, and what their rights ought to be. After all, the idea of states choosing to pool their sovereignty (if that is what the EU is about) looks a bit like the idea of individuals choosing to pool theirs in something like the contractualist model of political association exemplified by the United States. And the idea of states voluntarily cooperating in a single market, if that is our model of the EU instead, would not seem to imply restrictions on recruiting labour any more than it would disbar the extraction of raw materials from some particular locale. However we conceive of the philosophy driving the bold and original project that is the EU, it is difficult not to see its immigration restrictions as anything more than a very conventional defence of national sovereignty. The concept of national sovereignty, however, seems in tension with the individual right to freedom of movement, the kind of right given apparent support by the Fundamental Charter.

The next section focuses, at a more fundamental level, on what immigration controls should involve, and how the freedom/ sovereignty dichotomy might be negotiated.

III. POLITICAL IDENTITY AND THE ETHICS OF IMMIGRATION

Discussion of the morality of immigration is complicated by the fact that mass immigration would not likely exist in an ideal world. If all states were reasonably prosperous and reasonably liberal the main reasons for taking the significant step of leaving one's country of birth would be undercut.[12] This need not imply that talk of a just immigration regime is a misnomer — at least not for those who

[11] On the uniqueness of the EU and its implications for political science, see Heidrun Friese & Peter Wagner, "Survey Article: The Nascent Political Philosophy of the European Polity" (2002) 10:3 J. of Political Philosophy 342.

[12] See Joseph Carens, "Migration and Morality: a liberal egalitarian perspective" in Brian Barry & Robert E. Goodin, eds., *Free Movement: Ethical Issues in the Transnational Movement of People and of Money* (London: Harvester Wheatsheaf, 1992) 35 [Carens, "Migration and Morality"].

argue that borders should in principle be open — but it does mean that discussion of the morality of immigration must take place in the context of a discussion about how to remove those factors, such as poverty, which prompt migration in the first place. Second, it is worth pointing out that immigration suffers from the familiar problem of collective action. As EU states realize, there are some gains to be made from cooperation but both potential gains and great losses to be had from non-cooperation. In the world of *realpolitik*, states do not decide their immigration policies *sui generis* but with reference to the policies of states that are alternative potential destinations of would be immigrants. A self-interested attempt to shift the burden onto other states will likely lead to a self-interested response from them, and a situation where there are no principles and few states will know where they stand with respect to new entrants.[13] Conversely, it requires more moral heroism than we have reason to expect for a state to single-handedly adopt a very generous admissions policy. A reasonable division of burdens for the admission of outsiders requires trust and cooperation; common aims if not a common policy.

IV. FREEDOM AND JUSTICE

Recently, a number of political philosophers have argued for a policy of open borders in migration.[14] Open borders are, in many respects, a natural extension of the liberal right to freedom, and thus have a certain logical appeal. Open borders are not merely philosophical conceit because we can find a kind of open borders regime among the Schengen signatories — albeit one surrounded by several lines of defence (those concentric circles). In the philosophical literature, we can find two different defences of open

[13] See J. A. Scanlan & O. T. Kent, "The Force of Moral Arguments for a Just Migration Policy in a Hobbesian Universe: The Contemporary American Example" in Mark Gibney, ed., *Open Borders? Closed Societies? The Ethical and Political Issues* (Westport: Greenwood Press, 1988) 61.

[14] See *e.g.* Carens, "Migration and Morality," *supra* note 12; & Joseph H. Carens, "A Reply to Meilaender: Reconsidering Open Borders" (1999) 33 International Migration Rev. 1082; Phillip Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration* (Edinburgh: Edinburgh University Press, 2000); Michael Dummett, *On Immigration and Refugees* (London: Routledge, 2001); Robert E. Goodin, "If People Were Money" in Barry & Goodin, *supra* note 12, 6; and, Teresa Hayter, *Open Borders: The Case Against Immigration Controls* (London: Pluto Press, 2000).

borders that rely on divergent premises and are liable to distinct objections.[15] Both arguments start from the presupposition that all human beings are of equal moral worth, regardless of on which side of a border they reside. On the first argument, as mentioned, free movement is simply presented as a basic human right of persons. The freedom to cross national borders is a deduction from the right to free movement that is itself an aspect of individual freedom. Free movement, of course, has a long history in the liberal tradition. Not just a basic right, it is a functional necessity in a market economy founded on contract, a fact of no less (perhaps more) significance in a globalizing economic order.

The appeal of this argument is J.S. Mill's axiom that one is free to do anything that does not prejudice the basic interests of others. But if one is free to do *something*, then that something cannot itself merely consist of freedom. One is free to brush one's teeth, own a cat, become a Buddhist, and so on; to say that one is free to be free does not add anything to this list. What then does free movement in the open borders argument give one the freedom to do? Many immigrants, of course, travel large distances, often at great physical and financial cost, but migration, for human beings, is not principally about movement. Focussing on the idea of movement is apt to confuse us. For one thing, it seems to support the absurdity that people living in geographically large, relatively sparsely populated states, would have less right to migrate.

I want to suggest instead that immigration is about the acquisition and enjoyment of certain statuses. I interpret status as a publicly recognized position that gives access to certain opportunities.[16] Briefly, in the case of immigration, there are three such statuses. First, there is the economic status of being a participant in the labour market, able to make contracts and receive economic benefits from one's job. Further down the line, economic status also includes rights to welfare benefits in case of unemployment, sickness and the like. Second, there is the political status that gives one the right to vote, stand in an election and, crucially, the right to a passport; this status

[15] Carens, "Migration and Morality," *ibid*. See also James Woodward, "Commentary: Liberalism and Migration" in Barry & Goodin, *supra* note 12, 59 who distinguishes these two arguments.

[16] On the status of citizenship with respect to migration, see Rainer Bauböck, *Transnational Citizenship: Membership and Rights in International Migration* (Aldershot: Edward Elgar, 1994).

recognizes one's co-equality as a citizen in equal standing. Finally, there is social status. This is not something that can be conferred by law (thought it may be assisted by it); it involves recognition by one's fellow citizens that one is a social equal, entitled to exercise one's economic, welfare, and political rights. The right to immigrate need not involve all three kinds of status; the third, in any case, is not in the direct control of governments and may take a very long time. But it does involve the acquisition of some status position, at a minimum an economic one. This normative intuition explains what we find wrong with illegal migrants forced to seek work by clandestine means.

The status positions that immigrants can acquire entail social, economic and political rights. Established members of the host society are consequently asked to extend the duties they previously owed only to one another to people who were hitherto not members of this society. Defenders of fortress Europe certainly recognize that the right of third country nationals to immigrate into EU member states would give them a status. That is why they object to it. If, in a different world, most non-Europeans simply wanted to visit EU states (an alternative construal of the right to free movement), then even the most parochial Europeans would have little trouble with it.

The second argument for open borders seeks to achieve the goal of social justice. The great majority of voluntary migration consists in people from poorer states seeking opportunity in richer ones. This argument appeals to people's vital interest in those resources they need to live a decent life. Closed borders are similar to a feudal privilege that arbitrarily protects the position of the better-off in ways unjustified by the equal moral worth of persons.[17] Egalitarian justice directs us to give priority to the worst-off. The global poor want something approaching the resources and opportunities available in richer states, either as migrants or as recipients of cash remittances. Closed borders are an arbitrary barrier to this aim. Free movement removes it.

Would open borders help engineer social justice? There are three reasons for doubt. First, the very poorest people in the world do not migrate simply because they cannot afford to.[18] It is the next echelon

[17] Carens, "Migration and Morality," *supra* note 12.

[18] Peter Stalker, *International Migration* (London: Verso, 2001) at 127-30.

up that would benefit from the opportunities in richer countries and are able to migrate. It is an odd kind of social justice that does not focus on the very poorest in the world. The very poorest may be helped, of course. They may be made better off by the remittances that emigrants send back. In some countries, the Philippines or Turkey for example, such remittances are a substantial proportion of GDP.[19] But most remittances go to families of the poor but not desperate. It is a further and contingent question whether the very worst-off or the wider community will be helped. In any case – this is the second point – it is a rather insecure form of wealth redistribution. Remittances can suddenly decline (if, for example, the host nation suffers an economic downturn) or the new migrants might begin identifying with their new state and stop sending remittances, or not send as much. Compared with the reliability of the tax-funded redistribution that marks most regimes of social justice, the voluntary efforts of migrants are unlikely to be so effective. Finally, some of those who migrate from poorer countries are highly skilled people who could do much more good at home. The scale and effects of the brain-drain on developing countries are disputed, but it seems clear that most of the time, the migration of highly skilled people mainly benefits the migrants themselves, not their compatriots back home. From the point of view of social justice, they would do better to stay or return home once trained abroad.[20]

One cannot say for sure, of course, what the result of open borders would be on these trends. No doubt open borders would see increased remittances, but they would also likely see a larger brain-drain. It also would probably still be true that the chief economic beneficiaries of immigration would be the immigrants themselves. Unless open borders would herald world population movements on a massively increased scale, they are unlikely to engineer a fundamentally just distribution of wealth and well-being across the world. Having said that, it is hard to dispute the claim that more open borders would do *some* good in alleviating global poverty. It remains true that the main barriers to a fairer distribution of the world's wealth are not immigration restrictions, but a global economic system that systematically favours richer states. Fundamental reforms to that system, allied to more open state borders, would likely do a

[19] *Ibid*. at 107-12.
[20] *Ibid*. at 102-7.

lot of good in alleviating poverty.[21] They would do good from a utilitarian point of view where any gain in wealth or well-being, provided it is not matched by an offsetting loss elsewhere, is an advance. Given that we do live in a world with massive disparities in wealth and well-being, there seems a strong argument to open borders to a greater degree than at present. For the reasons canvassed above, open borders on their own, however, would be unlikely to distribute that wealth and well-being fairly amongst the worst-off. That is why they have to work in tandem with other political and economic reforms. Those reforms would work to achieve further economic development among the world's poorer countries. This is consistent with more open borders. But it may not be consistent with wholly open borders because of the planning necessary to achieve economic growth. In any case, only a small minority of the world's population wants to migrate. Most people's attachment to their country of birth is quite strong and they would no doubt prefer greater wealth and well-being in their country of birth and residence. Citizens of rich countries too, of course, have just as great an attachment. If this is the case, however, we must now ask a further question: can we really reform the structure with international society without meeting a moral and practical stumbling block — the sovereignty of nation-states?

V. NATIONAL SOVEREIGNTY

National sovereignty is an empirical reality but also a normative ideal. Arguments against large-scale immigration maintain that national cultures are valuable (at least for their members) and that current members have the right to preserve or modify their national culture as they see fit.[22] They assume that large numbers of migrants will damage their identity and thus assert that current members have the right to keep them out. Popular arguments — that mass immigration means welfare tourism, overpopulation, cultural swamping, public disorder, and job losses for nationals — all assume

[21] See Veit Bader, "Fairly Open Borders" in Veit Bader, ed., *Citizenship and Exclusion* (Basingstoke: MacMillan, 1997) 28.

[22] See Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (New York: Basic Books, 1983) at 31-63; Peter C. Meilaender, *Toward a Theory of Immigration* (New York: Palgrave, 2001); and, David Miller, "Immigration: the case for limits" in Andrew I. Cohen & Christopher Heath Wellman, eds., *Contemporary Debates in Applied Ethics* (Oxford: Blackwell, 2005).

that members own their nation and its institutions as a collective right. This is why nationals' job losses count more than immigrants gaining them and why it is assumed that welfare is for nationals not outsiders. In fact, what we have here is a set of questionable empirical assertions and one central normative argument that supports a right to restrict entry of immigrants. Its main premise, however, is hard to sustain.

The questionable assertions are those that say that immigration has a large affect on a country's population and its institutions (a precursor for claiming that they damage it). How much an influx of immigrants affects the host population depends on how many immigrants there are proportional to that population, at what rate they enter, what differences in outlook exist between immigrants and the host population, whether they speak the same language, where the immigrants settle, how dispersed they are, and what legal measures are taken to integrate them. Of course, EU states already recognize this. They recognize that, because most people emigrate for economic reasons, the flows of migrants between a group of rich states are not likely to be huge. With third country nationals it is a different matter. But, even assuming for the moment it is permissible to distinguish between one's own nationals and nationals of third countries in matters of immigration, the assertion that immigration necessarily has a large affect on one's national identity and institutions is difficult to sustain.

The normative argument for restricting immigration says that national cultures are valuable and hence that current members have the right to preserve or modify their national culture as they see fit. What the argument needs to show is that a nation's particular cultural identity – assuming there is such a thing – is valuable from an impersonal point of view, since there are many things that are valuable from a personal point of view (a new car; a larger house) but do not give rise to claims for justice. Given the patchy historical record of nationalism in the twentieth and twenty-first centuries, this argument is not easy to make. Just a bit of common sense sociology is enough to dispatch the Herderian argument that nations encapsulate a people's authentic, collective achievements.[23] Nor is

[23] See also Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed., *Multiculturalism: Examining 'The Politics of Recognition,'* 2d ed. (Princeton: Princeton University Press, 1994) 25.

it enough to claim that nations are unique. Many things are unique (my bicycle, for example). A more promising argument will appeal to the role of national cultures in providing a frame for human action and thus securing the vital goods of recognition, identity, orientation and meaning. This argument needs to be elaborated in a way which interrogates these goods, shows precisely why they are valuable (and answers the cosmopolitan objection that they are not) and demonstrates why smaller kinds of social groups such as families, neighbourhoods, cities, firms, and cultures, in some combination, cannot provide an effective – and affective – framework.

The expanded argument also needs to address the phenomenon of multinational states where the boundaries of recognition-conferring entities (nations) do not correspond with the boundaries of those jurisdictions which have authority to determine immigration (states). Finally, the recognition argument needs to be able to distinguish between the threat that immigration poses to a nation's identity and institutions and the way that these are subject to change for other reasons. Communities organized around single industries (coal mining or steel-making, for example) find their identities under threat when cheaper imports mean mines and plants are closed down. If the consequences of globalization include this kind of loss, apparently beyond a state's effective control, then why is immigration — another syndrome of a globalized world — unique? If we are dealing with the tennis club, then we can draw a reliable and morally defensible distinction between changes in membership and changes to the infrastructure. But nations are imaginary communities with large populations. They provide an institutional matrix that affects our fates in varied and complex ways. It is therefore difficult to maintain a distinction between changes to membership caused by immigration and other kinds of equally profound changes to the context within which we make our life choices.

In sum, the main premise of the argument for restrictions in immigration – that there is something especially valuable about national identity that is especially threatened by greater immigration - is highly questionable. But there is also a further difficulty with the very structure of the argument. The difficulty is that it is hard to square the premise about the value of national identity with a thoroughgoing commitment to democracy. For if a national culture is valuable (because its traditions provide members with orientation,

sources of mutual recognition and so on), then it is valuable because it is the way it is, and, if that is so, then surely it limits members' right to change it. Tradition is backward-looking; democracy looks to the future. If national identities are valuable, then that must be because they have some existential weight, so to speak. Collective decisions to take actions that potentially change that national identity thus threaten to degrade that value. Yet it seems counter-intuitive to argue that citizens should not have the right to decide matters of immigration and other politically important issues because they may, in the process of exercising such rights, threaten the value of their national identity.

We can see many of the problems that afflict anti-immigration arguments encapsulated in a passage from Michael Walzer's *Spheres of Justice*, one often quoted by both friends and critics of immigration restrictions:

> [1] At stake here is the shape of the community that acts in the world, exercises sovereignty, and so on. [2] Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. [3] Without them, there could not be *communities of character*, historically stable, ongoing associations of men and women [4] with some special commitment to one another and some special sense of their common life.[24]

I have added the numbers [1] - [4] to illustrate the difficulties. [1] says that the shape of the national community is necessarily *at stake* with immigration whereas, as we have seen, that depends on the numbers, destinations and outlooks of immigrants, and what is done to assimilate them, and so on. [2] says that the right to admit or exclude is particularly important for self-determination. National self-determination, however, has many aspects. It includes control over economic policy, foreign investment and flows of capital, relations with neighbouring states, and raw geo-political power. Walzer assumes that the unfettered right to exclude is an inestimably important aspect of self-determination, much more important than all its other aspects, an assumption that does not seem obviously warranted. [3] assumes that communities of character are especially valuable which, I have suggested, at the very least requires an argument to make it plausible.[25] Finally, [4] suggests special

[24] Walzer, *supra* note 22 at 61-62 [emphasis in original].

[25] To be fair, Walzer does make this argument elsewhere in the book.

responsibilities and special commitments always take precedence over other reasons for delivering justice such as need or suffering or the causal responsibility of state A for state B's plight.[26]

VI. POST-NATIONAL SOVEREIGNTY

Our survey of the philosophical arguments on immigration has revealed that (i) more open borders could help to relieve global poverty; (ii) immigration is best theorized not through the liberal right to free movement but rather as the acquisition of various status positions; and, (iii) that arguments for immigration restrictions founder on the source of the value of national identity. In this section I pull these threads together to suggest in outline how we might best construe the right of immigrants to admission. In the final section I apply this in more concrete terms to the EU, and in doing so, take up the issue of status positions.

Someone sympathetic to increased immigration into the world's richer countries may be tempted to say that all that should bind citizens together in a liberal democratic state (or federal collection of states) is their common commitment to liberal principles of human rights, justice, democracy and constitutionalism, rather than a shared way of life and/or pre-political ethnic nationalism.[27] The weaknesses of this argument, however, are, first, that it supplies no obvious way of demarcating state boundaries; second, that it not clear that these thin, procedural values will find sufficient motivational appeal among citizens; third, that it underplays the way that immigration involves acquiring status positions in political society; and fourth, that it cannot account for our strong intuition that members of a polity should owe at least some special duties towards each other, beyond those they owe to all human beings as such.

The post-national polity may be interpreted in another way, however. Though we often think of polities and the political cultures that maintain them as things, they are in fact processes, continually remade and reinvented.[28] I want to suggest that citizens can create a

[26] For the latter – reparative – argument, see Mark Gibney, *Strangers and Friends: Principles for a Alien Admission Policy* (Westport, Conn.: Greenwood Press, 1986).

[27] On this point, see the discussion in Kostakopoulou, *supra* note 6 at 27-37.

[28] See Rainer Bauböck, "Sharing History and Future? Time Horizons of Democratic Membership in an Age of Migration" (1998) 4 Constellations 321.

post-conventional *demos* through their own purely political cooperation in the public realm.[29] This approach is forward-looking, rather than backward-looking, as ethno-nationalism. It appeals to politics as a process of communication, participation and deliberative decision-making. It calls for a robust public sphere and a republican understanding of citizens' duties and responsibilities. The key to what Kostakopoulou calls the "constructivist" approach, is that a shared history does bind and is a valid source of special duties, but this history is not pre-political. On the contrary, this history is self-consciously manufactured through citizens' collective deliberation on political matters.[30] Citizens do share a collective identity that marks them out from the world of human beings as such, and this is normatively defensible. But this is a self-consciously political identity formed through no more than a history of public participation and deliberative decision-making. To be sure, this is no easy task. It is more demanding on citizens who may desire simply to exercise their private liberal rights and it urges them to confront those with different outlooks, perspectives and political interests. It unsettles them from the parochial security of a historic cultural identity. It substitutes the predictability of a future that will be much like the past for one that is contingent and uncertain. I suggest that if the constructivist approach is successful, however, it can supply a sufficient basis for motivation and loyalty among citizens in the liberal polity. The motor to political action and source of citizens' affective sense towards one another is the fellow-feeling that tends to be created among participants in a democratic process, as well as the sense of ownership each possesses over the specific laws, policies, and more general framework of rights and procedures, both of which are their historic creation. The constructivist approach thus shares with the ethno-national approach an appeal to history in explaining the reasons citizens have for political action. But they differ in that constructivism alone appeals to a manufactured history created by citizens here and now, one in which their future is defined by their actions alone.

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29 See Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge: MIT Press, 1998), especially the essays in Part III.

30 Kostakopoulou, *supra* note 6 at 35-36, 101-26. This and the following paragraphs are much inspired by Kostakopoulou's discussion, although I have drawn slightly different conclusions about constructivism and duties towards immigrants and perhaps emphasized more than her the way that political identities are (re-)created.

It is reasonable and intuitive that citizens who have worked together over time to create a political culture and polity, who have made compromises and benefited from the compromises of others, and who have borne the sacrifices that their decisions for the common good entail, should owe each other special duties over and above those they owe to the world as such. This does not mean that they do not owe stringent duties to those outside their polity. Certainly they do; duties, for example, to help relieve global poverty. Democratic activity helps foster virtues such as solidarity, trust and belonging and the mutual indebtedness that citizens have towards one another when these fragile virtues are created is what underlies the creation of their more exclusive mutual obligations. There are, then, ties that bind fellow citizens together that do not extend to humanity as such. But they are not based on any extant identity beyond what citizens themselves have created.

The constructivist approach to political identity supports the idea of fairly open borders; borders should be much more open than at present, but there is no unrestricted right to migrate.[31] The negative reason for opening borders is that there is, in principle, no reason why peoples from other states should not become fellow members of the democratic project upon their entry into the polity. There is no ascriptive background that is intrinsically excluded on this model since citizens are created through the political acts of democratic participation. There are no virtues which any group, non-Europeans for example, cannot acquire. The democratic community is defined by the commitment of its members to resolve problems through democratic means, a process open to all comers. The positive reason is, as we have seen, that more open borders can do some good in relieving global poverty. As long as richer states fail to meet their positive obligations to the global poor, they can still do some good by opening up borders and letting some of those poor into the state. And if and when those positive obligations – resource transfers and assistance in economic development and democratization – are met, more open borders can still help as part of a coherent normative account of global social justice.

The constructivist approach nonetheless also justifies some restrictions on immigration. Citizens are entitled to exclude the small number of people who cannot be persuaded to endorse liberal

[31] See Bader, *supra* note 21. The phrase "fairly open borders" is Bader's.

democratic norms. Citizens also are entitled to not have their state so flooded that their labour market and welfare system cease to function. To be sure, both of these concerns can be met with many more immigrants. But there is a difference between saying, with the constructivist approach, that while the spread of the welfare state can be progressively extended, it cannot suddenly meet millions more people's basic needs, and claiming, on the national sovereignty approach I have criticized, that a welfare state only exists to serve the interests of those who are currently nationals. As well as sheer numbers, then, there must be some regulation on the flows of migrants. The same goes for assimilation; even with the best will in the world on both sides, only so many can be admitted at any one time.

I have claimed that citizens who have engaged in democratic cooperation together are entitled to give some priority to each other's needs and interests beyond the duties that they owe to those outside their polity. In addition to the reasons above, then, it is reasonable to think that polities are entitled to introduce *some* further restrictions on the influxes of migrants. Those who have worked together to create a polity should enjoy some insulation from the wills of others. But these restrictions should not dislodge the argument that borders should be fairly open, not fairly closed. This is simply because the needs of the global poor are very great, and so too are our obligations to them. This goes a long way (though not the whole way) towards mitigating whatever special duties citizens owe to one another. Fairly open borders is a bit vague, of course, but we should not try to push armchair theorizing further than it can reasonably go. Normative theory can defend the broad outlines of policy; it is often bad at supplying anything more detailed.[32] Concrete policy can only be decided in concrete circumstances – orientated by the kind of normative frame I have sketched above.

VII. CONCLUSION

The sketch above glosses over difficult questions including exactly what this extra participation means in concrete practice; why citizens should be persuaded to engage in it; whether it will necessarily lead to increased trust, solidarity and allied forms of social capital; how the model will work across the varying political

[32] See Bader, *ibid.* at 49-50.

cultures, social structures and economic systems throughout Europe; and, how it will address the tensions in multicultural, multifaith societies where many immigrants and their descendents do not enjoy effective social, economic or political assimilation or integration. I will try to go a small way towards answering some of these by returning again to the EU, this time offering some tentative normative recommendations.

First, the constructivist approach calls for a plurality of political competencies throughout the EU and greatly increased opportunities for political participation by European citizens, with the aim that they will increasingly feel a sense of ownership of a Union that transcends national identities.[33] The political values proclaimed in the Nice Charter — human dignity, freedom, equality, solidarity and democracy — are a welcome extension of the economic conception of citizenship that has up to now dominated Union policy. But they need to be institutionalized in a way that encourages publicly autonomous citizens' active shaping of the Union as a polity, not merely in a way which respects people's private pursuit of their interests. [34] In practice, citizenship could be a multi-level concept with citizens having allegiances to their neighbourhood, town, region, state and the EU itself with none dominating (in order to erode the dominance of national ties). There can be greater use of national, regional and European referenda; more civic education in schools and elsewhere; career breaks for citizens to serve on panels, juries, and in actual decision-making units; and time, space and money devoted to helping create public spheres in neighbourhoods,

[33] See Thomas W. Pogge, "Creating Supra-National Institutions Democratically: Reflections on the European Union's 'Democratic Deficit'" (1997) 5 J. of Political Philosophy 163.

[34] For some discussions of citizenship relevant to the comments in this and the next two paragraphs, see Andrew Linklater, "Citizenship and Sovereignty in the Post-Westphalian European State" in Daniele Archibugi, David Held & Martin Köhler, eds., *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Stanford: Stanford University Press, 1998) 113; Ulrich K. Preuß, "Citizenship in the European Union: a Paradigm for Transnational Democracy" in Archibugi, Held & Köhler, eds., *ibid.*, 138; Gerard Delanty, *Citizenship in a Global Age* (Buckingham: Open University Press, 2000) esp. c. 8; Percy B. Lehning, "European Citizenship: Between Facts and Norms" (1998) 5 Constellations 346; and, Klaus Eder & Bernard Giesen, *European Citizenship: National Legacies and Transnational Projects* (Oxford: Oxford University Press, 2000).

towns and regions where these issues can be debated and where democratic inputs can be formulated. There also, of course, needs to be more transparency and accountability of decision-making for ownership to become meaningful.

Second, the EU should move towards a common immigration policy, taking in much greater numbers of migrants, and ensuring their fair distribution between different member states.[35] Considerations based on the need to preserve historic cultural identities (national or pan-European) are not good reasons for keeping immigrants out. Besides the difficulty in defending the value of national identities, such reasons are not public and in principle not shareable with the excluded who must bear their cost. The constructivist model of citizenship allows citizens to give their own interests limited priority over those of outsiders, however: that is why EU borders need not be completely open. In any case, I have suggested that international justice supports more open but not completely open borders. In addition, there are some more parochial considerations, such as the number of migrants who can in principle be assimilated at any one time, the need to preserve functioning welfare systems, and the need to prevent over-crowding, which can legitimately restrict inflows of peoples. A common policy on immigration — with some mechanism to agree and enforce a fair distribution of admissions — is important to prevent states struggling to shift the burden onto each other. The more pan-European conception of democracy signalled above can help achieve this. Finally, more open borders should ideally be accompanied by a shift in attitude from the present overwhelming interest in security to a more liberal approach that welcomed the contribution migrants can make to the cultural, political and economic life of member states and the EU itself.

Third, the constructivist approach calls for the fairly swift acquisition of citizenship for new migrants, with citizenship based on residence, and expunged, as far as possible, of historic national symbols. Citizenship is about social status and economic and legal entitlement. But it is also about the democratic input that one has as a right, and, on the quasi-republican view I have adopted, a duty to make. Immigrants who are subject to the vagaries of the national and European economic and social order should have the right to a say

[35] See Bader, *supra* note 21.

in shaping it. This entails duties on both sides. States have duties to help integrate new migrants: to meet their basic needs, teach them necessary languages, introduce them into national institutions, and to fight prejudice and racism. They should adopt a system for the acquisition of national citizenship based on residence with low, culturally-neutral qualifying conditions of political knowledge and allegiance, linguistic competence, and, for those able, at least the desire (if not the means) to be economically sufficient. It is important that, once acquired, citizenship is a status equally shared by all, recent immigrants and the indigenous population. In the medium term, EU member states should move towards a uniform policy of acquisition of national citizenship based on residence. This is no easy task, especially given the imminent expansion of the Union to encompass states with strong ethno-national sentiments and poor records towards immigrants. But it is crucial in order to move towards a liberal and non-exclusionary Union that welcomes migrants and gives real content to its lofty declaration of freedom, dignity and equality. There will then be a simple route for new immigrants to also acquire the post-national political citizenship of the Union itself (which I argued above should have genuine democratic content), a citizenship which is at present tantalizingly out of reach for many of them. The Amsterdam Treaty's declaration that citizenship of the Union shall complement and not replace national citizenship could be retained (provided national citizenship is interpreted along constructivist lines).

New immigrants and would-be citizens have duties of their own. Their own motives, often primarily economic ones, need to be shaped. The influence they would gain over their new state and the EU itself is one motive for them to expand their horizons beyond immediate economic interests. Another is the more amorphous, but no less real, social status and social recognition as equals by the indigenous population, something that can only be aided by their acquisition of citizenship. New entrants have duties to assimilate, to learn the language and respect the values of their new home — though they also have the right to shape these values over time. On the constructivist view I have outlined, there is no historic identity to a polity; it is something manufactured by its members. New entrants contribute to this process. Granting them citizenship gives them the right to do so, and measures that assist their integration help give them self-confidence and security.

Fourth, the EU can and should do much more to tackle the economic causes of mass migration.[36] If borders become much more open than at present they will have an interest in doing so. But, morally speaking, the relatively rich states of the EU have some responsibility for the position of would-be migrants insofar as they benefit from political and economic arrangements which sustain disparities in wealth and privilege and do not work to replace them with something fairer. This is a form of implicit consent.[37] Most people, after all, prefer to stay in their own country and are driven to migrate because of lack of opportunity. The structures that maintain unequal opportunities are ultimately human creations and hence subject to moral evaluation, criticism and reform. Increased development aid, economic and technical advice and, above all, a fairer global trading regime would all begin to address this. At present, policy is dominated by the vision of concentric circles around the core area of the EU. This guiding metaphor should be replaced by the idea of a complex web where, in a globalized world, EU member states interact and influence far away states at many nodal points. The existence of trans-national migrant networks is testimony to some of those connections. This influence could be constructively made to help remove some of the push factors of migration.

A polity's identity is defined by who is in it and, by implication, who it keeps out. Immigration is contentious just because it challenges this collective consciousness. At a time when the nature of the EU is itself being defined, I have tried to offer reasons why migrants might be welcomed rather than spurned. There is, indeed, a larger reason why Europe's indigenous citizens should not retreat into their fortress. Europe, a new kind of trans-state entity, is still being progressively defined. That definition should not be solely in the hands of elites, even elected and accountable ones. Undergirding the formal European project, there should be public spheres where Europe's peoples, the established and the new, come into contact with one another and their views, values, judgments and ideals are tested against each other. These should be, as I have suggested, institutionalized; but they may be quite informal too. To exclude

[36] See Kostakopoulou, *supra* note 6 at 146-51; Bader, *ibid.;* and, Thomas Pogge, "Migration and Poverty" in Bader, *supra* note 21, 12.

[37] Thomas W. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Blackwell Publishers, 2002).

migrants from this process – with their fresh perspectives and their own conceptions of value – is to presume just what we are not entitled to: that we know precisely what the European polity is and should become. Migrants have always changed the societies that they have encountered; rarely, in the long term, for the worse. Europe – large, diverse, evolving and not under the "ownership" of any national culture – seems much more likely to gain from the ideational as well as the economic input of the migrants knocking at its door. While Europe's borders should not be completely open, neither should they be as closed as they hitherto have been to those who, just because of their unique position as new entrants, could not but help to define its future.

REGIONALISM, MIGRATION, AND FORTRESS (NORTH) AMERICA

Yasmeen Abu-Laban*

The article takes the 2004 Summit of the Americas as the starting point to examine the ongoing issues regarding migration, security and mobility rights within a North American context. It argues that since 11 September 2001, a distinctive racist internationalism has amplified the exclusionary logic of North American regionalism with respect to the mobility of people. The article considers the relevance of migration to illuminating the interplay between security, international politics and domestic politics. Domestic security measures instituted in the wake of September 11 and the revived debate regarding national borders at the North American regional level have had a significant impact on rights of mobility, particularly movement across borders, and underscore the limitations of citizenship in the face of the racialized security threat of terrorism. Rather than ceasing to be relevant, national borders are assuming a new importance in the early twenty-first century in the context of revitalized discourses that posit immutable differences between peoples of the West and of the East.

Commencement avec le Sommet des Amériques de 2004, cet article examine les questions courantes sur les droits de migration, de sécurité et de mobilité dans le contexte nord-américain. L'auteur fait valoir que depuis le 11 septembre 2001, un internationalisme raciste particulier a amplifié la logique limitative du régionalisme nord-américain en ce qui concerne la mobilité des personnes. L'auteur étudie la pertinence de la migration pour illuminer l'action réciproque de la sécurité, de politiques internationales et nationales. Les mesures de sécurité nationales mises en place à la suite des attentats du 11 septembre et l'intensification du débat sur les frontières nationales au niveau régional en Amérique du Nord ont eu de sérieuses incidences sur les droits de mobilité, surtout sur les mouvements à la frontière, et met en évidence les limitations des citoyens face à la menace de terrorisme racialisée pour la sécurité. Au lieu de perdre leur pertinence, les frontières prennent une nouvelle importance au début du XIXe siècle dans le contexte de discours revitalisés posant comme postulat les différences inaltérables entre les populations de l'Occident et de l'Orient.

I. INTRODUCTION

The 2004 Summit of the Americas in Monterrey, Mexico stands out for the way in which both Canadian Prime Minister Paul Martin and Mexican President Vincente Fox focussed on issues relating to migration, security, and mobility rights at the U.S. border. Indeed, journalists were able to report that the two leaders pledged to "work

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together to ensure that the fight against terrorism doesn't shut down their borders with the United States as they try to develop a stronger continental economy," and to explore "new high-tech efforts to combat terrorism at their borders."[1] Private discussions between U.S. President George W. Bush and Martin led to the announcement of a new promise to "inform" Canadian officials if a Canadian national is detained in the United States on security grounds,[2] and a private meeting between Bush and Fox led the American president to propose a new temporary worker program which could serve to legalize many undocumented Mexican workers already in the United States.[3] Yet, critics in both Mexico and Canada have faulted these developments for not going far enough. Opposition politicians and commentators in Mexico accused Fox of abandoning a more sweeping cross-border migration deal, as seemingly envisioned just prior to 11 September 2001.[4] As well, in the words of one Pakistani-Canadian journalist, despite the Martin-Bush "tête-á-tête":

> I find myself worrying over the possibility of being deported, if I enter the U.S., to another country: a fate similar to that of Maher Arar, a dual Canadian-Syrian citizen whose Canadian passport meant little when American officials shipped him back to his native Syria to wallow in prison for nearly a year.[5]

To begin to make sense of the ongoing issues relating to migration, security and mobility rights that emerged in the wake of the 2004 Summit requires bringing together a number of concepts and levels of analyses to address the post-NAFTA and post-September 11 context from an historically informed perspective. In what follows, this paper considers: 1) the relevance of migration to

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1 Drew Fagan, "Martin, Fox Vow to Fight U.S. Border Crackdown" *The Globe and Mail* (12 January 2004) A1.

2 Drew Fagan, "Canada, U.S. Strike Arar Deal" *The Globe and Mail* (13 January 2004) A1.

3 United States, White House, "President Bush, President Fox Meet with Reporters in Mexico" (Remarks by President Bush and President Fox), online: The White House <http://www.whitehouse.gov/news/releases/2004/01/20040112-7.html>.

4 Paul Knox, "Fox is Not so Foxy Anymore" *The Globe and Mail* (21 January 2004) A19. For a discussion of the immigration discussions prior to September 11, see Sonya Ross, "Bush and Fox Set Tone for Warm Relationship" *The Globe and Mail* (17 February 2001) A21.

5 Adnan R. Khan, "Getting a Cold Shoulder: The Canadian Passport No Longer Carries the Weight it Once Did" *Maclean's* (22 March 2004) 38 at 39.

illuminating the interplay between security, international politics and domestic politics; 2) the North American regional level, and national borders; and, 3) a major orienting concept in contemporary political theory — citizenship — especially one particular right of citizenship, namely the right to enter and, once having entered, the right to remain in a country. I argue that post-September 11 there has been a distinctive racist internationalism that amplifies the exclusionary logic of regionalism in North America in new ways when it comes to the mobility of people, and that this has consequences for the practice of citizenship and citizenship rights.

II. THE (RE)CONSTITUTION OF SECURITY THREATS: INTERMESTIC CONSEQUENCES

To speak of "security" is to enter into a contested realm. As political analysts have pointed out, while security is critical to understanding international politics, it is an ambiguous concept because it is subjective and elastic, potentially encompassing both military and non-military dimensions.[6]

Indeed, the way state actors have defined security and threats to security has been subject to change in living memory. During the Cold War (roughly 1946-1991), security concerns were primarily focussed on the so-called "high politics" of military strength and nuclear deterrence. In the post-Cold War era dating from 1991, space was created for state actors to focus more squarely on other dimensions of security, including the environment, population growth and migration, as well as collective security and human security. In terms of the North American context, a focus on human security was especially evident when Canadian Lloyd Axworthy was minister of Foreign Affairs from 1996 until 2001. Since the horrific violence of 11 September 2001, American leaders, along with those of many other countries, have come to define security as the threat posed by terrorism. Thus, it is appropriate to consider "security" in flux taking on different tones during the Cold War, after the Cold War, and in the post-September 11 order. As such, the constitution of threats to security is also in flux.

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[6] See Barry Buzan, Ole Waever, & Japp de Wilde, *Security: A New Framework for Analysis* (Boulder, Colorado: Lynne Rienner, 1998) at 1-20 and Robert J. Art, "Security" in Joel Krieger, ed., *The Oxford Companion to Politics of the World* (Oxford: Oxford University Press, 2001) 757.

One way that the real consequences of these abstract debates over security are made evident is through consideration of people. Given the hegemonic position of the United States in the world today, the U.S.-led war on terrorism has clearly produced its own violent and destructive repercussions at an international level.[7] The human toll has been especially high in Afghanistan, in Israel/Palestine, and in Iraq. Additionally, a focus on migration can be especially illuminating for showing the way both international and national developments play into how people are affected by shifting definitions of security, and how specific people are variously constituted as threats to security. This is because international migration — the movement of peoples across national boundaries for purposes of settlement — simultaneously involves the foreign and the domestic.

Consider the manner in which the Cold War and the post- Cold War period have prompted very different responses to refugees by Western states. At the core of the international refugee regime is the 1951 *United Nations Convention Relating to the Status of Refugees*[8] which emerged from the context of the 40 million Europeans displaced after World War II, as well as the Cold War — where offering asylum to those fleeing Communist persecution bolstered the propaganda arsenal of the liberal-democratic West over the communist Soviets and others.[9] However, as refugee flows from countries of the South grew, and particularly once the Cold War ended, the response of Western states changed dramatically. As noted migration scholar Stephen Castles avers:

> The refugee regime of the rich countries of the North has been fundamentally transformed over the last twenty years. It has shifted from a system designed to welcome Cold War refugees from the East and to

[7] Yasmeen Abu-Laban, "Liberalism, Multiculturalism and the Problem of Essentialism" (2002) 6:4 Citizenship Studies 459 at 461.

[8] 28 July 1951, 189 U.N.T.S. 137 (entered into force 22 April 1954, in accordance with article 43), online: Office of the High Commisioner for Human Rights <http://www.unhchr.ch/html/menu3/bo_c_ref.htm> [*United Nations Convention*].

[9] Stephen Castles, "The International Politics of Forced Migration" in Leo Panitch & Colin Leys, eds., *Fighting Identities: Race, Religion and Etho-nationalism* (London: Merlin Press, 2002) 172 at 178.

> resettle them as permanent exiles in new homes, to a 'non-entrée regime', designed to exclude and control asylum seekers from the South.[10]

Consequently, the humanitarian and human rights norms underpinning the 1951 *United Nations Convention* (along with the 1967 Protocol Relating to the Status of Refugees) have been sidestepped through increasingly restrictive border and visa controls and use of concepts like "safe third country" and "non-persecuting state" by policy-makers across liberal democracies.[11]

As well, the ideological discourse of "left" and "right" which underpinned the Cold War could function in nationally specific ways to constitute certain people as security threats — a feature again illuminated by considering how ideological criteria emerged as a distinct form of exclusion in immigration, working alongside and frequently reinforcing long-standing exclusions based on "race" and "ethnicity." For instance, ideological criteria were directly used to bar certain immigrants in the case of the United States, and indirectly in the case of other countries like Canada.[12] Thus, while the United States overtly erected barriers to immigrants who might have communist sympathies through the 1952 *Immigration and Naturalization Act* (the McCarran-Walter Bill),[13] in Canada, the Royal Canadian Mounted Police along with senior bureaucrats established similar screening mechanisms to exclude immigrants and refugees on grounds of national security in a less open manner.[14] It has been argued that this came about because many Canadian

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10 *Ibid.* at 181.

11 Gudrun Hentges,"Refugee and Asylum Policy Influenced by Europeanisation" in The Evens Foundation, ed., *Europe's New Racism? Causes, Manifestations and Solutions* (New York: Berghahn Books, 2002) 105 at 118.

12 Of course, the roots of this ideological distinctions might be traced to the 1917 Bolshevik Revolution. As Reg Whitaker notes with respect to Canada, the 1917 Revolution along with the Winnipeg General Strike and sympathy strikes in other Canadian cities in 1918 led state officials to prevent the entry of entire groups (like Finns, Ukrainians and Russians) for their perceived communist views, as well as efforts to deport or prevent the naturalization of those immigrants in Canada deemed "dangerous." See Reg Whitaker, *Double Standard: The Secret History of Immigraton* (Toronto: Lester & Orpen Dennys, 1987) at 13-14.

13 *Imigration and Nationality (McCarran-Walter) Act*, Pub. L. No. 414, 66 Stat. 163 (1952).

14 Whitaker, *supra* note 12.

officials carried the same views as American officials, rather than direct pressure from American officials on Canada to preserve "the world's longest undefended border" by having similar immigration criteria.[15]

Just as exclusions created by the Cold War ideological criteria intersected in complex ways with "ethnic" and "racial" constructions, the discourse underpinning terrorism — especially in the post-September 11 order — plays into "ethnic," "racial," and "cultural" constructions of a distinct sort. Thus, despite the perspective of a critical analyst like Noam Chomsky, who has long insisted that the United States government is the leading proponent of terrorism for its use of violence for political ends,[16] the popular image of "a terrorist" is in fact someone who is dark, who is Muslim, who is Arab. In this way, the mainstreaming of both of the term and the calls to engage in "profiling" across liberal democracies to protect against terrorism in the post-September 11 period, is in reference to the practice of security and immigration officials differentially targeting those "seen" to be Arab, Middle Eastern, and/or Muslim.[17]

Also suggesting how "terrorism" is buttressed by distinct cultural referents, and is thus a racialized discourse, is the post-September 11 resurgence of "the clash of civilizations" argument. First articulated by Bernard Lewis in a gendered and polemical account of how the Muslim male, feeling he is losing control over the Muslim female, directs his rage at the millennial Judeo-Christian enemy,[18] the term was subsequently appropriated and extended by Samuel Huntington in 1993 to highlight the "fundamental source of conflict in [the] new world" with the collapse of communism.[19] Summed as "the West

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15 *Ibid.* at 21.

16 See Noam Chomsky, *Pirates and Emperors: International Terrorism in the Real World* (Montreal: Black Rose Books, 1987) and Noam Chomsky, *9-11* (New York: Seven Stories Press, 2001) at 84-89.

17 Sujit Choudhry, "Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s.15 of the *Charter*" in Ronald J. Daniels, Patrick Macklem & Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 367 at 367-368.

18 Edward W. Said, *Covering Islam: How the Media and the Experts Determine How We See the Rest of the World* (New York: Vintage Books, 1997) at xxxii.

19 Samuel P. Huntington, "The Clash of Civilizations?" (1993) 72:3 Foreign Affairs 22 at 22.

versus the rest," Huntington's thesis suggests that the "obstacles" to joining the West are greatest for "Muslim, Confucian, Hindu and Buddhist societies."[20] This is an essentialist vision, and thus problematic.[21] Notably, however, irrespective of one's view of Huntington's argument, in the post-September 11 order the "clash of civilizations" has once again come to signal the supposedly immutable differences between Islam and Christianity, and therefore between the so-called West and the so-called Muslim world, as in Bernard Lewis' initial articulation. The vast scholarship from contemporary liberal political philosophers, which draws on gendered and stereotyped purported "Islamic practices" to address whether Islam and liberal democracy are even compatible, further fuels the clash of civilizations perspective.[22]

Of course any thoughtful analysis of the countries and peoples and histories that make up either "the West" or "the Muslim World" would immediately suggest their complexity and heterogeneity.[23] Yet, when it comes to "the Muslim world," as Aziz Al-Azmeh observes, this complexity and heterogeneity is increasingly obscured both by "experts" trading in what Edward Said referred to as orientalism,[24] and by Bin Laden and his associates adopting "medievalizing coiffure and manners "in a misleading exhibitionistic claim to "authenticity."[25] Hence,

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20 *Ibid.* at 45.

21 Yasmeen Abu-Laban, "Humanizing the Oriental: Edward Said and Western Scholarly Discourse" in Naseer Aruri & Muhammad A. Shuraydi, eds., *Revising Culture, Reinventing Peace: The Influence of Edward W. Said* (New York: Interlink, 2001) 74.

22 For an overview and a critique, see Joseph H. Carens, *Culture, Citizenship and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford: Oxford University Press, 2000) at 140-160.

23 See Said, *supra* note 18.

24 This is a style of scholarship rooted in an ontological and epistemological distinction between societies of the East (the Orient) and the West (the Occident) which emerged in the formation of Europe and laid the basis for colonialism. See Edward W. Said, *Orientalism* (New York: Vintage Books, 1979).

25 Aziz Al-Azmeh, "Postmodern Obscurantism and "The Muslim Question"" in Leo Panitch & Colin Leys, eds., *Fighting Identities: Race, Religion and Ethonationalism* (London: Merlin Press, 2002) 28 at 37.

> [a] vast culture, and indeed a vast industry of misrecognition, has been put in place, all the more firmly since September 11, as much by advocates of Islamism as by western opinion, expert and inexpert, purporting to find, over and above the complex and multiple histories and present conditions of Muslim peoples, a homogeneous and timeless Islam, construed as a culture beyond society and history, a repository of 'meaning.' This, it is maintained, informs all significant thoughts and actions of real or putative Muslims at all times and places (any contrary evidence being treated as an anomaly).[26]

Nevertheless, the essentialism underlying the clash of civilizations perspective as applied to Islam does serve a purpose. It facilitates what French theorist Etienne Balibar calls a "racist "internationalism" or "supranationalism" which tends to idealize timeless or transhistorical communities."[27] A primary example of this for Balibar would be how "the West" is sometimes evoked — such a transhistorical and transcultural community is "at the same time both closed and open," so it "has no frontiers [except perhaps] the frontiers of an ideal humanity."[28] Any community is socially constructed, including a transnational community and, arguably, at the international level lines of belonging and unbelonging are being (re)constructed in very sharp ways. To paraphrase American President George Bush, you are either with us or with them — we are civilized and they are barbaric. To the extent that there are any nuances in these kinds of articulations, they are quickly lost because the discourse underpinning terrorism draws so heavily on essentialized "cultural" markers in the first place. Indeed, it is only through investigations and scholarship that actually recognizes complexity and heterogeneity in any "culture" or "community" from the outset, that such a racist internationalism can begin to be challenged.[29]

III. TERRORISM AS A SECURITY THREAT AND NORTH AMERICAN BORDERS

The distinct racist internationalism fostered in the post-September 11 order has implications for both the North American region and

[26] *Ibid.* at 30.

[27] Etienne Balibar, "Racism and Nationalism" in Etienne Balibar & Immanuel Wallerstein, eds., *Race, Nation, Class: Ambiguous Identities* (London: Verso, 1991) 37 at 61.

[28] *Ibid.* at 61.

[29] For a discussion, see Yasmeen Abu-Laban, *supra* note 7 at 467-468.

its national polities. A major one has been that since the September 11 attacks, political elites, and media and academic commentators have increasingly focussed on themes of border control and cross-border integration, with the U.S.- Canada border assuming a new importance.

To exemplify, in 2003, Canada's then Ambassador to the U.S. Michael Kergin flagged issues relating to the border and mobility as *the* top priority for Canada-U.S. relations, and especially the exemption of Canadian citizens and permanent residents from proposed U.S. legislation to take effect in 2005, which would require logging the arrival and departure of all persons entering the U.S. from Canada.[30]

As well, a spate of new books have appeared examining the issue of the border between Canada and the United States, such as James Laxer's *The Border: Canada, the U.S. and Dispatches from the 49th Parallel*.[31] Another recently released book is the volume edited by Peter Andreas and Thomas J. Biersteker, *The Rebordering of North America*,[32] which looks at Canada, the U.S., and Mexico. This in itself is fascinating because at the *fin de siècle*, there was much academic discussion about the collapse of borders, the borderless world, globalization, and even the end of the nation-state.[33] Now, in the early years of the twenty-first century, there is a growing body of work by international relations specialists, political scientists and other social scientists taking up borders.

The shift in focus may in part be attributed to how the future of the "world's longest undefended border" is at stake in the post-September 11 order. This is because Canada has been portrayed by American media and political elites as a "haven for terrorists" due

[30] William Walker, "U.S. Border Exemption Sought — Log-in, Log-out Law will Snarl Traffic" *The Toronto Star* (4 February 2003) A17; Steven Chase, "U.S. Border Plan is Unfair, Manley Says" *The Globe and Mail* (6 May 2003) A4.

[31] (Toronto: Doubleday Canada, 2003).

[32] (New York: Routledge, 2003).

[33] See *e.g.* Roger Burback & William I. Robinson, "The Fin de Siecle Debate: Globalization as Epochal Shift" (1999) 63:1 Science and Society 10.

to its immigration policy.[34] Indeed, feeding off what Stephen Clarkson calls a "panicky media" and "ignorant" pundits were such figures as former American ambassador to the United Nations Richard Holbrooke who called Canada a "Club Med for terrorists" and Senator Hilary Clinton who stated that that "the terrorists came to the U.S. through Canada."[35] Yet, this representation is misleading not only because none of the September 11 hijackers came through Canada, but also because of the roughly 18 percent of Canadians who are immigrants, there are very few instances of law-breaking amongst them.[36] The evidence, therefore, does not back the new portrayal of Canada's borders as presenting a risk to the United States. Nonetheless, there is good reason to take formal borders seriously in North America.

Borders are specific kinds of territorial spaces that are particularly prone to violence. In North America, through the 1990s, the border between Mexico and the United States featured a dramatic growth in the number of border police, surveillance equipment and fencing on the part of the United States. People crossing from Mexico into the United States risk being beaten at the border, raped at the border, and shot at the border.[37] Such practices by American border patrol agents have been thrown into sharper relief as the southern border became increasingly militarized as a result of both drug and immigration enforcement.[38] In 2002, an average of two people a day

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34 Christina Gabriel & Laura Macdonald, "Beyond the Continentalist/ Nationalist Divide: Politics in a North America "Without Borders"" in Wallace Clement & Leah F. Vosko, eds., *Changing Canada: Political Economy as Transformation* (Montreal and Kingston: McGill-Queen's University Press, 2003) 213 at 223-224.

35 Stephen Clarkson, *Lockstep in the Continental Ranks: Redrawing the American Perimeter After September 11th* (Ottawa: Canadian Centre for Policy Alternatives, 2002) at 12.

36 Yasmeen Abu-Laban & Christina Gabriel, "Security, Immigration and Post-September 11 Canada" in Janine Brodie & Linda Trimble, eds., *Reinventing Canada: Politics of the 21st Century* (Toronto: Prentice Hall, 2003) 290 at 291.

37 Diane Neumaier, "Judy Baca: Our People are the Internal Exiles" in Gloria Anzaldúa, ed., *Making Face, Making Soul: Creative and Critical Perspectives by Feminists of Color* (San Francisco: Aunt Lutte Books, 1990) 256 at 256.

38 On the risk of being shot, see Timothy J. Dunn, "Border Militarization via Drug and Immigration Enforcement: Human Rights Implications" (2001) 28:2 Social Justice 7. On the connection between rape and the militarization of the

died while attempting to cross the border from Mexico into the United States.[39] Thus, there are compelling reasons relating to human rights and human life that warrant taking borders seriously.

However, much of the media commentary coming out on borders in North America has a tendency implicitly, if not explicitly, to take borders literally, to reify borders therefore and to treat borders as natural. Consider such headlines as "A Perilous Border" from Canada's English-language, self-described national newspaper, *The Globe and Mail*,[40] or "Foreign-born Canadians find Trouble at U.S. Border" from the newspaper with the largest circulation, *The Toronto Star*.[41] Even academic work is not immune from this tendency. As Katharyne Mitchell notes, in much scholarly work dealing with transnationalism, "the spaces and borders of the state are taken as fixed, as containing *or* breaching the boundaries of the nation-state and a particular spatial territory."[42] It is easy to do this because the Westphalian ideal of the sovereign state with clear lines of authority, clear territorial space, and a homogeneous population still looms large in our popular imagery. As Daniel Segal avers, it comes out in day-to-day reference materials that are used, like an atlas, that "implicitly proclaims the epistemological adequacy — that is, 'correctness' of treating the world of humanity as a world of nations . . . When school children are shown the *Atlas* . . . they are shown a world in which alternative social forms have been placed under erasure."[43] As Salter also observes, the combination of assigning and policing nationality and maintaining physical borders

border, see Sylvanna Falcón, "Rape as a Weapon of War: Advancing Human Rights for Women at the U.S.-Mexico Border" (2001) 28:2 Social Justice 31.

39 See Peter Andreas, "A Tale of Two Borders: The U.S.-Canada and U.S.-Mexico Lines After 9-11" in Peter Andreas & Thomas J. Biersteker, eds., *The Rebordering of North America* (New York: Routledge, 2003) 1 at 5.

40 (31 October 2002) A20.

41 Peter Small & Christian Cotroneo, "We Don't Welcome You Anymore: Foreign-Born Canadians Find Trouble at U.S. Border" *The Toronto Star* (7 November 2002) A3.

42 "Transnational Discourse: Bringing Geography Back In" (1997) 29:2 Antipode 101 at 102-103.

43 "Nationalism, Comparatively Speaking" (1988) 1:3 J. of Historical Sociology 301 at 303.

helps to condition not only the bureaucratic rationale but also popular acceptance for controlling populations.[44]

Nonetheless, the controlling of populations does not simply take place via physical borders — especially in this era of globalization where potential migratory flows are "managed" through consulates abroad enacting visa restrictions, or personnel in airports throughout the world checking documentation before passengers board a direct flight. Much screening therefore takes place long before people may even arrive in the geographic space of a state as symbolized by "lines on a map." State borders are not natural either — the mapped image of the state stems from the emergence of modern cartography as a field in the sixteenth century,[45] and of course the Westphalian state is a historically specific form of organization. Not least, we know the boundaries of states can change, even if there are powerful forces today propelling the continued legitimacy of existing interstate boundaries.[46] Indeed at one point Texas, New Mexico, Arizona, Colorado, California and Nevada were Mexican territory. A recent poll in Mexico found that 58 percent of Mexicans agreed with the statement that "the territory of the United States' Southwest belongs to Mexico," and 57 percent agreed that "Mexicans should have the right to enter the United States without permission." In contrast, a recent poll in the United States found 68 percent of Americans agreed with the statement that "[t]he US should deploy military troops on the border as a temporary measure to help the U.S. Border Patrol curb illegal immigration."[47] Part of the difference in responses may well be attributed to the historicity of borders, the different narratives that may develop as a result of this, and thus different "national" communities.

As well as animating lines of inclusion/exclusion in "national" communities, the policing of nationality and the maintenance of physical borders also shapes lines of inclusion/exclusion in

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44 Mark B. Salter, *Rights of Passage: The Passport in International Relations* (Boulder: Lynne Reiner Publishers, 2003) at 123.

45 Michael Biggs, "Putting the State on the Map: Cartography, Territory, and European State Formation" (1999) 41:2 Comparative Studies in Society and History 374.

46 Salter, *supra* note 44 at 122.

47 Glynn Custred, "North American Borders: Why they Matter" (Centre for Immigration Studies, May 2003) at 8.

"regional" communities. Returning to consider some of the issues that emerged at the 2004 Summit of the Americas is useful because the banding together of leaders from Canada and Mexico to push for an open American border (and greater security cooperation) reflects on the real uncertainty of where these lines of inclusion/exclusion are to be drawn, especially in the post-September 11 order. This might be posed as the question of whether the budding regionalism contained in the NAFTA project is leading to a "Fortress America" or a "Fortress North America." "Fortress America" has been defined as the unilateral fortification of U.S. border controls; "Fortress North America" suggests that the NAFTA countries, or at least Canada and the United States, will have a "Europeanization" of border controls akin to the Schengen arrangement amongst most European Union countries.[48] The Schengen arrangement has allowed for the removal of internal checkpoints (in relation to most European Union citizens) and the fortification of external borders. While done in the name of the "free movement of people," there is nonetheless ample evidence to suggest that racialized EU citizens face obstacles to crossing borders in the "New Europe," and that it is professional multilingual males who are most likely to actually make use of the "right" to move.[49] As such, the fact that most European citizens do not move has emerged as a problem for European policy-makers.[50] For migration and human rights specialists, Fortress Europe has for many years been used to signal the difficulty non-EU citizens increasingly have had in entering Europe (especially asylum seekers and nationals from many third world countries).[51] Clearly, boundaries of inclusion and exclusion might also emerge in distinct ways in a Fortress America versus a Fortress North America.

The Fortress North America vision is contained in large part in the idea of a "North American security perimeter," which appeared more forcefully on the agenda for public and policy discussion as a

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48 Andreas, *supra* note 39 at 14-15.

49 Elizabeth Meehan, *Citizenship and the European Union* (London: Sage, 1993) at 141-142 and John Salt & Reuben Ford, "Skilled International Migration in Europe: The Shape of Things to Come?" in Russell King, ed., *Mass Migration in Europe* (London: Belhaven Press, 1993) 293 at 297.

50 Organization for Economic Cooperation and Development, *Trends in International Migration: SOPEMI 2002* (Paris: OECD, 2003) at 36.

51 See Jacqueline Bhabha, "Belonging in Europe: Citizenship and Post-National Rights" (1999) 51:159 International Social Science J. 11.

result of the immediate aftermath of September 11.[52] The virtual closure of the U.S. border after September 11 carried significant economic costs, particularly for Canada and Mexico. Between 1993 when NAFTA was signed, and 2000, trade between Canada and the United States more than doubled, and tripled between Mexico and the United States (it has also grown, though much less spectacularly, between Canada and Mexico).[53] Recent figures suggest that 87 percent of Canada's trade and 90 percent of Mexico's trade is with the United States.[54] That only 25 percent of American exports go to Canada and 15 percent to Mexico, suggest an asymmetry, although given the size of the American economy this is still significant.[55] In this way, the virtual closure of the American border after September 11 was in essence analogous to the U.S. imposing "a blockade on its own economy"[56] and carried significant economic consequences for all three countries. Indeed, major business interests in all three countries have been applying pressure to ensure that security in the post-September 11 era does not trump trade flows.[57] This helps to account for the growing salience of the idea of a "North American security perimeter."

Yet there remains considerable ambiguity about whether and where Mexico fits in these discussions.[58] To understand this ambiguity better, and the manner in which North American regionalism is unfolding now when it comes to issues relating to migration, it is helpful to recall history. In particular, the debates surrounding the 1993 NAFTA agreement and the final text underline how the mobility of people — especially Mexican nationals — was subject

[52] In particular, there was a greater emphasis on "security" in the perimeter discussions following September 11. See Abu-Laban & Gabriel, *supra* note 36.

[53] Gary Clyde Hufbauer & Gustavo Vega-Cánovas, "Whither NAFTA: A Common Frontier" in Peter Andreas &Thomas J. Biersteker, eds., *supra* note 39, 128 at 130.

[54] Andreas, *supra* note 39 at 12.

[55] *Ibid*.

[56] Stephen E. Flynn, "The False Conundrum: Continental Integration versus Homeland Security" in Peter Andreas & Thomas J. Biersteker, eds., *supra* note 39, 110 at 117.

[57] Thomas J. Biersteker, "The Rebordering of North America? Implications for Conceptualizing Borders After September 11" in Peter Andreas & Thomas J. Biersteker, eds., *ibid*., 153 at 155.

[58] Gabriel & Macdonald, *supra* note 34 at 224.

to an exclusionary logic with the rights associated with citizenship to remain primarily nationally circumscribed. Attention to this, as well as post-World War II history, suggests that a "Fortress North America" that actually includes Mexico is a highly unlikely outcome in the foreseeable future.

IV. FORTRESS (NORTH) AMERICA: CITIZENS AND CITIZENSHIP RIGHTS

Stephen Castles and Alistair Davidson have recently observed that as a result of international migration, regionalism (particularly with the EU) and globalization, a new version of citizenship, which transcends the single state, is developing. However, they also maintain that "[m]ost societies and polities have still not got beyond the citizenship of the nation-state," which they expect to remain a "dominant form into the twenty-first century."[59] One major right associated with citizenship of the modern state is the right to enter legally, and once having entered, to stay legally in a country. I will call this licitness for short.

The relevance of national citizenship and the rights associated with it have across many advanced capitalist polities, taken on renewed meaning in the context of economic decline since the early 1970s, growing immigration and refugee pressures from Third World countries, and increased attention to policing borders. This is because immigration and ethnic and racial diversity have, in variable ways, turned into important political, electoral and policy issues across countries of the industrialized West.[60] Thus, if one feature common to Western industrialized countries in the two and a half decades following World War II was the widespread use of immigration to meet labour market needs, the negative and dehumanized images of immigrants are reflective of the way immigration has turned into a politicized "problem" across these same countries by the 1980s. However, while all kinds of people may move across national boundaries, and take a variety of positions in the labour market, only some are targeted in national discourses

[59] Stephen Castles & Alastair Davidson, *Citizenship and Migration: Globalization and the Politics of Belonging* (New York: Routledge, 2000) at 156.

[60] Yasmeen Abu-Laban & Daiva Stasiulis, "Ethnic Pluralism Under Siege: Popular and Partisan Opposition to Multiculturalism" (1992) 18:4 Canadian Public Policy 365 at 380.

as "immigrants" — typically those from Third World origins holding marginalized positions in the economy.[61]

At the same time that immigration has been "problematized" over the last twenty years, advanced capitalist countries have also witnessed the deepening of processes of globalization and regionalism. While globalization is not necessarily new, contemporary globalization processes dating roughly from 1945, suggest that there has been a quantitative intensification of economic, technological and cultural flows, and qualitative differences in the organization and reproduction of these flows compared to earlier epochs.[62] Global cultural flows include the movement of ideas, images and peoples — tourists, immigrants, refugees, workers, exiles, and so on — across national boundaries.[63] The regional spaces forged in NAFTA and in the European Union appear to be a corollary to contemporary globalization. In fact, while the simultaneous presence of globalization and regionalism are seemingly opposed,[64] the tendency for transnational corporations to concentrate trade and investment activities in three continents (North America, Europe and East Asia) has led some to argue that globalization processes take place through regionalism.[65] This seems

[61] Robert Miles, "Migration, Racism and the Nation-State in Contemporary Europe" in Vic Satzewich, ed., *Deconstructing a Nation: Immigration, Multiculturalism and Racism in '90s Canada* (Halifax: Fernwood, 1992) 21 at 29-30.

[62] David Held *et al.*, *Global Transformations: Politics, Economics and Culture* (Stanford: Stanford University Press, 1999) at 425.

[63] Arjun Appadurai, "Disjuncture and Difference in the Global Cultural Economy" in Mike Featherstone, ed., *Global Culture: Nationalism, Globalization and Modernity* (London: Sage, 1990) 295.

[64] Grinspun and Cameron note that despite globalization, there is a "crisis of multilateralism" heightened by the potential development and tension between a united Europe, and a North American and an Asian mercantilist bloc. See Ricardo Grinspun & Maxwell A. Cameron, "The Political Economy of North American Integration: Diverse Perspectives, Converging Criticisms" in Ricardo Grinspun & Maxwell A. Cameron, eds., *The Political Economy of North American Free Trade* (Montreal and Kingston: McGill-Queen's University Press, 1993) 3 at 17.

[65] Henk Overbeek, "Towards a New International Migration Regime: Globalization, Migration and the Internationalization of the State" in Robert Miles & Dietrich Thränhardt, eds., *Migration and European Integration: The Dynamics of Inclusion and Exclusion* (London: Pinter, 1995) 15 at 22.

to be so even when greater regional integration was pursued by political leaders in the absence of explicit consideration of globalization (as George Ross argues was the case for Europe through the 1980s and 1990s).[66]

Just as the presence of globalization and regionalism appears contradictory, the way that regionalism is unfolding in the context of Europe as opposed to North America appears to present a very different model, not least because only in Europe is there an express emphasis placed on the "free movement of people," as opposed to simply goods, services and capital. In this way, both the processes of regionalism and globalization also create a paradox in so far as they propel consideration of some, if not greater, mobility of people at the very moment when there has been increasing emphasis on controlling immigration in Western polities.

The problematization of immigration and immigrants in contemporary advanced capitalist polities is key to understanding the inherent tendency that *both* North American and European arrangements share in limiting the entry and residence of peoples from peripheralized states. In this sense, regionalism has, in both contexts, worked to facilitate the licitness of some but not others in very similar ways. But the 1992 NAFTA arrangement is distinctly neoliberal, and the U.S. distinctly hegemonic. There is no foreseeable regional political union in the North American arrangement, nothing analogous to EU citizenship developing in North America, and nothing like the social dimension found in Europe.

NAFTA flowed — both in inspiration and in form — from the 1989 Free Trade Agreement (FTA) between Canada and the United States. Neither the FTA nor NAFTA were premised on removing barriers to the movement of people, and provisions carried over from the FTA to NAFTA simply allow for the expedited temporary entry of business people and professionals. Clearly, to the extent that NAFTA allows for the very limited movement of people via this temporary entry provision, it is worth noting that it is a "right" that has an overt class (or socioeconomic) bias inherent in it, as it may be

[66] George Ross, "European Integration and Globalization" in Roland Axtmann, ed., *Globalization and Europe: Theoretical and Empirical Investigations* (London: Pinter, 1998) 164 at 179.

granted only to those designated as "business persons," or "professionals." This class bias also serves to discriminate against those groups in all three countries less likely to have the opportunities to achieve the necessary educational or economic status required, such as women, and some — especially female — ethnic minorities. Thus, along with having to hold the formal citizenship of one of the three signatory countries to qualify for temporary entry, it is also limited by lines that exclude groups from equality when citizens, such as class, gender, race, or ethnicity.

In addition, there is a further discernible national bias when considering that historically, the nature of migratory flows — especially short-term ones — between the U.S. and Canada are very different than those from Mexico to the United States.[67] The latter has tended to be primarily unskilled workers, whereas U.S. and Canadian flows have tended to be primarily skilled workers, professionals and managers.[68] In this sense, it is worth recounting that the defining role played by the United States post-NAFTA also predates the implementation of the agreement. Thus elite debates in the United States at the time of the negotiation of NAFTA are important to consider. As these show, the liberal market-driven discourse of the NAFTA was paralleled by a discourse on "illegal" immigration control through trade.

In the United States, NAFTA was much more visibly controversial and contested than the FTA had been. Indeed, whereas in the case of the U.S.-Canada FTA "the immigration aspects of the free-trade pact went almost unnoticed by politicians and commentators,"[69] in the NAFTA discussion in the United States the question of immigration from Mexico was much more overtly discussed. One important line of argument centred on the idea that NAFTA, with its focus on trade, would be a solution to illegal immigration. Thus, while not the only point of the NAFTA debate,

[67] Canada-Mexico flows are relatively insubstantial.

[68] Dolores Acevedo & Thomas J. Espenshade, "Implications of a North American Free Trade Agreement for Mexican Migration into the United States" (1992) 18:4 Population and Development Rev. 729 at 740-741.

[69] Joel Guberman, as quoted in Fred Langan, "Canadians Get Easier Entry to US" *The Christian Science Monitor* (12 June 1991) 7.

immigration did emerge as a justification for the Agreement for public relations purposes in the course of the discussions.[70]

The roots of this trade-immigration argument can be found in the recommendations of a U.S. bi-partisan commission known as the Commission for the Study of International Migration and Cooperative Economic Development (CSIMCED) which was created as part of the provisions of the 1986 *Immigration Reform and Control Act*.[71] *IRCA* itself was the congressional outcome of the politicization of illegal immigration as a problem. Specifically, *IRCA* mandated that "the commission, in consultation with the governments of Mexico and other sending countries in the Western Hemisphere" should set about to "examine the conditions in Mexico and such other sending countries which contribute to unauthorized migration to the United States" and also explore "mutually beneficial, reciprocal trade and investment programs to alleviate such conditions."[72] Although *IRCA* presented draconian enforcement provisions by way of employer sanctions and enhanced southern border controls, the creation of the CSIMCED through this same legislation is seen to be "the first time [that] Congress acknowledged that the United States might have to consider the immigration issue in nonenforcement terms."[73]

After three years of study, the CSIMCED argued in its final report that "[t]he Commission is convinced that expanded trade between the sending countries and the United States is the single most important long-term remedy to the problem it was mandated to study."[74] Free trade was posited as the major remedy for development — and hence in the long-term, a remedy for unauthorized or illegal migration from Mexico and countries of the

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70 See also Sidney Weintraub & Georges A. Fauriol, "Migration and Economic Intervention" in Kimberly A. Hamilton, ed., *Migration and the New Europe* (Washington: The Center for Strategic and International Studies, 1994) 72 at 79.

71 *Immigration Reform and Control Act*, Pub. L. No. 99-603, 8 U.S.C. (1986) [*IRCA*].

72 United States, Commission for the Study of International Migration and Cooperative Economic Development, *Unauthorized Migration: An Economic Development Response* (Executive Summary) (Washington: U.S. Government Printing Office, July 1990), mandate [*Unauthorized Migration]*.

73 Acevedo & Espenshade, *supra* note 68 at 731.

74 *Unauthorized Migration*, *supra* note 72 at 4.

Caribbean Basin.[75] Thus the CSIMCED recommended that "[t]he United States should expedite the development of a U.S.-Mexico free trade area and encourage its incorporation with Canada into a North American free trade area."[76]

The linking of free trade to reduced (Mexican) immigration was an idea animating other circles as well. In 1989, the U.S. House of Representatives Committee on Ways and Means requested that the U.S. International Trade Commission conduct a two-part study providing a review of Mexico's recent trade and investment reforms,[77] as well as a summary of experts' views on the future of U.S.-Mexico trade relations. The "experts" included a wide array of "U.S. and foreign trade negotiators and other government officials, U.S. and foreign private sector representatives active in business or trade between the United States and Mexico, academics . . . and executives of industry associations, labor unions and other non-governmental organizations."[78] In the summary of experts' views released in 1990, the reduction of Mexican immigration is listed under a lengthy section of "advantages for the United States" of free trade with Mexico.[79]

The American media interestingly also picked up on the idea that a U.S.-Mexican Free Trade Agreement "could accomplish what the 1986 overhaul of the immigration law could not: slow the flow of

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[75] This is measured in the long-term given that, as the CSIMCED argued, "the major paradox" is that "the development process itself tends to stimulate migration in the short to medium term by raising expectations and enhancing people's ability to migrate" *(ibid*. at 41).

[76] *Ibid*.

[77] Under both President Miguel de la Madrid (1982-1988) and President Carlos Salinas (1988-1994) there was an ideological commitment to market-oriented economic reforms. "Structural adjustment" measures were begun in 1985 with trade openings, and in 1988 by a major reduction in tariffs. By the 1990s, sales of public telephones, airlines, and banks occurred in the name of privatization.

[78] United States International Trade Commission, *Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States - Mexico Relations* (Investigation No. 332-282, Phase II: Summary of Views of Prospects for Future United States - Mexico Relations) (Washington, October 1990) at iii [*Review of Trade and Investment Liberalization Measures*].

[79] *Ibid*. at 1-16.

illegal aliens into the United States."[80] And during the course of the NAFTA debate "authorities on both sides of the Rio Grande" presented the proposed pact as a solution to illegal immigration.[81] Former President Salinas of Mexico for instance argued early on — in a phrase that was often repeated by both American politicians and journalists — that "we want to export goods from Mexico, not people."[82] Later, Salinas stressed that migration and NAFTA were linked in so far as NAFTA would reduce emigration from Mexico into the United States although "[i]t will not eliminate migration because the U.S. economy will still exert a demand, but certainly Mexicans prefer to work in their own communities."[83]

While the Bush administration (1988-1992) negotiated NAFTA partially in the hope that it might be "a free market solution to the problem of illegal immigration from Mexico,"[84] and pro-NAFTA elites in both the U.S. and Mexico made use of the trade to reduce immigration argument, the absence of any provisions concerning labour mobility was a theme that clearly divided U.S. and Mexican pro-NAFTA elites. The results of the experts' views of the future of U.S.-Mexico trade relations summarized by the U.S. International Trade Commission are instructive as to the position of American elites:

> One of the most contentious non-trade issues suggested by participants for inclusion in a United-States - Mexican FTA is the free movement of workers across borders. A majority of Mexican participants expressed the view that, because massive illegal immigration from Mexico to the United States has been a major source of bilateral friction, it would be "hypocritical" not to address labor mobility issues in an FTA . . .
>
> The majority of U.S. participants stated emphatically that the free movement of labor should not be part of an FTA. Most termed the issue "explosive," as typified by one high-level U.S. Government official who

[80] Richard W. Stevenson, "Selling a Free-Trade Pact with Mexico" *The New York Times* (11 November 1990) 12.

[81] Dianna Solis, "Illegal Immigration by Mexicans, Despite Reform of Laws, Nears '86 Record Level" *The Wall Street Journal* (3 June 1991) A8.

[82] Mike Hailey, "Salinas Says Pact Would Boost U.S. Jobs" *The Houston Post* (13 April 1991) A21.

[83] Cited in Gregory Katz, "Migrant Worker Pact Urged: Salinas wants Accord Apart from Free Trade" *The Dallas Morning News* (10 March 1993) 1A.

[84] Carl. T. Hall, "Free Trade Pact Won't Be a Panacea" *San Francisco Chronicle* (8 July 1991) B1.

> said that "nothing could derail the negotiations faster than the Mexicans insisting that their workers be permitted free access to work in the United States." Others commented that labor mobility might be appropriate if the two countries were forming a common market, but not an FTA.[85]

But if the U.S. ended up keeping labour mobility off the negotiating table, and emphasizing immigration control, this was not without regret in some quarters. Then President Salinas of Mexico noted, for instance, that while not pushing for an "open border," he nonetheless initially wanted immigration to be part of the negotiations but was persuaded by U.S. officials to not pursue it.[86]

Given this history, it is not surprising that after NAFTA passed, and well before 11 September 2001, immigration control continued to characterize American-Mexican relations. Thus, despite the February 2001 pledge between American President George W. Bush and Fox to improve their immigration relationship, in part by reducing illegal immigration by further expanding trade across the U.S.-Mexico border,[87] in May 2001, U.S. Attorney General John Ashcroft spoke of the desirability of further increasing the number of officers and equipment along the U.S.-Mexico border.[88] This was in keeping with developments since 1993, when NAFTA was signed, as the build-up of American border police and equipment along the southern border doubled by the end of the 1990s.[89] Mexico's southern border was also increasingly militarized in the 1990s, in an effort to deport Central Americans crossing illegally into Mexico who were deemed a "security problem" by state officials.[90] In addition to the similarity of discourse between this view of Mexico's southern frontier and America's southern frontier, there are also issues relating to human rights abuses. Since both borders are sites in which human security concerns are rampant, and the right to move is not. Once again the relevance of national citizenship for licit entry is underscored.

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85 *Review of Trade and Investment Liberalization Measures*, *supra* note 75 at 1-9.

86 Cited in Katz, *supra* note 83.

87 Ross, *supra* note 4.

88 Giovanna Dell'orto, "Attorney General Wraps up Border Tour" *Associated Press Newswires* (7 May 2001).

89 Peter Andreas, "The Escalation of U.S. Immigration Control in the Post-NAFTA Era" (1998-99) 113:4 Political Science Quarterly 591 at 594-598.

90 Custred, *supra* note 47 at 6-7.

In marked contrast, immigration control was not a major theme in the Canada-U.S. relationship prior to September 11. Moreover, beginning in 1997, both countries attempted to work more closely with each other in facilitating goods, and American and Canadian citizens, moving between the U.S.-Canada border by having agents in both countries work together with American satellite information to deter potential refugee claimants and other non-American and non-Canadian migrants flowing across the border.[91] Such developments led American immigration experts to even speculate that the U.S.-Canada border will gradually disappear,[92] and former Canadian Prime Minister Brian Mulroney even called for the removal of border posts and guards which inhibit the movement of goods, services and people between the United States and Canada.[93] More to the point, prior to September 11 it was never a serious political issue that there might be "illegal" Canadians entering the United States, even though this group was estimated by the U.S. Immigration and Naturalization Service to be the fourth largest group of illegal immigrants in the United States in the 1990s.[94] In fact, it is notable that to the extent that "illegal immigration" from Canada was an issue for American officials, it centered around refugee claimants (especially from China) and the purported "Mexican illegals who fly to Canada and then walk back across the relatively unguarded Canadian border."[95]

Given the exclusionary logic of the NAFTA arrangement when it comes to the movement of peoples from peripheralized states like Mexico, the possibilities of a "Fortress North America" that includes Mexico seem remote. What has happened in the post-September 11 period are a "series of incremental, piecemeal initiatives, involving a mixture of enhanced cross-border security coordination and collaboration, partial and uneven policy convergence, and. . . new inspection methods."[96] This is captured in the policy lexicon of so-

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91 John Nicol, "Hands Across the Border" *Maclean's* (31 July 2000) 16.

92 *Ibid*. at 17, citing Demetrios Papademetriou.

93 Campbell Clark, "Get Rid of Border Posts, says Mulroney" *The Globe and Mail* (6 September 2000) A1.

94 Lisa Granatstein, "America's Invisible Snowbacks" *The Globe and Mail* (12 August 1995) D1.

95 Tom Fennell *et al*., "Canada's Open Door" *Maclean's* (23 August 1999)12 at 14.

96 Andreas, *supra* note 39 at 15.

called "smart borders." According to Commissioner Robert C. Bonner of the Customs and Border Protection agency of the new Department of Homeland Security, in contrast to trying to "search, inspect and question everyone and everything that presents itself at the border," a smart border requires "adding personnel, detection equipment and getting advance information in automated form to risk manage who you question and what you inspect."[97]

Since September 11, moves towards "smart borders" have been underway, although these arrangements have taken bilateral, rather than trilateral forms, and have been more extensive between Canada and the United States than between Mexico and the United States. This suggests that if a "Fortress North America" is emerging, it is between the United States and Canada. Smart border agreements were signed between Canada and the United States in December 2001 and between Mexico and the United States in March 2002. The "U.S.-Canada Smart Border Declaration" is a thirty point plan to review and possibly change everything from refugee determination processes to visa policies, as well as share passenger information and immigration databases, and develop common border policing teams.[98] The "U.S.-Mexico Border Partnership Agreement" is a twenty-two point agreement that focuses on fostering bilateral cooperation to enhance the "secure flow of people, goods and infrastructure."[99] Movement on the Mexico-U.S. agreement has been much slower than Canada, in part because Mexico does not have the same budget and resources for such initiatives as does Canada (in fact, 25 million was given by the State Department in 2002 to aid Mexico in implementing the agreement).[100] In short then, the trade arrangements in North America that unfolded in the 1990s were animated by lines of exclusion and inclusion related to national immigration debates in the United States, and particularly the "problem" of Mexican immigration. To the extent that regional

[97] "Remarks of Commissioner Robert C. Bonner, Customs and Broder Protection" Keynote Address at the Conference on "Safety and Security in North American Trade," Center for Strategic and International Studies (16 July 2003) at 4-5.

[98] Abu-Laban & Gabriel, *supra* note 36 at 300.

[99] Deborah Waller Meyers, "Does "Smarter' Lead to Safer? An Assessment of the Border Accords with Canada and Mexico" (2003) 2 Migration Policy Institute Insight 1 at 9.

[100] *Ibid*.

arrangements draw on national immigration debates, they are also intimately connected to issues of citizenship, race, ethnicity, and national belonging. Since September 11, the creation of a new Department of Homeland Security in the United States and the smart border moves signify how issues relating to human security at borders of NAFTA countries are low on the agenda compared to the security concerns shaped by the war on terrorism. North America has become, at best, the site of two sets of bilateral relations (U.S.-Canada and U.S.-Mexico) rather than trilateralism.[101]

Additionally, post- September 11 also serves as a reminder of how one's citizenship may be irrelevant in light of one's perceived ethnicity, religion, or country of birth. This may be linked to the racist internationalism spawned by the war on terrorism, which is serving to amplify in new ways the exclusionary logic of regionalism in North America when it comes to the movement of people. For example, following the September 11 attacks, the Mexican government detained and questioned hundreds of people of Middle-Eastern origin, restricted the entry of citizens from a number of Central Asian and Middle Eastern countries, and provided U.S. authorities with intelligence information on possible suspects based in Mexico.[102] Recently passed anti-terrorist legislation in Canada[103] and the *USA Patriot Act*[104] carry considerable implications not only for migrants, but for citizens from specific minority groups, and there is evidence of profiling in both countries.[105]

The stories covered in the Canadian media about the mistreatment of Canadian citizens in the U.S. are rampant, with the most graphic

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[101] In October 2004, the Canadian and Mexican governments announced a new "Canada-Mexico Partnership" to improve relations between the two countries. To this end, a bi-national working group of government and private sector representatives is scheduled to develop an action plan for June 2005. It remains to be seen whether such an initiative will alter the basic U.S.-Canada/U.S.-Mexico dynamic of relations within North America.

[102] Andreas, *supra* note 39 at 12.

[103] *Anti-terrorism Act*, S.C. 2001, c.41.

[104] *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001) [*USA Patriot Act*].

[105] For a discussion of the case of the United States, see David Cole, "Their Liberties, Our Security: Democracy and Double Standards" (2002-2003) 27(6) Boston Rev. 1. For the case of Canada, see Abu-Laban, *supra* note 7.

being the story of Maher Arar, a Canadian citizen born in Syria who immigrated to Canada at age seventeen. Returning from a family vacation in Tunisia via New York, Mr. Arar was subjected to a lengthy interrogation at New York's Kennedy Airport. He was accused by the U.S. Immigration and Naturalization Service officials of being a member of al-Qaida, and then deported to Jordan and ultimately Syria.[106] This accusation has never been proven, nonetheless Arar languished for close to a year in a prison in Syria — a country known for its human rights abuses — before being returned to Canada. Irrespective of the legality of deporting a naturalized Canadian citizen to his country of his origin, there was at the very least a choice; in the words of one American official, "citizenship is in the eye of the beholder."[107]

The fallout from the Arar case has many raised questions concerning the role of the Canadian state — particularly the RCMP — along with the United States. The kinds of concerns this case has raised for many minorities and naturalized citizens in Canada are unlikely to be alleviated by the 2004 Summit of the Americas pledge of President George Bush to "inform" the Canadian government if a Canadian national is being held in the U.S. on security grounds.

V. CONCLUSION

It is evident that the NAFTA framework, with its emphasis on "free trade," is a distinct project from the European Union's emphasis on granting mobility and other rights to nationals of signatory countries, and the broader historically rooted goal of some kind of political union. Thus, not surprisingly, the movement of peoples is unfolding in different ways in each region. However, in both cases, individual states still have a lot of power in determining who is granted citizenship and the rights associated with citizenship, and controls over state boundaries continue to etch out the lines upon which some groups are granted privilege and other groups are excluded from privilege.

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[106] Estanislao Oziewicz, "Ottawa Man Feared Being Sent to Prison" *The Globe and Mail* (October 15 2002) A5.

[107] "The Alarming Case of Maher Arar" *The Globe and Mail* (19 October 2002) A24.

In the case of NAFTA, there is an overt class bias to its temporary entry provisions. For American elites, the question of immigration control, particularly as it pertains to countries (and the nationals of countries) on the periphery of the global economy, was clearly central. In this way, national immigration debates characterized by the "problem" of immigration are connected to developments and perceptions about the question of free movement in regional blocs. In the U.S., the focus on Mexicans and the discourse on the "illegal problem" that has characterized debates since the 1980s, fuels the manner in which both the NAFTA and post-NAFTA climates have developed, showing the inter-connection between domestic and regional developments.

In the final analysis, a full-blown "free movement of people" would likely serve to challenge the existing inequitable distribution of global resources and wealth. Indeed, the perception (or hope) of some American elites that Third World immigration will lessen with trade, poignantly underscores the extent to which there is implicit recognition that immigration is a feature of an inequitable world system, in which Western states have been advantaged. In consequence, the North American regional arrangements regarding the licit flow of people may also be read as attempts to protect the uneven distribution of wealth globally. This suggests why citizenship connected to the territorial nation-state and tied to licitness will likely remain central in the twenty-first century, just as it was in the twentieth century, despite contemporary globalization and regional processes.

If NAFTA underscored the importance of citizenship in being able to cross borders, the post-September 11 order is now underscoring the limitations of citizenship in the face of the racialized security threat of terrorism. For all citizens of North American countries, the early years of the twenty-first century do not suggest that borders have ceased to be relevant. On the contrary, borders are assuming a new importance in the context of a revitalized essentialist discourse that posits immutable differences between peoples of the West and of the East, between Islam and Christianity. It is through nuanced, multidisciplinary scholarship about the West and its varied peoples, and nuanced and multidisciplinary scholarship about the "rest" and its varied peoples, that a racist internationalism can be challenged. Challenging a racist internationalism can revive

not only the meaning of already existing national citizenships in multicultural countries like Canada, but also lay the basis for taking human rights and human security seriously in North America and beyond. This is a big part of what lies behind that notion, however elusive, of a global citizenship.

THE CONSTITUTION OF AFRICA AS A SECURITY THREAT

Malinda S. Smith*

In the post-September 11 world, Africa is often characterized as a global security threat; a continent that is unsafe, dangerous, and emblematic of environmental, biological, and terrorist threats to the rest of the world. This article explores and discusses the reasoning behind this western view of Africa and how it is overdetermined by various discourses. The author argues that the western view of Africa produces a tainted view of the continent and fails to be representative of historical and political economy explanations for Africa's current state of affairs. This argument is developed through a discussion of the portrayal of Africa as a security threat in mass media, through environmental and biological, including neo-Malthusian, analyses, and lastly, in commentaries on the "new wars" and the "war on terrorism."

Depuis le 11 septembre, l'Afrique est souvent caractérisée comme présentant une menace pour la sécurité mondiale, et comme un continent qui n'est pas sûr, mais dangereux et emblématique de menaces environnementales, biologiques et terroristes pour le reste du monde. Cet article explore le raisonnement derrière cette opinion occidentale de l'Afrique et discute de quelle manière divers discours la surdétermine. L'auteur fait valoir que l'opinion occidentale de l'Afrique donne une image contaminée du continent et n'est pas représentative des explications historiques et politico-économiques de la situation actuelle en Afrique. Cet argument est développé dans une discussion sur la représentation de l'Afrique en tant que menace pour la sécurité dans les communications de masse, dans des analyses environnementales et biologiques, incluant des analyses néomaltusiennes, et enfin dans les commentaires sur les « nouvelles guerres » et la « guerre contre le terrorisme ».

I. INTRODUCTION

Africa has been "overdetermined" by discourses that depict it, writ large, as a global security problem, and these dominant discourses too often crowd out more temperate competing narratives. In the social sciences, there have been various sophisticated meditations on the concept of overdetermination, which most often is traced through Freud, to Althusser and, more recently, to various poststructuralist interpretations of Marxist theory.[1] Here, I use the

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concept overdetermination to point to discourses that rule out consideration of alternative representations or explanations of the African condition. Both in academic and popular media discourses the African continent is depicted as a space consumed by a protracted social and developmental malaise. In the post-September 11 security environment, this developmental malaise is also seen as a global security problem. The Africa we think, talk, and theorize about is a product of western discourses that, with an unprecedented banality of sameness, characterize the continent as unsafe, dangerous, and emblematic of environmental, biological, and terrorist threats to the global commons.

The aim in this article is to show how Africa is overdetermined by various discourses, relating to (over)population, environmental security, and post-September 11 counter-terrorism. Arguably, the continent is constituted through and within such discourses as, first and foremost, a global security threat. The article suggests no clear demarcation can be drawn between the security discourses on and about Africa, and Africa as the object of such discourses. Further, the argument here is not that these discourses produce an "untruthful" or even fictive Africa, although some of them purport to present a dispassionate, objective, and incontrovertible truth. Rather, the article suggests that what is presented as African reality is based on "truths" that are produced within the discourses themselves. These discourses have become representative of African reality in the west by drowning out competing historical and political economy explanations. In turn, these representations help form the policy frames through which the west connects with Africa.

Is Africa the "dark continent" or the continent about which we, in the west, are most frequently "in the dark"?[2] Africa is constituted both by what is said and by strategic silences within the discourses that delimit what we think, talk, and theorize about its hybridities and heterogeneities. Africa is constituted through discourses that repeatedly return to colonial narratives of the "dark continent" in

[1] See *e.g.* Sigmund Freud, *The Interpretation of Dreams*, 3d ed., trans. by A.A. Brill (New York: Macmillan, 1911); Louis Althusser, "Contradiction and Overdetermination," part III, in *For Marx*, trans. by Ben Brewster (New York: Penguin, 1962); and, Barbara Epstein, "Interpreting the World (Without Necessarily Changing it)" (1998) 6:4 New Politics 107.

[2] See Jessica B. Harris, *The African Cookbook: Tastes of a Continent* (New York: Simon and Schuster, 1998).

order to reduce African difference to the monotony of sameness – dark, dangerous, and deadly. It is partly in this sense that Africa is overdetermined. The Africa we know, and how we know it, is also constituted by, and constitutive of, the global security reality. This reality is continuously in a state of transformation despite the dark language that suggests the continent is always outside time and located in an ahistorical, desocialized space marked by hopelessness.

At the 2005 World Economic Forum in Davos, British Prime Minister Tony Blair told the audience, "I almost think if what was happening in Africa today as we speak was happening in any other part of the world there would be such a scandal and clamour that governments would be falling over themselves to do something about this."[3] This article does suggest that one reason why there is no clamour relates to how Africa is framed within security, development, and public policy discourses. Discourses are shaped by existing relations of power. Such relations of power, Foucault argues, "cannot themselves be established, consolidated nor implemented without the production, accumulation, circulation and functioning of a discourse."[4] The primary focus of this article is on popular and academic discourses on and about Africa produced in the global North. "Africa" variously refers to the entire continent, to sub-regions and to specific countries. The following sections explore the constitution of Africa as a security threat in the everyday mass media; in discussions around environmental security, including neo-Malthusian analysis; and, finally, in commentaries on the "new wars" and the "war on terrorism."

II. AFRICA AS A DISEASED BODY POLITIC

The language commonly used to refer to Africa is quite exceptional in the lexicon of global developmental and security discourses, for what it says about Africa, how it says it, and the way in which almost all other competing accounts are pushed to the margins of what is considered conventional wisdom. The continent is referred to as an "ailing Africa," "a sickly, weak continent," a

[3] Associated Press, "Gates, Blair and Bono blast indifference to Africa's poor" *USA Today* (27 January 2005), online: USA Today <http://www.usatoday.com/money/world/2005-01-27-davos-gates_x.htm>.

[4] Michael Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, ed. by Colin Gordon & trans. by Colin Gordon *et al.* (Brighton: Harvester Press, 1980) at 93.

"battered" and "shattered" continent. The most common metaphors suggest Africa is "a diseased patient in need of medical assistance."[5] Another common metaphor used to characterize the continent as psychologically ill is the notion of Africa as a "basket case." A survey of this kind of talk in academic and popular media discourses over the past decade illustrates how Africa is constructed as unsafe, a security threat, as existing in a brutish state of nature, and as culturally inclined towards a despotism that is dangerous and destabilizing for the global commons. Arguably these discourses are not new to the extent they reproduce nineteenth century colonial narratives that portray Africa as inhabited by barbarians or "natural slaves," and as the white man's burden. The "new" discourses depicting Africa as diseased, chronically ill, and a biosocial hazard to the global commons complement a "new barbarism" discourse that has emerged in the post-Cold War moment.[6]

The idea that the world's periphery regions are inhabited by uncivilized and inferior people dates back to the Greeks, who saw themselves as the centre of the civilized world, particularly after the Greek triumph in the series of interstate conflicts that constituted the Persian Wars (500-323 BC). Over time, barbarians were understood as being the antithesis of western civilization. So-called barbarians lived in the periphery, in rural areas, on less fertile lands, or were nomadic peoples. "Barbarians were seen as preferring force and living under circumstances where they had no recourse other than marauding and thievery since confined to wilderness and removed from arable lands."[7] Moreover, unlike civilized western peoples, "barbarians stood for lack of both [rule of law and culture] and the dominance of brutality."[8] In the words of Greek geographer Strabo (circa 63 BC-AD 21), barbarians "carried on a guerrilla warfare in swamps, in pathless forests, and in deserts."[9] A review of the new discourses depicting Africa as unsafe and a source of global insecurity reveal how they repeatedly reproduce the assumptions that

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5 Sally Matthews & Hussein Solomon, "The Necessity of a Challenge to Western Discourses by the African Renaissance" (2003) 35:2 Acta Academica 148.

6 See John Bellamy Foster & Brett Clark, "Empire of Barbarism" *Monthly Review* 56:7 (December 2004) 1, online: Monthly Review <http://www.monthlyreview.org/1204jbfclark.htm>.

7 *Ibid.* at 2.

8 *Ibid.*

9 As cited in *ibid*.

barbarians live in the peripheral regions, and Africa is the iconic periphery.

Popular discourse, especially in the mass media, is replete with images of Africa as outside the rule of law, backward and, increasingly, as dangerous. In "Africa: The Scramble for Existence," the journalist Lance Morrow tells a story about the continent both by what it states explicitly and by what it references in its title, an allusion to the 1883 "scramble for Africa" during which the continent was divided up and colonized by European imperial powers.[10] The "new scramble" is for an Africa that is characterized by bare survival, struggling for existence, and in need of rescue from insecurity, human misery, and endemic conflicts. In Morrow's scramble – this time in postcolonial Africa – the continent is characterized as "a basket case of civil wars and suffering" and as a continent that is experiencing "a sort of neo-post-colonial breakdown."[11] In W.P. Hoar's article, "Darkness covers a continent," the author alludes to another colonial piece of writing, this time Joseph Conrad's notion of Africa as the "heart of darkness."[12] Hoar characterized Africa writ large as "dark" but also as an "unhappy continent,"[13] and uses the kind of language more typically associated with psychological diagnoses of depression and despair.

In another media story, J. Anderson suggests the colonial experience in Francophone Africa, from Côte d'Ivoire to the Congo and Rwanda, gave way to French cultural imperialism, which led the former imperial power to turn "a blind eye to the African leaders' moral and political flaws," to support authoritarian rule, and to prop up dictators in ex-colonies.[14] As the French withdrew, the U.S. became more engaged, but even this interest was at best characterized by attention deficit. After the Cold War, U.S. interest in Africa ended, particularly in light of the 1993 death of American peacekeepers in Somalia. This inattention only changed when "the tribal rivalries throughout the continent began to turn up on CNN and other television networks in the form of starving children and piles

[10] Lance Morrow, "Africa: The Scramble for Existence" *Time* 140:10 (7 September 1992) 36.

[11] *Ibid.*

[12] *The New American* 8:4 (1992) 41.

[13] *Ibid.* at 41-48.

[14] J. Anderson, "End of an Era: France's Last Gasp in Africa?" *Deutsche Press-Adentur* (DPA, 9 June 1997).

of people who had been hacked to death with machetes."[15] As a consequence of these post-colonial experiences, Africa was a continent that was "dying from a combination of disease, ethnic hatred and corruption."[16] While Anderson does not romanticize the colonial or neo-colonial experience, he nonetheless resorts to combining biomedical and ethnocultural factors to describe the African body politic in the post-colonial period.

Images of Africa as sick also were reproduced in a 2001 Pulitzer Prize-winning three-part series that ran in the *Chicago Tribune* under the ominous title, "Plagues of Old Reclaim the Continent." In the lead piece, Paul Salopek depicts Africa as the "ailing continent," one experiencing an ongoing "sickening" from the return of old plagues such as sleeping sickness, which is transmitted by the tsetse fly.[17] In addition to the "health woes" and "health calamities," Salopek writes, "madness is late-stage sleeping sickness, a lethal, long-vanquished foe from the age of Stanley and Livingstone, and its baleful reappearance is just the latest sign of Africa's seemingly unstoppable slide into a health disaster of historic proportions." After listing what he calls the "litany of diseases lashing Africa" at the outset of the twenty-first century – AIDS, cholera, Lassa fever, malaria, meningitis, and tuberculosis – Salopek suggests we should care, or at least be worried, for our global safety because "in a shrinking world linked by easy jet travel, fears are rising that Africa's problems can become global as diseases spill out from the continent and spread across the world."[18]

Some of the most apocalyptic depictions of Africa as an unsafe geopolitical space have appeared in the widely circulated economic magazine, *The Economist*. One story ran under the headline, "The Heart of the Matter," evoking Graham Green's novel by the same title.[19] In that piece of fiction, the hero is a colonial police officer who, after having an adulterous affair, is wracked by guilt. Green

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15 *Ibid.*

16 *Ibid.*

17 Paul Salopek, "Africa the Ailing Continent: Plagues of old reclaim the continent" *Chicago Tribune* (9 January 2000) 1 at 1, online: The Pulitzer Board <http://www.pulitzer.org/year/2001/international-reporting/works/africa1.html>.

18 *Ibid.*

19 "The heart of the matter" *The Economist* 355:8170 (11 May 2000) 22; Graham Green, *The Heart of the Matter* (New York: Viking Press, 1948).

presents the hot, tropical conditions of the colony as the corrupting influence that led to illicit sex. Notably, attention is deflected away from the complicity of the colonial police officer in maintaining the corrupting influence of the colonial system itself. Unperturbed by this idealized construction of colonialism or, in fact, emboldened by it, *The Economist* claims "Africa was weak before the Europeans touched its coasts. Nature is not kind to it. This may be the birthplace of mankind, but it is hardly surprising that humans sought other continents to live in."[20] This "weakness" apparently persisted after the end of formal colonialism. It suggests African societies and "Iron-Age communities" are geared "to survival in Africa's fickle climate, not to development."[21]

The Economist's editorial minimizes the political economy of colonialism and imperial rule, stating that its most negative impact "was neither economic nor even political. It was psychological."[22] The editorial rhetorically poses the question to which its own analysis has already supplied an answer: "Does Africa have some inherent flaw that keeps it backward and incapable of development?"[23] It answered its own question by saying "[s]ome think so. They believe Africa's wars, corruption and tribalism are 'just the way Africa is', and that African societies are unable to sustain viable states."[24] While the problems confronting Africa exist almost everywhere, the article does suggest an African exceptionalism: "Africa's troubles are not exclusive to Africa. But their combination is."[25] What Africa needs, the article surprisingly (given the fatalism of its litany of complaints) concludes, is a psychological makeover, a building of "self-confidence" and trust in each other, between citizens and rulers, and in institutions that command the support of African peoples.

As if its own story had not already struck a blow to the heart of Africa, *The Economist* ran another cover story with the headline, "Hopeless Africa."[26] The image on the cover was a young man with a rocket launcher superimposed over a map of the African continent.

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[20] *The Economist, ibid.* at 23.
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.* at 22.
[24] *Ibid.*
[25] *Ibid.* at 23.
[26] *The Economist* 355:8170 (13 May 2000) 17.

The image associated the entire African continent as a site and source of violence and hopelessness. The language of the editorial is striking for its departure from what one might think of as conventional economic discourse. Like the earlier piece, it suggests colonial Africa was better, more hopeful, than post-colonial Africa where countries like Sierra Leone are symbols of "failure and despair." The editorial suggests African character or moral "flaws" contribute to the continent being "backward" and "incapable." These flaws, it suggests, are psychosocial, and deeply buried in the continent's societies and cultures. Moreover, emphasizing the notion of a fatal flaw, *The Economist* makes the blanket statement that, on the continent, "brutality, despotism and corruption exist everywhere – but African societies, for reasons buried in their cultures, seem especially susceptible to them."[27]

In a subsequent apologia, the author, Richard Dowden suggests his was not a pessimistic account of Africa, and that "journalists in particular, have a duty to reflect the reality. Africa is in a bad way."[28] Dowden distances himself from Robert D. Kaplan's notion of the "coming anarchy," stating his analysis was a rational attempt to explain why post-colonial Africa produced "a crop of bad leaders" like Sani Abacha, Foday Sankoh, and Joseph Savimbi.[29] He concludes that the challenges Africa faced were not related to exogenous factors, whether a history of colonialism or slavery, or the economic interventions and policies of institutions like the World Bank or International Monetary Fund. Rather, the challenge Africa faces is the psychological scars remaining from the colonial experience and that "[u]ntil Africa regains its self confidence and develops institutions it actually believes in, it will remain weak and it will fail."[30]

The incessant replication of depictions of the African continent as an unsafe space of insecurity, marked by disease, decay, death, backwardness, incapacity, and corruption impacts how we think and talk about the continent. Such depictions need to be foreground not only because they shape the popular imaginary, but also because they

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[27] *Ibid.* at 17.

[28] Richard Dowden, "The Economist man defends himself" *New African* 387 (July/August 2000) 31 at 31.

[29] *Ibid.*

[30] *Ibid.* at 32.

have development and security policy implications. If the problems are endemic to Africa and its peoples — their national character, biopsychological make up, societies, and cultures – then perhaps there is no obligation or national interest to intervene, save to ensure that "African problems" be contained there, on the Dark Continent, to avoid posing a threat to the global commons.

In the remainder of this article I want to further flesh out how Africa is constituted as a security threat in the late twentieth and early twenty-first centuries. The article will do this in three moves. The first requires a return to early efforts to reconceptualize security in the late 1980s and early 1990s, which centred on the environment-security nexus and particularly the ways in which overpopulation and scarcity in Africa and the global South were identified as threats to the sustainability of the planet. In the second move, the article turns to the development-security nexus, in which poverty and underdevelopment increasingly became conceptualized as "dangerous" and "destabilizing." Finally, the article draws attention to how the poor and "have-nots" increasingly are being allied discursively with "evildoers" and incorporated as dangerous and destabilizing elements in the United States' war on terrorism. In this third iteration, African poverty and underdevelopment are constituted as the ideal conditions for the incubation of terrorist cells, illicit financial networks, and other criminal activities.

III. AFRICA AS A BIO-NATIONAL SECURITY THREAT

In the previous section I explored various commentaries in mainstream media that depicted Africa not only as unsafe and dangerous, but also as a threat to global security. This kind of thinking also plays out in academic discourse and theorizing about what constitutes a threat or danger to national and global security. One major effort to reconceptualize post-national security after the Cold War focused on population pressures, specifically the perceived dangers of overpopulation and resource scarcity in the global South. The notion of environmental and biological dangers emanating "out of Africa" featured prominently in the environmental security discourse. A basic thrust of the environmental security perspective was that a causal relationship existed between overpopulation, resource scarcity, and internal conflicts in the global South. In an article that tried to rethink security after the Cold War, Jessica

Matthews drew a link between population and the environment.[31] Matthews argues that "[p]opulation growth lies at the core of most environmental trends" and that any national security agenda had to include population control and family planning.[32] Subsequent articles strengthened the link between population and the environment, and also sought to build causal relations between resource scarcity and new conflicts.

Throughout the 1990s, it was difficult to find any writings that suggested population growth, particularly in Africa and Asia, might have any benefits.[33] In fact, such writings were more likely to reflect deep pessimism about the "population problem" in the language first articulated by Thomas R. Malthus in his 1798 treatise, "An Essay on the Principle of Population," which warned about the dire implications for humanity if population growth exceeded the capacity of society to satisfy the ever expanding needs.[34] Then the focus was on the political economy of population, which in the late twentieth century had morphed, like many other issues, into security concerns. After reviewing 544 articles on population that appeared in popular periodicals from 1946-1990, demographer John Wilmoth published his findings in the September-October 1994 issue of *American Enterprise*, which suggested the population discourse was overwhelming pessimistic, and this affected public perception and public policy.[35] In the articles from 1966-1980, over 80 percent suggested population growth was a grave threat to the planet. Some 60 percent of the articles between the years 1986-1990 depicted population negatively, whereas some 5 percent suggested positive aspects.

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[31] Jessica Tuchman Matthews, "Redefining Security" (1989) 68:2 Foreign Affairs 162.

[32] *Ibid.* at 163.

[33] See "Janet Cooke Award: ABC Environmental Reporter Loads Cairo Story with White House-Favoured Spokesmen" (1 October 1994), online: Media Watch <http://secure.mediaresearch.org/news/mediawatch/1994/mw19941001jca.html>.

[34] Thomas R. Malthus, "An Essay on the Principle of Population, as it Affects the Future Improvement of Society with Remarks on the Speculation of Mr. Godwin, M. Condorcet, and Other Writers" (London, 1798), online: McMaster University, Department of Economics <http://www.economics.mcmaster.ca/ ~econ/ugcm/3ll3/malthus/popu.txt>.

[35] John R. Wilmoth, "Population issues: Perspectives: Past and present" *American Enterprise* 5:5 (September/ October 1994) 36.

There is a deeply ideological aspect to the population-environmental security discourse, and even a "greening of hate"[36] particularly with the use of apocalyptic language like "population bomb,"[37] "population explosion," and "surging populations."[38] Paul Ehrlich's work, *The Population Bomb*, has been influential in the overpopulation debate, and notably it begins with a story about his family's fear of the unfamiliar lifestyle and habits of the "other."[39] Further, Ehrlich came to his view that population in the global South was a time bomb that needed to be controlled "one stinking hot night in Delhi."[40] Apparently during this visit to India, his family was caught in a traffic jam in Delhi, and outside the taxicab it was hot and dusty, the densely populated slums were visible, including people engaged in everything from washing and cooking to defecating and urinating.[41] It was this encounter with the "other" that led to his family being afraid. In the "Prologue" Ehrlich concludes that "[w]e can no longer afford merely to treat the symptoms of the cancer of population growth; the cancer itself must be cut out. Population control is the only answer."[42]

In a widely cited essay in *Scientific America*, Thomas Homer-Dixon, Jeffrey Boutwell, and George Rathjens argue that unrestricted population growth and competition over scarce resources were contributing to conflict in the global South.[43] The mainstream version of this thesis spawned a virtual cottage industry of works in the late 1980s and 1990s on the "environment-population-security nexus."

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36 Ronald Bailey, "Real Environmental Racism: Radical Feminist Betsy Hartmann decries 'greening of hate'" (5 March 2003), online: Reason Online <http://www.reason.com/rb/rb030503.shtml>.

37 See Paul R. Ehrlich, *The Population Bomb* (New York: Ballatine, 1968) and Paul R. Ehrlich & Anne H. Ehrlich, *The Population Explosion* (New York: Simon and Schuster, 1990).

38 See Robert D. Kaplan, "The Coming Anarchy: How scarcity, crime, overpopulation, tribalism, and disease are rapidly destroying the social fabric of our planet" *The Atlantic Monthly* 273:2 (February 1994) 44 [Kaplan, "The Coming Anarchy"].

39 Ehrlich, *supra* note 37 at 15-16.

40 *Ibid.* at 15.

41 *Ibid.*

42 *Ibid*. at xi.

43 Thomas Homer-Dixon, Jeffrey H. Boutwell & George W. Rathjens, "Environmental change and violent conflict" *Scientific America* 268:2 (February 1993) 38.

Many of the case studies focused on Africa, including the genocide in Rwanda and post-colonial states embroiled in protracted civil conflicts, such as in Sierra Leone. Ignoring, or at best, minimizing the North-South dimensions of the competition for resources, and the uneven consumption patterns between the global North and South, Homer-Dixon and his colleagues insist that growing resource scarcity is "contributing to violent conflicts in many parts of the developing world."[44] In research conducted for a project on the environment, population, and security funded by the Canadian Centre for Global Security and the American Association for the Advancement of Science, Homer-Dixon tried to establish a quasi-scientific causality between population growth, resource scarcity, and intrastate conflict in diverse countries like South Africa, Rwanda, Haiti, and Chiapas, Mexico.[45] Internal conflicts are the likely result of intensified competition over increasingly scarce resources "captured" by a local privileged elite, and an increasingly impoverished majority.[46] The inevitable result is conflict between small enclaves of the rich and the excluded majority.

Following the trend in academic discourse, various United States government reports established that "environmental issues are the prism through which most Americans perceive population size and growth."[47] Population growth and migration in the global South were conceived not only as an ecological threat to the global commons, but also as a matter of United States national security. A United States Agency for International Development (USAID) report notes that population growth "consumes all other economic gains, drives environmental damage, exacerbates poverty, and impedes democratic governance."[48] Population stabilization became one of USAID's four top priority areas in the mid-1990s. The policy objective was to

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44 *Ibid.* at 38.

45 Thomas Homer-Dixon, "The Project on Environment, Population and Security: Key Findings of Research" in *Environmental Change and Security Project Report 2* (Washington, D.C.: Wilson Center, 1996) 45, online: Wilson Center <http://wwics.si.edu/topics/pubs/ACFA6.pdf > [Homer-Dixon, "The Project"].

46 Thomas F. Homer-Dixon, "Environmental Scarcities and Violent Conflict" (1994) 19:1 International Security 5 at 13.

47 (US Department of State, October 1993: 32).

48 (USAID, 5 October 1993: 7).

provide "birth control to every woman in the developing world who wants it by the end of the decade."[49]

Arguably the latter objective was quite compatible with a feminist policy agenda to provide women control over their reproductive health and well-being, and to plan families as a way of women's empowerment. However, reproductive rights in the context of social citizenship rights and basic health care were not the main concerns of most scholars who saw population control or stabilization as central to national security. Rather, the concern was almost exclusively with how developments in the global South might lead to a depletion of renewable resources, with population pressures leading to large-scale migration from urban to rural areas, and with civil conflicts that might contribute to global migration. Similarly, a January 1995 Central Intelligence Agency (CIA) report suggested "ethnic conflict, civil war, natural disasters will place a greater demand on humanitarian support in Africa than at any time" in the post-colonial period. [50] At the same time, population and migration pressures were linked to civil conflict, and transborder criminal networks and shadow economies. For the CIA, there was concern that "the nation-state is losing its grip in Africa because of unstable borders, large refugee flows between states, massive international migration within Africa, civil strife, criminal cross-border trading networks, the emergence of warlords in several countries, and foreign intervention."[51]

The preface to the 1996 U.S. National Security Strategy states that "large-scale environmental degradation, exacerbated by rapid population growth, threatens to undermine political stability in many countries and regions" and, hence, this became a growing concern for U.S. national security.[52] A year later, the Rockefeller Foundation produced a report entitled *High Stakes*, which explored the

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[49] Steven Greenhouse, "U.S. asks to increase birth control" *New York Times* (23 January 1994) 9 at 9.

[50] Basil Enwegbara, "Same Old Story, New Characters" *The Tech* 121:22 (1 May 2001), online: The Tech <http://www-tech.mit.edu/V121/N22/col22enweg.22c.html>.

[51] *Ibid.*

[52] U.S., White House, *1996 U.S. National Security Strategy of Engagement and Enlargement,* excerpted in *Environmental Change and Security Project 2* (Washington, D.C.: Wilson Center, 1996) 72 at 72, online: Wilson Center <http://wwics.si.edu/topics/pubs/ACFA6.pdf>.

implication of global population growth for the United States and "our common future."[53] According to the report, "resource scarcities, often exacerbated by population growth, undermine the quality of life, confidence in government, and threaten to destabilize many parts of the globe."[54] Similar to the arguments put forth by Homer-Dixon and his colleagues, the Rockefeller report goes on to conceptualize resource scarcity and class conflict as if they were divorced from the global political economy, multinational corporations, and extractive industries or broader relations of production and social reproduction.[55] It argues that as scarcity leads to internal competition for resources, "a society's 'haves' often seize control of it, leaving an even smaller share for the 'have-nots.' Since population growth rates are highest among the have-nots, this means that an even larger number of people are competing for a smaller share of resources – and violent conflict is often the result."[56]

Overpopulation and resource competition was given as an explanation for genocide in Rwanda. In a much-heralded speech on the environment, President Clinton's Secretary of State Warren Christopher warns that "[w]e must not forget the hard lessons of Rwanda, where depleted resources and swollen populations exacerbated the political and economic pressures that exploded into one of this decade's greatest tragedies."[57] Likewise, Clinton's Under Secretary of State for Global Affairs Timothy Wirth also suggested the Rwandan genocide could be reduced to an internal conflict, rather than, for example, one that spoke to the global indifference to genocide or the failures of the UN Security Council, particularly the United States, France, and Britain, to offer timely peacekeeping support. According to Wirth, in Rwanda, the issue was that "there

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53 Laurie Ann Mazur, *High Stakes: The United States, Global Population and our Global Future: A Report to the American People from the Rockefeller Foundation* (New York: Rockefeller Foundation, 1997).

54 *Ibid.* at 9.

55 See *e.g.* Manuel Castells, *End of the Millennium*, vol. 3 (Malden, Mass.: Blackwell, 1998) at 82, entitled "De-humanization of Africa."

56 Mazur, *supra* note 53 at 21.

57 Warren Christopher, "American Diplomacy and the Global Environmental Challenges of the 21st Century" (Speech presented at Stanford University, Palo Alto, Cal., 9 April 1996), reprinted in *Environmental Change and Security Project Report 2* (Washington, D.C.: Wilson Center, 1996) 81 at 83, online: Wilson Center <http://wwics.si.edu/topics/pubs/ACFA6.pdf>.

were simply too many people competing for too few resources."[58] Among the reasons for genocide in Rwanda, the environmental security arguments are arguably among the least compelling, as Leonce Ndikumana has argued in a study on the population-resources nexus in Rwanda and Burundi.[59] According to Ndikumana, "[t]hese countries have promoted nepotist and dictatorial political systems that reward ethnic identity rather than merit while miserably failing to protect the rights and interests of the individual and minority groups."[60] Population pressure "is only a scapegoat for people willing to put the blame of failed development policies on rural populations."[61]

Other writers suggested these conflicts pose a danger to United States' culture and values, and to the national security of the United States, and even to western civilization. Nicholas Eberstadt suggested that overpopulation in the global South also might pose a serious threat to western values, especially in light of the declining population rates in the global North.[62] Cherished western values such as respect for individual rights and the rule of law "are not shared by the states presiding over the great majority of the world's population,"[63] and thus with third world populations outgrowing those in the west, the survival of the latter would be at stake unless this population trend was changed. However, Eberstadt also cautions against extremism when he noted that there are many densely populated countries that are not mired in conflict.[64]

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58 Timothy Wirth, "Population Pressure and the Crisis in the Great Lakes Region of Africa" (Remarks at the Center for National Policy, 18 December 1996), excerpted in *Environmental Change and Security Project Report 3* (Washington, D.C.: Wilson Center, 1997) 117 at 188, online: Wilson Center <http://wwics.si.edu/topics/pubs/ACF26E.pdf>.

59 See Leonce Ndikumana, "Institutional Constraints and the Population-Resource Dilemma in Burundi and Rwanda" (Working paper, Economics Department, University of Massachusetts, Amherst, Mass., 1997) [unpublished, archived with author].

60 *Ibid.* at 21.

61 *Ibid.* at 30.

62 Nicholas Eberstadt, "Population Change and National Security" (1991) 70:3 Foreign Affairs 115.

63 *Ibid.*

64 Nicholas Eberstadt, "Population Issues. Assumptions: Accurate or Not" *American Enterprise* 5:5 (September/October 1994) 36.

These arguments were taken further in neo-Malthusian explanations and among proponents of the "lifeboat ethics," a notion first coined by Garrett Hardin.[65] In a nutshell, neo-Malthusians argue that sustainable improvements in human development and well-being are impossible without limiting the numbers of people competing for scarce resources in the global South. Their main policy prescription is population "stabilization" or "control" through limiting births. Others argue against intervening to save lives as, for example, in Ethiopia during conditions of drought and endemic famine – a view associated with the "lifeboat ethics." Hardin, for example, ask whether every person on earth has "an equal right to an equal share of its resources?"[66] For Hardin, the answer is no. Instead of increased foreign aid or humanitarian assistance, Hardin argues that we should support the "harsh ethics of the lifeboat" because by maintaining the lives of the starving, we are also maintaining the demands on scarce resources.[67] Without a world government that can implement policies "to control reproduction and the use of available resources," Hardin insists that rich countries have an obligation to protect themselves by restricting access to national wealth and resources, including limiting access to such resources by poor countries with higher fertility and whose own resources may be inadequate to meeting their domestic needs.[68] In order to avoid "the tragedy of the commons," Hardin also insists that we should not allow "misguided idealists to justify suicidal policies for sharing resources through uncontrolled immigration and foreign aid."[69] Homer-Dixon updated Hardin's lifeboat metaphor with one of the "stretch limo," which depicted the world's affluent being transported through the global village in luxurious conditions, including air-conditioning and computers, while outside, the teeming masses of the global South clamour to get in.[70] The idea of a cloistered enclave

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[65] See Garrett Hardin, "Lifeboat Ethics: The Case Against Helping the Poor" *Psychology Today* (September 1974), online: The Garrett Hardin Society <http://www.garretthardinsociety.org/articles/art_lifeboat_ethics_case_against_helping_poor.html>.

[66] *Ibid.*

[67] *Ibid.*

[68] *Ibid.*

[69] *Ibid.*

[70] Thomas F. Homer-Dixon, "On the Threshold: Environmental Changes as Causes of Acute Conflict" (1991) 16:2 International Security 76, online: Trudeau Centre for Peace and Conflict Studies, University of Toronto <http://www.library.utoronto.ca/pcs/thresh/thres1.htm>; Garret Hardin, "The

or "gated community" of the rich and secure, holding at bay the poor and insecure, continues to permeate security and immigration discourses in the twenty-first century.

In what follows I further flesh out how Africa is constructed as a "diseased body politic" that constitutes a threat to the global health and well-being. In the focus on new security threats, a major preoccupation is with new diseases and pathogens as uniquely African tendencies that needed to be contained.

IV. SURVEILLANCE AND CONTAINMENT OF NEW THREATS

More biologically deterministic versions of the environmental security arguments have been popularized by writers such as Robert D. Kaplan[71] and Jeffrey Goldberg,[72] who draw on West African examples to suggest Africa poses a new kind of security threat. The African continent, particularly West Africa, is constructed as a "biological national security threat" that needs to be subject to surveillance and intelligence gathering in order to contain, and prevent, the globalization of disease and disorder.[73] This "biological national security" discourse is replete with images of Africa as the dangerous "other," as dark, impenetrable, uncontrolled, hypersexual, and overpopulated, and in turn, as a threat that needed to be contained. A "new containment" policy thus emerges in the post-Cold War moment, one that conceives of national security threat in biological and environmental terms.

It is important to think through the work of writers such as Kaplan and Goldberg because they aptly illustrate the quite peculiar ways in which Sub-Saharan Africa is represented in security discourses and how these discourses, in turn, constitute the continent as a unique and exceptional kind of threat. It is also important to examine these works because they have shaped popular thinking as well as American policy-makers and public policy in the areas of

Tragedy of the Commons" (1968) Science 1243.

[71] See Robert D. Kaplan, *The Ends of the Earth: A Journey at the Dawn of the 21st Century* (New York: Random House, 1996) [Kaplan, Ends of the Earth] and Kaplan, "The Coming Anarchy," *supra* note 38.

[72] Jeffrey Goldberg, "Our Africa" *New York Times Magazine* 146:50719 (2 March 1997) 32.

[73] *Ibid.* at 35.

international development assistance and global security. The Clinton administration took the environment-security nexus seriously, including Kaplan's prediction of a "coming anarchy."[74] In a speech on population, then U.S. President Bill Clinton notes, "I was so gripped by many things that were in that [Kaplan] article and by the more academic treatment of the same subject by Professor Homer-Dixon."[75] Clinton goes on to say that such arguments should shape policy, because "[y]ou have to say, if you look at the numbers, you must reduce the rate of population growth."[76]

Kaplan, who describes himself as a "travel and foreign affairs writer," first published "The Coming Anarchy" in *The Atlantic Monthly* in 1994.[77] It coincided with a number of works that appeared in popular magazines, offering political obituaries on the Soviet Union and purporting to map the future of the planet after the Cold War, including Francis Fukuyama's "The End of History," which first appeared in the National Interest,[78] and Samuel P. Huntington's "The Clash of Civilisations," which first appeared in Foreign Affairs.[79] All of these pieces subsequently were published as full-length manuscripts, and generated widespread debate on the nature of the world order after the Cold War.

Kaplan argues that environmental factors, broadly understood, are the major sources of security threat in the post-Cold War era.[80] Citing Homer-Dixon as authoritative on the subject, Kaplan suggests that "future wars and civil violence will often arise from scarcities of resources such as water, cropland, forests, and fish. Just as there will

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[74] Kaplan, "The Coming Anarchy," *supra* note 38.

[75] "Advancing a Vision of Sustainable Development" (Published version of President Clinton's address to the National Academy of Science, Washington, D.C., 29 June 1994) *Dispatch* 5:29 (18 July 1994), online: U. S. Department of State, Electronic Research Collections <http://dosfan.lib.uic.edu/ERC /briefing/dispatch/1994/html/Dispatchv5no29.html>.

[76] *Ibid.*

[77] *Supra* note 38.

[78] Francis Fukuyama, "The End of History?" *National Review* 16 (Summer 1989) 3.

[79] Samuel P. Huntington, "The Clash of Civilisations" (1993) 72:3 Foreign Affairs 22 and Samuel P. Huntington, *The Clash of Civilizations and the Remaking of the World Order* (New York: Simon and Schuster, 1998).

[80] See Kaplan, "The Coming Anarchy," *supra* note 38 and Kaplan, *Ends of the Earth*, *supra* note 71.

be environmentally driven wars and refugee flows, there will be environmentally induced praetorian regimes."[81] Clearly resources have been, and continue to be, commodities over which conflicts arise; however, Kaplan wants to reject the historical and social contexts of conflicts and place an emphasis on biology and nature. In another reference to Homer-Dixon, Kaplan tries to minimize the sociality of conflicts: "Homer-Dixon says that 'for too long we've been prisoners of "social-social" theory, which assumes there are only social causes for social and political changes, rather than natural causes too.'"[82]

This kind of "mentality" dates back to the Industrial Revolution, but in the twenty-first century, Kaplan suggests "nature is coming back with a vengeance, tied to population growth. It will have incredible security implications."[83] The return of nature will feature two kinds of "Man," one he calls Hegel's and Fukuyama's Last Man, who represents the rich, well-fed and technologically advanced. The other Kaplan calls Hobbes's First Man, who represents the world's poor, hungry, technologically underdeveloped, and whose lives will be characterized as "poor, nasty, brutish, and short."[84] In this brutish competition for survival in a world threatened by environmental pressures, Hegel's First Man will ably "master it" while Hobbes' First Man "will not" and presumably will perish.

For Kaplan, the African continent is a geopolitical space marked by environmental degradation, impending resource scarcity, ethno-cultural conflicts, population explosion, and war. While the essay focuses on a number of conflicts in the Balkans and across the global South, the main sub-regional focus is West Africa because it represents the future of criminality and lawlessness everywhere.[85] The future envisioned for West Africa is one of more criminality as a result of demographic, social, health, and environmental problems.[86] West Africa is not just a problem for the African continent; rather, in Kaplan's analysis it is depicted as emblematic of global ecological and security crisis. "Crime is what makes West Africa a natural point of departure for my report on what the political

[81] Kaplan, "The Coming Anarchy," *ibid.* at 59.
[82] *Ibid.* at 60 [citation ommitted].
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.* at 44-46.
[86] *Ibid.*

character of our planet is likely to be in the twenty-first century."[87] In the subsequent section entitled "A Premonition of the Future," Kaplan spells out why West Africa's "criminality" is the future we need to fear, and holds the "strategic" dangers we need to contain. "West Africa is becoming the symbol of worldwide demographic, environmental and societal stress, in which criminal anarchy emerges as the real 'strategic' danger." Moreover, Kaplan adds, "disease, overpopulation, unprovoked crime, scarcity of resources, refugee migrations, the increasing erosion of nation-states and international borders" are listed not as the challenges of underdevelopment, of fragile states, or of weak institutions.[88] Rather, they are depicted as environmental security concerns that need to be contained or prevent or minimise harm to United States' national security and the global commons. The person to whom we need to turn for enlightenment, according to Kaplan, "is Thomas Malthus, the philosopher of demographic doomsday, who is now the prophet of West Africa's future" and, over time, the future of rest of the planet.[89]

Two years later, in *The End of the Earth*, Kaplan extends the "demographic doomsday" arguments that environmental factors are the major source of conflict in the post-Cold War era, and that West Africa is the global symbol of the new sources of insecurity and conflict.[90] Again, following what he perceived to be Homer-Dixon's cue, Kaplan minimizes the significance of political economy factors in the making of colonial and post-colonial Africa in order to argue that the most relevant factors are nature, geography, and climate. In fact, he argues early on in his book that the late twentieth century was a moment "when politics … [were] increasingly shaped by the physical environment" and although the Industrial Revolution offered a brief window "which gave humankind a chance to defend itself somewhat from nature, [that moment] may be closing" in the twenty-first century.[91] Nature, for Kaplan, is foundational. "It seemed to me that here [Guinea], as elsewhere in Africa and the Third World, man is challenging nature far beyond its limits, and nature is now beginning to take its revenge."[92] And, it seems, "nature" has made its first call of revenge in West Africa.

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87 Kaplan, "The Coming Anarchy," *supra* note 38 at 46.
88 *Ibid.* at 46.
89 *Ibid.* at 48.
90 Kaplan, *End of the Earth*, *supra* note 71.
91 *Ibid.* at 4.
92 *Ibid.* at 54.

Kaplan makes a number of moves that produce Africa, particularly West Africa, as an environmental security threat. Further, it is particularly notable how Kaplan always invokes the voice of a diplomat, or friend, or African minister to say the most damning things about the continent. In a chapter on the Gulf of Guinea, Kaplan discounts social history and political economy, making the most audacious claim that colonialism, the slave trade, and the brutalizing institution of slavery were not the "greatest burden inflicted on Africa by the Europeans."[93] Failing to make the case, Kaplan tries another move that effectively says, notwithstanding slavery and colonialism, the "greatest burden" of the European colonial encounter with Africa is the political cartography that included the invention of nations and states that were not an "organic" outgrowth of geography and the environment. Rather, the "political map, with its scores of countries, each identified by the colour of its imperial master," has given rise to "such questionable concepts as the Ivory Coast, Guinea, Sierra Leone, Togo, and Nigeria."[94] Post-colonial African states drew on this colonial "cartography created facts" and, in turn, "artificially conceived" what we think of today as much of West Africa. For Kaplan, artificiality and "the lies of mapmakers" are juxtaposed against the idea of a foundational nature, geography, climate, and tribes.[95]

Kaplan is not so much interested in revealing the conception of African "nations as narration" in the sense of Homi Bhabha,[96] or as "imagined communities" in the sense of Benedict Anderson.[97] Rather, for Kaplan, invented nations in West Africa are tragedies because they are not "real" in the sense that they are not "an organic outgrowth of geography and ethnicity."[98] Finally, then, Kaplan is able to depict the entire West African region as a colonial invention that has led to a tragic post-colonial political space characterized by chaos, overpopulation, disease, and unemployed youth occupying their time in various anti-social behaviour such as terrorizing people

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93 *Ibid.* at 83.

94 *Ibid.*

95 *Ibid.*

96 Homi K. Bhabha, ed., *Nation and Narration* (London & New York: Routledge, 1990).

97 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (New York: Verso, 1991).

98 Kaplan, *Ends of the Earth*, *supra* note 71 at 71.

and criminal activities. Quoting a "U.S. diplomat friend," Kaplan then goes on to argue that "[t]he greatest threat to our value system comes from Africa. Can we continue to believe in universal principles as Africa declines to levels better described by Dante than by development economists?"[99] Africa matters, according to Kaplan, in a utilitarian way. "Our domestic attitudes on race and ethnicity suffer as Africa becomes a continent-wide 'Wreck of the Medusa.'"[100]

The allusion to Dante's inferno – hell on earth – needs no further explanation. The evocation of the "wreck of the Medusa" is, again, instructive. It is a story about a French ship, the Medusa, which set sail for colonial Senegal in July 1816, about a year after Napoleon's defeat at the Battle of Waterloo. Senegal had been returned to France by Britain and the ship included a new colonial governor and colonialists. The ship, with a grossly incompetent captain, ran adrift off the West African coast. The officers mutinied and abandoned the ship on the lifeboats with the remaining rations. They left a rickety raft, on which the remaining passengers became castaways. Of the 150 people on the overcrowded raft, only about fifteen survived after twelve days characterized by conflict, including murder, starvation, and, ultimately, passengers resorting to cannibalism.[101] For Kaplan, Dante's inferno and the "wreck of the Medusa" best capture the reality of life in West Africa, rather than, say, the "wreck" being a metaphor for colonialism itself.

Kaplan's representation of Liberia's environment is also telling. Liberia's rainforests are characterized as "dense" and "dark," and as creating the environmental conditions in which "men tend to depend less on reason and more on suspicion."[102] Where other writers might have depicted Liberia's forests as a potential source of eco-tourism, Kaplan suggests instead that Liberia's forests constitute "a green prison with iron rain clouds" and a "forest culture," which makes it susceptible to forms of worship that resist external civilizational influences and, hence, inevitably are susceptible to (barbaric)

[99] *Ibid.* at 4.

[100] *Ibid.*

[101] See Alexander McKee, *Wreck of the Medusa: The Tragic Story of the Death Raft* (New York: Signet Books, 2000) and J.B. Savigny & Alexander Corréard, *Narrative of a Voyage to Senegal in 1816* (Marlboro, Vt.: Marlboro Press, 1986).

[102] Kaplan, *Ends of the Earth*, *supra* note 71 at 28-29.

violence.[103] This evocation of civilization-barbarism dialectic is not coincidental. Kaplan, in fact, favourably quotes the British colonial writer Richard Burton who made the audacious claim that slaves taken from their ancestral lands in Africa lived a life of "paradise" and in "lands of happiness" on white-owned slave plantations in the United States and the colonial West Indies.[104]

Jeffrey Goldberg extends Kaplan's arguments in an article written for the liberal *New York Times Magazine* entitled "Our Africa Problem."[105] According to Goldberg, the threat posed by Africa also is a source of insecurity for the United States.[106] In the table of contents to the magazine, the article is introduced with the following: "Africa has never been more dangerous – or more ready, finally, to join the rest of the world. The outcome may well depend on the United States, which has more than humanitarian reasons to care."[107] In the body of the article, Goldberg characterizes Africa as a space of disease, poverty, and chaos – and as a threat to the national security of the United States. These dangers, Goldberg argues, are biosociological and constitute a threat to the United States, which did "have compelling national security interests in Africa."[108] On the one hand, these interests "conform to traditional definition of national security" and as examples of this Goldberg cites Sudan, which he accuses of being "the premier African exporter of radical Islamic fundamentalism and serves as a haven for an A-list of international terrorists," and Nigeria, which he characterises as the primary "transhipment point for narcotics."[109] On the other hand, Africa is important to the United States' national security interests because "there is a whole set of what might be called biological national-security issues: environmental destruction, explosive population growth, the rapid spread of disease and the emergence of entirely

[103] *Ibid.*
[104] *Ibid.*
[105] Goldberg, *supra* note 72.
[106] *Ibid.* at 35.
[107] "Table of Contents" *New York Times Magazine* 146-50719 (2 March 1997) 8 at 8.
[108] Goldberg, *supra* note 72 at 35.
[109] *Ibid.*

new diseases."[110] These threats of population, pathogens ,and drugs, among others, need to be contained.

Unlike the old containment policy initially crafted by George F. Kennan in response to the rise of the Soviet Union and the perceived threat of a globalizing communist ideology,[111] the new containment policy suggested by Goldberg and others emerged after the collapse of the Soviet Union and in response to the perception of a globalizing environmental and biocultural security threat. These new biocultural security concerns made Africa a "compelling" and "vital" security interest in the post-Cold War era. Despite the difference in what is being contained, there are some striking parallels between the old ideological containment of Kennan and the new biological containment of Goldberg, especially the language used to describe the "other." In what became known as the "Long Telegram" of 26 February 1946, Kennan, then a diplomat in the United States embassy in Moscow, described the Soviet Union as a threat to the United States, global order, and western civilization. The post-war Soviet Union was described as "neurotic" and "committed fanatically" to undermining the United States' power in the world.[112] Moreover, the Soviet leadership was depicted as brutish, as "impervious to logic of reason" and "highly sensitive to the logic of force." [113] Subsequently, a version of the piece under the pseudonym "X" appeared in the journal, Foreign Affairs, in May 1946. Kennan spelt out what came to be known as the political doctrine of containment, which suggested that the "main element of any United States policy toward the Soviet Union must be that of a long-term, patient but firm and vigilant containment of Russian expansive tendencies."[114] It was necessary for the United States to "confront the Russians with unalterable counter-force at every point where they

[110] *Ibid.* See also Scott E. Brower & Anna Simons, "The ACRI [African Crisis Response Initiative] Command and Control Challenge" (2000-2001) Parameters 118.

[111] See X [George F. Kennan], "The Sources of Soviet Conduct" (1947) 25 Foreign Affairs 566 and George F. Kennan, "Containment Then and Now" (1987) 65 Foreign Affairs 885.

[112] George Kennan, "The 'Long Telegram,'" From the Charge in the Soviet Union (Kennan) to the Secretary of State, Moscow, 22 February 1946, online: George Washington University <http://www.gwu.edu/~nsarchiv/coldwar/documents/episode-1/kennan.htm >.

[113] *Ibid.*

[114] Kennan, "The Sources of Soviet Conduct," *supra* note 111.

show signs of encroaching upon the interests of a peaceful and stable world."[115]

There are both discontinuities and continuities between the old and the new containment. In the case of Goldberg, there is the same kind of representation of the "other," including the belief that the "other" is less rational, and better influenced by force than logic. The point of departure is that instead of containing communism, Goldberg is proposing a long-term and vigilant containment – or quarantining – of the expansive tendencies of new pathogens found in "tropical" or "Black Africa." Moreover, the new containment suggests conditions of poverty and underdevelopment constitute the ideal condition for the germination of a whole slew of new threats – undesirable population, disease, criminality, and terrorism – all of which threaten the United States' body politic and national security.

While the transborder spread of disease is not novel and "Africa is not the only exporter of disease," Goldberg argues that "tropical Africa – hot, wet and poor, and home to an unmatched diversity of animals, plants and microbes – has been an especially fertile petri dish for pathogens" such as AIDS, Ebola, and malaria that are a "real threat" to the United States.[116] Further, when combined with poverty, these diseases constitute a condition of anarchy that reinforces insecurity. "Infectious diseases flower in conditions of anarchy," he writes.[117] Goldberg proceeds to map a vicious cycle of disease, poverty, and anarchy. Conditions of poverty are conceptualized in a particular way as well. For Goldberg, "[p]overty is a good incubator of disease" and likewise, political instability is seen as leading to chaos that also is conceived as "the best incubator of disease," which in turn reinforces chaos. This leads to the assessment that "an endless cycle of misery: war and corruption mean no health care and no family planning; no health care and no family planning mean too many sick people; too many sick people create desperation and poverty; which lead back to corruption and war."[118] Africa needs surveillance because "surveill-ance is intelligence."[119] What the United States needed to do to confront this threat was to gather

[115] *Ibid.*
[116] Goldberg, *supra* note 72 at 35.
[117] *Ibid.*
[118] *Ibid.*
[119] *Ibid.*

biological national security intelligence on Africa, and to provide it assistance to create biological stability and contain biosocial threats.

V. NATURAL SCARCITY VERSUS SOCIAL SCARCITY

The environmental-security hypothesis generated a lot of critical commentary, all of which need not be revisited here. What some of the recent evidence suggests is that there is no necessary correlation between population growth, population density relative to cropland, and a tendency to conflict; and large refugee populations do not necessarily increase the risk of conflict.[120] What I would like to focus on is the conflation of natural scarcity and social scarcity in all of these works, which build on the population-environment nexus divorced from history, and particularly the political economy of imperialism and globalization. Theorizing on environmental security proceeded by analytically separating out the causes and consequences of resource scarcity, and by conflating the relationship between natural resource scarcity and social scarcity. The Homer-Dixon project took as given resource scarcity and failed to problematize the uneven distribution and consumption of resources in the global community. Homer-Dixon, in fact, acknowledges that his work does not focus on "the maldistribution or depletion of resources, dysfunctional markets, exploitative gender relations and the international political economy."[121] The project focused, instead, on "the social consequences of scarcity,"[122] making little to no attempt to look at the global competition for resources among multinational corporations, agribusiness, mining and logging companies, or the role the latter play in social unrest and political and economic struggles.

Further, despite his case studies, including post-apartheid South Africa and post-genocide Rwanda, Homer-Dixon's conceptions of the state, of civil society actors, and the role of the private sectors are lodged in a liberal conception that seems incongruent with the

[120] See *e.g.* Henrik Urdal, "Ecoviolence? Evidence for Neo-Malthusian Concerns, 1950-2000" (Paper prepared for the Joint Session Meeting of the European Consortium for Political Research, Edinburgh, United Kingdom, 28 March – 2 April 2003), online: European Consortium for Political Research <http://www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/edinburgh/ws9/Urdal.pdf>.

[121] Homer-Dixon, "The Project," *supra* note 45 at 45.

[122] *Ibid.*

historical and political realities of these countries. Natural resource scarcity is depicted as a threat to "the delicate give and take relationship between state and society" and developmental challenges such as agricultural shortfalls are construed as "opportunities for the powerful groups to seize control of local institutions or the state and use them for their own gain."[123] Grassroots civil society organizations, for their part, are reduced to interest groups that contribute to conflict by making demands on an overstretched state, rather than as historically important political actors that, for example, helped undermined apartheid and subsequently contributed to the building of a democratic and more inclusive South Africa.

Precisely because of a de-emphasis of the global political economy of resources, redistribution, or other social citizenship concerns, there is a risk of conceiving environmental security issues in such a way that "biological scarcity is the 'last instance' of determination in planetary life."[124] The environmental security discourse, however inadvertently, contributes to the conflation of two conceptions of scarcity - one biological and the other social. Social scarcity under globalizing capitalism generates an "elite fear which seeks biological explanations and solutions for deep-rooted social and economic distress."[125] Instead of a focus on social restraints and limits on the consumption of the rich, for example, the dominant explanations of the "wasteful consumer class" in the global North turn to notions of natural scarcity; the poor, both their numbers and actions, were leading the earth to reach its "natural limits." Throughout the 1990s, "the new concerns about natural scarcity have been paralleled, every step of the way, by a brutal imposition of social scarcity."[126] Thus, instead of focusing on, say, feminist arguments about social citizenship rights and family planning and birth control as means to empowering women, the population and security discourse focuses on "control" and "stabilization" of overpopulation and the need to discipline the poor, particularly poor women in peripheral regions who were over-breeding. Moreover,

[123] *Ibid.* at 48.

[124] Andrew Ross, "The Lonely Hour of Scarcity" (1996) 7:3 Capitalism, Nature, Socialism 3 at 26.

[125] Betsy Hartmann, "To Vanquish the Hydra" (1994) 1 Political Environments online: Committee on Women, Population, and the Environment <http://www.cwpe.org/iss ues/dangerous_html/hydra.html>.

[126] Ross, *supra* note 124 at 6.

natural scarcity and social scarcity "have been confused, either deliberately, in order to reinforce austerity measures against the poor, or else inadvertently, through a lack of information and education about how natural resources are produced and distributed."[127]

Historical, political, and social contexts, however, do matter. In periods of economic instability, labour dislocation, and increased migration, pseudo-scientific explanations can appear seductively comforting. This was the case with the eugenics movement during the instabilities that accompanied industrialization and the shift to laissez-faire capitalism. Arguably, it also is the case with the shift from contemporary Keynesianism to neo-liberal globalization. Eugenics derived from the Greek root meaning "good birth," and in the nineteenth and early twentieth centuries its proponents saw it as the science of human improvement through "good breeding." The environmental-population debate is very much about (over)breeding by the poor in the global South and, hence, its proponents appealed to Thomas Malthus, but also to Francis Galton who coined the concept "eugenics" in 1883.[128] As Garland Allen wrote, "To those with economic and social power, and imbued with the new spirit of scientific planning," it was not surprising that "eugenics appeared to be taking an eminently rational approach to society by purporting to treat social problems at their roots."[129] Moreover, "[i]f ills such as unemployment, feeblemindedness, or normadism were genetic in origin, then the rational and efficient way to eliminate these problems would be to prevent people with such hereditary defects from breeding."[130] The dramatic changes of the 1990s also led to a search for certainty that, invariably, turned to biological explanations. According to David King, "[e]conomic globalisation . . . was eroding people's standard of living and job security, leading to a 'New World Disorder', in which resource shortages and environmental crises, as well as the emergence of new diseases, is leading to widespread fear

[127] *Ibid.*

[128] See Thomas Malthus, *supra* note 34; Francis Galton, "Eugenics: Its Definition, Scope, and Aims" (1904) 10:1 The American J. of Sociology.

[129] Garland Allen, "Eugenics and American Social History, 1880-1950" (1989) 31 Genome 885 at 886 [Garland, "Eugenics"]. See also Garland E. Allen, "Old Wines in New Bottles: From Eugenics to Population Control" in Keith R. Benson, Jane Maienschein & Ronald Rainger, eds., *The American Development of Biology* (New Brunswick, N.J.: Rutgers University Press, 1991).

[130] Garland, "Eugenics," *ibid.*`

and uncertainty."[131] As with the earlier eugenics movement, the environment-population proponents appeal to science and rationality to justify what are, in effect, historically contingent and deeply ideological arguments.

The aim here is not to deny the obvious, which is that many states on the African continent face profound development challenges in the contemporary era. Rather, the aim is to call into question the resort to biological and ideologically-driven environmental arguments in order to explain profoundly political, economic, and social changes. Arguably, intensified neo-liberal globalization has made significant parts of the global South "structurally irrelevant"[132] and "black hole[s] of informational capitalism."[133] Manuel Castells argues that a "structural, social causality underlies this historical coincidence" of the rise of the informational/global capitalism and the collapse of many African polities, economies, and societies.[134] The population-environmental security theorizing tries to explain this historical "coincidence" with environmentally and biologically deterministic arguments that problematically contribute to the collective "de-humanisation of Africans" and their location in broader historical patterns of inclusion and exclusion.[135]

As these structural effects of neo-liberalism deepen, the focus of security discourse has shifted to "[t]he threat of an excluded South fomenting international instability through conflict, criminal activity and terrorism."[136] Conditions of underdevelopment increasingly are conceptualized as a global security problem, what Duffield calls the new "development security nexus."[137] This convergence between development and security goes beyond the common sense understanding that long-term sustainable development is unlikely without a durable peace. Thus far this article has shown that in popular and academic discourses, the African continent is con-

[131] David King, "The Persistence of Eugenics" *GenEthics News* 22 (February/March 1998) 6 at 8, online: Human Genetics Alert <http://www.hgalert.org/topics/geneticSelection/eugenics.htm>.

[132] Castells, *supra* note 55 at 135.

[133] *Ibid.* at 161-65.

[134] *Ibid.* at 83.

[135] *Ibid.* at 82-83.

[136] Mark Duffield, *Global Governance and the New Wars: The Merger of Development and Security* (London: Zed Books, 2001) at 2.

[137] *Ibid.* at 15-17, 22-43.

structed as a diseased body politic, as unsafe, dangerous, as a security "threat" to the global commons and, indeed, as a threat to western values and civilization. In the next section, I briefly show how these depictions of Africa are playing out in security discourses following the terrorist attacks on the World Trade Centre and the Pentagon on 11 September 2001, and particularly in the President George W. Bush Administration's "war on terrorism" discourse.

VI. AFRICA AS AN "INCUBATOR" FOR GLOBAL TERRORISM

In the final section that follows, I briefly discuss how African conditions of poverty and underdevelopment are constituted, or perhaps, reconstituted, as the "soft underbelly" of the global body politic, whose borders are easily infiltrated and thus can serve as an "incubator" for global terrorist networks, criminal enterprises, and illicit financial networks. First, I offer a brief comment on the theoretical terrain, and second I show how these play out in the constitution of Africa as a site and source of terrorist threats. In the aftermath of the 11 September 2001 terrorist attacks on the World Trade Centre and the Pentagon, Africa's so-called "failed" and "collapsed" states are depicted, with increasing frequency, as an "enabling environment" for terrorism and criminality. Further, failed states are also viewed as the political spaces in which "new wars" are likely to occur.[138]

A. Failed States and New Wars

Both the concepts "failed states" and "new wars" are deeply contested. The concept "failed state" is employed with increasing frequency to characterize post-colonial states on the African continent. The concept of "failed state" was popularized by Michael Ignatieff.[139] However, there is no precise definition of the concept or easy way of classifying the disparate states that the concept is used

[138] See Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Stanford: Stanford University Press, 1999) [Kaldor, *New and Old Wars*]; Duffield, *ibid.*; and, Herfried Münkler, *The New War,* trans. by Patrick Camiller (Cambridge, U.K.: Polity Press, 2005).

[139] See Michael Ignatieff, *The Warrior's Honour: Ethnic War and the Modern Consciousness* (Toronto: Viking, 1998).

to explain.[140] Under international law, the concept is equally relevant to states in which institutions of legitimate governance have collapsed as it is to an arbitrary and tyrannical exercise of power – entailing a powerful police, security services, and a judiciary that are more loyal to the rulers, rather than the rule of law. The historical context for the use of the concept tends to be at least three-fold: first, the end of the Cold War and the end of the superpower practice of propping up often illegitimate and brutal proxy regimes in the global South because leaders espoused either communist or anti-communist allegiance; second, the colonial legacy that led to the destruction of indigenous traditions and, at the same time, failed to develop or consolidate the new, imposed western institutions that would be sustainable in the post-colonies; and, third, the instabilities and dislocations associated with the processes of economic globalization.[141]

Former United Nations Secretary-General Boutros Boutros-Ghali suggests failed states were "invariably the product of a collapse of the power structure providing political support for law and order, a process generally triggered and accompanied by 'anarchic' forms of internal violence."[142] The disintegration of state institutions, particularly the police services, security forces, and judiciary result in a paralysis of governance, a break down in the rule of law, and, ultimately, social disorder. Unlike the historical experience of interstate conflicts, in failed states the problem is seen as endogenous and within the territorial boundaries of the state. Moreover, some failed states witness the suspension of government functions, the destruction or looting of public assets, and either the killing or flight of experienced senior civil servants.[143] The effect of these conditions of uncertainty is that individuals may feel insecurity that, in turn, is

[140] See Daniel Thürer, "The 'Failed State' and International Law" (1999) 836 International Rev. of the Red Cross 731, online: International Committee of the Red Cross <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/438B7C44BDEAC7A3C1256B66005DCAAB>.

[141] *Ibid.*

[142] Boutros Boutros-Ghali, "Concluding Statement" *United Nations Congress on Public International Law – Towards the Twenty-First Century: International Law as a Language for International Relations*, *13-17 March 1995* (New York: UN, 1995) at 9.

[143] *Ibid.* at 9.

manifested in fear, volatility, and unpredictable behaviour, including violence.[144]

A basic assumption of "new wars" theorizing is that the nature of warfare changed in the twentieth century from "cold war" (what Kaldor termed the "imaginary warfare"[145]), to what is variously called "new wars,"[146] "irregular warfare,"[147] "degenerate warfare,"[148] and "privatised warfare."[149] The Cold War was "imaginary" to the extent that it did not entail direct "hot" war between the superpowers, although it did entail an unprecedented number of "hot" proxy wars fought across Africa and elsewhere in the global South. Since the Cold War, the incidences of classic interstate conflicts such as between Iraq and Iran or Ethiopia and Eritrea, which often entailed superpower intervention, have declined. A trend noticed during the Cold War was that proxy wars entailed a greater ratio of civilian-to-military casualties. This trend continues in the new wars which are internal, entail more civilian deaths than military, and involve a difficulty separating warriors/soldiers from citizens.[150] As well, states have lost their monopoly on warfare. The new wars are now fought by "paramilitaries, bandits and vigilantes as well as regular units, embedded in networks of corruption, black marketeering, protection rackets, arms and drug trafficking."[151] According to Shaw, there is a distinct political economy to "degenerate warfare," which "does not produce or mobilise so much as trade, loot and steal."[152] While new wars are different from, say, low-intensity conflicts that took over 100 million lives during the Cold War, they are, paradoxically, similar to older protracted conflicts such as the Thirty Years War, which was really a series of brutal and destabilizing wars in central

[144] Thürer, *supra* note 140 at n. 6.

[145] Mary Kaldor, *The Imaginary War: Understanding the East-West Conflict* (Oxford: Blackwell, 1990).

[146] See Kaldor, *New and Old Wars, supra* note 138; and Münkler, *supra* note 138.

[147] Ignatieff, *supra* note 139.

[148] Martin Shaw, "War and Globality" in Ho-Won Jeong, ed., *The New Agenda for Peace Research* (Aldershot, U.K.: Ashgate, 1999) 61.

[149] D. Keen, "When War Itself is Privatized: The Twisted Logic that Makes Violence Worthwhile in Sierra Leone" *Times Literary Supplement* (29 December 1995).

[150] See Kaldor, *New and Old Wars*, *supra* note 138.

[151] Shaw, *supra* note 148.

[152] *Ibid.*

Europe from 1618-1648. Like new wars of the twenty-first century, the Thirty Years War occurred before the "statization of war"; that is, before the state had a monopoly on warfare. As well, it involved various kinds of actors, including state, para-state, and private, and the duration was intermixed with periods of peace and protracted conflict.[153] Unlike classic interstate conflicts, new wars increasingly entail irregular armies, militias, guerrilla groups, warlords, private security firms, mercenaries, and other military entrepreneurs operating in failed or weak states. A major component of their modus operandi is the exploitation of resources. Because more benefit is derived from conflict than conditions of peace, and because political stability and economic recovery are unlikely even in conditions of peace, war becomes "a permanent field of activity."[154] This leads Münkler to offer a conclusion quite different from, for example, the neo-Malthusians and lifeboat ethics: "the specific economy of the new wars, together with their long duration, ensures that the exhausted and devastated regions in question will never get back on their feet without extensive outside aid."[155]

The new wars discourse has other implications for thinking about Africa, as it has witnessed the merger of two previously parallel tracks within international studies – development and security. New wars discourse strengthened the merger of development and security insofar as proponents claim that post-Cold War conflicts are caused by a "developmental malaise of poverty, resource competition and weak or predatory institutions."[156] Since 9/11, there has been a tendency in academic security discourses to draw "links between these wars and international crime and terrorism."[157] In this new security framework, poverty and underdevelopment are cast as "dangerous and destabilising."[158] This has implications for the African continent, where poverty is on the rise, particularly in conflict zones, in the contemporary era.

[153] Münkler, *supra* note 138 at 2-3.
[154] *Ibid.* at 1-2.
[155] *Ibid.* at 2.
[156] Duffield, *supra* note 136 at 15-16. .
[157] *Ibid.* at 16.
[158] *Ibid.*

B. Failed States, Poverty, and Terrorism

In the post 11 September 2001 security framework, the African continent's "failed" and "weak" states, shaped by conditions of poverty and underdevelopment, are constituted – or perhaps reconstituted – as an "enabling environment" for terrorist cells and assets and transborder shadow economies in illegal commodity trade. Admiral Sir Ian Forbes, the North Atlantic Treaty Organization's Deputy Supreme Allied Commander asserts that "the strategic context in which we find ourselves has changed dramatically since 11 September 2001."[159] What has changed, Forbes claims, is that "[f]uture threats come not from conquering states, but from failed or failing ones and from catastrophic technologies in the hands of embittered minorities."[160] Africa's "failed states" are viewed as providing a favourable context for domestic and international terrorist networks, and its "weak regulatory institutions and policies" as offering safe haven for terrorist networks, including "bypassing international banking systems and financial scrutiny."[161]

The 2002 National Security Strategy of the United States of America also draws a link between weak states, poverty, and terrorism. In the preface to the document, United States President George W. Bush suggests some states "are compromised by terror, including those who harbor terrorists" and that this compromised position is "because the allies of terror are the enemies of civilization."[162] The president further claims "that weak states . . . can pose as great a danger to our national interests as strong states."[163] While it does not articulate a necessary correlation between poverty and terrorism, it does suggest such a link is strengthened by conditions of underdevelopment and poverty in weak states. "Poverty does not make poor people into terrorists and murderers. Yet poverty, weak institutions, and corruption can make weak states

[159] Ian Forbes, "Transformation Towards Future Warfighting" (October 2003) 148:5 RUSI [Royal United Services Institute for Defence and Security Studies] J. 56.

[160] *Ibid.* at 56.

[161] Greg Mills, "Africa's New Strategic Significance" (2004) 27:4 Washington Quarterly 157 at 161.

[162] U.S., White House, *National Security Strategy of the United States of America* (Washington, D.C.: The White House, 2002) at v., online: The White House <http://www.whitehouse.gov/nsc/nss.pdf>.

[163] *Ibid.*

vulnerable to terrorist networks and drug cartels within their borders."[164] A link between poverty and terrorism was drawn more strongly by Tanzanian President Benjamin Mkapa, although it is not clear that he would conceptualize the link in civilizational terms. According to Mkapa, "[i]t is futile, if not foolhardy to think there is no link between poverty and terrorism."[165] Since 9/11, this line of thinking has led some African leaders to "equate the war against terrorism primarily with the war to end poverty and, to this end, to receive greater assistance."[166] This has led to some parallels being drawn between the Cold War and the current war against terrorism: some African leaders – for example, in Uganda, Algeria, Morocco, and Nigeria – see espousing anti-terrorism as a pragmatic way to obtain foreign assistance and to stay in power.

African leaders are not alone in linking poverty and terrorism. Similarly, Ireland's Bono of the rock band U2, who has campaigned with the non-governmental organization DATA (Debt, AIDS, and Trade) to reduce the debt burden and to increase foreign aid to end poverty, repeatedly and perhaps instrumentally, invokes the poverty-terrorism nexus. At the 2005 World Economic Forum (WEF), Bono states that "[i]t is touching to be told that we have a heart for these matters, but sometimes it's better to have a hard head."[167] Bono suggests the kind of aid program used to limit the influence of communism is also needed in Africa to halt the influence of terrorism. According to Bono, "[t]he Marshall plan that came out for Europe wasn't just from the goodness of the [U.S.] heart, but as a bulwark against Sovietism. We're saying a Marshall-type plan [for Africa] could be against the tyranny of our time, on the front line of terror."[168]

One link between failed state, poverty, and terrorism is used to suggest the need for a "reluctant" return to imperialism by "orderly societies" in order to confront the threat posed by failed states

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[164] *Ibid.*

[165] Tanzania's President Benjamin Mkapa quoted in Adam Lusekelo, "Africa's war on terror targets poverty" *BBC News World Edition* (27 February 2003), online: BBC News <http://news.bbc.co.uk/2/hi/business/2797405.stm>.

[166] Mills, *supra* note 161 at 159-60.

[167] World Economic Forum, Press Release, "Global Leaders Call for Big Push on Aid to Africa at World Economic Forum Meeting in Davos" (28 January 2005), online: CSR Wire <http://www.csrwire.com/article.cgi/3480.html>.

[168] *Ibid.*

primarily in Africa and the Middle East.[169] For example, Mallaby, an editorial writer for the *Washington Post*, argues that that failed states argues that are increasingly trapped in a cycle of poverty and violence, and that a consequence of the United States war on terrorism is that it "has focused attention on the chaotic states that provide profit and sanctuary to nihilist outlaws, from Sudan and Afghanistan to Sierra Leone and Somalia."[170] Violence and social disintegration are linked to population pressures and environmental factors, particularly "to rapid population growth, and this demographic pressure shows no sign of abating" in poor countries.[171] Sub-Saharan Africa, for Mallaby, is marked by "an excruciating combination of high birth rates and widespread AIDS infection [that] threatens social disintegration and government collapse – which in turn offer opportunities for terrorists to find sanctuary."[172] In addition to providing an "enabling environment" for "dysfunctional states," Mallaby suggests that so-called failed states also pose a threat because they are sites and sources of an illegal drug trade, illegal workers, and other kinds of criminal enterprises. Anti-imperialism, Mallaby concludes, is hard to sustain "as the disorder in the poor countries grow more threatening" for the United States and world order.[173]

Clearly there is debate about the precise nature of the link between poverty and terrorism. The links drawn between poverty and terrorism do give reason for pause, especially to avoid constructing a bifurcated world in which the "other" is poor, over-breeding, threatening the earth's resources, as well as the primary source of instabilities, including crime and terrorism. In a recent book on new wars, Münkler also states that "it is by no means the case that military conflicts are most common where the poverty is most abject."[174] Some time ago, Walter Laquer cautioned against making sweeping generalizations about the "who" of terrorists or terrorism,

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[169] See Sebastian Mallaby, *The World's Banker: A Story of Failed States, Financial Crises, and the Wealth and Poverty of Nations* (New York: Penguin Books, 2004) and Sebastian Mallaby, "The Reluctant Imperialist: Terrorism, Failed States, and the Case for American Empire" (2002) 81:2 Foreign Affairs 2 [Mallaby, "Reluctant Imperialist"].

[170] Mallaby, "Reluctant Imperialist," *ibid.* at 2.

[171] *Ibid.*

[172] *Ibid.* at 3.

[173] *Ibid.* at 2.

[174] Münkler, *supra* note 138 at 2.

as well as against trying to construct overarching "root causes" of terrorism based on social, cultural, or structural conditions.[175] Poverty and social inequality can be among the factors that contribute to terrorism, although they are just as likely to contribute to other kinds of social-revolutionary struggles. Further, a survey of the wave of terrorism across Europe – in Germany, Italy, and Spain – in the 1970s and the 1980s show they had little to do with poverty and inequality.[176] The lack of a consistent link is evident from a survey of poverty and terrorism in Latin America, but also from the sometimes ideological distinction drawn between "terrorist" and so-called "freedom fighters."

"Terrorism is an abomination and must be countered," write Ken Booth and Tim Dunne, "but poverty is the world's biggest killer."[177] Similarly, Cardinal Cormac Murphy-O'Connor, leader of the Catholics in Scotland and Wales, suggests we needed to clarify our priorities in relation to both terrorism and poverty.[178] The world should have poverty as its priority. While condemning "the terrible scourge of terrorism" and "the truth that it is more dangerous today than it has ever been," this has led to a misunderstanding of failed states and poverty reduction.[179] "We point the finger at such states because we fear that it is there that terrorism is allowed to flourish."[180] Murphy-O'Connor goes on to say this tendency worries him, not the least because it leads to us getting both our definitions and our priorities wrong. "States fail when they are incapable of lifting people out of poverty, or when they pay insufficient heed to

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[175] See Walter Laquer, *The Age of Terrorism* (Boston: Little, Brown, 1987) and Walter Laquer, "Postmodern Terrorism: New Rules for an Old Game" (1996) 75:5 Foreign Affairs 24, online: Federation of American Scientists <http://www.fas.org/irp/news/1996/pomo-terror.htm>.

[176] Susanne Karstedt, "Terrorism and 'New Wars'" in Bülent Gökay & R.B.J. Walker, eds., *11 September 2001: War, Terror, and Judgement* (London: Frank Cass, 2003) 139 at 140.

[177] Ken Booth & Tim Dunne, "Worlds in Collision" in Ken Booth & Tim Dunne, eds., *Worlds in Collision: Terror and the Future of Global Order* (Basingstoke: Palgrave MacMillan, 2002) 1 at 6, online: The Global Site <http://www.theglobalsite.ac.uk/press/206dunne.pdf>.

[178] See Cardinal Cormac Murphy-O'Connor quoted in Alex Kirby, "Poverty 'is the world's worst threat'" *BBC News World Edition* (17 February 2004), online: BBC News <http://news.bbc.co.uk/2/hi/science/nature/3495685.stm>.

[179] *Ibid.*

[180] *Ibid.*

the importance of ensuring that wealth is adequately distributed so that the whole of the population can flourish."[181] The priority is not just the environment, or ideology, but also ethics – and social justice. States fail, Murphy-O'Connor concludes, when there is an inattention to social relations, including the equitable distribution of national wealth among the many, and not just the few.[182]

While Yoshikzu Sakamoto accepts that the marginalized peoples in the global periphery might harbour resentment and anger, the reason for this is the "structural roots of terrorism."[183] Terrorism, according to Sakamoto, "is the product of oppressive political and social structures, of which poverty is a component," but it is also "the corresponding political and social consciousness of being oppressed."[184] This political consciousness is inclusive of the "global dominance of global capital," as well as the "global political and military dominance of the United States," and a growing gap between a rich North and an impoverished South. Given the role that communications play in terrorism and counter-terrorism, Karstedt suggested it is necessary to follow a policy of containment of new wars to ensure a disruption of organized crime, the global illegal economy, and terrorism, as well as giving voice and empowerment to the powerless must be part of any strategy.[185] It is this growing inequality that might lead the poor to engage in acts of terrorism. Notwithstanding the contingencies and complexities in the relationship between poverty and terrorism, the link is frequently drawn and helps to underwrite the merger of the development and security discourses.

Africa increasingly is portrayed as a space of emerging terrorist threats, and its conditions of poverty and underdevelopment as sources of terrorism, which pose a threat to the national security of the United States. In some commentaries, the African continent is

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181 *Ibid.*

182 *Ibid.*

183 Yoshikazu Sakamoto, "The Politics of Terrorism and 'Civilization': How to Respond as a Human Being" in Bülent Gökay & R.B.J. Walker, eds., *11 September 2001: War, Terror, and Judgement* (London: Frank Cass, 2003) 30.

184 *Ibid.* at 37.

185 Karstedt, *supra* note 176 at 151-52.

referred to as the "sleeping giant" in the war on terrorism.[186] Countries like Nigeria are characterized as a "potent" mix of ethnic and communal tensions, radical Islamism, and anti-Americanism that fuel militancy and violence.[187] Other African states in the Horn of Africa with large Muslim populations, like Sudan and Somalia, are depicted as "fertile breeding grounds" for Islamic militancy, as potentially "another Afghanistan," and as a threat to United States' security.[188] The sub-regions of West and Central Africa are depicted as a "fertile breeding ground" where terrorism can germinate unnoticed and grow, because they are spaces "where disorder and poverty harbour extremism."[189] These sub-regions frequently are characterized as "anarchic zones," where local "rogue" leaders are partners in "lawless bazaars" involving an unholy alliance of criminal networks laundering money from the illicit "blood diamonds" trade, drug trafficking, or hiding al-Qaeda and other criminal assets.

Africa as a breeding ground for terrorism, and thus a threat to the United States, is now part of the official discourse of President George W. Bush's administration, but it also was the perception of at least some senior officials in the administration of President Bill Clinton. At a Pentagon media roundtable, Michael Westphal, deputy assistant defense secretary for African affairs, notes that "Africa is not always a topic high on the agenda list here in the Pentagon," but it does matter, not the least because the United States relies on the African continent for some 15 percent of its oil and because at least forty of the forty-eight states in Sub-Saharan Africa are places where "poverty, unemployment and lack of capital development exacerbate social and ethnic tensions and create havens for conflict, insecurity and terrorism."[190] While there is a tendency to compare specific

[186] See Gordon Lubold, "Africa Command?" (2004) 143:5 Armed Forces J. International 12 and John G. Roos, "Terrorism is International: And it has a foothold in Africa" (2004) 141:2 Armed Forces J. International 4.

[187] See Princeton N. Lyman & F. Stephen Morrison, "The Terrorist Threat in Africa" (2004) 83:1 Foreign Affairs 175.

[188] *Ibid.* at 175.

[189] Matthew A. Cenzer, "Specters of War: African chaos invites terrorist exploitation" *Chicago Tribune* (16 December 2001) 1 at 1.

[190] Jim Garamone, "Backgrounder: U.S. Policy on Africa Seeks Stability" (3 April 2002), online: Defend America, U.S. Department of Defense News About the War on Terrorism <http://www.defendamerica.mil/articles/apr2002/a040302a.html>.

African "failed states" like Somalia with Afghanistan, which terrorists can use for transit, to station themselves, raise funds, and plan operations, there is equal tendency to generalize to all of Sub-Saharan Africa.

As I noted previously, some Clinton administration officials also argued that Africa was a source of terrorist threats to the United States. In testimony before the United States House Committee on International Relations one month after 9/11, Susan Rice, former assistant secretary of state under President Bill Clinton, describes Africa as the "world's soft underbelly for global terrorism," arguing that poverty and underdevelopment constitute an enabling environment for terrorist cells and illicit financial networks.[191] In testimony before the United States House Committee on International Relations, Rice claimed terrorist cells like al-Qaeda hide throughout all sub-regions of Africa, and "[t]hey plan, finance, train for, and execute terrorist operations in many parts of Africa, not just from Sudan and Somalia."[192] Rice suggests terrorist networks take advantage of Africa's "weak" institutions, including policing, security, and the judiciary. "Africa's porous borders" enable the uninhibited movement of "men, weapons, and money around the globe."[193] Moreover, such networks "take advantage of poor, disillusioned populations, often with religious or ethnic grievances, to recruit for their jihad against the civilized world. In short, terrorist networks are exploiting Africa thoroughly. And in the process, they are directly threatening our national security."[194]

Echoing the language of Kaplan and Goldberg, Susan Rice characterizes Africa as an "incubator," however instead of for pathogens, she adds for producing new terrorist threats to the United States' security. According to Rice, "much of Africa has become a veritable incubator for the foot soldiers of terrorism," and that "[i]ts poor, young, disaffected, unhealthy, undereducated populations often

[191] U.S., *Africa and the War on Global Terrorism, Hearing before the Subcommittee on Africa of the Committee on International Relations house Representatives*, 107th Cong. (Washington, D.C.: United States Government Printing Office, 2001) at 6 (Susan E. Rice), online: Committee on International Relations, U.S. House of Representatives <http://wwwc.house.gov/international_relations/107/76191.pdf>.

[192] *Ibid.* at 7.

[193] *Ibid.*

[194] *Ibid.*

have no stake in government."[195] They are without faith or hope in the future and, therefore, are easily exploited by terrorist networks.[196] Rice concludes that the cold, hard facts suggest that "[t]hese are the swamps we must drain . . . [or] we are going to place our national security at further and more permanent risk."[197] A similar argument is advanced by Karl Wycoff, the Bush administration's associate coordinator for counterterrorism. In an April 2004 statement made to the House Committee on International Relations, Wycoff argues that Africa was vulnerable to terrorism because conditions of underdevelopment such as "the prevalence of poverty, famine and disorder offers terrorists an opportunity to insert themselves into a region, to develop support systems, and to troll for new members for their groups."[198] In order to combat terrorism in Africa, he proposes the merging of development and security initiatives "to address the factors that create an enabling environment for terrorism – poverty, intolerance, political alienation, and corruption."[199] Wycoff also argues that charities, such as the al-Haramayn Islamic Foundation, which is now on the United States' banned list as a Saudi terrorist group, as well as other non-governmental organizations, have been "abused" by terrorist organisations, which have turned members into extremists.[200] Paradoxically, however, while these terrorist groups have served extremist ends, they also contribute to community development by building hospitals, schools, and conducting regular charitable activities. Closing down such charitable groups has led to deprivation, particularly among the most needy in society and, consequently, have reinforced conditions that make the poor vulnerable to recruitment by terrorist groups.

While acknowledging that states in Africa and the global South may have various development priorities, some senior United States policy-makers have sought to merge development and terrorism, but

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[195] *Ibid.* at 8, 12.

[196] *Ibid.*

[197] *Ibid.* at 8.

[198] Karl Wycoff, "Fighting Terrorism in Africa" (Testimony by Karl Wycoff, Associate Coordinator, State Department Office of the Coordinator for Counterterrorism to the House International Relations Committee, Subcommittee on Africa, Washington, D.C., 1 April 2004), online: Committee on International Relations, U.S. House of Representatives <http://www.house.gov/international_relations/108/Wyc040104.htm>.

[199] *Ibid.*

[200] *Ibid.*

to insist that terrorism should be an equal priority for Africa. In a speech before the second intergovernmental high-level meeting on prevention and combating of terrorism in Africa, United States Ambassador Cofer Black, coordinator for counterterrorism, notes that he understood that the African continent and other countries in the global South have other important priorities like "economic development, combating AIDS, good governance, health care, alleviating poverty."[201] However, Black cautions that "these concerns cannot be used as excuses to bow out of the struggle against terrorism."[202] As an example, Black suggests that "anti-corruption efforts are as essential to the struggle against terrorism as the struggle against poverty."[203] Black conflates development and counter-terrorism agendas in Africa by suggesting that terrorists look for "easy targets" and "soft spots" to attack, "weak states" to serve as safe havens, and "less known locations that allow them to operate unhindered."[204] The examples he cites include Kenya, Morocco, and Russia. What Black ignores, ironically, is that the World Trade Centre and the Pentagon were attacked in the United States, which is not normally viewed as a weak or failed state. And while Black did acknowledge that some of the most spectacular terrorists attacks are carried out by middle class and relatively wealthy men like Osama bin Laden and that "members of Al-Qaida are educated; they are sophisticated users of modern technology," there is still a tendency to link the poor to terrorism.[205] According to Black, poor people and alienated young people, turn to violence and terrorism "because they believe something is lacking in their lives, [and] their societies that cannot be obtained in any other way."[206]

At issue is not whether these conditions in failed states create insecurity or are destabilizing for citizens within them, for neighbouring countries that might have to deal with refugees, and for the well-being of the global community. What is at issue is whether

[201] Cofer Black, "The Prevention and Combating of Terrorism in Africa" (Remarks by Ambassador Cofer Black, Coordinator for Counterterrorism, at the Second Intergovernmental High-Level Meeting on the Prevention and Combating of Terrorism in Africa, Algiers, Algergia, 13 October 2004), online: <http://www.state.gov/s/ct/rls/rm/2004/37230.htm>.

[202] *Ibid.* [emphasis added].

[203] *Ibid.*

[204] *Ibid.*

[205] *Ibid.*

[206] *Ibid.*

it makes sense to think of these developments through the prism of the environmental security discourse, which over-emphasizes population and resource scarcity and under-emphasize history and the global political economy. What is also at issue since 9/11 is whether it makes sense to think about these issues, of the challenges of post-colonial state building, underdevelopment, and the persistence of poverty through the prism of the United States-led war on terrorism? What continues through the various post-Cold War security discourses, including on failed states, new wars, and the war on terrorism, is the perception that Africa constitutes a security threat.

VII. SUMMARY AND CONCLUSION

This article draws critical attention to the manifold ways in which "Africa" is constituted as a threat in western popular and academic discourses on security. While the nature of the threat differs across discourses, a persistent theme is the constitution of Africa as a threat to western security broadly defined. These representations do matter for how we think, talk, and theorize about Africa and, importantly, for what kind of priority the global community gives to issues relating to Africa. The first section began with the everyday mass media, and how an undifferentiated Africa often is characterized as a diseased body politic, as sick, a basket case, dying, and decaying and, invariably, as posing a danger and security threat to the global commons. Similarly, in mainstream environmental security discourses, Africa is often constructed as symbolic of the dangers of a global "population explosion," environmental destruction, and resource scarcity leading to protracted conflicts between enclaves of privileged few and the excluded many. In the more popularized versions of the environmental security discourse, African is depicted as a source of criminality and social disorder, as well as a "Petri dish" for new pathogens that can threaten the "biological national security" of the United States. Finally, the article briefly touches upon the ways in which Africa is being constructed as an "enabling environment," and an "incubator" for terrorist cells, illicit financial transactions, and "lawless bazaars" that are part of transborder shadow economies trading in drugs, "blood diamonds," and other illicit commodities. Africa is depicted as a "swamp that needs to be drained" in order to protect the national security of the United States. Considering the violence with which the United States now confronts perceived security threats worldwide, these representations and

policy frames do not bode well for the African continent.

THE CHANGING CONSTITUTION OF SECURITY IN EUROPE

Alister Miskimmon and Joanne Wright*

This article discusses the post-September 11 relationship between Europe and the United States in terms of transatlantic security. The authors argue that the response to intense pressure following the Cold War was to recalibrate rather than fundamentally change this relationship. However, it is argued that this recalibration has failed to resolve all the tensions of the relationship and have been exacerbated by policy differences on issues such as terrorism and military action in Iraq. This is shown by focussing on three historical phases in the relationship: 1) the period following World War II and during the Cold War in which the U.S. and Western Europe largely agreed on the nature and origins of security threats; 2) the period following the fall of the Berlin Wall, in which NATO expanded, the European Union was created, and there was pressure resulting from the Balkan conflicts, which saw an increased political and military role on the part of Europe; and, 3) the period of increased differences and unresolved pressures from NATO's involvement in Kosovo, the September 11 attacks, and most recently, military action in Iraq, which have exacerbated the differences between Europe and the U.S regarding the interests, assumptions, policies, and practices of transatlantic security. The authors argue that this last phase in particular has led to a need to recast and reshape transatlantic security.

Cet article porte sur la relation qui existe entre l'Europe et les États-Unis depuis le 11 septembre en ce qui concerne la sécurité transatlantique. Les auteurs estiment que la réponse aux pressions intenses suite à la Guerre froide a été d'introduire une nouvelle orientation dans la relation au lieu de la changer fondamentalement. Cependant, on fait remarquer que cette nouvelle orientation n'a pas réglé les tensions qui existaient dans la relation et aggravées par les différences en politiques sur des questions tels que le terrorisme et l'action militaire en Irak. Les auteurs le démontrent au moyen de trois étapes historiques dans la relation : 1) la période qui a suivi la Seconde guerre mondiale et la Guerre froide alors que les États-Unis et l'Europe occidentale s'entendaient essentiellement sur la nature et les origines des menaces pour la sécurité; 2) la période qui a suivi la chute du mur de Berlin qui a vu l'expansion de l'OTAN et la création de l'Union européenne ainsi que les pressions résultant de conflits dans les Balkans, ce qui a donné lieu à un plus grand rôle politique et militaire pour l'Europe; et 3) la période de plus grandes différences et de pressions non réglées découlant du rôle de l'OTAN au Kosovo, des attaques du 11 septembre et des dernières actions militaires en Irak qui ont aggravé les différences entre l'Europe et les États-Unis quant aux intérêts, aux hypothèses, aux politiques et aux pratiques en matière de sécurité transatlantique. Les auteurs prétendent que c'est surtout cette dernière étape qui a déclenché le besoin de réexamen et de refonte de la sécurité transatlantique.

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I. INTRODUCTION

In the immediate aftermath of the September 11 terrorist attacks on the U.S., there was a wave of transatlantic solidarity most notably manifested in NATO's first operationalization of its collective defence provisions, which was declared on 12 September 2001.[1] However, this gesture only temporarily masked divisions that were already emerging between the Americans and the Europeans over conceptions of security, security institutions, and the operational requirements for security. The militarization of the U.S. campaign against terrorism helped reignite these divisions, as did the U.S.'s actions against Iraq in 2003. The debate between the Americans and the Europeans has many dimensions – both conceptual and practical. These include the value of alliances as opposed to coalitions of the willing, the role of international law and pre-emptive military action, the role of military power in solving security problems, the nature of modern military power, the significance of the capabilities gap between the Europeans and the Americans, and the relationship between NATO and the European Union (EU). In this article we argue that, while the relationship between the allies was subject to considerable pressures in the decade after the Cold War, their response was to recalibrate rather than fundamentally recast their relationship. However, this recalibration failed to resolve all the tensions in the relationship and these tensions have now been exacerbated by policy divergences in relation to terrorism and especially Iraq. This suggests that a more fundamental recasting of the transatlantic security bargain may be necessary.

In order to demonstrate this, we examine three historic phases in the relationship between Europe and the United States. The first is a phase of consolidation in the aftermath of WWII and during the Cold

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[1] Lord Robertson, "The Future of the Transatlantic Link" (Speech in Lisbon, Portugal, 24 October 2001), online: NATO <http://www.nato.int/docu/speech/2001/s011024a.htm>.

War. During this time, Western Europe and the United States were largely agreed on the nature and origins of security threats. The second is a phase of recalibration that encompasses the decade following the collapse of the Berlin Wall, the double expansion of both NATO and the EU and the pressure placed on both organizations by the Balkans conflicts. The process of recalibration is best illustrated in the attempts to give the Europeans a greater political and military role in regional security problems. For various reasons this was not entirely successful, and events since the NATO action in Kosovo, September 11, and more recently over the war in Iraq, suggest that a deeper and more significant recasting of security relationships between states is necessary. This third phase involves new and unresolved pressures on the transatlantic security community and particularly divergences in interests, assumptions, policies, and practices.

One potentially important aspect in any recasting of the transatlantic security relationship will be the role of institutions. In 1995 Christoph Bertram stated that "[i]n times of certainty, institutions mirror the realities of power. In times of uncertainty, they can shape the realities of power."[2] The events that followed the September 11 terrorist attacks on the United States clearly mark the beginning of uncertain times within European and transatlantic security policy. Whilst Bertram maintains that institutions can act as important fora in which states organize collective responses to new challenges, the actual responses of the major players in European security policy since September 11 have, at best, been ambivalent in terms of finding institutional solutions to the issues facing them.

II. PHASE I: CONSOLIDATING THE U.S.-WEST EUROPEAN SECURITY RELATIONSHIP, 1945-1989

This section of the article provides a brief historical overview of U.S.-European conceptions of security in the post-Cold War era. This context is important as it establishes the major foundations of the relationship, and that while these foundations were constantly

[2] *Europe in the Balance: Securing the Peace Won in the Cold War* (Washington, D.C.: Carnegie Endowment, 1995) at 14.

challenged during the Cold War, they still proved strong enough to survive many crises and leave intact a collective defence system around NATO, an economic system centred largely on free trade (at least among its members) and a set of political views based on liberal democracy.[3] While the current "crisis" in U.S.-European relations may have some qualitative and quantitative differences from previous crises, there are also historical continuities. The allies, for example, have never held an exclusively military conception of security, although there were times, especially during the 1980s, when this was predominant.

At the end of the Cold War, there was general agreement that for, the security of the Americans and European to be guaranteed, there had to be three mutually reinforcing elements. First and most obvious, was physical protection from what was seen as an aggressive and expansionist Soviet Union. But, especially in the early Cold War years, there was also a common understanding that people also needed economic and political protection. Thus the United States was prepared to invest huge amounts of capital into the economic and political restructuring of Western Europe. Even though it was not referred to as such at the time, there was an element of what we would today call "human security" when interdependence and mutual vulnerability to corrosive elements in society were recognized.

In many ways, the military security element in the relationship is the simplest to understand, although its intricacies are not the simplest to explain. In formal terms, the *North Atlantic Treaty*[4] constitutes an arrangement for collective defence on a regional basis

[3] For more detail on these themes see Michael Smith, *Western Europe and the United States: The Uncertain Alliance* (London: Allen & Unwin, 1984); A. W. DePorte, *Europe Between the Superpowers* (New Haven: Yale University Press, 1979); John Lewis Gaddis, *The Long Peace: Inquiries into the History of the Cold War* (Oxford: Oxford University Press, 1987); Walter LaFeber, *America, Russia, and the Cold War, 1945-1996* (New York: McGraw Hill, 1997); and, Richard H. Ullman, *Securing Europe* (Princeton: Princeton University Press, 1991).

[4] 4 April 1949, Can. T.S. 1949 No. 7, online: NATO <http://www.nato.int/docu/basictxt/treaty.htm> [*Washington Treaty*].

as provided for in article 51 of the *Charter of the United Nations*.[5] During the late 1940s and 1950s, there was a strong consensus among the Americans and the West Europeans on the nature and intensity of the threat they faced. The West Europeans, it was widely believed, were vulnerable to Soviet ground superiority and incapable of defending themselves. Thus there was a need for defence, but it was a new kind of defence, supplied largely by a geographically distant power. Even at this early stage, then, the key was to be American air power combined with, for the moment, its nuclear superiority and conceived of within a strategy of massive retaliation.

The first major challenge to this conception came with the Soviet acquisition of intercontinental ballistic missile capability in the late 1950s and early 1960s. The issue was now one of how to extend credibly the U.S. nuclear guarantee to Europe, and both the Americans and the Europeans spent the next two decades coming up with sometimes very different answers.

The American response to the credibility gap that had opened up was to build up non-nuclear forces so that any potential Soviet invasion could be blocked without having to resort to the nuclear level (flexible response). The Americans argued that this shored up deterrence, making it more credible by providing a U.S. president with a range of options below the nuclear threshold. The Europeans took the opposite view, arguing that this was sending a message to the Soviets that they could engage in aggression below the nuclear level. This difference of opinion is very well illustrated in the "no first-use" debate that erupted in the early 1980s, especially in the pages of Foreign Affairs.[6] The Americans, including Kennan and McNamara, argued that NATO should adopt a policy of "no first-use" on the basis that any use of nuclear weapons ran the risk of unacceptable escalation from which there would be no winner. The

[5] 26 June 1945, Can. T.S. 1945 No. 7, online: UN <http://www.un.org/aboutun/charter/> [*UN Charter*].

[6] McGeorge Bundy, George F. Kennan, Robert S. McNamara & Gerard Smith, "Nuclear Weapons and the Atlantic Alliance" (1982) 60:4 Foreign Affairs 753; Robert C. Aldridge, *First Strike! The Pentagon's Strategy for Nuclear War* (Boston: South End, 1983).

Europeans responded that the purpose of nuclear weapons was to deter all war, not just nuclear war, and that the best way to do this was to present the Soviet Union with the incalculable risk of any conflict escalating to the nuclear level. Essentially, the Europeans were arguing that the Americans were trying to reduce nuclear risks to themselves at the same time as increasing the conventional risks for the Europeans. Europeans apparently wanted to plug the credibility gap with a strategy that emphasised the risks of nuclear conflict. However, this position became much less certain when NATO planned to introduce a new generation of short and medium term nuclear weapons to the European theatre, also in the early 1980s.

One of the strongest supporters of the introduction of these new generation nuclear missiles was West German Chancellor Helmut Schmidt. By stressing the nuclear emphasis of NATO, he argued strongly that the real function of these weapons was to ensure that the risk of nuclear attack was more equitably shared by the allies as well as the benefits of deterrence.[7] But, as these weapons were being integrated into NATO strategy, many European political leaders and large sections of the European public became increasingly uneasy. This was because U.S. military leaders in particular adopted war-fighting and even war-winning rhetoric that caused the Europeans to think that Americans were setting up a scenario for a limited nuclear war on European soil.[8] The tensions of this debate were exacerbated by the generally poor relationship between the U.S. and the Soviet Union in the late 1970s and early 1980s.

The Europeans were always ready to respond much more quickly and positively to Gorbachev than the Americans. By the mid to late 1980s, many Europeans were beginning to question the value of

[7] For an excellent disposition of the relationships between West Germany, the United States and the rest of Europe, see Wolfram F. Hanrieder, *Germany, America, Europe: Forty Years of German Foreign Policy* (New Haven: Yale University Press, 1989) at esp. Part 1.

[8] Ronald Reagan himself said that he could foresee a nuclear exchange in Europe that would not necessarily involve the territory of the United States or the Soviet Union.

NATO. Indeed, NATO spent its fortieth birthday in early 1989 amidst rather gloomy speculation about its future.[9] It is somewhat ironic that it was the removal of the threat NATO was designed to counter that gave it a new lease of life. However, although the centrality of nuclear weapons to NATO has receded, the arguments about risk-sharing and U.S. preponderance have continued.

III. PHASE II: INSTITUTIONAL RECALIBRATION, 1990-2001

The decade opened with a great flourish of optimism in both academic and policy-making circles about the role of international institutions. The liberal institutionalist thesis that institutions "matter" became dominant in the policy orientated academic journals spurred on by the multilateralist rhetoric of the Clinton election campaign and early administration.[10] This suited the mood of many Europeans who were full of confidence in the aftermath of German unification and the launch of the drives for economic and monetary union and political union. The future for security institutions thus looked bright, and there was some attempt to reconceptualize security in a more holistic manner to embrace humanitarian and development issues. There also was some attempt to restate the bargain between the transatlantic partners that involved the Europeans taking greater responsibility for regional security and the Americans recognizing European leadership. The EU and NATO

[9] Richard K. Betts, "NATO's Mid-Life Crisis" (1989) 68:2 Foreign Affairs 37. For more information on the tensions caused by short and medium range nuclear weapons and the Strategic Defence Initiative of the Reagan years see John Baylis, "NATO Strategy: The Case for a New Strategic Concept" (1987-88) 64 International Affairs 43.

[10] See *e.g.* Stephen Van Evera, "Primed for Peace: Europe After the Cold War" (1990-91) 15:3 International Security 7; Stanley R. Sloan, "NATO's future in a new Europe: an American perspective" (1990) 66 International Affairs 495; Richard H. Ullman, "Enlarging the Zone of Peace" (1990) 80 Foreign Policy 102; Richard H. Ullman, *Securing Europe* (Princeton: Princeton University Press, 1991); John Meuller, "A New Concert of Europe" (1989-90) 77 Foreign Policy 3; Charles A. Kupchan & Clifford A. Kupchan "Concerts, Collective Security, and the Future of Europe" (1991) 16:1 International Security 114; and, Robert O. Keohane & Lisa L. Martin, "The Promise of Institutionalist Theory" (1995) 20:1 International Security 39.

underwent some recalibration in an attempt to institutionalize these shifts. However, by the end of the decade, it was clear that something more than recalibration was needed.

Two trends dominate the development of both NATO and the EU during the 1990s. The first was the expansion of membership to include countries of the former communist block. While this was not without its problems (some of which continue), more problematic was the second trend – the expanding definition of the types of security problems that each institution was prepared to regard as a legitimate part of its mandate. The conflicts and interventions in Bosnia and Kosovo demonstrated, however, that norms, institutional goals, and capabilities had become quite seriously disjointed. This continues to feed into the current transatlantic discord and is a major challenge for any real reconceptualization of security in Europe.

Almost as soon as the Cold War ended, it was clear that the countries of central and Eastern Europe were eager to join both NATO and the EU However, it was equally clear that not all would be able to join at the same time. In the case of NATO, any expansion of membership also had to be considered against a background of relations with Russia, whose attitudes towards NATO enlargement were far from consistent. Although the negotiations were understandably much more protracted and complex in the case of the EU, it agreed to expansion to include former communist countries during the 1990s. The main security decision for these new members of the EU, as for the old ones, is to what extent they will commit to the EU's evolving common security and defence policy (ESDP). The development of the Common Foreign and Security Policy (including the ESDP) represents a major expansion of activity on the part of the EU and its predecessor the European Community. Both organizations faced major difficulties in expanding their memberships and mandates and in defining new relations between them.

At its 1991 Rome Summit, NATO launched a *New Strategic Concept* that widened the type of security mission that NATO was prepared to include in its operational as opposed to its consultation

mandate (generally referred to as non-article 5 missions).[11] NATO's 1999 *Strategic Concept* continued this trend.[12] Under the heading of "Security Challenges and Risks" it talks of:

> [E]thnic and religious rivalries, territorial disputes, inadequate or failed attempts at reform, the abuse of human rights, and the dissolution of states [which] can lead to local and even regional instability. The resulting tensions could lead to crises affecting Euro-Atlantic stability, to human suffering, and to armed conflicts. Such conflicts could affect the security of the Alliance by spilling over into neighbouring countries, including NATO countries, or in other ways, and could also affect the security of other states. [13]

Hints that NATO was considering a global as opposed to regional role,[14] also point to a departure from the original conception of NATO as a regional collective defence organisation under article 51 of the *UN Charter*.

The *Treaty on European Union (Maastricht)* of 1991[15] was the first time the Europeans formally institutionalized foreign and security cooperation within the European Union.[16] The *Treaty*'s second pillar established the Common Foreign and Security Policy (CFSP) with the stated objective that, over time, this might evolve to a common defence policy. Initially though, it was conceived of as concentrating on security issues outside collective defence. The EU designated the Western European Union (WEU) as its military

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[11] NATO, "The Alliance's New Strategic Concept," online: NATO <http://www.nato.int/ docu/comm/49-95/c911107a.htm>.

[12] NATO, Press Release, "The Alliance's Strategic Concept," online: NATO <http://www.nato.int/docu/pr/1999/p99-065e.htm>.

[13] *Ibid.* at para. 20.

[14] *Ibid.* at para. 24.

[15] 7 February 1992, 31 I.L.M. 247, online: EU <http://europa.eu.int/abc/obj/ treaties/en/entoc01.htm>.

[16] There had been an ill-fated attempt to set up a European Defence Community in the early 1950s. See Kevin Ruane, *The Rise and Fall of the European Defence Community : Anglo-American Relations and the Crisis of European Defence, 1950-55* (Basingstoke: Macmillan, 2000); Hans-Heinrich Jansen, *Grossbritannien, das Scheitern der EVG und der NATO-Beitritt der Bundesrepublik Deutschland* (Bochum, Germany: Universitätsverlag Dr. N. Brockmeyer, 1992).

arm that could be asked to undertake certain humanitarian and peacekeeping tasks on behalf of the EU For the first half of the 1990s, there seemed to be a general agreement that NATO would retain primary responsibility for defence and that the EU, through the WEU, would assume at least some responsibility of other types of security problems.[17] However, the experiences of Bosnia and Kosovo revealed both the operational and conceptual weaknesses of such an approach and remain a major contributing factor to the debates surrounding a more radical recasting of the transatlantic security order that had emerged by the end of the decade.

The implications of the conflicts in Bosnia and Kosovo were immediately felt in NATO, the EU, and in transatlantic relations. For NATO, weaknesses were clearly revealed in its ability to deal effectively with the non-article 5 missions that were now such a central part of its mission. For the Europeans, the Balkan conflicts revealed the scale of the capabilities gap between them and the Americans, leaving dangerously exposed any claims or aspirations they might have to act independently of NATO and/or the U.S. in even the most minor of security operations. By the Kosovo crisis of 1999, the Europeans were reportedly "shocked" at the military gap that had been revealed and the Americans were warning of dire consequences as a result.[18] Some sort of recalibration was needed, and the allies attempted this by the augmentation of the European military capability.

In the first part of the decade, most European countries had been in favour of augmenting their military capabilities via NATO. At its January 1994 summit in Brussels, NATO announced its Combined Joint Task Force (CJTF) concept by which it agreed to lend the EU,

[17] See Western European Union, *WEU Contribution to the European Union Intergovernmental Conference of 1996*, WEU Council of Ministers, Doc. 1492 (1995) at Option C2; and Assembly of the Western European Union, *Organising Security in Europe – Political Aspects*, Assembly of the Western European Union, Doc. 1509 (1996) at paras. 21-4.

[18] Elizabeth Pond, "Kosovo: Catalyst for Europe" (1999) 22:4 Washington Quarterly 77 at 80.

via the WEU, assets to conduct operations under EU leadership.[19] At its 1999 Washington Summit, NATO also adopted a Defence Capabilities Initiative that was designed to bolster European resources in an efficient, effective, and interoperable manner.[20]

At the same time, however, the Europeans were also absorbing the implications of their lack of political clout during the Bosnian and Kosovar conflicts. As a direct result of the Bosnian experience, there was some change in the British position, which led to some rapid developments within the EU Prior to the Bosnian conflict, Britain had been most insistent on the primacy of NATO, arguing that any attempts to develop an independent European capability would be both wasteful and potentially damaging to the transatlantic relationship. Britain also refused to countenance any absorption of the WEU by the EU Since Bosnia, however, Britain has pursued a slightly more ambiguous line.

After an Anglo-French Summit in St. Malo in December 1998, the British appeared to drop their hostility towards the development of some sort of autonomous European defence and security capability and agreed to the WEU being absorbed into the EU. In response, the U.S. agreed to lend NATO assets to the EU as opposed to the WEU. At its Cologne Summit held in June 1999, just as the Kosovar conflict was ending, the EU agreed to some substantial military objectives that were confirmed at the Helsinki Summit six months later. At the Helsinki Summit, not only did the EU agree to the setting up of an interim EU Military Committee (EUMC), an interim EU Military Staff (EUMS), and an interim EU Political Security Committee (PSC), but also to develop a 50,000 - 60,000 strong European Rapid Reaction Force capable of being deployed within 60 days and sustainable for up to one year.[21]

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[19] NATO, Ministerial Communiqué, "Declaration of the Heads of State and Government" (10-11 January 1994), online: NATO <http://www.nato.int/docu/comm/49-95/c940111a.htm>.

[20] NATO, Press Release, "Defence Capabilities Initiative" (25 April 1999), online: NATO <http://www.nato.int/ docu/pr/1999/p99s069e.htm>.

[21] The EUMC was made permanent under EC, *Council Decision 2001/79/CFSP of 22 January 2001 setting up the Military Committee of the European Union*, [2001] Official Journal of European Communities, L27/4; the EUMS was

During the first decade after the end of the Cold War, there was then some attempt to reconceptualize security and lots of debate about institutional design. There was also some recalibration of the institutions in an attempt to give the Europeans a more visible security presence. But there were two major problems with this. First, there was little in the way of substance to make any sort of European defence and security policy a reality. The Europeans failed to devote the necessary resources to make autonomous action credible. Second, among Americans, there was increased hostility towards multilateralism in any form. Coupled with the Revolution in Military Affairs (RMA), American frustrations over Bosnia set the stage for a more radical recasting of the transatlantic security bargain.

Events since the Kosovo war in 1999 have prompted two main developments. First, Kosovo reinforced in the minds of European and American leaders that the question of burden-sharing in European security could no longer be fudged. Second, the September 11 attacks on the United States and the subsequent "war on terrorism," along with the invasion of Iraq, raised unresolved questions concerning both the fundamental nature of security threats and the role and function of NATO and the EU in providing for Europe's stability. In responding to these developments, the member states of both NATO and the EU need to recast institutional agreements between and within each organization to ensure their effectiveness into the new century.

Central to the 1990s recalibration of security institutions were the duplication of capabilities between NATO and the EU, the possibility of the decoupling of EU decision-making structures from the transatlantic security community, and the issue of discrimination

made permanent underEC, *Council Decision 2001/80/CFSP of 22 January 2001 on the establishment of the Military Staff of the European Union,* [2001] Official Journal of the European Communities, L27/7; the PSC was made permanent underEC, *Council Decision 2001/78/CFSP of 22 January 2001 setting up the Political and Security Committee,* [2001] Official Journal of the European Communities, L27/1.

in terms of the openness of such new structures to new members across Europe.[22] The NATO Summit at Prague in December 2002 recognized the progress that had been made in ESDP-NATO relations. The EU-NATO Declaration on ESDP outlined the following principles of EU-NATO cooperation:

> Partnership: ensuring that the crisis management activities of the two organizations are mutually reinforcing, while recognizing that the EU and NATO are organizations of a different nature;
>
> Effective mutual consultation, dialogue, cooperation, and transparency;
>
> Equality and due regard for the decision-making autonomy and interests of the EU and NATO;
>
> Respect for the interests of the Member States of the EU and NATO;
>
> Respect for the principles of the *UN Charter*, which underlie the *Treaty on European Union* and the *Washington Treaty*, in order to provide one of the indispensable foundations for a stable Euro-Atlantic security environment, based on the commitment to the peaceful resolution of disputes, in which no country would be able to intimidate or coerce any other through the threat or use of force, and also based on respect for treaty rights and obligations as well as refraining from unilateral actions; and,
>
> Coherent, transparent, and mutually reinforcing development of the military capability requirements common to the two organizations.[23]

The recalibration of the relationship between the two institutions was further illustrated in the transfer of responsibility for peacekeeping in Europe from NATO to fledgling EU forces. On 31 March 2003, NATO handed over authority to the EU in Macedonia. Central to this development was the need to establish a legal basis for handover to allow the EU to take over the mission. The operation in Macedonia, *Operation Concordia*, is an EU-led mission making

[22] See Madeline Albright's "3 Ds" – duplication, decision-making, discrimination; Madeline K. Albright, "The right balance will serve Nato's future" *Financial Times (U.K.)* (7 December 1998) 22.

[23] "E.U.-NATO Declaration on ESDP" (16 December 2002), reprinted in *NATO: The Prague Summit and NATO's Transformation* (Brussels: NATO Public Diplomacy Division, 2003) at 106-107.

use of NATO resources – relying on the use of SHAPE (Supreme Headquarters Allied Powers Europe) planning facilities. The mission is led by the Deputy SACEUR (Supreme Allied Commander Europe) who reports to the EU, and in particular the Political Security Committee, as well as SACEUR and the North Atlantic Council. The EU has also taken over SFOR (the NATO Stabilisation Force in Bosnia-Herzegovina), the most significant deployment of the European Rapid Reaction Force to date. The handover of these two operations in Macedonia and Bosnia to the EU from NATO is of major symbolic importance, as the EU seeks to share more of the burden in military affairs within Europe. However, the real significance lies in the rise in *political* influence of the Europeans in European security affairs as the EU becomes more assertive in foreign and security policy.

In addition, a joint EU/NATO Capability Working Group was set up in May 2003 that includes Defence planners from the EU and NATO member states. These are mutually reinforcing moves that facilitate cooperation between the EU and NATO. In relation to the "*war on terror*," there is also a good deal of EU/NATO cooperation. However, there is a major problem in that the EU coordinates its anti-terrorism policy across the three pillars of the treaty – the Economic Community, the Common Foreign and Security Policy, and Justice and Home Affairs. EU/NATO cooperation only falls within Pillar Two activities, thus complicating coordination between the two organizations. Many of the anti-terrorism measures that have been implemented within the EU have been within the sphere of Justice and Home Affairs, Pillar Three of the *Treaty on European Union*. As a result NATO and the European Commission find it difficult to work together as there is no institutional link through which they can cooperate.[24] Attempts have been made within the NATO international staff to forge better EU Commission/NATO cooperation, but have been controversial, especially in France, due to concerns about compromising the role of EU member states in the policy-making process.

[24] Author's confidential interview with NATO official, Brussels, 2 July 2003.

While it is important to acknowledge that much cooperation between the two organizations continues, it does have to be recognized that this attempt at recalibrating the relationship between the European and the Americans has not been entirely successful. The Europeans have failed to establish a security capability or credibility that is truly independent of NATO and crucially they have failed to establish a meaningful global partnership with the U.S. In the meantime, the Americans have become even more unilateral in their pronouncements and behaviour. Robert Kagan in a provocative book argues that the U.S. and European states come from fundamentally opposite ends of the policy spectrum in security affairs,[25] with the U.S. being more willing to consider the use of force for political ends than European states. On the other hand, Andrew Moravcsik posits that Europeans are more influenced by the fall of the Berlin Wall on 9 November 1989 than the events of 11 September 2001 – 11/9 rather than 9/11.[26] This points to very divergent American and European perspectives that might only be resolved by a more radical recasting of the relationship between them.

IV. THE NEED FOR RECASTING, 2001-2005

Many of the major issues driving change and provoking debate within European security circles are a direct reaction to American unilateral action. The emergence of new practices, policies, and assumptions affecting the construction and operation of U.S. security policy based on predominantly national lines will necessitate a recasting of the transatlantic security community.

The perception of what constitutes a challenge or threat to security is perhaps the major dividing line between European states and America. Barry Buzan has called for

> a readjustment of security analysis away from material factors and towards the processes of securitization (and desecuritization) by which human

[25] Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order* (New York: Alfred S. Knopf, 2003).

[26] Andrew Moravcsik, "Striking a New Transatlantic Bargain" (2003) 82:4 Foreign Affairs 74.

> collectivities determine what is (or is not) to be understood, and treated, as an existential threat. Threats, in other words, are to be primarily understood as a social phenomenon, which may or may not be associated with a corresponding material reality.[27]

The very public falling out at the 2003 Munich Security Conference between Donald Rumsfeld, the American secretary of state for defence and Joschka Fischer, the German foreign minister, demonstrated that amongst some Europeans and the American administration there was a wide gap in perceptions of the threat posed by Iraq before the fall of Sadam Hussein.[28]

Mary Hampton has suggested that the "positive identity" that had been built up over years within the NATO alliance has been irreparably damaged as a result of differences relating to the war against terrorism.[29] Hampton claims that community values are no longer in evidence within the transatlantic community due to the U.S.'s policy of defining "coalitions of the willing" rather than working through established institutional mechanisms.[30] This will ensure that transatlantic cooperation will not be as reflexive as during the Cold War and in the 1990s, which may entrench the scope and depth of diverging interests between the U.S. and the EU. Ultimately, it is the U.S., as hegemon, that must decide if the transatlantic partnership is worth the effort.[31] However, whilst

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27 Barry Buzan, "Change and Insecurity Reconsidered" in Stuart Croft & Terry Terriff, eds., *Critical Reflections on Security and Change* (London: Frank Cass, 2000) 1 at 9.

28 Fischer urged Rumsfeld "[y]ou have to make the case" in a heated discussion during the conference: Stichworte zur Sicherheitspolitik, Sonderausgabe, February 2003, Presse- und Informationsamt der Bundesregierung, XXXIX Münchner Konferenz für Sicherheitspolitik (7-9 February 2003), online: Federal Government of Germany <http://www.bundesregierung.de/Publikationen-Fotos/Online-Publikationen/Stichworte-zur-Sicherheitspoli-11673.469790/bericht/Sonderausgabe-02-2003.htm>.

29 Mary N. Hampton, "NATO, Germany, and the United States: Creating positive identity in Trans-Atlantia" in Glen R. Chafetz, Benjamin Frankel & Michael Spirtas, eds., *The Origins of National Interests* (London: Frank Cass, 1999) 235.

30 Mary N. Hampton, "Crisis in Trans-Atlantia: The U.S., Germany, and NATO" (Paper presented to the Twenty-seventh Annual Conference, German Studies Association, New Orleans, 18-21 September 2003) [unpublished].

31 Ivo H. Daalder, "The end of Atlanticism" (2003) 45:2 Survival 147.

September 11 did not change everything, it reinforced in the minds of the Bush administration the need to move well beyond a multilateral institutionalized conception of international security policy.

It is instructive to consider American and European conceptions of international order, broadly defined. The terms by which America defines the post-September 11 order centre on a number of central concepts or tenets:

Pre-emption – Slocombe argues that America has a "carte blanche" to pursue its security policy objectives, including retaliatory strikes on other countries, on the basis of the attacks on the U.S. on September 11.[32]

Intervention – America will intervene anywhere where it suspects its security is being threatened.

War on Terrorism – America feels that in taking the war to terrorists it can best defend itself. Hard security (that is military) will be most effective in quashing terrorist cells.

Sidelining institutions when consensus is difficult to achieve – Policy-makers in Washington are less willing to work through international institutions than previously. Rumsfeld has defined America's new outlook in the phrase, "the coalition will not define the mission - the mission will define the coalition."[33] As a reaction against this, pressure has built up concerning the emergence of a European avant-garde in security policy, based around the quartet of France, Germany, Belgium, and Luxembourg.

[32] Walter B. Slocombe, "Force, Pre-emption and Legitimacy" (2003) 45:1 Survival 117 at 118-19.

[33] Donald Rumsfeld & Paul Wolfowitz as cited in Government of the United States, *National Security Strategy of the United States of America* (Washington, D.C.: Government of the United States, 2002), online: The White House <http://www.whitehouse.gov/nsc/nss.pdf>.

The EU has defined its relationship with the U.S. and the rationale behind how their relationship fits the world order in a different fashion. Javier Solana, the high representative of the European Union, advocates that the transatlantic bargain can be reconstructed if both sides commit to four key principles:

1) Europe and America commit to being allies and partners;
2) That the partners make fair contributions to maintaining world order;
3) The focus of attention would be on causes as much of symptoms;
4) That rules would be the basis of joint action to sustain a world order.[34]

According to Solana then, Europe is seeking to establish an international order that is defined by rules and commitments that engenders trust and mutual dependence among nation-states. This has been evident in attempts to encourage positive engagement in international affairs from Russia, China, and Japan. Europe is clearly moving towards a greater institutionalization of its domestic and foreign affairs whilst America is embarking on a conflicting trajectory of loosening multilateral ties, thus heavily compromising existing multilateral structures and making a recasting more necessary and likely.

V. CONCLUSIONS

This article has mapped out the central higher order security issues and debates affecting the transatlantic security community since the end of the Second World War. Bush's insistence that September 11 represents a paradigm shift for policy-makers working in the field of security and defence has dramatically affected the institutional terrain on which transatlantic security policy has been based since 1949. What we have argued, is that throughout the 1990s, there has been some recalibration of security policy and of the institutions that define and provide security in Europe. Whilst the

[34] Javier Solana, "Mars and Venus Reconciled: A New Era for Transatlantic Relations" (Albert H. Gordon Lecture at the Kennedy School of Government, Harvard University, 7 April 2003), online: Council of the European Union <http://ue.eu.int/ueDocs/ cms_Data/docs/pressdata/EN/discours/75373.pdf>.

effects of September 11 can be overplayed, the terrorist attacks on America did reinforce in the minds of the Bush administration that America's interests had fundamentally altered since the fall of the iron curtain. European interests have altered too and, it seems, increasingly diverge from those of the U.S. Europe and America have clearly differed over the correct strategy of dealing with the potential development of nuclear weapons in Iran, on the issue of Europe's intention to lift the EU's self-imposed arms embargo on China,[35] and most seriously, on the issue of what role international institutions should play in shaping global order.

Things have clearly changed in transatlantia. The re-election of George W Bush in 2004 did little to change the frosty diplomatic climate on both sides of the Atlantic. Bush's choice of Condoleezza Rice as secretary of state for his second administration rather than signalling a new policy towards Europe, reinforced the direction of American foreign policy has taken since Bush took office in 2000.[36] Bush's proposal of arch-neoconservative Paul Wolfowitz and John Bolton as president of the World Bank and U.S. ambassador to the United Nations respectively, seemed to suggest that Bush's distain for the mechanics of multilateral diplomacy had reached new heights.[37] Chancellor Schröder's statement in February 2005 that NATO was no longer the main forum for discussions within the transatlantic community on security issues further signalled NATO's demotion in the institutional hierarchy since the events of 11 September 2001.[38] The future of transatlantic relations will necessitate enhanced EU-U.S. summits to discuss foreign and

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35 Charlemagne, "The Reds in the West" *The Economist* 374:8409 (13 January 2005) 40.

36 "France and America: Condi's charm offensive" *The Economist* 374:8413 (10 February 2005) 36.

37 Stephen Fidler & Mark Turner, "An assertive nationalist: Man in the news John Bolton, Bush's straight-talking nominee for the UN is no neo-conservative" *Financial Times (U.K.)* (16 April 2005) 11.

38 Schröder stated, "[NATO] is no longer the primary venue where transatlantic partners discuss and coordinate strategies." See Gerhard Schröder, "Speech to the 41st Munich Conference on Security Policy" (12 February 2005), online: Munich Conference on Security Policy <http://www.securityconference.de/konferenzen/rede.php?menu_2005=&menu_konferenzen=&sprache=en&id=143&>.

security policy issues of mutual interest. The emergence of ESDP will reinforce this development, despite Menon's verdict that ESDP is the result of "[i]ll-judged and insensitive leadership wielded on one side of the Atlantic (spawning) an ill-thought out, precipitative initiative on the other."[39]

The recalibration of security policy that has taken place since the end of the Cold War has been a major challenge for European and U.S. policy-makers. Whilst NATO and the EU have sought to reinvent themselves in the post-Cold War era, nation-states, rather than institutions have shaped the new realities affecting the transatlantic community. Rather than building on the end of the Cold War division of Europe, America and Europe have struggled to redefine their relationship in the face of new challenges. What has emerged since the end of the Cold War is a recalibration of the central bargains on which transatlantic security cooperation rested. This was driven by greater American insistence that European states shoulder more of the burden for regional and global security issues, and demands from European states that there should be new provisions for power-sharing within the Atlantic alliance. While this recalibration was limited in its success, the greater prevalence of American unilateralism since September 11 has unsettled it further as the U.S. has sought to conduct an unfettered foreign policy committed to confronting, often by military means, threats whatever and wherever they are perceived to be.

Mary Hampton's claim that the fundamental norms that underpinned the transatlantic security community are under threat from American unilateralism is a convincing one. The United States as the hegemon has the key role in deciding whether security policy within the transatlantic community can continue to be recalibrated to meet new challenges, or whether it will have to be fundamentally recast to reflect new interests and a new American strategic outlook. However, it will be new or recast transatlantic institutions centring on the European Union and the United States, as opposed to the

[39] Anand Menon, "Why ESDP is Misguided and Dangerous for the Alliance" in Jolyon Howorth & John T. S. Keeler, *Defending Europe: The EU, NATO, and the Quest for European Autonomy* (New York: Palgrave, 2003) 203 at 215.

Cold War and 1990s focus on NATO, which will mirror future realities.

THE U.S., THE UN, AND THE GLOBAL RULE OF LAW

W. Andy Knight*

The author analyzes the emerging global rule of law that has developed since World War II, arising from principles of just war theory, human rights covenants and international laws and practices respecting global criminality, and the willingness of the United States to disregard these principles when its national interests are at stake. It is argued that this attitude on the part of the U.S., arguably the world's greatest power, undermines efforts being made to consolidate and entrench a global rule of law. In the article, the author examines the evolution of the concept of the rule of law, including the Westphalian and liberal legalist models, elements and sources of the emerging global rule of law, the impact of the 11 September 2001 terrorist attacks, and the U.S. counter-terrorist response on the existing global rule of law. The author concludes by saying measures necessary to implement a counter-terrorist strategy that would benefit the global rule of law.

L'auteur analyse la primauté mondiale émergente du droit depuis la Seconde guerre mondiale, découlant des principes de la théorie de la guerre juste, des pactes relatifs aux droits civils et politiques et aux lois et pratiques internationales concernant la criminalité mondiale et la volonté des États-Unis de ne pas tenir compte de ces principes lorsque leurs intérêts sont en jeu. On prétend que cette attitude de la part des États-Unis, sans doute la plus grande puissance au monde, mine l'effort fait pour consolider et reconnaître la primauté mondiale du droit. Dans l'article, l'auteur examine l'évolution du concept de la primauté du droit, incluant les modèles des légalistes westphaliens et libéraux, les éléments et les sources de la primauté mondiale émergente du droit, l'impact des attaques terroristes du 11 septembre 2001, la réaction antiterroriste des États-Unis en termes de primauté mondiale existante du droit. L'article conclut par considerer ainsi que les mesures nécessaires à la mise en œuvre d'une stratégie antiterroriste aidant la primauté mondiale du droit.

> "[T]he United Nations must be able to articulate an effective and principled *counter-terrorism strategy* that is respectful of the rule of law and the universal observance of human rights."[1]

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1 *A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change,* GA Res. 565, UN GAOR, 59th Sess., UN Doc. A/59/565 (2004) 3.

> "[I]f there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment – and to visit again the military option."[2]

I. INTRODUCTION

In the immediate post-Cold War period, there was much hope of a new world order that would be governed by international legality as a basic regulator of state behaviour, by predictability and orderliness, and by strengthened multilateralism. However, this hope suffered a severe setback on 11 September 2001 when terrorists attacked the United States, and dwindled even further with the U.S. counter-terrorist response. Not only did the 9/11 terrorist attacks signal a new world disorder, the U.S. response to those terror acts significantly undermined any prospects for consolidating a global rule of law.

This article suggests that an embryonic global rule of law has been slowly evolving and developing since World War II, built on the foundations of just war theory, the Geneva Conventions, and the *Universal Declaration on Human Rights*.[3] A number of significant developments at the UN and within the international community, such as the accumulation of a body of international laws on global criminality, the practice of ad hoc international tribunals, and the creation of a permanent international criminal court (ICC) have also aided the development of this emerging global legal system.

The main argument in this paper is that while the U.S. is generally supportive of the idea of a global rule of law, it is willing to disregard this idea when its national interests are at stake. However, this ambivalent position on the part of the world's hegemonic power only serves to undermine efforts being made to consolidate and entrench what can be seen as an embryonic global rule of law.

What follows is a discussion and examination of the evolution of the concept of the rule of law; the realist position on the universality

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2 *Ibid.* at 55.

3 UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

of this concept and flaws in the realist argument; two distinct models of the global rule of law – Westphalian and liberal legalist models; the normative thrust of a universal rule of law; elements and sources of what can be seen as an embryonic global rule of law; the state of this embryonic law particularly after the terrorists attacks of 9/11 and the U.S.'s counter-terrorist response; and, what it would take to implement a truly global rule of law counter terror strategy.

II. TOWARDS A "GLOBAL" RULE OF LAW?

The rule of law has long been associated, especially by those in the West, with a well-ordered society.[4] However, there is not a single conception of the rule of law but several, often conflicting and confusing, concepts associated with it. In fact, as some correctly argue, "the rule of law" has become somewhat of a popular political shibboleth or a moral-political philosophic principle.[5] It is important, therefore, in beginning any discussion of the rule of law to be clear as to its meaning and to explain why and to what extent it is a "good" for society. Things can become even more complicated when one begins to deal with "the global" rule of law. This term implies that there is some consensus over what constitutes a universal "rule of law."

Realist scholars tend to question this assumption and posit that even if there is an embryonic global rule of law, it is at best epiphenomenal and definitely "dependent on power and therefore subject to short-term change at the will of power-applying States."[6] For many realists, the rule of law is something that develops domestically, within a state, because a state's governing authority can muster the legitimacy and coercive control to back up that law. At the global level, it is quite another matter, in their opinion, since the condition of anarchy does not allow for the existence of a global

[4] Not everyone agrees that the rule of law is necessarily a desirable thing. See Christine Sypnowich, "Utopia and the Rule of Law" in David Dyzenhaus, ed., *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart Publishing, 1999) 178 at 179.

[5] See Andrei Marmor, "The Rule of Law and its Limits" (2004) 23 Law & Philosophy 43; also found online: University of Southern California <http://lawweb.usc.edu/cleo/working-papers/olin/documents/03_16_paper.pdf>.

[6] Michael Byers, *Custom, Power, and the Power of Rules* (Cambridge: Cambridge University Press, 1999) at 22.

governing authority that has either legitimacy or coercive clout. This argument, while persuasive on one level, is suspect for a number of reasons.

First, it assumes that the world is in a perpetual state of anarchy, which is clearly not the case. Second, it ignores evidence of global (or international) practices that certainly resemble norms of the rule of law in their characteristic ability to cause states to act at times with restraint and sometimes in rather predictable and orderly ways. Third, it turns a blind eye to attempts to apply domestic legal principles at the global level. And, fourth, it does not recognize the accumulation of a body of legal principles and practices that already exists, nor the evolution of legal institutions designed to disseminate and adhere to legal principles and practices at the global level.[7] But before turning to the evidentiary features that indicate the presence of at least an embryonic global rule of law, it is important to understand what lies at the heart of this concept – "the rule of law."

The "rule of law" is actually a very ancient ideal that was posited by Aristotle as a system of rules inherent in what he called "the natural order."[8] For Aristotle, there is an inherently natural way in which human beings relate peaceably to one another in the absence of any written laws. That natural pattern of peaceable interaction is reinforced by "natural law." But the idea of natural laws is not accepted unanimously. Among those who reject this notion are some legal positivists, like Austin, who question the premise of a natural moral order that can somehow produce natural laws. They posit that law is really devised by the sovereign and depends on social facts that may or may not be guided by ethical or moral sentiments. To put it another way, what laws are in force in any system will very much depend on what social standards the officials of that system recognize as authoritative such as, for instance, legislative enactments, judicial decisions, or social customs.[9] However, most legal positivists would concede that whether or not laws have ethical

[7] Some of these points are raised by Antonio Franceschet, "Towards a Global Rule of Law? Prospects and Challenges" (2003) [unpublished paper presented at the Atlantic Provinces Political Science Association Meetings, St. John's Newfoundland and Labrador, 26-28 September 2003] 2.

[8] By "natural order," Aristotle was referring to the moral source from which natural laws tend to emerge and derive their authority.

[9] See "Legal Positivism," online: Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/entries/legal-positivism/>.

and moral content is secondary to the fact that they exist as rule-governed apparatuses – to guide and constrain human conduct and to produce clear standards that would result in predictability of behaviour and a sense of order within society.

Other legal positivists insist on drawing a distinction between the ideal of what laws "ought to be," and what laws "are" in practice. Such a distinction is important in discussions of a global rule of law. In the first instance, one can begin from the assumption that states and peoples ought to have some rule-governed apparatus that is global (i.e., above and beyond that which is found within individual state/society complexes) in order to guide and constrain human conduct in an increasingly globalized world and to keep a semblance of global order amidst anarchic tendencies. Without such a rule-governed apparatus we would most likely revert back to a state of nature in which there would be an uncontrollable spiral of, *inter alia*, illegal inter-state and intra-state wars, terrorism, genocide, ethnic cleansing, internecine violence, racial animosity, homophobia, forced migration, transnational crime (including drug trafficking, trafficking in women and children, money laundering), HIV/AIDS, financial upheavals, poverty, famine and environmental degradation. In that kind of scenario, the very foundations of human society would be completely disrupted and the order of the world would be lamentably defective.

Of course, one could argue that we are already living in such a state of world disorder.[10] However, the situation might be even worse were it not for the presence of a body of international rules and norms and the voluntary commitment of many states to adhere to them. These global "laws" ought to be refined, in some cases, but they are clearly present in rudimentary form. The primary concern, though, is the absence of enforcement measures that are strong enough to ensure that all countries, large and small, abide by those global laws that are in effect. But where is the evidence for the existence of a global rule of law?

[10] I have made this argument elsewhere. See W. Andy Knight, "Global (Dis) orders" in Janine Brodie & Sandra Rein, eds., *Critical Concepts*, 3d ed. (Toronto: Pearson Education Canada, 2004).

III. CONCEPTIONS OF THE GLOBAL RULE OF LAW

Antonio Franceschet argues that there are two distinct models of the global rule of law: Westphalian and liberal legalist models.[11] Both models offer cautiously optimistic assessments about global politics and about the ability of the international community to be governed by particular principles, norms, rules and regulations.

A. The Westphalian Model of the Global Rule of Law

The Westphalian model begins from the premise that global norms and rules emerge and act as procedural constraints on sovereign states within the inter-state system. This model can be traced to 1648 when the treaties of Westphalia brought an end to the Thirty Years' Wars in Europe – a war that pitted Catholics against Protestants. Out of those treaties were formed legitimate and authoritative territorial actors called "states." These states became the new sovereigns, offering protection to their citizens from potential attacks coming from outside their territories. The Westphalian principles, norms, rules and regulations that governed state to state interaction remained in place for over 350 years. One can see within the Westphalian international system, the beginnings of a rule of law (a set of constraints) to which sovereign entities were expected to adhere.

However, as Franceschet correctly observes, the Westphalian rule of law "is a very thin, unspecified, and minimalist set of procedural restraints."[12] Why was this the case? Since, states, the sovereign entities, did not recognize any other sovereign, the inter-state system was bereft of a single authoritative or overarching governance entity. Thus, the principles that governed the interactions of states had to be minimalist, or bare bones, for international order to be a realistic possibility. Arriving at a global rule of law therefore required that sovereign state actors engaged in a substantial amount of discussion, debate, consultation, and compromise.

The main purpose of any global rule of law is to act as a constraint on war. But the Westphalian model of the global rule of

[11] Franceschet, *supra* note 7 at 2-7.
[12] *Ibid*. at 3.

law could, at best, only minimize the use of force. States were not allowed to use force against each other unless there was a justifiable reason to do so – for example, in self-defence. Absent an authoritative global sovereign, it was impossible to convince all states that the use of coercive force should be outlawed altogether. So states largely rejected the Kellogg-Briand Pact of 1928 (which would have outlawed war) and opted for a more minimalist set of procedural rules to limit the incidences of war. These rules can be found in the UN Charter.

In the Charter, there is a tension between the notion of sovereign equality and great power responsibility. All states are supposed to be equally sovereign. Yet, an apex body was created in the UN system – the Security Council – that granted greater responsibility and power to a select group of states – the permanent five: the U.S., Britain, China, France, and Russia (formerly the Soviet Union). These five states were granted veto power over all substantive decisions within the Council. At the same time, it was expected that with this power also came a greater responsibility both to contribute substantively to the maintenance of international peace and security and to uphold the rule of law within the international system. However, with no overarching authority above states, no state can be forced to abide by international law. States can voluntarily consent to these laws (treaties, conventions, protocols) or decide not to. Thus, powers with material strength can undermine the global rule of law by simply deciding not to adhere to specific parts of the law, by claiming exemption from parts of it (exceptionalism), or by acting as though the global rule of law does not exist.

B. The Liberal Legalist Model of the Global Rule of Law

The liberal legalist model of the global rule of law has challenged the Westphalian model, but not replaced it. It modifies the Westphalian model slightly by suggesting that the right to state sovereignty is conditional upon a state's willingness to abide by certain human rights norms domestically. The whole purpose of inserting this condition is to ensure individual rights and fundamental freedoms within the state. Thus the individual is given prominence of place by this version of the rule of law. It also suggests that individual rights and freedoms are best guaranteed by democratic or republican governments.

Advocates of this position, like Immanuel Kant, argue that the best hope for a peaceful inter-state system lies in domestic governance reform. If all states were democratic (or republican in form) then it would be easier to gain consensus about the global rule of law. Hence, the liberal legalist model conceives of a link between law-governed relationships both at the domestic and international levels.[13] As Franceschet puts it, "[w]ithout a strong rule of law among states, domestic legalism would be tenuous and vulnerable, and vice versa."[14]

Another primary goal of the liberal legalist position with respect to the global rule of law is to place limits on powerful states within the international system so that weaker states are not unduly subjugated. No state, rich or poor, powerful or weak, should be above the law, according to this model. This has particular relevance to the post-9/11 situation in which the world's hegemonic power appears to adhere to certain elements of the global rule of law only when it is in that country's interest to do so. Indeed, as Francis Boyle has pointed out, particularly under the Bush administration, major questions are being raised about the U.S.'s respect for the global rule of law. Recent cases, as shall be shown later, point in fact to "international legal nihilism" on the part of the U.S. government.[15]

Whether one accepts the minimalist version of the global rule of law, as posited by the Westphalian model, or the more expansive version, posited by the liberal legalist model, the reality is that there is, at the very least, an embryonic global rule of law. All laws, whether domestic or international, exist to regulate behaviour. Laws that govern the international sphere are about as essential in providing order and predictability to international relations as those that govern domestic relations.[16] Even though the former may not be as consolidated as the latter, one can still have a clear normative view of what the global rule of law should be. The global rule of law ought

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[13] See Immanuel Kant, "Perpetual Peace: A Philosophical Sketch" in Immanuel Kant, *Political Writings*, ed. by Hans Reiss (Cambridge: Cambridge University Press, 1991).

[14] Franceschet, *supra* note 7 at 6.

[15] Francis Boyle, "George Bush, Jr., September 11th and the Rule of Law" in Francis Boyle, *The Criminality of Nuclear Deterrence: Could the U.S. War on Terrorism Go Nuclear?* (Atlanta, GA: Clarity Press Inc., 2002) 16 at 17.

[16] Michael G. Roskin & Nicholas O. Berry, *IR: The New World of International Relations*, 5th ed. (Upper Saddle River, NJ: Prentice Hall, 2004) at 285-297.

to regulate exchanges between states in ways that are consistent and predictable. It ought to be a "civilized" approach to dealing with conflicts and should be designed primarily to prevent the recourse to violence. It ought to act as a constraining devise that lowers the temperature of disputes, thus reducing the chance of a resort to war. In essence, a fully-fledged global rule of law should therefore regulate state behaviour in all areas of international relations so that war becomes a measure of last resort.[17]

IV. AN EMBRYONIC GLOBAL RULE OF LAW?

As suggested earlier, the need for a global rule of law grew out of a desire to place legal constraints on war. Close observers of history can see this longing immediately after every major war. Of course, one can still find individuals who hold on to extreme views about war. Militarist and realists, for instance, argue for the benefits of war. They recognize and observe that some wars can yield certain material gains to a nation in the form of increased territory and resources. For realists, though, "war is a nonmoral activity."[18] A typical position on the subject is taken by Nicholas J. Spykman who once stated that,

> [i]n international society all forms of coercion are permissible, including wars of destruction. This means that the struggle for power is identical with the struggle for survival, and the improvement of the relative power position becomes the primary objective of the internal and the external policy of states. All else is secondary.[19]

The decision to go to war must be based, according to realists, on national interest alone, and not be subjected to any ethical or moral judgment. Militarists, on the other hand, may view war as a moral crusade – "the first resort in dealing with the ills of society and the world."[20] In other words, for them, war may be fought for purposes higher than national interest; for example, to spread a religious ideology, or to strengthen an empire. At the other extreme is pacifism, which views war as not only horrible but morally wrong.

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17 *Ibid.* at 335.

18 Nick Fotion, Bruno Coppieters & Ruben Apressyan, "Introduction" in Bruno Coppieters & Nick Fotion, eds., *Moral Constraints on War: Principles and Cases* (New York: Lexington Books, 2002) 1.

19 Nicholas J. Spykman, *America's Strategy in World Politics: The United States and the Balance of Power* (New York: Harcourt Brace, 1994) at 18.

20 Fotion *et al.*, *supra* note 18 at 7.

The desire of some pacifists is to eliminate this evil altogether. Somewhere in between those two extremes is "just war theory."

A. Just War Theory

Just war theory recognizes that while war is repulsive and appalling, there may be times when a state may have no other choice but to fight. But just war theorists also strive to place moral and procedural constraints on the use of force. The initial purpose of just war theory was to place war within a legal framework and, in so doing, reconcile "might" and "right" (*Sein* and *Sollen*), ensuring that the former serves the latter by restoring a right that is violated (*consecutio juris*), or punishing an offender. According to this theory, war is acceptable if it is a "just" response to unprovoked aggression.[21] Apart from punishing an aggressor, a just war can be used for defence, the recuperation of property taken unjustly, and the recovery of debts.

The just war theory tradition is generally traced to the early Christians and the writings of Christian philosophers including St. Augustine and St. Thomas Aquinas.[22] Later, just war theory was secularized by Hugo Grotius.[23] Grotius set out a specific set of rules

[21] On just war theory, see Jean Bethke Elshtain, ed., *Just War Theory* (Oxford: Blackwell, 1992); Robert Hubert Willem Regout, *La doctrine de la guerre juste de Saint Augustin à nos jours* (Paris: A. Pedore, 1935); Didymus Beaufort, *La guerre comme instrument de secours ou de punition*: *aperçu des idées sur le droit des gens et la morale des nations* (S-Gravenhage: Nijhoff, 1933); Michael Walzer, *Just and Unjust Wars: A moral argument with historical illustrations*, 2d ed. (New York: Basic Books, 1992).

[22] See Whitney J. Oates, ed., *The Basic Writings of Saint Augustine* (New York: Random House, 1948). See also Paul Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues*, 2d ed. (Englewood Cliffs, NJ: Prentice-Hall, 1999), esp. c. 3. However, note that the just war tradition may have an even earlier history. Before St. Augustine, St. Ambrose elaborated on similar principles and before him, Romans and Greeks tackled the issue of the moral dilemma facing leaders and soldiers upon making the decision to go to war. Outside of the West, Chinese philosophers like Mo Tzu and Mencius had also devised similar just war principles.

[23] James F. Childress, "Just War Theories: the Bases, Interrelations, Priorities, and Functions of their Criteria" (1978) 39 Theological Studies 427, and Thomas Aquinas, *Summa Theologica*, vol. 3 IIa IIae QQ.1-148, trans. by the Fathers of the English Dominican Province (Westminster, MD: Christian Classics, 1981) at 1354.

to govern war in his *On the Law of War and Peace*, which was printed in 1625 in the midst of the Thirty Years' War. For Grotius, and for many others, that war marked a particularly brutal phase in the history of human relations. Grotius reluctantly accepted war as a necessary evil, but at the same time sketched out a proposal for restricting war to sovereign states (legitimate authorities) and just causes (*jus ad bellum*). He proposed that states respect a set of rules to regulate how they would conduct their militaries during war (*jus in bello*); for example, by restricting force to proportionate means and protecting non-combatants from physical harm.[24] The following constitutes the six core principles of *jus ad bellum*:

a) decision to go to war must be made by a legitimate authority;
b) there must be a just cause (a very good reason) for going to war;
c) there must be the right intentions for going to war;
d) force used during war must be proportionate to the provocation;
e) war must be the last resort after other alternatives have been exhausted; and,
f) there must be a reasonable chance of success before deciding to go to war.

Once war has begun, just war theory further specifies a couple of general *jus in bello* principles to which states must adhere. The first is the principle of proportionality. The purpose here is to limit unnecessary loss of life and destruction of property. The second principle is discrimination. Soldiers are expected to target only enemy soldiers, not civilians. Again, the purpose here is to reduce loss of life by targeting only those on the enemy's side who are engaged directly in the fighting.

In 1949, the International Committee of the Red Cross (ICRC) expanded on the *jus in bello* principles in the *Geneva Conventions for the Protection of War Victims* by listing specific rules of

[24] Hugo Grotius, "Preliminary Remarks," Grotius on the Rights of War and Peace, trans. by William Whewell (Cambridge: University Press, 1853) at xxxi, art. 28.

engagement whilst in the midst of battle.[25] These rules can be summarized as follows:

1. it is not permitted to shoot a wounded enemy;
2. it is not permitted to loot civilian homes and other property on enemy territory;
3. it is not permitted to take personal property from prisoners;
4. it is not permitted to rape either enemy civilians or military personnel;
5. it is not permitted to attack an enemy's medical facility;
6. it is not permitted to attack religious and cultural institutions;
7. it is not permitted to torture or brainwash enemy prisoners nor deprive them of food, clothing, medical treatment, and housing; and,
8. it is not permitted to use prisoners for military tasks.[26]

B. Other Sources of the Embryonic Global Rule of Law

Other sources of the embryonic global rule of law can be found in a number of other places and have some practical connections to just war theory. Article 38 of the Statute of the International Court of Justice (ICJ) is a good starting point. The ICJ, according to that article, is supposed to function in accordance with international conventions (both general or particular), international customs, the general principles of law that are recognized by civilized nations, judicial decisions, and the teachings of highly qualified publicists.

The United Nations Charter, the *Universal Declaration on Human Rights*, and the Geneva Conventions and added protocols are just some of the international conventions in which elements of the global rule of law can be found. Decisions and resolutions of UN bodies like the UN Security Council and the General Assembly have come to make up some of the international customs and general principles of law recognized by UN member states. Judicial decisions made by the ICJ and ad hoc tribunals, such as the International Criminal Tribunal for Rwanda (ICTR) and the

[25] For ratification information, see: online: ICRC <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList166/ EDBA262A8A73FEC4C1256B66005B9375>.

[26] See Fotion *et al.*, *supra* note 18 at 15.

International Criminal Tribunal for the Former Yugoslavia (ICTY), also contribute further elements in the construction of a global rule of law. The ad hoc tribunals, for instance, have expanded the boundaries of humanitarian and international criminal law. They have set a number of important legal precedents, expanding in the process the legal elements of the crime of grave breaches of the Geneva Conventions, as well as crimes against humanity such as torture, rape and other forms of sexual violence, genocide, and war crimes. They have also provided legal clarification regarding international criminal responsibility – spearheading the shift from immunity to accountability, and have been engaged in activities that, overall, strengthen the rule of law.

Another place where elements of the embryonic global rule of law can be found is the International Law Commission (ILC), a subsidiary body of the United Nations. This body was established by the UN General Assembly in 1947 and has since been engaged in the progressive development and codification of international rules and regulations. The founding states of the UN did not want to confer any legislative power on the world body to enact binding rules of international law. However, there was strong support for conferring limited powers of study and recommendation on the Assembly, which eventually led to the adoption of a provision in article 13, paragraph 1 of the UN Charter, which states that the "General Assembly shall initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification."

On 31 January 1947, the Assembly adopted Resolution 94 (I), establishing the Committee on the Progressive Development of International Law and its Codification. This Committee, also known as the "Committee of Seventeen" held thirty meetings from 12 May to 17 June 1947. Over the course of these meetings, the Committee adopted a report that recommended the establishment of an international law commission (the ILC) and set out provisions designed to serve as the basis for its statute. The ILC, which meets annually, is composed of thirty-four members who are elected by the General Assembly for five-year terms and serve in their

individual capacity, not as representatives of their governments.[27] The ILC has a close working relationship with the UN's sixth Committee (the Legal Committee).[28] Some of the topics on its agenda are chosen by the ILC and others are referred to it by the Sixth Committee, the General Assembly or the Economic and Social Council.[29] When the ILC completes draft articles on a particular topic, the Assembly usually convenes an international conference of plenipotentiaries to incorporate the draft articles into a convention which is then open for states' signature and ratification.

During its 48th session, the ILC completed the final articles of the draft Code of Crimes against the Peace and Security of Mankind and the provisional draft articles on State Responsibility. The draft Code of Crimes, another element in the construction of the global rule of law, was then put before the 1998 conference of plenipotentiaries that created the International Criminal Court (ICC).[30]

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[27] Note that the size of the ILC's membership was enlarged three times: from 15 to 21 in 1956 (see *Amendments to articles 2 and 9 of the Statute of the International Law Comission*, G.A. Res. 1103 (XI), UN GAOR, 11th Sess., (1956); from 21 to 25 in 1961 (see *Enlargement of the International Law Commission: amendments to articles 2 and 9 of the Statute of the Commission) G.A. Res. 1647 (XVI)* UN GAOR, 16th Sess., (1961); and, from 25 to the present number of 34 in 1981 (see *Enlargement of the International Law Commission*: *amendements to articles 2 and 9 of the statute of the Commison*, G.A. Res. 36/39, UN GAOR; 36th Sess.,(1956)). Proposals for the enlargement stemmed from the influx of new member states into the United Nations following decolonization. A large majority of the General Assembly felt that the provision of art. 8 of the Statute requiring "in the Commission as a whole representation of the main forms of civilization and of the principal legal systems," could be best assured through increasing the size of the Commission to reflect all regions of the globe. See "Composition and Membership," online: International Law Commission <http://www.un.org/law/ilc/ilcmembe.htm>.

[28] See "Sixth Committee Agenda (UN GA 59th Session)," online: UN Legal Committee <http://www.un.org/law/cod/sixth/59/sixth59.htm>.

[29] For example, see "Programme and Methods of Work," online: International Law Commission <http://www.un.org/law/ilc/progfra.htm>.

[30] See W. Andy Knight, "Legal Issues" in John Tessitore & Susan Woolfson, eds., *A Global Agenda: Issues Before the 52nd General Assembly of the United Nations* (New York: Rowman & Littlefield Publishers Inc., 1997) at 267-298.

C. The International Criminal Court (ICC)

The signatories to the 1919 Paris Peace Treaty were the first to actually call for the establishment of a permanent international tribunal to deal with war crimes. The absence of such a global court meant that prosecuting those responsible for war crimes was highly unlikely. The UN, for example, assigned national courts to deal with the war criminals of World War II. This proved to be a failure. As a result, the victors of the war took on the role of prosecuting war crimes. In Germany, for example, it was the victors who ran the court that judged the Nazis. The court over which they presided at Nuremberg, however, never fully established an autonomous legal and moral authority through appeals to natural and existing international law. With the creation of the ad hoc tribunals by the UN Security Council to deal with war crimes committed in the former Yugoslavia and Rwanda, this situation was rectified. The Council empowered international and autonomous tribunals to indict and try individuals responsible for committing crimes during the conflicts in those two countries.

The ad hoc tribunals therefore represent an attempt by the UN and the international community to establish a relatively independent international criminal jurisdiction. The authority of these tribunals is lent by the sovereign states that agreed to create them. The main purpose was not just to punish war crimes and crimes against humanity but, more importantly, to deter such crimes in the future by threatening international indictments. However, such deterrence hinges on the permanence of an enforcement body to ensure that war criminality is dealt with appropriately.

A resolution passed at the 51st UN General Assembly helped inch the international community closer to the goal of establishing such a permanent international criminal court.[31] This resolution responded to the ILC's recommendation that an international conference of plenipotentiaries be convened to study a draft statute (prepared by the ILC) on war crimes and crimes against humanity and to conclude a convention establishing an international criminal court. An ad hoc committee was formed by the Assembly in December 1994 to review the major substantive and administrative issues arising from

[31] *Establishment of an International Criminal Court*, GA Res. 207, UN GAOR, 51st Sess., UN Doc. A/RES/51/207 (1996).

the draft statute. This committee recommended the creation of a preparatory committee (PrepCom) that would be open to all members of the UN, the specialized agencies, and the International Atomic Energy Agency (IAEA), to reconcile the differing views that government representatives on the General Assembly had of the draft statute. The job of this PrepCom was to draft a widely acceptable consolidation convention text for a permanent international criminal court before the next stage in the process – the convening of the conference of plenipotentiaries. The mandate of the PrepCom was reaffirmed during the 51st General Assembly, which called for three committee meetings in 1997 and one in 1998 to complete the consolidated text for the convention scheduled for the summer of 1998.

The main rationale used for creating a single, permanent international criminal court was to obviate the need for ad hoc tribunals for particular crimes, the implication being that a permanent international judicial structure and process would likely ensure stability and consistency in international criminal jurisdiction. It is important to realize here that the ICC was intended to complement national criminal justice systems, not to replace them.[32] The ILC worked hard to establish the principle of complementarity between the ICC and national criminal justice systems. It was decided at the conference of plenipotentiaries held in June 1998 that the ICC's jurisdiction would apply either when a state had custody of an accused person, because that state had jurisdiction over the crime, or because it had received an extradition request relating to it, or when the crime was committed on its territory. A provision was also made for crimes that would be referred to the ICC by the UN Security Council, acting under Chapter VII of the UN Charter.[33] The ICC was given competence over "hard core" international crimes; for example, aggression, genocide, war crimes, and crimes against humanity.[34] It was also widely agreed that the legal principles of *nullum crimen sine lege* (no crime without law) and *nulla poena sine*

[32] See W. Andy Knight, "Soft Power, Moral Suasion, and Establishing the International Criminal Court: Canadian Contributions" in Rosalind Irwin, ed., *Ethics and Security in Canadian Foreign Policy* (Vancouver: University of British Columbia Press, 2001) 113 at 125.

[33] UN GA Press release L/2760 (22 March 1996).

[34] See full statute, online: UN Legal Committee <http://www.un.org/law/icc/statute/romefra.htm>.

lege (no penalty without law) should be strictly followed by the court.

The ICC came into force on 17 July 2002 when the 60th state party ratified the Rome Statute. This statute consolidates much of the existing international humanitarian and criminal law that was previously agreed to by the majority of states within the international community, and reflects many elements of just war theory. But only those states that are party to its statute can fall under the jurisdiction of this court. It should be noted that a few major countries, like Russia and the U.S., have not yet ratified this statute.[35]

These states are concerned that their nationals could be unfairly prosecuted by the ICC. Clearly, the ICC diminishes "the ability of political and military leaders to hide behind the corporate responsibility of the state."[36] In addition, the ICC statute imposes considerable constraints on the ability of states to utilize force and "reduces the ability of powerful states to define what conduct violates international criminal law."[37] But if the ICC is to live up to its potential as a court that will enforce the global rule of law, then its jurisdiction must apply universally – to all states and peoples.

D. The UN and Terrorism

Some may wonder whether any provision is made within the fledgling global rule of law for dealing with one of the major security problems facing the international community today, namely terrorism. Terrorism, *per se*, was not included as one of the core crimes in the Rome Statute. In part, this may have to do with the fact that there has always been a problem, within the UN specifically and in the international community more generally, in reaching consensus over the meaning of terrorism. International public opinion has, for decades, deplored terrorism in all its forms and yet the international community could not agree, until recently, on precisely what constitutes terrorism.

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[35] Today there are 139 signatories and 97 parties to this statute.

[36] Michael J. Struett, "NGOs, the International Criminal Court, and the Politics of Writing International Law" (Paper presented at the Universiteit Utrecht, Netherlands, 4-6 July 2002) 1.

[37] *Ibid.*

International terrorism has occupied the UN's agenda since the late 1960s. However, the Assembly chose to deal with specific forms of terrorism rather than address the problem as a whole and to get UN member states to cooperate in investigating and combating specific acts of terrorism. The following brief section aims to give the reader a sense of how the UN has tackled the issue.

By 1972, the UN General Assembly began to explicitly address acts of terrorism as a global security problem. The then UN Secretary General Kurt Waldheim raised the issue with the UN General Assembly in the wake of several major high-profile acts of terror, such as the Lod Airport attack and the slaughter of Israeli athletes at the Summer Olympic games in Munich. While condemning those specific attacks, the General Assembly continued to reaffirm the inalienable right to self-determination and to uphold the notion of the right for national liberation movements to use violence in their struggle against racist, oppressive and colonial regimes. The U.S. and several industrial states regarded such violence as "terrorism." But Third World states generally sympathized with those liberation struggles and argued that any attempt to criminalize such activity by labeling it "terrorism" would simply serve to protect colonizers and imperialist. They were also quick to point out that the U.S., Israel, and South Africa (at the time) practiced their own brand of "state" terrorism against leftist/Marxist movements, Palestinians, and anti-apartheid activists, respectively.

Essentially this demonstrated that the UN was a long way away from consensus on the issue of terrorism, reflected in the adage "one man's terrorist is another's freedom fighter." Nevertheless, the problem of terrorism remained firmly on the Assembly's agenda throughout the 1970s and 1980s, leading to the adoption of a number of international conventions aimed at addressing specific acts of terrorism: hostage taking, attempts by terrorists to secure nuclear material, attacks on airports and on civil aviation, maritime navigation, fixed platforms on the continental shelf, and bombings that targeted innocent civilians. The issue of terrorism was later assigned to the Sixth Committee by the General Assembly.

The end of the Cold War, around 1989, opened up a window of opportunity for the UN finally to reach some consensus on the definition of terrorism. But the situation was complicated by shifts in the conception of security and the proliferation of international

criminal activity, as a result of the globalization of crime, linked to terror; for example, narco-terrorism, drug trafficking, money laundering, para-military gangs, etc. All of these raised issues of human insecurity; these were problems not only for the state but for human beings generally all across the globe – problems for the international community at large. This began a clear normative shift in the way security was viewed.

Despite the new normative framework, acts of terrorism continued to threaten states, citizens, and the international community. Major examples include the terrorist attack on Pan Am Flight 103 over Lockerbie Scotland (December 1988) and on the UTA flight 772 over Niger (September 1989). These acts in particular prompted France, Britain, and the U.S. to take up the subject of terrorism at the level of the UN Security Council in 1992. The subject was placed on the agenda of the First Heads of Government meeting that was held at the UN Security Council level in 1992. At that meeting, the need to tackle international terrorism collectively was raised. Under pressure from the U.S. and the U.K., the Council imposed mandatory sanctions against Libya. Libya was considered a threat to international peace and security and Chapter VII of the UN Charter was invoked for the first time against a specific act of "terrorism."

The economic sanctions brought against Libya were followed by an arms embargo and more specific targeted sanctions on flights coming in and out of Libya, as well as the freezing of specific assets. This combined pressure forced Libya to eventually hand over to Scotland two of its nationals who were suspects in the Lockerbie terror attack, to be tried under Scottish law in the Netherlands. In effect, these actions by the Security Council helped to "criminalize" terrorism – treating it as a crime against humanity. The Council did something similar against Sudan in 1996 after the assassination attempt on Egyptian President Mubarak. However, when Sudan resisted the Council's sanctions and pressure, the Clinton administration decided to use military force, bombing a pharmaceutical plant in Khartoum that was suspected of being a dual-use facility for al-Qaeda. This military pressure forced the government of Sudan to order bin Laden to leave Sudan. However, the terrorist problem was simply transferred, as we now know, to Afghanistan, with the blessings of the Taliban.

The al-Qaeda terror network did not succumb to the military and economic pressure of the U.S. In fact, the retaliatory terrorists acts against U.S. interests in Nairobi, Kenya and Tanzania, which killed 301 people and injured about 5,000, are a vivid illustration of the failure of U.S. military counter-terrorist action. Those two incidents forced the U.S. to go back to the UN Security Council in pursuit of a multilateral response. The Council passed a resolution demanding that the Taliban hand over al-Qaeda leaders and expel the operation from Afghanistan. In 2000, financial and travel sanctions were imposed on the Taliban, followed by an arms embargo.

V. 9/11: THE U.S. AND THE GLOBAL RULE OF LAW

The United States government's attitude towards a global rule of law has been a matter of debate for quite sometime.[38] On the one hand, the U.S. has been at the forefront of several initiatives aimed at creating, adopting and implementing international law. Yet, as John Murphy points out, this sole remaining superpower's commitment to the global rule of law has been widely questioned, especially within the past couple of decades. While not necessarily an "international outlaw," the U.S. has certainly given the impression recently that it is lukewarm in its support of any global rule of law.[39]

That attitude was particularly evident in the late 1990s when the U.S. Congress refused to ratify the Comprehensive Test Ban Treaty. But there are many other examples of apparent ambivalence towards various elements of the global rule of law. For instance, the U.S. signed the Convention on Discrimination against Women in 1980, but has failed to ratify it. In 1995, the U.S. signed the Convention on the Rights of the Child but remains only one of two states not to ratify it; the other state is Somalia. The International Covenant on Economic and Social Rights has been ratified by 142 states, but so far the U.S. has been a hold-out. While President Clinton did sign the Kyoto Protocol in 1998, the Bush administration has since categorically rejected the protocol, arguing that it would likely harm

[38] The U.S. attitude towards a global rule of law has mirrored its attitude towards multilateral institutions generally. On the latter, see Rosemary Foot, S. Neil MacFarlane & Michael Mastanduno, eds., *US Hegemony and International Organizations* (Oxford: Oxford University Press, 2003).

[39] John F. Murphy, *The United States and the Rule of Law in International Affairs* (Cambridge: Cambridge University Press, 2004).

the U.S. economy and exempt developing countries from reduction requirements. Of the industrialized countries, only the U.S., Australia, and Israel have refused to ratify this protocol.

The Bush administration actually withdrew its signature from the Anti-Ballistic Missile Treaty (ABM) in December 2001, thus making the U.S. the first major power to unilaterally withdraw from this very important agreement. That same year, the U.S. walked out on negotiations to improve the Biological and Toxin Weapons Convention (BWC). While the U.S. has ratified the Chemical Weapons Convention, it has severely restricted how this convention will be applied. The U.S. and Cuba are the only states in the Western Hemisphere not to sign the Ottawa Process Treaty banning anti-personnel landmines. The U.S. is the only member of the North Atlantic Treaty Organization (NATO), beside Turkey, to refuse to sign or ratify that Treaty. Finally, while initially one of the leading proponents of international criminal law and one of the first countries to support the idea of establishing a permanent international criminal court, the U.S. has since decided that it is not within its national interest to ratify the Rome Statute and actually withdrew its signature from the ICC statute in June 2002.

A similar pattern of the U.S. initially supporting human rights standards and then not following through with ratification is well documented. Kenneth Roth put it best when he said:

> Much of why people worldwide admire the United States is because of the moral example it sets. That allure risks being tarnished if the US government is understood to believe that international human rights standards are only for other people, not for US citizens.[40]

This flouting of international law by the U.S. has been accompanied by a simultaneous flexing of its military might globally. But as some analysts have noted, the U.S. is acting increasingly like an "instrumental multilateralist" power,[41] by using multilateral instruments to legitimize its global actions, but being willing to bypass the multilateral process if it thinks that such a process will

[40] "The Charade of US Ratification of International Human Rights Treaties" (2000) 1:2 Chicago J. of International Law 347 at 353.

[41] The latter term is used by Rosemary Foot, S. Neil MacFarlane & Michael Mastanduno, "Conclusion: Instrumental Multilateralism in US Foreign Policy" in Foot, MacFarlane & Mastanduno eds., *supra* note 38, 267 at 267-272.

cramp its ability to act in its national interests. As shown below, instrumental multilateralism has clearly been exhibited by the U.S. in its recent counter-terrorist actions, following the 11 September 2001 attack on the Pentagon and the World Trade Centre.

A. The U.S.'s Post-9/11 Counter-terrorist strategy: Afghanistan and Iraq

There are at least two ways in which the U.S. government could have interpreted the 9/11 terrorist attacks. First, it could have viewed these actions as an attack on the U.S. nation-state and its people. Second, it could have considered them as gross crimes committed against humanity.[42] The differences in those two interpretations are not just technical, they are also political in the sense of implying different strategies for, or reactions in, addressing this problem.

By choosing the first interpretation, the Bush administration had to punish someone or some group for the 9/11 attacks. Once the initial shock of having the very heart of its economic and military bases attacked by terrorists had registered, the Bush administration interpreted those attacks as offensives against the U.S. state, its security and its sovereignty. The U.S. government reacted with swift retaliation against the perpetrators, in the classical vein of self-defence. It chose Afghanistan because the Taliban government there harboured Osama bin Laden and his al-Qaeda terrorist organization – the organization that ultimately assumed responsibility for the attacks.

Just one week after the attacks, President Bush addressed in person a joint session of the Congress, as well as the American people via television, pledging to seek out and destroy the terrorist network wherever it happens to be located, and to punish those that harbour and financially support that network. He singled out Iraq, Iran and North Korea as elements of the "axis of evil" and let Syria, Somalia and a few other countries know that they would be in the gun-sights of the riled superpower if they continued to habour and/or

[42] Certainly, that act of terrorism was an international crime, not just against U.S. citizens. It is estimated that the number of nations whose citizens perished in the 9/11 attacks was 115. See "9/11 by the Numbers," online: New York Metro <http://www.newyorkmetro.com/news/articles/wtc/1year/numbers.htm>.

support terrorists. The problem, though, was that the perpetrators of these horrible acts of terror were non-state actors – al-Qaeda terrorists – who had set up training camps in Afghanistan and used that country and its regime as cover for its operations.

Needless to say, the construction of a U.S. counter-terrorist response based on the notion that the initial act constituted a state-to-state military conflict was difficult to justify or sustain legally. Certainly, it just cannot be justified using tenets of international law. As Francis Boyle points out, apart from the fact that the U.S. military campaign in Afghanistan created a human catastrophe for close to 20 million people in that country and caused major instability in the region, it was clearly an "illegal armed aggression."[43] After three years, there is still no clear confirmation that the Taliban government ever knew that the 9/11 attacks were planned or were about to be carried out. There was no real "legal" case against the Taliban regime with respect to the terrorist attacks on the US. Indeed, despite the fact that bin Laden and al-Qaeda later took credit for this horrible event, the U.S. did not immediately have concrete evidence linking him and his organization to the attack. And, bin Laden never implicated the Taliban government in the 9/11 attacks.

By waging war against a country that did not attack or even threaten to attack America, the U.S. government was disingenuous at best. Of the nineteen names, released by the FBI, of suspected hijackers of those planes that ploughed into the Pentagon, the World Trade Centre and Shanksville, Pennyslavania, none were Afghan citizens. They were from Saudi Arabia, Egypt, and the United Arab Emirates. Yet, President Bush and his administration tried to justify the war on terrorism in Afghanistan as "an act of self-defence." Realizing that the "self-defence" justification would prove untenable, the Bush administration changed its tune and shifted the rationale to that of "a humanitarian defence" – an act of freeing the Afghan people, including its women, from oppression.

Similarly, the U.S. used the terror attacks on its soil to mount an illegal war against Iraq. Clearly, there was no just cause for attacking Iraq. President Bush and his administration simply blurred the truth about Saddam's involvement in international terrorism as a means of getting Americans to support the U.S.'s war against Iraq. Yes,

[43] Boyle, *supra* note 15 at 18.

Saddam had provided money to mothers of Palestinian suicide bombers. Yes, he supported terrorist activity in the Palestinian-Israeli conflict. But there was no evidence to link Saddam to international terrorism, and more specifically, to the 9/11 terrorist attack on the U.S. Yet, President Bush, time and again, insinuated that the former Iraqi President was directly or indirectly linked to the terrorist attacks on American soil.

Waging the war against Iraq without any clear mandate from the UN Security Council was, according to the ICJ, a flagrant violation on the prohibition on the use of force. It certainly could not be justified either by using just war theory or any other legal rationalization. President Bush, for instance, tried to use UN Security Council Resolution 1441 as the basis for going to war with Iraq. That resolution held Iraq in material breach of its obligations to comply with the UN's call for disarmament in that country.[44] The UN Security Council had repeatedly warned Saddam Hussein that unless he complied with the mandate of the new UN inspection team, the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC), and the International Atomic Energy Agency (IAEA), then Iraq would face "serious consequences." Saddam's intransigence played into President Bush's hands. The U.S. president used this as an excuse to call on the UN to up the ante and pass a stern resolution not only condemning Iraq but also stating in no uncertain terms that military force would be used to enforce the UN Security Council resolutions.

However, for many UN member governments, the call for a preemptive strike against Iraq not only violated the UN Charter but also the just war tradition. It certainly caused a split within the UN Security Council that weakened this body's legitimacy and effectiveness. President Bush Used this tension and the UN's inaction to declare that the world body was on the verge of irrelevance. He pointed out that no UN member state could be constrained from acting to defend itself against the threat posed by another country. U.S. Secretary of State Colin Powell, in an address to the UN Security Council on 5 February 2003, argued that Resolution 1441 gave Iraq one last chance to come into compliance with previous UN Security Council resolutions calling for Iraqi

[44] Those obligations can be found in *The Situation Between Iraq and Kuwait,* SC Res. 687, UN SCOR, 1991, UN Doc. S/RES/687.

disarmament, or face serious consequences. He continued by noting that "[n]o Council member present and voting on that day had any illusions about the nature and intent of the resolution or what serious consequences meant if Iraq did not comply."[45] Powell Used that occasion to present "factual evidence" to support the U.S. claim that Iraq not only was in possession of biological and chemical weapons of mass destruction but that Iraqi officials were engaged in a deliberate attempt to hide the location of these weapons from UN inspectors. His laser-light show was convincing. But as we now know, almost everything that was said that day turned out to be untrue.

Thus, the U.S. and a small coalition of countries went to war with Iraq on the pretense that Iraq was an imminent threat to the U.S., and other freedom-loving states, and that something had to be done to rid that country of weapons of mass destruction before those weapons were used against the U.S. or before they got into the hands of international terrorists.

The U.S. war on terrorism, whether it be in Afghanistan, Iraq, or any other place, is not making the world any safer. Neither is it making the U.S. any safer. The U.S.'s counter-terrorist strategy has undermined the Middle East peace process and further destabilized the Central Asian region – providing insurgents with a "cause" to go after American and Western targets. For every terrorist killed by the U.S. military in *Operation Enduring Freedom*, which was initially called O*peration Infinite Justice*, or in *Operation Lightening Freedom*, it seems as though others are more than willing to take his/her place. The al-Qaeda operation has, by all accounts, been multiplying across the globe. An al-Qaeda video archive obtained by CNN testifies to this terrorist organization's global reach in places like Algeria, Azerbaijan, Bahrain, Bangladesh, Bosnia, Burma (Myanmar), Chechnya, Dagestan, Eritrea, Indonesia, Jammu and Kashmri, Jordan, Kenya, Kosovo, Kuwait, Lebanon, Libya, Malaysia, Morocco, Pakistan, the Philippines, Saudi Arabia, Singapore, Somalia, Sudan, Syria, Tajikistan, Tanzania, Tunisia, Turkey, Uganda, Uzbekistan, Xinjiang in China, Yemen, the West

[45] U.S. Department of State, Colin Powell's Remarks to the United Nations Security Council, United Nations, New York, 5 February 2003. Online: U.S. Department of State <http://www.state.gov/secretary/rm/2003/17300.htm, accessed on 4 January 2005>.

Bank and Gaza, and now Iraq. Rohan Gunaratna, an expert on al-Qaeda who reviewed the tapes, has said that they provide proof that al-Qaeda has bound itself to similar groups, becoming what he calls "an organization of organizations."[46] It is now become clear that al-Qaeda has links to terrorist organizations in Egypt, Libya, Yemen, Kashmir, Uzbekistan and Algeria, among other places. Al-Qaeda suspects have been arrested in European countries as well, including Italy, Spain and Germany, and there are definitely al-Qaeda cells in Britain, the U.S., and possibly in Canada.[47]

The dispersed nature of al-Qaeda cadres around the globe has provided Osama bin Laden with command over a global terror network with capabilities to carry out lethal terrorist attacks at will. al-Qaeda has strategically forged alliances with like-minded fundamentalist groups such as Egypt's Al Jihad, Iran's Hezbollah, Sudan's National Islamic Front, and also with terrorist outfits in Yemen, Saudi Arabia, and Somalia. Al-Qaeda also has ties to the "Islamic Group," led at one time by Sheik Omar Abdel Rahman, the Egyptian cleric serving a life sentence since his 1995 conviction for his role in the bombing of the World Trade Centre in New York in February 1993, in which six persons were killed and thousands injured. Two of Sheik Rahman's sons have reportedly joined forces with bin Laden.[48]

Basically what is described above is a global web of terror that is intent on carrying out spectacular crimes against humanity. It is unlikely that the Bush counter-terrorist strategy will totally eliminate this global web of international criminals. In fact, the globality of this terror network should provide the clearest rationale for a global counter-terrorism strategy. But how can there be a global counter-terrorism strategy when the UN system is so divided on how to deal with terrorism? The problem at the UN is that while there is a general consensus about the need for collective response to terrorism, there is deep division about what shape that a collective response

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46 Nic Robertson & Mike Boettcher, "Tapes Give Evidence of al-Qaeda's Global Reach," online: CNN <http://archives.cnn.com/2002 /U.S./08/22/terror.tape.main/>.

47 In testimony before the Senate Armed Services Committee, Defense Secretary Donald Rumsfeld said al-Qaeda had operatives in more than sixty countries, including the United States.

48 "Al Qaeda," online: South Asia Terrorism Portal <http://www. satp.org/satporgtp/usa/Al_Queda.htm>.

should take. What ought to be the trigger for such a collective response? Is pre-emption a responsible and legal strategy for countering would-be terrorists? Does the UN's role in authorizing the use of force need to be revised? These are some of the questions asked by the Stanley Foundation in a report published in October 2004.[49]

The so-called pre-emptive attack by the U.S. on Iraq provided an excellent opportunity for scholars to consider these questions. The issue became one of the major issues to confront the UN's High-Level Panel,[50] and as the *Stanley Foundation Report* put it, few issues "are as consequential for the international rule of law as the question of when states may take up arms against other nations."[51] The next section addresses this issue in the context of developing a global rule of law counter-terrorist strategy.

VI. TOWARDS A GLOBAL RULE OF LAW COUNTER-TERRORIST STRATEGY

What if the U.S. had decided to take the second interpretation of the nature of the 9/11 attacks? Choosing that interpretation would most likely have meant acting multilaterally, through the United Nations, the ICC, and other global rule of law channels. One should not diminish the fact that the Bush administration initially responded to the 9/11 terror attacks by seeking the UN's endorsement for the U.S. counter-terrorist plan. In doing so, there was some recognition of the importance of a global rule of law for addressing this problem.

The U.S. government understood that the UN Charter (article 2.4) prohibits member states from using or threatening to use force against each other, except in cases of self-defence (article 51) and when international peace and security is breached (Chapter VII). The language of article 51 is restrictive. It states that

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[49] The Stanley Foundation, *Capturing the 21st Century Security Agenda: Prospects for Collective Responses* (Muscatine, IA: Stanley Foundation, 2004) 65 [*Stanley Foundation Report*].

[50] See United Nations, *A More Secure World: Our Shared Responsibility, Report of the Secretary General's High-Level Panel on Threats, Challenges and Change* (New York: United Nations Department of Public Information, 2004), online: United Nations <http://www.un.org/secureworld/>.

[51] *Supra* note 49 at 65.

> [N]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures to maintain international peace and security.

According to established international legal practice, military action in self-defence can only be taken if there is an actual attack on a state or if a threat is imminent. Even so, the response must be proportionate. The U.S. did the appropriate thing in notifying the UN that it had been attacked and that it intended to carry out a retaliatory measure in response to that attack against the terrorists and "those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts."[52] According to the UN Charter, a state acting in self-defence does not necessarily need the approval or authorization of the United Nations to secure its sovereign borders. However, whatever measures are contemplated and undertaken ought to be "immediately reported" to the UN Security Council.

So, technically, in this case, the U.S. government demonstrated that it was interested in promoting and supporting certain elements of the global rule of law. At the same time, substantively, the Bush administration sent a clear signal that when it comes to protecting U.S. sovereignty and security, international treaties and laws are secondary to U.S. military might and capabilities. The U.S. put together a "coalition of the willing" that produced at best the thinnest veneer of multilateralism to cover what has in fact been a unilateralist counter-terrorism response.

What would a global rule of law counter-terrorist strategy look like? That strategy could have been similar to the response of the U.S. to the criminal acts committed in the domestic terrorism that destroyed half of the ninth-storey Murrah Federal Building in Oklahoma City on 19 April 1995. That attack left 168 people dead and was considered at the time the worst incident of terrorism on American soil.[53] Timothy McVeigh and his former army buddy Terry

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[52] See *Threats to International Peace and Security Caused by Terrorist Acts*, SC Res. 1368, UN SCOR, 2001, UN Doc. S/Res/1368.

[53] Tony Clark, "The Worst Terrorist Attack on U.S. Soil: April 19, 1995," online: CNN Interactive <http://edition.cnn.com/U.S./OKC/daily/9512/12-30/index.html>. See also "The Bombing," online: CNN Interactive <http://edition.cnn.com/U.S./OKC/bombing.html>.

Nichols were investigated and charged with the offence. If the U.S. had decided to stay within the framework of the global rule of law, there could have been a global cooperative law enforcement response to the 9/11 tragedy that would have been more effective in identifying and apprehending those responsible for the terrorist attack. Here is an example of how the new permanent ICC could have been used and, in the process, the result could have been to prevent future terrorist attacks, while harming fewer people than the war in both Afghanistan and the so-called preemptive use of force in Iraq have done.

The preemptive use of force is a military action in anticipation of what is believed to be an impending or imminent attack. This can be a considered a self-defence measure. However, the state that is carrying out the preemption must bear a high burden of proof that the attack it faces is indeed real and imminent. It is not sufficient simply to react based on fear of a threat. Sometimes in the midst of such a preemptive strike the situation may be confusing. But if, later, it is found that the threat was either not real or imminent, then the preemptive attack must be ruled illegitimate. This is why it is exceedingly important for states that feel compelled to carry out preemptive strikes to obtain multilateral support for their actions in advance.

Chapter VII of the UN Charter provides such multilateral legitimacy for preemption, and the Charter also lays out a series of steps that must be taken when there is a threat to global peace, including deliberations, observations, mediation using the UN Secretary-General's good offices, use of non-military pressure such as sanctions, arbitration, judicial settlement, etc. But again, the decision to launch a preemptive strike may not be able to wait until the UN Security Council gets around to debating the issue and designating a threat as one that compromises international peace and security. As the *Stanley Foundation Report* aptly puts it, "a conflict-averse insistence on exhausting these various options can at times bog down international deliberations and serve as an obstacle to timely and effective action against a genuine and growing threat."[54] This is why it is important for the UN to come to an agreement about what constitutes "threat imminence" and to lay out a procedure for dealing with it once a certain threshold is reached.

[54] *Supra* note 49 at 68.

This would not necessarily require amending the UN Charter. But it may require a reinterpretation of the Charter's position on what constitutes a threat to international peace and security, something that the High-Level Panel tried to do recently, albeit unsuccessfully. It certainly calls for the development of a real consultative and multilateralist dialogue first between the major powers, in recognition of the actual material basis of power within the international system, and then between the major powers and all other states.

Below are five principles that could be Used to guide such a multilateral dialogue in developing a global rule of law counter-terrorist strategy in the future.

A. Legitimize and Strengthen Multilateral Institutions

The rule of law depends on the utilization of multilateral instruments and institutions, particularly the UN system. The UN is the only transnational organization which represents nearly all of the world's people. The institutions, policies, conventions of this organization cover most of the world's urgent problems. Its constitution is designed to address global issues of war and peace, refugees, human rights, etc. However, its capacity is limited by major powers; for example, withholding of funds. Its authority is curtailed by the use and threat of use of the veto. Meanwhile, its credibility has been called into question recently by the Bush administration. There is a growing need to strengthen this organization and support its efforts in consolidating a global rule of law, particularly as it applies to dealing with acts of terrorism.

a) Coordinate law enforcement and intelligence institutions across the globe

This is a difficult undertaking because the U.S. does not like to share its intelligence information with any other state or any institution, especially the UN. But in light of the abysmal failure of the two most sophisticated investigative and intelligence organizations in the world – the Central Intelligence Agency (CIA) and the Federal Bureau of Investigations (FBI) – to stop the 9/11 attacks, it seems that the traditional state-centered approach to intelligence gathering ought to be questioned. Also, increased

transitional organization and movement of crime cries out for a more multilateral approach to intelligence gathering and the enforcement of global laws. Even within the U.S., the various. intelligence and law enforcement bodies find it had to cooperate. This old paradigm must be replaced in light of 9/11. But any new transnational intelligence and law enforcement cooperation should come with procedures that will ensure accountability and transparency in order to protect the rights of individuals.

b) Increase financial regulation and smart sanctions

One of the most effective ways to curb transnational criminal activity (including terrorism) is to hit the perpetrators in their pocket books. Globalization allows money used for criminal activity to move easily across states. Tracking and regulating the movement of funds, or applying "smart" or targeted sanctions to violators, can help to dry up the flow of support to these criminal organizations and it will not result in the kind of collateral damage that has accompanied the U.S. military counter-strategy to terrorism. However, if this cooperation is to occur with respect to financial regulation, then the U.S. has to change its foreign policy approach and its use of intimidation tactics.

c) Utilize international courts

It must be noted that the U.S. has been acting outside the bounds of global law with its treatment of Afghanistan and al-Qaeda prisoners. The U.S. government is using the term "illegal combatants" – rather than "prisoners of war" (POWs) so as to argue that the Geneva Convention does not apply to these individuals. Furthermore, the U.S. government is not applying its own domestic legal principles of "due process" and "legal protection" to many of the "alleged terrorists." Vice President Dick Cheney has stated that terrorists do not deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process. This shows the disdain that the vice president, and the entire Bush administration, shows for the most elemental legal principle of due process. This sends a bad signal internationally.

If terrorist attacks are interpreted as crimes against humanity, then this would allow for the setting up of international tribunals similar to the ICTY or the ICTR to try individuals responsible for carrying

out such attacks. Judges could come from both Western and Islamic countries. Then this would not be viewed as a conflict between Islam and the West, but rather between the international community and a band of outlaws. Ideally, these kinds of crimes should be dealt with by the ICC. However, the U.S. has refused to sign on to the Rome Statute which brought the ICC into being. If the U.S. was a signatory to this Statute, then the perpetrators and masterminds of the 9/11 attacks could be put on trial by that body and this would strengthen the embryonic global rule of law.

d) Narrow the gap created by global inequities

This is an attempt to deal with the underlying sources of violence, more generally. Disparities in wealth and power, and injustice, can be considered a reason for the growth in terrorism. Many terrorists, even those who are rich like Osama bin Laden, use this structural inequity argument as a means of recruiting terrorists and justifying terrorism. The world will not be able to move towards a fair, inclusive and effective global governance, upheld by the global rule of law, without the major reallocation of economic, technological, and organizational capacities to reduce existing global disparities in the quality of life. For this we need to strengthen international organizations that represent the voices and perspectives of the world's poor more so than utilizing the existing international financial and development organizations such as the World Bank, the IMF and the World Trade Organization (WTO), which seem to be feeding the disparities. This is, of course, a long term approach to resolving the problem of global insecurity, and as a corollary, terrorism. It is one that will help to strengthen global democratic institutions and nurture multilateralism and the global rule of law, while putting a damper on the "clash of civilizations" and the "clash of fundamentalisms" thesis.

Had the Bush administration chosen to interpret the terrorist attack as a crime against humanity, which undoubtedly it was, the counter-terrorist response could have been significantly different. It could have been a response based on the rule of law, which could have certainly garnered a lot more international cooperation (multilateralism). It could have been a response aimed at combating the underlying sources of the problem of terrorism and might have opened the way to a more just and stable global order.

VII. CONCLUSION

The global rule of law is designed to avoid the possibility of individual actors abusing others. It is designed to limit or constrain power, particularly when that power becomes concentrated and consolidated. It is designed to protect the weak from the abuses of the strong. But, paradoxically, the rule of law is dependent on hierarchical concentration of power either in a central governance body or in some kind of collective arrangement in which power is pooled for enforcement purposes. A global rule of law is thus essential, especially at a time when the U.S. has become such an overwhelming hyper-power with disproportionate dominance over other actors in the system. Robert Cox writes that the most apparent tendency today is "towards a world shaped by one hegemonic power. This hegemony is sustained by economic globalization and the homogenization of cultures through a dominant mass media, the expansion of which is protected by a unitary concentration of military-political force."[55]

There is another aspect to the rule of law. The most powerful have an obligation, nay, a greater responsibility to uphold the rule of law. Thus, as a result, they are generally given disproportionate influence in the institutional bodies – for example, veto power in the UN Security Council, or the immense powers of the Concert of Europe.[56] This has to be the case unless there is a universal sovereign. The very powerful should therefore agree to uphold the rule of law voluntarily – since there is no other greater power to enforce that law upon that actor. This is a point usually lost on utopians who long for a global rule of law in a post-hegemonic world.

[55] *The Political Economy of a Plural World: Critical Reflections on Power, Morals and Civilization* (London: Routledge, 2002) at 72.

[56] Robert H. Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press, 2000).