

EMPIRE HAS ITS OWN HURDLES: *Exploring the nature of exceptionalism and its consequences for international law and multilateral decision-making.*

Saptarishi Bandopadhyay

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While it is increasingly becoming a platitude that exceptionalism exists in international law, little is being said about the nature, degrees of this exceptionalism and their differential consequences on the international legal system.

In my effort to bridge what I see as an oversight, this paper will seek to show how contemporary exceptionalist practices are creating a fault in the international legal order which will in turn provide a basis for others to argue for an overall reformulation of rules i.e. actions in contravention of the multilateral international legal framework would no longer need to be justified by manipulative rule interpretation but by a clear challenge to the very morals and standards on which they are built. The friction between these unilateral ambitions and the widespread opposition to incidents along the lines witnessed in Kosovo and Iraq (which perhaps indicative of a larger disaffection with the option of being exceptional as a matter of right) will not only undermine the interests of the international community but will also prove to be against the interests of even the most exceptional hegemon (which will ultimately find it impossible to sustain its position of global influence in the face of rapidly fading trust and legitimacy).

Thus, conforming to the Charter paradigm and keeping state exceptionalism tied within multilateral restrictions is not only in the larger interest of global peace and security but also in the specific interest of any state seeking to retain its position and mandate as a global peacekeeper. In the course of this paper, I will seek to explore the possibilities that various kinds of exceptionalism opens up for the future of the international order and argue that the ends will satisfy neither the goals of any state(/s) nor the international community as a whole.

(I) THE PROBLEM WITH GLORY

*Oh the history books tell it, they tell it so well
The cavalries charged, the Indians fell
The cavalries charged, the Indians died
Oh the country was young, with God on its side.*¹

The history of the world has seen four realistic attempts when “*men have sat down to reorder the world*”; the most recent of these was after World War II in San Francisco (1945) leading to the formation of the United Nations.² This was to be an organization aimed to further peace, whose tools would be diplomacy backed by collective security³ and whose very basis of existence would be an unfettered belief in the equality of nations.⁴

¹BOB DYLAN, WITH GOD ON OUR SIDE, verse 2, © 1963 M. Witmark & Sons, renewed 1991 Special Rider Music.

² Historian JOHN KEEGAN has cited the other 3 occasions as: “*at the Peace of Westphalia in 1648 after the Thirty Years War, at the Congress of Vienna in 1815 after the Napoleonic Wars, in Paris in 1919 after World War I*”, as cited in STEPHEN SCHLESINGER, *More Than Ever, We Need the UN*, Los Angeles Times (Wednesday, September 24, 2003) (available at: <http://www.commondreams.org/views03/0924-06.htm>).

³ U.N. Charter, Chapter V, 59 Stat. 1031 T.S. No. 993, 3 Bevans 1153, amended 24 U.S.T. 2225 T.I.A.S. 7739 [*hereinafter* Charter]. Much has been said lauding the collective security mechanism --- See DAVID D. CARON, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INTL. L. 552, 573-574 (1993); MICHAEL HOWARD, *The Historical Development of the UN’s Role in International Security* in UNITED NATIONS, DIVIDED WORLD 63, 77-78 (Adam Roberts & Benedict Kingsbury eds. 2nd ed. 1993) (discussing the effectiveness of the UN Peacekeeping Forces). However, enough of the literature raises doubts on the ability of international law to assure global security, see John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT’L. L. 205, 208-209 (2000); Jack L. Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 92-93 (2003);

⁴ *Id.* Charter, art. 2, para 1. The principle has been endorsed at a number of fora, for instance, at the 1945 San Francisco Conference it was pointed out that States are “*juridically equal*”, see UNCIO VI, 457, Doc. 944, 1/1/34 (1). Similarly, the 1970 Friendly Declaration spelt out that States “*...have equal rights and duties*”, see U.N.GAOR 2625 (XXV) of 24th Oct. 1970. Thus while undisputed and realistic equality may not ever have been a reality, the principle of sovereign equality is a concession between peers, which has continuously inspired solutions to international relations problems. It is simply a principle of organization of the international community, which does not imply equality between subjects of international law. “*It is an equality before the rule, not within the rule*”, see Michael Cosnard, *Sovereign Equality – “The Wimbledon Sails On”* in US HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW, 117 (Michael Byers et al. eds. 2003). See also Mariana Florentino Cuellar, *Reflections On Sovereignty and Collective Security*, 40 STAN. J. INT’L. L. 211 (2004) (“*It [UN Charter] also incorporated a cluster of interrelated legal doctrines emphasizing the sovereign equality and territorial integrity of nations and prohibiting aggressive war among them*”) [*hereinafter* Cuellar]

However, keeping in mind the lessons learnt from the failure of the League of Nations, the fifty-one Charter nations at San Francisco, sought a reasonable balance between value-based idealism and power-based realism by acknowledging the importance of major world powers lending their support to this effort. Thus the motivation behind the initial acknowledgement of the ‘powerful’ nation status was to ensure the support and productive involvement of some of the world’s major decision making states. It was in good faith believed that the greatest decision-making authority must lie with states having the primary responsibility for preventing a world war. This same authority was realized by the creation of the Security Council with its exclusive membership, widespread authority and discretionary veto,⁵ all of which were then placed into the hands of the aforementioned powerful states.

This however is seen differently by different nations, for instance, the United States has interpreted this acknowledgement as being commemorative of the inevitable conclusion that “*some countries would be more equal than others*”.⁶ The attitude conveyed, is summarized by Edward Luck’s assertion that, “*United States policymakers seem to care a lot less about whether their chosen courses of action are labeled as unilateralist or multilateralist than do their critics in other capitals.*”⁷ This is the exceptionalism, which threatens the future of multilateral decision-making in the future.

The idea of “*American exceptionalism,*” is generally credited to Alexis de Tocqueville⁸ and his belief that “*the United States was created differently, developed differently, and thus has to be understood differently—essentially on its own terms and within its own context.*”⁹

⁵ The veto was developed as the “*essential glue that kept the great powers in the bargain*”. See Remarks by the United States Assistant Secretary for International Organization Affairs – Kim R. Holmes, THE UN CHARTER: THEN AND NOW, at a Conference on “*The Future of the UN and International Law*” sponsored by the Konrad Adenauer Foundation (Bonn, Germany: November 21, 2003) (available at: <http://www.state.gov/p/io/rls/rm/2003/26960.htm>) [*hereinafter* Holmes]

⁶ *Id.*

⁷ See Edward C. Luck, *Exceptionalism, Power and Global Architecture*, Centre on Int’l Org. (SIPA, Columbia) paper prepared for the Conference on Emerging Global Challenges: Managing Interdependence in a Complex World (May 31st, 2002) at 6 [*hereinafter* Luck]. This disregard for established customary international law is clearly visible in the text of the United States National Security Strategy (released on Sept 20th, 2002) which expressly adopted and then attempted to stretch (“*We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries*”) the Webster formula, making no mention of the UN Charter (as if implying the pre-1945 customary right of self defense as being the applicable law), see The National Security Strategy of the United States, at 15 (www.whitehouse.gov/nsc/nss.pdf) as cited in Michael Byers, *Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change*, JOURNAL OF POLITICAL PHILOSOPHY, Vol. II, No. 2, 171 at 182. [*Hereinafter* Byers]

⁸ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, volume II, (1970) [*hereinafter* Tocqueville]

⁹ See BYRON SHAFER, ed., *IS AMERICA DIFFERENT?*, v. (1991). See also Robert Weisberg, *Values, Violence and the Second Amendment: American Charter, Constitutionalism, and Crime*,

As much as this may seem reasonable, the idea of exceptionalism has very often been misconstrued to signify an imperial position conveyed not only by publicists¹⁰ but also by highly ranked officials.¹¹ Such a construction of Tocqueville's exceptionalism is inaccurate as the author himself proceeded to emphasize the need for developing a more objective outlook towards foreign cultures and civilizations by saying, "*Let us cease, then, to view all democratic nations under the example of the American people, and attempt to survey them at length with their own features*".¹²

While it is increasingly becoming a platitude that exceptionalism exists in international law, little is being said about the nature, degrees of this exceptionalism and their differential consequences on the international legal system. In my effort to bridge what I see as an oversight, this paper will seek to show how contemporary exceptionalist

39 HOUS. L. REV. 1, 9 (2002). The concept has been employed mostly to explain why throughout its history the U.S. has not had a significant labor or socialist movements within its territory, see SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD (1997).

¹⁰ See Lea Brilmayer, *Transforming International Politics: An American Role For the Post Cold War World*, 64 U CIN L REV 119, 123, 127-128 (1995) (where the author has argued that the concept of the equality of states is a legal fiction, and that the reality of contemporary world politics is one of hierarchy in which hegemonic states like the U.S. should "*assume the role of executive officer for the world community at large,*" or "*something akin to an unelected monarch working in conjunction with an elected legislature*" and exercise "*a right to lead and, in the process of leadership, to do things that are forbidden to other nations*"). See also Detlev Vagts, *Hegemonic International Law*, 95 AJIL 843 (2001) quoting Charles Krauthammer ("*[he said] in Time magazine 'America is no mere international citizen. It is the dominant power in the world, more dominant than any since Rome. Accordingly America is in a position to reshape norms, alter expectations and create new realities. How? By unapologetic and impeccable demonstrations of will.'*")

¹¹ See Dick Cheney (United States Secretary of Defense), DEFENSE STRATEGY FOR THE 1990S: *The Regional Defense Strategy* (available at: http://www.informationclearinghouse.info/pdf/naa_pr_Defense.pdf) [*hereinafter* Defense draft] which has been described by David Armstrong as:

"The Plan is for the United States to rule the world. The overt theme is unilateralism, but it is ultimately a story of domination. It calls for the United States to maintain its overwhelming military superiority and prevent new rivals from rising up to challenge it on the world stage. It calls for dominion over friends and enemies alike. It says not that the United States must be more powerful, or most powerful, but that it must be absolutely powerful."

See David Armstrong, *Dick Cheney's Song of America*, United States Congressional Record (October 10th 2002) (available at: http://www.thirdworldtraveler.com/American_Empire/Cheney's_Song_America.html) (*hereinafter* Armstrong)

¹² *Tocqueville*, *supra* note 8 at 36-7. Quite the opposite argument was made by Bloom with reference to contemporary higher education, when the author argued against the prima facie acceptance of relativism without the application of individual reason and the recognition prejudices, see generally ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND, (1987).

practices are creating a fault in the international legal order which will in turn provide a basis for others to argue for an overall reformulation of rules i.e. actions in contravention of the multilateral international legal framework would no longer need to be justified by manipulative rule interpretation but by a clear challenge to the very morals and standards on which they are built. The friction between these unilateral ambitions and the widespread opposition to incidents along the lines witnessed in Kosovo and Iraq (which perhaps indicative of a larger disaffection with the option of being exceptional as a matter of right) will not only undermine the interests of the international community but will also prove to be against the interests of even the most exceptional hegemon (which will ultimately find it impossible to sustain its position of global influence in the face of rapidly fading trust and legitimacy). Thus, conforming to the Charter paradigm and keeping state exceptionalism tied within multilateral restrictions is not only in the larger interest of global peace and security but also in the specific interest of any state seeking to retain its position and mandate as a global peacekeeper. In the course of this paper, I will seek to explore the possibilities that various kinds of exceptionalism opens up for the future of the international order and argue that the ends will satisfy neither the goals of any state(s) nor the international community as a whole.

I *begin* my inquiry by arguing that exceptionalism displayed by the United States and NATO (as the most powerful economic and political actors in the international community) has created precedents for other smaller power centers to follow suit. *Second*, I describe how this precedent may prove to be a bigger challenge than the *West* can handle because the religion and culture based exceptionalism displayed by many like the Islamic groups is far more dangerous, acting as it does, with absolute disregard for the western notions of fundamental human rights and democratic structures such a transparency and freedom of information (which the western exceptionalists would feel pressured to at least pay lip service to). In as much as I see these forces threatening the sanctity of the *international world order*,¹³ I would use the *third* portion of my paper to oppose the notion that international law has been breached to the significant extent that such cracks and consequent seepage of exceptionalism needs to become the rule rather than the exception. Quite to the contrary, I would contend that unilateral actions have begun to isolate its perpetrators shaking their legitimacy before the international community.

Finally, I would conclude that the global dissent against the actions of the U.S. in Kosovo and Iraq are symbolic of the international community's continued affection for the Charter paradigm and that the way ahead is not to pursue a rethinking of standards but a reinforcement of the boundaries that the Charter places upon Westphalian liberties.

¹³ In finding a suitably broad definition of the phrase '*international legal order*' I accept Professor Schachter's description of it as being a socio-political product of convergent perspectives of formal authority and actual behaviour, see Oscar Schachter, *Towards a Theory of International Obligation*, 8 VIRGINIA J. INT'L L. 300-322 (1968).

(II) SETTING THE STAGE: *Creating precedents that perpetuate breaches*

First world diplomacy has always attempted to manipulate the international legal system to its advantage.¹⁴ However, even till a few decades ago, the U.S. attempted to manipulate and stretch interpretations (in Grenada¹⁵ and Panama¹⁶) to provide legality to its actions.¹⁷ This in itself showed some concern on the part of the governing parties towards the authority of the UN and mandates of sovereign equality and collective security as enshrined in the Charter. The 90's however, signaled in a new era of foreign policy where the concept of 'security' was expanded from demilitarization and containment to a more "forward presence"¹⁸ so as to ensure the expansion of American beliefs and interests.¹⁹ This transition was accurately articulated by *Anthony Lake*, (the

¹⁴ See Byers, *supra* note 7 at 173, where the author cites 16th century Spain, 18th century France and 19th century Britain as precedents of such diplomacy.

¹⁵ In Grenada (1983), the United States alleged that some American students were under threat and relied in part on a claimed right to protect nationals from threatened attack to justify invading the territory of another nation. The State Department under Reagan and Bush asserted that this right to protect citizens from potential harm came within Article 51's exception for self-defense. However, this was one of three parallel justifications provided by the U.S. and the same was actively condemned by a large majority of states. See W. GILMORE, *THE GRENADA INTERVENTION*, 55-64 (1984). See also MALCOLM N. SHAW, *INTERNATIONAL LAW*, 792 (4th ed., 1998) [*hereinafter* Shaw]

¹⁶ In Panama (1989), the United States argued self-defense (parallel to arguments based on the need to restore democracy and secure the Panama Canal), once again by way of protecting its nationals (one American had been killed and several others allegedly harassed), see V. Nanda, *The Validity of the United States Intervention in Panama Under International Law*, 84 *AJIL* (1990) 494, 497. See also OPPENHEIM'S *INTERNATIONAL LAW*, (Sir Robert Jennings and Sir Arthur Watts eds.), 436 at n. 14 (vol. 1, 9th ed. 2003) [*hereinafter* Oppenheim]

¹⁷ See Mary Ellen O'Connell, *American Exceptionalism and the International Law of Self-Defense*, 31:1 *DENV. J. INT'L L. & POL'Y* 101 at 113 (2003) [*hereinafter* O'Connell: Self-defense]

¹⁸ See Armstrong, *supra* note 11 (Both Cheney and Powell and his staff believed that a weakened Soviet Union would result in shifting alliances and regional conflict. The United States was the only nation capable of managing the forces at play in the world; it would have to remain the preeminent military power in order to ensure the peace and shape the emerging order in accordance with American interests. U.S. military strategy, therefore, would have to shift from global containment to managing less-well-defined regional struggles and unforeseen contingencies.)

¹⁹ Conservative factions in America have maintained that the purpose of the foreign policy is to use its military force and political power to serve the clear moral purpose of "actively promoting American principles of governance abroad--democracy, free markets, respect for liberty", if necessary by force. See William Kristol and Robert Kagan, *Toward a Neo-Reaganite Foreign Policy*, 75 *FOREIGN AFF.* 18, 23 (July-Aug 1996); Robert Kagan, *The Benevolent Empire*, 111 *FOREIGN POL.* 24 (Summer 1998); Charles Krauthammer, *The Unipolar Moment*, 70 *FOREIGN AFF.* 23 (1990/1991).

then National Security Adviser to Clinton's first administration), when in describing the foreign policy goals of the new administration (in 1993) he argued that "*the successor to a doctrine of containment must be a strategy of enlargement--enlargement of the world's free community of market democracies*".²⁰ Unfortunately this "*new interventionism*"²¹ (by way of enlargement) in collusion with the already prevalent exceptionalist attitude, initiated the undermining of the Charter paradigm enshrining state sovereignty and prohibiting the use of force except in self-defense.

The aforementioned undermining of the UN system was assured when in June of 1998 the U.S. Secretary of Defense, William Cohen argued that NATO would not need a UN Security Council authorization to intervene in Kosovo.²² This stand was later diluted by the then Secretary of State---Madeline Albright, when at a NATO meeting in Dec. 1998, she said:

*"Let me say a word about (Security Council) mandates. NATO will in all cases act in accordance with the principles of the UN Charter, while continuing to address the issue on a case-by-case basis."*²³

However, an unilateralist precedent was confirmed when the attitude of superiority and exceptionalism allowed the US to stand above international law and the mandates of multilateralism as the Clinton administration followed through in its second term, with NATO's bombing of Kosovo in 1999; an abject *use of force* for which the U.S. government saw no reason to provide legal justifications to the international community.²⁴

²⁰ Remarks of Anthony Lake, Assistant to the President for National Security Affairs, '*From Containment to Enlargement*' delivered at the Paul Nitze School of Advanced International Studies of the Johns Hopkins University, Washington, D.C., Sept 21, 1993, cited in Jules Lobel, AMERICAN HEGEMONY AND INTERNATIONAL LAW: *Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, 1 CHI. J. INT'L L. 19 (Spring, 2000) [*hereinafter* Lobel]

²¹ See Stephen John Stedman, *The New Interventionists*, 72 FOREIGN AFF 1, 4 (America and the World 1992-1993).

²² See Remarks of Secretary of Defense William S. Cohen at Los Angeles Foreign Affairs Council Breakfast, Federal News Service, June 29, 1998 at 10 available in LEXIS, News Library, Fednew File. See Mary Ellen O'Connell, *The UN, NATO and International Law After Kosovo*, 22 HUM. RTS. Q. 57 at 76 (2000)[*hereinafter* O'Connell: Kosovo]

²³*Id.* at 79

²⁴ *Id.* at 115, note 69 ("The US did put on a defense at the ICJ in a case brought by Yugoslavia. Basically it followed the British lead and argued that the Yugoslav bombing came close to being justified. In the weeks before the case however, repeated calls to the Legal Adviser's office at the US Dept. of state yielded promises of return calls that never came, referrals to phone nos. for disconnected phones and recommendations to call the office of public affairs, which had no idea what the request meant."). See also Abraham D. Sofaer, *International Law and Kosovo*, 1 STANFORD JOURNAL OF INTERNATIONAL LAW 1-21 (2000).

Assuming the more recent statement by the US Secretary of State to be the *practice* expected from the state, the actions of the US and NATO in Kosovo were clearly violative of the Article 53(1) of the Charter which states

“The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state [i.e. any state which during WWII was the enemy of any signatory of the present Charter]...”²⁵

This is in somewhat of a direct contradiction to the initial basis for which an exclusive position of responsibility was given to the United States within the framework of the United Nations. As stated initially, the purpose of collective security within the mandates of the Security Council was that while the Charter believed in and sought to encourage the equality of all nations, they respected the practicality that without nations like the United States taking the initiative in war prevention, the UN may never gain respectability much like its predecessor. Thus while the United States (through the Security Council) is put in a position of authority to legislate for the international community as a collective, its actions as an agent for this global community must be bound by a basic standard of morality and accountable against the same.

Immanuel Kant’s “*Categorical Imperative*” is a principle that exemplifies one such moral standard when it reasons that an agent ought to “*act only according to that maxim by which . . . [one] can at the same time will that it should become a universal law.*”²⁶ Under the rationale of this principle, an agent (however powerful) like the United States must act upon a policy only if he is willing to allow everyone else concerned, to do the same.²⁷ The rationale behind this principle fits perfectly with the equality of states ideal since it conveys that a standard once accepted, be made applicable to all.

An exceptionalist outlook then, would be virtually antithetic to such a standard of morality since a state *suffering* from this condition may be generally diagnosed with,

²⁵ See *Charter*, art. 53(1)

²⁶ See IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS*, (tr. Lewis White Beck, Indianapolis: Bobbs-Merrill, 1959), 421 as cited in JUDITH LICHTENBERG, *Pre-emption and Exceptionalism in U.S. Foreign Policy: Precedent and Example in the International Arena in WARS ON TERRORISM AND IRAQ: HUMAN RIGHTS, UNILATERALISM, AND U.S. FOREIGN POLICY* (Thomas G. Weiss, Margaret E. Crahan, and John Goering, eds.,) (London: 2004)[*hereinafter* Lichtenberg]

²⁷ While Kant’s categorical imperative was intended to be much stricter and austere objective, a simpler and more subjective interpretation would imply that agents must assess the legitimacy of their reasons (and thereby their actions) by their willingness to accept the universalization of such rationale. *Id.*

“(1) *A willingness to define its own path and positions within and toward international institutions, regardless of pressures and critiques by others;*²⁸

(2) *A proclivity for asserting the universal validity of its national values and practices;*²⁹

(3) *A tendency to look to domestic sources for legitimacy, even in the face of contradictory rulings by international bodies;*³⁰

(4) *A confidence that national policymakers have alternative ways of pursuing national interests and values, so that the use of multilateral institutions is generally perceived to be an option, not an obligation.*^{31,32}

²⁸ This is best seen in the myriad of ways and justifications using which the United States actually exempts itself from certain international law rules and agreements, even ones that it may have played a critical role in framing, through such techniques as noncompliance; non ratification; ratification with reservations, understandings, and declarations; the non-self-executing treaty doctrine, see Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. (2003) 1479 at 1482, 1483 [*hereinafter* Koh]. The latest act in furtherance of this trend being, the unsigning of the Rome Statute of the International Criminal Court (ICC), see Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061 (2003).

²⁹ The American obsession with its First Amendment to the extent of its blatant disregard for economic, social and cultural human rights is made obvious by its conspicuous absence from a number of international human rights covenants, for instance, its refusal to ratify the *International Covenant on Economic, Social and Cultural Rights* (U.N. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49 entered into force January 3, 1976) because it does not recognize economic rights to housing, employment and so on. In keeping with this ideology, the U.S. has also refused to be party to the *Convention on the Rights of the Child* (Adopted by the U.N. General Assembly on Nov. 20, 1989) and the CEDAW (Adopted and opened for signature, ratification under U.N. GAOR 34/180 on Dec.18, 1979) which are instruments dedicated to raising the status of women and children especially with relation to unfair labour practices adopted in many third world nations. On the contrary, its singular stress with respect to human rights has been along the lines of civil and political freedoms as advanced under the premise of its own Constitution. See R. Klein, *Cultural Relativism, Economic Developments and International Human Rights in the Asian Context*, 9 TOURO INTERNATIONAL LAW REVIEW, at 4, 17 (2001)[*hereinafter* Klein].

³⁰ This has even been espoused by some American Supreme Court Justices, and typified by Justice Scalia's statement in *Stanford v. Kentucky* that the practices of foreign countries are irrelevant to U.S. constitutional interpretation, because, in construing open-ended provisions of the Bill of Rights, "*it is American conceptions of decency that are dispositive*", 492 U.S. 361, 369 n.1 (1989) (emphasis in original) as cited in Koh, *supra* note 28 at 1482. Quite the opposite however, is argued by Justice Ginsburg when she advocates the use of a "*comparative dialogue*" (citing similar assertions by Chief Justice Rehnquist and Justice O'Connor), see Ruth Bader GINSBURG, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1,2 (2003). See also *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 342-343 (2003) (Ginsburg, J., concurring).

³¹ A common element of the Afghanistan, Sudan, Iraq and Kosovo bombings was the US and NATO's disregard for both international law and the United Nations. This is made obvious to the extent that the US Secretary of State stated that multilateralism and presumably international law,

It is recognized that using the above premise for identifying exceptionalism would lead to the characterization of the Soviet Union, China, and France as exceptionalist in their conduct at various periods in the UN's history.³³ However it needs to be emphasized that none of these nations had ever possessed as much power or pomp as the present day United States; nor have they consistently used this exceptionalism as the unabashed basis of their foreign policy (that too within the folds of a multilateralist world order). Only the US has been able to achieve this ignoble distinction not only within but also outside the UN system.

Along these lines, the U.S. in the course of flaunting its exceptionalist traits fails the Kantian standard on two distinct grounds:

First, the entire point of the American exceptionalist attitude is to convey that its actions and reasons are above all others and cannot be judged by the generalized standards of international law (since it is “*exceptional*”). This manifesto lies at the heart of exceptionalism as perceived by U.S. foreign policy. The most prominent instance of which is found in the Dick Cheney's controversial “*Defense Planning Guidance Draft*” of 1992³⁴ wherein the United States is presented as the overarching leader of the world, *benevolently*³⁵ forming regional alliances, enforced and maintained with permanent

are means and not ends, and thus may be done without in the interest of national interests, *see*, for example, Madeline Albright, *The United and the United Nations: Confrontation or Consensus?*, LXI Vital Speeches of the Day 354 (Apr 1, 1995) as cited in Lobel, *supra* note 20 at 36, n. 30. This *national interest* argument was used prominently once again in February of 1998 when the UN Secretary General Kofi Annan negotiated an agreement regarding weapons inspections with Iraq; Madeline Albright once again presented US's exceptionalist (and thereby unilateralist) stance when she said “[if] *we don't like* [Annan's agreement] *we will pursue our national interests*”, thereby reserving the use of force as a viable option, *see* Dan Morgan, *Administration Weighs Steps in Case U.N.-Iraq Deal Doesn't Satisfy U.S.*, Wash Post, (Feb 23, 1998), A15. *See also* Luck, *supra* note 7 at 12 where the author has argued that while the majority support has backed the American Executive in its undertaking of international and multilateral obligations, a vocal and politically active minority of about 15% has opposed –“*generation after generation*” - the expansion of international institutions and of US participation in them, largely because of perceived threats to national sovereignty. The proponents of this minority are no doubt absolute mascots of American exceptionalism in an era of eroding sovereignty.

³² *See* AMERICAN EXCEPTIONALISM AND INTERNATIONAL ORGANIZATION: *Lessons from the 1990s*, in *The US and Multilateral Organizations*, (Rosemary Foot, Neil MacFarlane, and Michael Mastanduno, eds.) (2002) as cited in Luck, *supra* no 7 at 8.

³³ *See generally* G.V. PLEKHANOV, *Socialism and The Political Struggle* (available at <http://www.marxists.org/archive/plekhanov/1883/struggle/chap1.htm>).

³⁴ Defense Draft *supra* note 11

³⁵ I say ‘*benevolently*’ to point out a declaration within the draft that exemplifies the US's outspoken propensity for unilateralism -- “*The perceived ability –which depends upon the actual ability – of the United States to act independently, if necessary, is thus an important factor even in those cases where we do not actually use it. It will not always be incumbent upon us to assume a leadership role. In some cases we [i.e. the US] will promote the assumption of leadership by others, such as the United Nations or regional organizations.*” *See* Defense Draft, *supra* note 11

strategic installations and military presence.³⁶ Thus the question of America's allowing this reasoning ('*maxim*') to be universally applicable does not arise.

Second, implicit in the '*categorical imperative*' is the syllogism that the rationale behind the agent's actions (the '*maxim*') should be accessible to all other parties concerned before the same can become universally accepted or contested (since all actions must be viewed from the standpoint of multilateral consensus which is the basis of the UN). Along these lines, what needs to be unequivocally clarified is that along with the tremendous authority and responsibility (that is placed on the U.S. through its position in the Security Council) must be attached, the greatest standard of accountability to the international community. In this regard, the outspoken denial of an obligation to justify its actions is a most unfortunate trend initiated by the U.S. which has set not only a most dangerous precedent but also established a damning line of thought.

At this point, academic fairness demands that I reiterate that the danger from exceptionalist statehood is not limited to the particular instance of the United States.³⁷ As stated earlier, the corrupter is the power of the State in "*collusion*" with a cultural attitude of inherent (or even divinely ordained) superiority.³⁸ Rainier Baum's "*invariance hypothesis*" alludes to how the former is capable of causing a heightened awareness of the latter, from a societal as well as an individual point of view. On a societal level, an enhancement in the economic, military and political power of the society encourages people to have confidence in their roots and consequently become culturally aggressive; while on the individual level, the increased standard of economic and political empowerment causes people to become more individualistic thereby weakening traditional bonds, heightening feelings of alienation and causing the proverbial '*identity crisis*'. This leads the individual to seek shelter in religion and traditional value systems thereby heralding cultural resurgence.³⁹

at 8 ("CONTINUED U.S. LEADERSHIP"). This benevolence has been echoed elsewhere as a "*benign hegemon*", see Luck, *supra* note 7 at 6.

³⁶ See Defense Draft, *supra* note 11 at 8 ("ENDURING REQUIREMENTS")

³⁷ See *supra* notes 32, 33 and accompanying text.

³⁸ In the '*The Origins of Satan*', Elaine Pagels traces the evolution of Satan from his roots in the Hebrew Bible. She explains that the evolving image of Satan served "*to confirm for Christians their own identification with God and to demonize their opponents---first other Jews, then pagans and later dissident Christians called Heretics...The use of Satan to represent one's enemies lends to conflict a special kind or moral and religious...in which 'we' are God's people and 'they' are God's enemies, and ours as well...Such a moral interpretation of conflict has proven extraordinarily effective throughout Western history in consolidating the identity of Christian groups*", see ROBERT JAY CLIFTON, THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE, xvii (1968).

³⁹ See Rainier Baum, *Authority and Identity --- The Invariance Hypothesis II*, Zeitschrift für Soziologie, 6 (Oct. 1977), 368-369 as cited in SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER, 76 (1996) [*hereinafter* Huntington: Clash]. While the "*Invariance hypothesis*" traces the society's enhanced economic, military and political power to an infusion of Westernization and/or modernization, such a consideration is

Every society, culture or civilization has an underlying belief in its superiority to others around it and it is this societal pride and belief in its uniqueness that Alexis de Tocqueville referred to as exceptionalism, one that can arise within any similarly placed society; the danger arises in its “*collusion*” with material power. In this case, it should suffice to say that

*“The fundamental problem is that America today has too much power for anyone’s good, including its own...the problem with American power is not that it is American. The problem is simply the power. It would be dangerous even for an archangel to wield so much power.”*⁴⁰

However in recent times, the predominant danger of unilateralism has indeed arisen from the United States and its allies, specifically the NATO. A danger which has once again been initiated by the overstepping of the Charter’s mandates in pursuit of an exceptionalist approach to international relations and the idea of security through regional arrangements.

Article 52 of the Charter espouses the creation of such “*regional arrangements*” when it states

*“Nothing in the present Charter precludes the existence of regional arrangements or agencies with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements...and their activities are consistent with the Purposes and Principles of the United Nations.”*⁴¹

Having assured such a vast scope of action to regional arrangements, the Charter in its foresight includes provisions such as Article 52(4) wherein it clearly stresses that the application of Articles 34 and 35 relating to the roles of the Security Council [hereinafter Council] and the General Assembly [hereinafter Assembly] remain unaffected.⁴² The supremacy of the Council is reinforced by Article 53(1), which provides that while the Council may, “*where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken...without the authorization of the Security Council*”. Moreover, while Article 24 of the Charter is explicit in placing upon the Council the “*primary*

largely inconsequential for the purposes of the argument made in this paper since the major premise on which the “*collusion*” argument bases itself is the idea that once a society has this power (and an underlying culture and value system), the combination is most likely to create a lineage of exceptionalist tendencies.

⁴⁰ See Timothy Garton Ash, *The Peril of Too Much Power*, N. Y. Times, (April 11, 2002) A4 at 6.

⁴¹ See *Charter*, *supra* note 3 at art. 52(1). See also B. SIMMA ed., *THE CHARTER OF THE UNITED NATIONS*, (Oxford: 1995) 679.

⁴² See Shaw, *supra* note 15 at 729.

responsibility for the maintenance of international peace and security"; Article 103 emphasizes that in the event of a conflict between the obligations of a UN member under the Charter and obligations under any other international agreement, the former will prevail.⁴³

Thus, in law there is enough and more room to doubt any justifications that NATO *may provide* for bombing Kosovo without the prior authorization of the Council.⁴⁴ Despite this, the Russian and Chinese draft resolution of March 1999 condemning NATO action received the support of only one other member of the Security Council, Namibia; the remaining 12 members voted against it.⁴⁵ This refusal to condemn however cannot constitute an implicit authorization since Council members might acquiesce in an unlawful action, yet not vote to approve it if given such an opportunity prior to its initiation. The more hazardous implication of such a post-action ratification by the Council is that it would encourage members to take illegal action with the expectation that the Council will later acquiesce the same thereby providing the stamp of legal authorization.⁴⁶

(A) *The message sent out...*

With respect to the future of decision-making though what is more important is the impression that survives the unilateral conduct undertaken by the NATO in its *deliverance* of Kosovo.

⁴³ See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (U.S. v. Nicar.) (Merits), ICJ Rep. 1984, 392, 440.

⁴⁴ Neither NATO nor the United States offered any legal justification for their action during the Kosovo crisis. In the proceeding before the International Court of Justice on Yugoslavia's complaint, only Belgium, of the ten NATO countries, mentioned humanitarian intervention as a possible legal justification, see Jonathan Charney, *Anticipating Humanitarian Intervention in Kosovo*, 32 VAND. J TRANS. L 1231, 1239 (1999). Even Belgium later stated its "*hope that resorting to force without the approval of the Security Council will not constitute a precedent*", see Statement by the Deputy Prime Minister and Minister of Foreign Affairs of Belgium at the 54th Assembly of the United Nations, 9 (available at: http://www.un.int/belgium/speech_Minister_Michel_54UNGA_ENG.html). Others, such as the United States, referred to violations of human rights in Kosovo and the need to avoid a humanitarian catastrophe, yet did not argue for a rule of international law that would justify NATO's action, see Lobel, *supra* note 20 at 33.

⁴⁵ See Ramesh Thakur, *The UN and Kosovo's Challenge of "Humanitarian Intervention"* (available at <http://www.isanet.org/archive/kosovoandun.html>) [*hereinafter* Thakur].

⁴⁶ See Lobel, *supra* note 20 at 31. This rationale for intervention receives a most unfortunate endorsement from the International Court of Justice which in the *Corfu Channel case* noted that since the right of forcible intervention in the name of international justice "*has, in the past, given rise to most serious abuses . . . From the nature of things, it would be reserved for the most powerful states*", *Corfu Channel Case*, 1949 ICJ Reports (Merits) 4, 35(1949). This however is based on a faulty premise since the misuse of forcible intervention has more often than not been done by such "*most powerful States*".

In India, a former Foreign Secretary noted: “If it is Iraq and Yugoslavia today, it could very well be India tomorrow. This demonstrates convincingly the importance of India’s nuclear deterrent.”⁴⁷

Alexei G. Arbatov (deputy chair of the Russian State Duma (Parliament) Defense Committee) summed up the lessons that Russia had learnt from the experience as being; that the ends justifies the means, that the use of force is the most efficient problem solver, if applied decisively and massively; that negotiations are of dubious value and should be used as a cover for military action and finally, that devastation and collateral fatalities among the civilian population are acceptable in order to limit one’s own casualties.⁴⁸

What is possibly even more disturbing is the precedent set by the Kosovo incident based on which it has been argued that NATO’s attack on Serbia may have effectively expunged a Russian taboo against the use of military force in Chechnya.⁴⁹ As flagrant as this argument may sound, it holds good when tested against Kant’s “categorical imperative” since the universal applicability of the rule would allow organizations like the Commonwealth of Independent States [CIS, with Russia as its hegemon],⁵⁰ the Economic Community of West African States [ECOWAS, with Nigeria as its hegemon],⁵¹ or the South Asian Association for Regional Cooperation [SAARC, with India as its hegemon]⁵² to pursue regional security and intervention based on some similarly customized and subjective thumb rule.⁵³

⁴⁷ See MUCHKUND DUBEY, *The NATO Juggernaut: Logic of an Indian Defense Deterrent*, The Times of India (Delhi: 8 April 1999). See also *Might on Show*, The Times of India, (2 April 1999) arguing that “The war unleashed by NATO against Serbia has implications for general staff establishments the world over...The nations which want to retain their strategic autonomy and sovereignty are left with no choice but to sustain their nuclear arsenals and go in for missiles and try to develop RMA [the revolution in military affairs] capabilities for themselves”.

⁴⁸ See Alexei G. Arbatov, *The Transformation of Russian Military Doctrine: Lessons Learned from Kosovo and Chechnya* (Washington DC: The George C. Marshall Center Papers, No. 2, 20 July 2000), “Executive Summary,” v.

⁴⁹ *Id.*

⁵⁰ Dec.8, 1991 (Minsk) and Dec. 21, 1991 (Alma Mata); Text in (1992) 31 ILM 138. The Charter was adopted on June 22, 1993; see (1995) 34 ILM 1279.

⁵¹ Formally established in 1975 (there was an earlier interim agreement of May 4, 1967, 5 U.N.T.S. 287, but the constituent body was extensively revised on July 4, 1993; Final text in 35 (1996) 674).

⁵² Charter of the SAARC, Dec. 8 1985 (available at: www.south-asia.com/saarc/charted.html).

⁵³ See Lobel, *supra* note 20 at 31 where the author cites the example of the atmosphere of insecurity and doubt that was created regarding the Security Council, when the Nigerian-dominated ECOWAS intervened in Liberia and Sierra Leone to protect human rights and democracy at the same time that the Nigerian dictatorship was violating those rights and democratic principles at home. The Security Council's failure to explicitly authorize those interventions may well have been linked to uneasiness about Nigeria's role, particularly in the Sierra Leone case where Nigeria apparently misled the Council as to the nature of its operations.

An adequate warning was provided in March 2002, when the members of the Arab League [League]⁵⁴ concluded that the anticipated attack on Iraq would be an act of aggression. They further announced that any such attack would be treated as an attack on each and every one of them.⁵⁵ The phraseology of this statement is only too similar to the founding principle of the NATO by which the members agree and accept that an “*attack against one or more of them in Europe or North America*” would be considered to be an attack against them all.⁵⁶

Proponents of the American hegemonic doctrine and members of the Dick Cheney/Paul Wolfowitz school of thought will no doubt argue that the League lacks the military power and political influence to undertake such a determination to any realistic degree of success. However, their current strength or ability to follow through is not in question. The question raised is whether the NATO’s unilateral determination and consequent disproportional intervention into Kosovo in 1999 establishes an adequate precedent/rule for the League to make its own determination that Israel is indeed guilty of gross human rights violations against Palestinian citizens.⁵⁷ Would it be acceptable to NATO (with the US as its hegemon) if the League used this determination as a thumb rule to intervene against Israel, in defense of the Palestinian peoples?⁵⁸ The obvious answer once again presents the face of collective exceptionalism that has been NATO’s binding force for some time now.

All of this may seem like a conspiracy theory of sorts in the background of *Luck’s* opinion that

“Historically, if one state appeared to be outstripping its neighbours and competitors in terms of the core attributes of power, especially militarily, the

Other regional actions, such as the U.S.-dominated OAS intervention in the Dominican Republic, the Organization of East Caribbean States/U.S. invasion of Grenada, and the Warsaw Pact invasion of Czechoslovakia, all raise the same hegemonic pretextual concerns.

⁵⁴ Pact signed on March 22, 1945; text in (1945) 39 AJIL Supp. 266.

⁵⁵ See Thom Shanker & David E. Sanger, U.S. Envisions Blueprint on Iraq Including Big Invasion Next Year, N.Y. Times, (Apr. 28, 2002) at 1.

⁵⁶ See Article V of the NATO treaty (43 AJIL 1949 Supp. 159)

⁵⁷ “*If this war [referring to President Bush’s war against terrorism] takes the form that affronts moderate Arab opinion, if it has the air of a clash of civilizations, there is a strong risk that it will contribute to Osama Bin Laden’s goal: a conflict between the Arab-Muslim world and the West*”, see Christopher S. Raj, Chintamani Mahapatra, *US Strategic Response to Emerging Problems in Asia*, INTERNATIONAL STUDIES Vol. 41, No. 3 (2004) 279 at 295 quoting the French daily *Le Monde*, (September, 2001).

⁵⁸ See Thakur, *supra* note 45, (“would [the US] accept former or present Israeli leaders being put on trial for crimes against humanity by a tribunal that was set up essentially by the Arab League, funded by them and dependent on them for collecting crucial evidence through national intelligence assets and for enforcement of arrest warrants?”)

*others would react by...forming coalitions to counter the hegemon. But it seems most likely that others by and large see the US as a relatively benign hegemon, one which has little stomach or motivation for conquest and which faces internal constraints on the sudden and capricious use of force.”*⁵⁹

The fallacy of the above stated argument however lies in the fact that the US (in this case) is indeed not a “*benign hegemon*”.⁶⁰ Neither does it lack the “*stomach or motivation*” to pursue conquest nor does its foreign policy get bound by any such “*internal constraints on the sudden and capricious use of force*”⁶¹ and this fact is only too obvious to most nations. Thus the world is a little more the way *Huntington* sees it; as a “*transitional uni-polar period*” characterized by a single superpower preferring unipolar hegemony, and several regional powers that prefer a multipolar system wherein they could restrain the superpower.⁶²

⁵⁹ See Luck, *supra* note 7 at 6. See also Fernando Reinares, *The Empire Rarely Strikes Back*, FOREIGN POLICY (Jan./Feb., 2002) where the author contends, “*Although terrorists attacked U.S. interests more than 2,400 times between 1983 and 1998, the United States responded with overt military action only three times.*”

⁶⁰ See Slavoj Zizek, *Iraq’s False Promises*, FOREIGN POLICY, (Jan/Feb 2004) 42 at 46, where he argues that “*The problem with today’s United States is not that it is a new global empire, but that, while pretending to be an empire, it continues to act as a nation-state, ruthlessly pursuing its interests*”.

⁶¹ See Curtis A. Bradley, Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118: 7 HARV. L. REV. 2048 at 2054, 2057-58 (2005) where the authors contend that “*Congress need not declare war in order to provide its full authorization to the President to prosecute a war*”. This is followed by the argument that any authorization for the use of military force is not truncated on the grounds that the fight against terrorists is not a real war; rather “*the authority conferred [by the authorization of use of military force] does not depend on whether the conflict meets some metaphysical test of war but rather on how the political branches view the conflict and how they characterize the belligerents in it*”. These arguments however are widely disputed; see n. 32, 33 at 2058, citing not only the intent of the Founders but also the conduct of previous U.S. Presidents contrary to the above stated argument. Contemporary literature on the subject also disputes the legality of such executive arrogance for e.g. see, Bruce Ackerman *The Emergency Constitution*, 113 YALE L.J. 1029 (2004); Diane Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT’L L. 263 (2004).

What is perhaps even more surprising is the Sept 18, 2001 Congress authorization to the U.S. President to “*use all necessary and appropriate force...to prevent future acts of international terrorism against the U.S. by such nations, organization or persons*”, see Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), [hereinafter AUMF]. The AUMF was approved by both Houses of the Congress on Sept 14, 2001 and signed by the President on the Sept 18, 2001. It was this unilateral and preemptive *carte blanche* that trained U.S. might on Iraq---On Sept 20, 2001, President Bush declared “*Our enemy is a radical network of terrorists, and every government that supports them...*”, see President George W. Bush, Address to the Joint Session of Congress and the American People (Sept 20, 2001) (available at: www.whitehouse.gov/news/releases/2001/09/20010920-8.html).

⁶² See Samuel Huntington, *The Lonely Superpower*, 78 FOREIGN AFF. 35 (Mar-Apr 1999).

The obvious reason to explain the absence of a coalition to counter such a hegemon (and its allies in the NATO) is the degree to which the international political system is influenced and often manipulated by the hegemon and its allies.⁶³ An example

⁶³ The most recent instance of which is America's declaration of Pakistan as being its major non-NATO ally in recognition of the latter's services as a bounty hunter of sorts, arresting and handing over more than 500 fugitives alleged to be part of the Al Qaeda and Taliban factions. See U.S. to Designate Pakistan Non-NATO Ally, Reuters (posted: March 18th 2004), (available at: <http://wireservice.Wired.com/wired/story.asp?section=Breaking&storyId=837158>). See also US Boosts Pakistan Military Ties (available at: http://news.bbc.co.uk/1/hi/world/south_sia/3522174.stm).

This designation has been accompanied by the lifting of all sanctions levied upon Pakistan after Pervez Musharraf seized power in a 1999 bloodless coup; since September 11, 2001, the US has rewarded Pakistan's cooperation in the war against terrorism by helping the country reschedule its loans with international financial institutions, see "US assures Pakistan of Immediate Debt Relief", Dawn (Oct. 21st 2001). See also "US Lifts Musharraf Sanctions", The Telegraph, (March 26th 2004) ("*the US President had last year announced a \$3 billion economic assistance package for Pakistan, including over a billion dollars to enable it to repay old loans.*") See also B. RAMAN, "Murder and Machination in Pakistan's backyard", (July 9th 2003) (available at: http://www.pakistan-facts.com/article.php/200_307081252_40298) (The Pakistani conducted arrest and handover of Khalid Shaikh Mohammed allegedly the chief of operations under Bin Laden, charged with planning the attack of September 11th, was seen as the biggest catch of Al-Qaeda. The performance earned President Musharraf accolades at Camp David and led to the announcement of a \$3 billion aid package from 2005).

To this extent there is the possibility of a deviation from *Huntington's* description of how the fault lines of civilizational conflict will be drawn between "*the West and the rest*", (see *Huntington: Clash, supra* note 37 at 22-49) since Pakistan's newfound boldness in siding with the US against Islamic militants within its territory is a prime example of the indecisiveness that continues to plague Non-western unity. (See M. LAL GOEL, *A Clash of Civilizations*, speech delivered at the Unitarian Universalist Fellowship of Pensacola, Florida (June, 2002) at 9,10 (on file with the author) where he states "*The quick eradication of the Bin Laden network in Afghanistan has emboldened President Musharaff to move boldly against militants in his own country. Musharaff would not have undertaken such a risky venture prior to 9/11. In the changed environment he feels encouraged. The moderate Islamic intelligentsia has begun to speak up against extremism*")

Pakistan as an Islamic theocracy could have served as a stronghold of an Islamic resistance against the West. However the presence of the US as a negotiator in the Kashmir issue has thus far precluded Pakistan's siding against them, see generally ASHLEY J. TELLIS, C. CHRISTINE FAIR, JAMISON JO MEDBY, LIMITED CONFLICT UNDER THE NUCLEAR UMBRELLA: INDIAN AND PAKISTANI LESSONS FROM THE KARGIL CRISIS, (Rand Corporation Publications, 2000) (available at: www.rand.org/publications/MR/MR1450). Pakistan has consequently attempted to balance its cultural allegiance with its foreign political interests for some time now, see KATHERINE PFLEGER SHRADER, U.S. Lets Pakistan Lead al-Qaeda Hunt, The Guardian (March 19th 2004) (available at: <http://www.freerepublic.com/focus/f-news/1101590/posts>) ("*The situation Musharraf faces is a delicate one, as he balances his desire to eliminate al-Qaeda and its allies, who have found safety in the tribal areas of Pakistan, with opposition among his people to the U.S.-led war on terror...Loren Thomson a defense analyst at the Lexington Institute...said Musharaff is in a dangerous situation, under U.S. pressure and having survived two attempts on his life by Islamic extremists, 'He appears to be doing the bidding of the United States at a time when U.S. standing in Pakistan is at a low ebb.'*") This new alliance however has shown adequate

of this with regard to the NATO, is seen in the “*Strategic Concept of the Alliance*” which was approved by the 19 members on its 50th anniversary (April, 1999).⁶⁴ This policy essentially transforms the NATO from a Cold War collective security organization to “...one that attaches more importance to political dimensions and expanded geographical focus beyond NATO territory”.⁶⁵ But in the course of its most ambitious expansion throughout Europe⁶⁶ (and even beyond through sub-alliances),⁶⁷ the NATO (and the US as a controlling authority within it) may have set a most dangerous precedent and another significant oversight; in believing themselves to be god’s only children.

(III) A MORE DANGEROUS TWIN: *The threat of a religious, cultural exceptionalism*

Islam for instance, grew out from being a threatened belief in Mecca in 622 A.D. (when Mohammed was forced to flee to Medina) to become a predominant international force with boundaries that stretched from India (712 A.D.) to Spain (715 A.D.), all within

potential to become a cause of dangerous acrimony for Pakistan within the bounds of its own Islamic community. See “Zawahiri Tape Urges Pervez Overthrow”, *The Telegraph*, (26th March 2004) (Dubai, March 25: Arabic Al Jazeera today aired a purported new tape of senior Al Qaeda leader Ayman-al-Zawahiri proclaiming ‘*I call on Muslims in Pakistan to get rid of their of their government which is working for Americans.*’); PETER MAASS, *Dirty War*, NEW REPUBLIC (11th Nov. 2002) at 18 (“*Arbitrary arrests and executions carried out by unloved governments at the bidding of the unloved United States, can lead to those governments being replaced by ones that support the terrorists instead*”); Dexter Filkins, “As Pakistani Popularity Slides, ‘Busharaf’ Is a Figure of Ridicule”, *New York Times*, 5th July 2002, A1. See also KANCHAN LAKSHMAN, *Deep Roots to Pakistan’s Sectarian Terror*, (July 8th 2003) (available at: http://www.pakistan-facts.com/article.php/200307081252_40298) (“*The incident [involving a successful suicide bombing in Quetta] comes in the wake of increasing Islamist fundamentalist/extremist opposition to his regime’s current engagement with the United States. Islamists may have intended to send a message regarding their uneasiness with Musharraf’s current agenda.*”) See generally RAMSEY CLARKE, *Divide and Conquer, The Destruction of the Balkan Federation by the United States and NATO*, (Nov 3rd 2003) (available at: http://www.Iacenter.Org/yugo/div_ide&conquer.htm).

⁶⁴ See “*The Alliance Strategic Concept*”, NATO Press Release NAC-S(99)65, April 24, 1999 (available at: www.nato.int/docu/pr/1999/p99-065e.htm). This agreement effectively redefines the Cold War alliance’s mission to address a wide range of potential threats (including regional threats) ranging from WMD proliferation to international terrorism.

⁶⁵ See Dingli Shen, *Can Alliances Combat Contemporary Threats?*, 27:2 THE WASHINGTON QUARTERLY, (Spring 2004), 165 at 168.

⁶⁶ See Thakur, *supra* note 45 describing the NATO’s triple transformation policy i.e. enlargement of membership, an eastward expansion of geographical borders, and a change of role from collective defense of member-states against armed attack from a non-member, to a more diffuse role of peace maintenance throughout Europe.

⁶⁷ See US Boosts Pakistan Military Ties (available at: http://news.bbc.co.uk/1/hi/world/south_asia/3522174.stm) (“*In effect, Pakistan now joins a club of 10 or so militarily most-favoured nations that include Israel, Egypt and Jordan among them.*”)

the next century.⁶⁸ This wave of conquest continued three centuries later with the overrunning of Anatolia (Turkey, 1071), Delhi (1201) and Constantinople (1453); to the growing numbers of followers of Islam, these victories against the greatest of odds represented God's pleasure at them and his displeasure at the non-believers. It gave them boundless faith in their cause leading to the creation of one of the most dangerous exceptionalist beliefs to have ever come into existence.⁶⁹ The primary tenet of Islamic theology is "*La Ilaha Ill Allah, wa Anna Mohammed Ar-Rasul Allah*" which translates to "*there is no other God but Allah, and Mohammed is the messenger of Allah*".⁷⁰ This represents a linear stream of thought most susceptible to exceptionalist tendencies especially in the face of an openly corruptive influence coupled with military aggression from the west.

Some of the crucial questions that need answering at this stage would be---is there not enough authority (by way of precedent) for Islamic groups to act unilaterally in defense of their security interests; will diplomatic considerations (i.e. the rule observed by Pakistan, Jordan and Bahrain) survive the fervor that accompanies a cultural confidence (that norm in say, Iran)? Will the buffers created by the *West* (in bestowing upon four Islamic strongholds, the charge of '*Major Non-NATO Ally*')⁷¹ prove an adequate safety net to prevent or (in the worst case) outlast an Islamic resurgence? The censure displayed by Jordan at the assassination of the spiritual leader of the Hamas--- Sheikh Ahmed Yassin ⁷² and King Abdullah's consequent hasty departure from the

⁶⁸ Mohammed himself captured Mecca before 632 A.D. Within 2 years of this, Muslim raiders had defeated and thereby conquered the Persian and Byzantium empires (the two most powerful empires in existence at the time). See DANIEL PIPES, *In the Path of God: Islam and Political Power*, Voice of India (Delhi, 2001) [*hereinafter* Pipes] where the author states that the "*It seemed that, armed with faith of Allah, nothing could stop the soldiers of Islam.*"

⁶⁹ "*Islam's rapid rise from obscurity to international empire had a touch of the miraculous for Muslims; how could they have attained all this without the God's approval and support*", *Id.* The danger in Islamic exceptionalism may be even more severe since it is seemingly divinely ordained as opposed to its American counterpart, which stems from a way of life.

⁷⁰ See M. Lal Goel, *A Clash of Civilizations*, speech delivered at the Unitarian Universalist Fellowship of Pensacola, Florida (June, 2002) at 6 (on file with the author) [*hereinafter* Goel]

⁷¹ Title 10 U.S. Code, Sec. 2350a (Nunn Amendment 1987), authorizes the Secretary of Defense with the concurrence of the Secretary of State, to designate Major Non-NATO Allies (MNNA) for purposes of the code. See Praful Bidwai, *Manufacturing Saffron Support*, FRONTLINE, Vol. 21:7 (March 21-April 9, 2004) (available at: <http://www.flonnet.com/fl2107/stories/20040409004811900.htm>).

⁷² See "Jordan Condemns Yassin Assassination", Petra News Agency, 22nd March, 2004 (available at: <http://www.jordanembassyus.org/03222004001.htm>).

United States in dissent⁷³ of the US's condoning the killing⁷⁴ is possibly one instance of the gaps in the Western buffer strategy.

The appreciable danger in this arises from the probability that an Islamic resurgence would flow primarily from a heightened anxiety within the community on the issue of a threat to their culture and way of life.⁷⁵ This is possibly the most lethal and uncontrollable form of exceptionalism, one that arises to protect community value systems. History is testament to the Russian, Chinese revolutions and the Nazi conquests during the Second World War which saw the return, in a magnified form, of the kind of brutality that characterized the religious wars of the sixteenth century, for what was at

⁷³ See "Jordan King Signals Rift with US", BBC News-World Edition, 20th April, 2004 (available at: http://news.bbc.co.uk/2/hi/middle_east/3641099.stm) ("*King Abdullah of Jordan has postponed talks with US President George W Bush on Wednesday amid concern over America's support for Israeli policy.*"); "King Condemns the Assassination of Hamas Leader", Petra News Agency, 22nd March, 2004 (available at: <http://www.jordanembassyus.org/03222004009.htm>).

⁷⁴ See "US vetoes UN measure on Yassin's death", CHINA Daily, 26th March, 2004 (available at: http://www.chinadaily.com.cn/english/doc/2004-03/26/content_318213.htm), quoting the U.S. Ambassador John Negroponte, "*This Security Council does nothing to contribute to a peaceful settlement when it condemns one party's actions and turns a blind eye to everything else occurring in the region*". (The vote was 11 countries in favor, three countries abstaining, and one country against — the United States); See also "U.S. says it's 'deeply troubled' by Yassin killing...But White House doesn't condemn Israel outright", MSNBC News, March 22nd, 2004 (available at: <http://www.msnbc.msn.com/id/4579005/>). See also "World fears after Yassin killing", BBC News—UK Edition, 22nd March, 2004 (available at: http://news.bbc.co.uk/1/hi/world/middle_east/3556559.stm) ("*The Bush administration said it was deeply troubled by the assassination, though it stopped well short of condemning it.*")

⁷⁵"*Terrorist leaders tell young men that the reason they feel humiliated---personally and culturally---is that international institutions like the IMF, World Bank and the UN are imposing capitalism and secular ideas on them with the aim of exterminating traditional values*", see JESSICA STERN, TERROR IN THE NAME OF GOD---*Why Islamic Militants Kill?*, 283 (2003) [*hereinafter* Stern]. This anxiety is not a new emotion. Frustrated by the largely unidirectional surge of cultural infiltration into its territory, the Islamic Republic of Iran tried to block out television programming through the implementation of a statute (in 1994), which disallowed the use of Satellite Programme Receivers within the territory of the State. This extreme form of restrictive State action was primarily motivated by the belief that:

"They [the West] wish to impoverish us and to impose the wrong and hollow culture of the West, which deprives people of any kind of humanity.... The bulk of the enemy onslaught against us, against our brave nation, is a cultural onslaught..."

See Majlis Official Comments on Bill Banning Use of Satellite Programme Receivers, BBC Summary of World Broadcasts, Dec. 20, 1994, LEXIS, News Library, BBCMIR File (excerpting weekly radio programme, entitled "The Nations House," on December 18, 1994 and broadcast on the Voice of Islamic Republic of Iran), quoted in PAUL D. CALLISTER, *The Internet, Regulation and the Market for Loyalties: An Economic Analysis of Transboundary Information Flow*, (2002) U. ILL. J.L. TECH. & POL'Y 59 at note 127.

stake was not just territory and resources, but the value systems and ways of life of entire populations.⁷⁶

Prudence also requires one to be mindful of the fact that the history of Islamic propagation tells a tale of vengeful crusades and systematic proselytization all of which arise from a sense of innate cultural righteousness, the duty of god's own children as it were.⁷⁷ The heat of this emotion is so smelting that it spares no one, not even its own people who in the eyes of the resurgence may have swayed from the ideals of the original austere Islamic faith⁷⁸ which gives them the locus to be exceptional.⁷⁹

Present day western virtues will on the other hand, not blindly allow the State to pursue activities in violation of the general principles of civil, political rights and liberties. The all-pervasive principles of transparency, public participation and democratic governance structures ensure the protection of the public from governmental extremism.⁸⁰ These self-imposed checks on not only the domestic functioning of the State

⁷⁶ See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN*, 11 (1992) [*hereinafter* Fukuyama].

⁷⁷ Possibly the best instances of such unbounded Islamic exceptionalism can be seen in its spread across Europe with the *Crusades* and the overrunning of Hijaz by the Wahhabi resurgence of 1924, see TARIQ ALI, *THE CLASH OF FUNDAMENTALISMS*, 75, 76 (2003) [*hereinafter* Tariq]. While the earlier Wahhabi conquests of the Shammar region in 1915-1917 might be explained by the pro-Ottoman attitude of the ruling Al Rashid family; and the occupation of the districts of *Abha* in *Asir* might also be represented as a '*matter of domestic policy*' and as the settling of unsolved border problems, the occupation of virtually international areas around the holy cities of *Mecca* and *Medina* required an entirely different rationale, especially in view of the fact that both the *Hijaz* and the *Najd* had concluded a defense treaty with the United Kingdom and received considerable subsidies under its terms. Thus, throwing up such a blatant defiance in the face of the world's greatest colonizer required something more than mere military strength; an unquestioning belief that their actions were guaranteed and held safe by divine will. A belief with which "...they advanced at some speed towards Mecca, plundered the city and destroyed all the symbols of the 'heathen' practices of the Meccans'", see REINHARD SCHULZE, *A MODERN HISTORY OF THE ISLAMIC WORLD* 69, 70 (2000).

⁷⁸ Sayyid Qutub (considered by many to be the father of modern Islamic extremism), targeted secular Arab leaders (because he found them to be "arrogant, corrupt, Westernized princes and autocrats") through a jihad, finding support for his condemnation of them in the writings of Ibn-Taymiyya, a 13th century theologian and jurist who wrote that jihad against Muslim unbelievers was a legitimate means of protecting the purity of the faith. Qutub described internal jihad as a necessary component of the permanent evolution of the Islamic movement. See RUDOLPH PETERS, *JIHAD IN CLASSICAL AND MODERN ISLAM*, 44 (1996) [*Hereinafter* Peters]

⁷⁹ The writings of Sayyid Qutub and the Muslim Brotherhood (for which he became the spokesman) inspired not only the Egyptian Islamic Jihad but many of the present day Islamic terrorists like the Al Qaeda and the Hamas, see Stern, *supra* note 75 at 46.

⁸⁰ An example of this is the much debated exclusionary principle used in U.S criminal procedure: Since its inception in *Weeks v. U.S.* (1914) (232 U.S. 383) the principle has been a guardian of the 4th and 5th amendments (see Justice Black dissenting in *Mapp v. Ohio*, (1961) 367 U.S. 643 at 662), as a guarantee of privacy (see *Olmstead v. U.S.* (1928) 277 U.S. 438 at 478), as necessary to

but also its foreign policy and international conduct, serve to significantly limit the extent to which exceptional activities may be pursued by the State.⁸¹ This weakness of any modern, democratically structured member of the international community does not exist in the case of States or communities that derive their requisite legitimacy from a religious ideology or divine right.⁸² While a democracy remains weakened in its effort to preserve a sphere of individual rights (which significantly delimit the state's powers), such authoritarian (ideologically or by religious/cultural fervor) regimes have the option of sacrificing specific aspects of individual rights and freedoms to facilitate the greater purpose for which they exist.⁸³

This cultural/religious basis of Islamic exceptionalism provides its actions with more endurance and less regard for the western social ideals of liberty and equality that the West has to uphold, at least in principle.⁸⁴ This redundancy of social accountability or

assure the accused of a fair trial (see Justice Frankfurter in *Irvine v. California* (1954) 347 U.S. 128 at 148) and a vanguard of the standard better known as the '*imperative of judicial integrity*' whereby the government cannot take advantage of its own failings (*Elkins v. U.S.* (1960) 364 U.S. 206 at 217). Another instance is provided by Fareed Zakaria when he argues that democracy without the protections of constitutional liberalism and due process, is a farce, see FAREED ZAKARIA, *THE FUTURE OF FREEDOM*, 17-19 (London, 2003) [*Hereinafter* Zakaria].

⁸¹ See Fukuyama, *supra* note 76 at 9, where the author states, "*They [Democracies] are hamstrung by their very democratic nature: by the plurality of their voices, the self-doubt and self-criticism that characterize democratic debate*". Thus a state which avoids such interventions into its functioning would be stronger than a democracy and consequently free to map out its foreign policy without the hindrance which in the opinion of Tocqueville plagues democracies. See also JEAN FRANCOIS REVEL, *How Democracies Perish*, 17 (New York: 1983) [*hereinafter* Revel], where the author continues the criticism originally made popular by Tocqueville, "*As things stand, relatively minor causes of discontent corrode, disturb, unsettle, paralyze, the democracies faster and more deeply...[than Communist regimes], whose subjects have no real rights or means of redressing their wrongs. Societies of which permanent criticism is an integral feature are the only livable ones, but they are also the most fragile*". Even though Revel uses the argument in the context of communist society, the analogy would hold good for an Islamic state which denies western democratic processes to its citizens.

⁸² The Wahhabi movement for instance, began in the early 18th century with the coalition of Muhammad ibn-Abdul Wahhab and the martial strength of Muhammad Ibn-Saud, whereby Saud became the emir—the political leader while Wahhab took on the role of a sheik (the religious leader). This new found "*religious legitimacy*" allowed a fatwa to be issued against all non-Wahhabis because Saud's forces were "*no longer a mob of traveling thugs and his victims were no longer innocent people. Now Ibn-Saud's goons were 'fighters for jihad' authorized to murder 'unbelievers'*", see Abdul Hadi Palazzi, "*Orthodox Islamic perceptions of Jihad and Martyrdom*" cited in Stern *supra* note 75 at 315, n.13.

⁸³ See Fukuyama, *supra* note 76 at 15.

⁸⁴ See Klein, *supra* note 29 at 17-45, where the author discusses the Asian cultural relativist argument against the universal applicability of international human rights standards as represented by 'western' codifications such as the UDHR and the ICCPR.

responsibility towards democratic values and civil, political rights in the eyes of the Islamic exceptionalist provides him with more than enough elbow room to identify and persecute members even within his own community⁸⁵ if their actions or opinions are seen to contradict or differ from the austere edicts of Islamic virtue.⁸⁶

(A) *The Changing dimensions of “enemy”*

An extension of this problem that needs to be acknowledged is the legal personality of the actors through whom Islamic exceptionalism is conveyed. While international law has always been strict about the status of its actors,⁸⁷ present day conflicts bypass such a rationale of restricting the law only to nation States.⁸⁸ The actors perpetuating invasions, armed attacks and so on are very often not states but non-state actors like militia, which may or may not be state endorsed.⁸⁹ The pervasion of technology and information has led to an overall decentralization of power, which has trickled down so far that there is what Fareed Zakaria calls a “*democratization of violence*” whereby an individual non-state actor has the capacity to effectively attack States.⁹⁰ This situation is far worsened by international law’s state centric approach

⁸⁵ The fervor of Wahhabism (attempting to replace orthodox Islam with their puritanical doctrine) was so severe that a jihad was proclaimed against the Ottoman Empire whose Sultan was considered the heir of the prophet Muhammad and the highest Islamic authority, see Stern, supra note 75 at 68.

⁸⁶ See Peters, supra note 78, The Wahhabiya resurgence brought on by the austere religious beliefs of Muhammad Ibn Abdul Wahhab and propagated by the military strength of the bandit Emir – Muhammad Ibn Saud spread rapidly, conquering areas where it felt the original edicts of Islam had been corrupted by idol worship, shrines and gravestones (the Wahhabi movement rejected all forms of religious ostentation since all Muslims are equal before Allah). In its stride, the Saudi-Wahhabi forces conquered and subjugated Najd (1745-45), Riyadh, Kharj and Qasim (1792), Karbala (1801) where they looted and killed 5000 people, destroying homes and shrines alike. In 1802 they occupied Taif (where they massacred the population) and Mecca (1803) (where they instructed the Sharif to destroy the tombs of the Prophet and the Caliphs), see TARIQ, supra note 77.

⁸⁷ See SHIRLEY V. SCOTT, INTERNATIONAL LAW IN WORLD POLITICS, 21 (Viva Books: New Delhi, 2005). See also ALLAN JAMES, SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY, 30 (London: Allen & Unwin, 1986).

⁸⁸ See Gregor Noll, *Force, Partisanship, Dislocation: An essay on International Law in the State of the Exceptional*, in NORDIC COSMOPOLITANISM: ESSAYS IN INTERNATIONAL LAW (JARNA PETMAN and JAN KLABBERS eds.) (Martti Koskeniemi, Martinus Nijhoff Publishers: Leiden, 2003) 207 at 213. [*Hereinafter* Noll]

⁸⁹ *Id.* (where the author states “*Yet, as long as the non-state actor manager to hide behind third states, and remains on their territory, the question imposes itself against whom to exercise right to self-defense. Going for the non-state perpetrators would need the consent of the government on whose territory they are present.*”)

⁹⁰ See Zakaria, supra note 80 at 16.

which often fails to adequately address non-state actors who may have liberated themselves from the restraints of a particular territory and consequently operate through a globalized form of warfare. The resulting asymmetric warfare leads one to wonder just how unfair the U.S. doctrine (allowing the pre-emptive use of force)⁹¹ happens to be. Can the UN system with its state centric premise still provide security for all? The precedents set for exceptional unilateralism on the part of the western states, the attempts and aspirations of other states/sub-state groups to use the same (for their own ends or to counter a perceived western imperialism) and the increased involvement of non-state actors (as conduits of such counter exceptionalism), creates a situation where not only the personality of the parties, the merits of their actions but the morality and usefulness of the law itself comes into question.⁹²

While it is perhaps still too early to condemn the working of the UN system, this present challenge to its veracity may be used to draw up two scenarios:

The *first*, is one where unilateral actions (for instance, the doctrine of pre-emptive force) get legitimized as an option to any state (or to some states only), and where the complex mechanism of pacific settlement of disputes, prohibition against the use of force, non-intervention are subverted; where exceptionalism gets labelled as nationalism or democratic intervention on the one hand and terrorism on the other. The *second*, is where the international order embarks on a return to the Charter paradigm of international relations and provides states with the initiative to formulate foreign policies aimed at self-improvement with due regard for the principles of sovereign equality and non-intervention.

(IV) IMAGINING ENDGAMES: *Is this the end of the Charter Paradigm?*

Firstly, while a doctrinal approach to international law would make it fairly easy to denounce the legality of the former scenario, the question of fairness is a different issue. Leaving aside ambitions of abject expansionism; how does a proud, efficient, 'free', State defend itself against unnamed armies/militia, for whose actions, no state takes responsibility?⁹³ How does it counter a challenge to its proud existence a challenge other than to leave a message on the door stressing its intent to use pre-emptive force⁹⁴ if

⁹¹ In situations where the state faces unknown enemies whose presence, movement and actions it cannot predict or even reliably acknowledge, the readiness to resort to the pre-emptive self-defense would serve to greatly increase the credibility of a threat levied by the state against such potential threats. *See Id.* at 8.

⁹² *See generally* NOAM CHOMSKY, FOR REASONS OF STATE, 19, 20 (2003).

⁹³ See Lawrence Freedman, *War*, FOREIGN POLICY (July/August, 2003) at 16 (where the author contends that "All Future Warfare Will Be Asymmetric").

⁹⁴ In the run up to the 2004 Presidential election, candidate John Kerry countered allegations that under his leadership, the U.S. would have to pass a "global test" to use preemptive strike, by arguing that he would reserve "*the right to preempt in any way necessary to protect the United*

necessary? The obvious problem with this of course is that not only does it wash away the structure of multilateral/consensus based security systems but also that, in a sense, it will perpetuate conflict. While a state's aggression may be called its exceptionalism, similar actions undertaken by a militia would be labelled fanatic terrorism. *Gregor Noll*, speaks of how

*“Unlike the conventional enemy (in an interstate war), terrorists represent an ‘absolute enemy’ in the Schmittian sense, and the struggle against it is informed by the logic of annihilation”.*⁹⁵

His reasoning (alluding to Schmitt's categorization of a ‘*just enemy*’ and an ‘*absolute enemy*’)⁹⁶ neglects the ‘*partisan*’ whose conduct may have been initiated in protection of his home territory (i.e. of a “*telluric character*”)⁹⁷ but whose ambitions are fuelled further by a religious/cultural/political or economic exceptionalism⁹⁸ which provides them with a global agenda⁹⁹ (as evidenced by an “*increased intensity of political*

States,” see Dana Milbank, “Bush Says Kerry Will Allow Foreign Vetoes”, *Washington Post*, (3rd October, 2004), A08 (available at: <http://www.washingtonpost.com/wp-dyn/articles/A2933-2004Oct2.html>) . See also Bill Van Auken, “Bush-Kerry debate: Two Candidates Committed to War”, *World Socialist Website* (1st October 2004) (available at: <http://www.wsws.org/articles/2004/oct2004/deba-o01.shtml>).

⁹⁵ See Noll, *supra* note 88 at 219 citing Carl Schmitt, *Theorie des Partisanen: Zwischenbemerkungen zum Begriff des Politischen*, (Berlin: 1963) at 91-96.

⁹⁶ Schmitt distinguishes between the partisan who is defending home territory and the revolutionary partisan with a global agenda. The former needs not construct the enemy as an absolute one, to be vanquished in annihilation, but is content with the eviction of the enemy from the ‘occupied territory’. The latter however needs to go further and portrays the enemy in absolute terms, which equals victory with annihilation. See Noll, *supra* note 88 at 218, nt. 29.

⁹⁷ *Id.* at 9 where the author cites Schmitt's definition of Telluric character as: “*at large, the authentic partisan is in a defensive situation, committed to the defence of the home territory*”. Such a definition I feel may be allowed to include a partisan who fights not only in the defence of his territory but also for the culture, values and life style associated with it (for instance Islamic extremist groups).

⁹⁸ See Stern, *supra* note 75 at 265 (“*The twin purpose of jihad is to cleanse Islam...and to fight against the West using political, economic and religio-cultural weapons...*”).

⁹⁹ The Egyptian Islamic Jihad for instance, was created with the local agenda of upholding Islamic rights in Egypt by converting it into an Islamic state. However, in later years, sustenance of the group demanded the broadening of its agenda to cover and thereby counter global threats to the Islamic faith. Thus upon merging with Osama Bin Laden's network, Zawahiri described the new mission of his group (now the core of the Al Qaeda) as a “*global battle*” against the “*unbelievers*” who have “*united against the mujahideen*”. He adds, “the battle cannot be fought on a regional level without taking account of the global hostility towards us”, see Stern, *supra* note 75 at 266-267.

commitment”).¹⁰⁰ This combination is possibly the most accurate description of the contemporary exceptional, be it a State or a military group. While the Al Qaeda, the Taliban took up arms in defence of their faith/culture (be it Wahhabism or another interpretation of Islam) and proceeded to take the heat to the shores of their ‘absolute enemies’, the US in turn exacted their pound of flesh in defence of their freedoms and pillars of economic and social progress by flattening the contours of Afghanistan. Whether or not the driving the Taliban out of power was a deed worth the effort is a different issue, but the natural consequence of this war abroad has been the creation of a license to continue it. Thus to allow States to proceed along these lines would only serve to feed a general trend of illegality in international relations.¹⁰¹

To submit and surrender the rule of law to this “*zone of indistinction between law and violence*”¹⁰² created by a “*war against terrorism*” would be to hand over the world system to fear, unilateralism, vengeance and an overall state of exception. The war in Iraq gives a glimpse of a future where the “*zone of indistinction*” will become the norm and an argument for the enforcement of the rule of law through multilateralism will be an exception.

A second prong of this argument (for allowing unilateral action in international law) is found in *Thomas H. Lee*’s challenge to the utility of the “*sovereign equality of States*” premise, when he writes that

“*First, it is difficult to prove that [international] stability results from sovereign equality per se as opposed to other system-level structural variables like the balance of power among the most powerful states...Second, whatever might be true of the multipolar or bipolar past, it is questionable how much sovereign equality can contribute to stability in our presumptive world of unipolarity and increasingly influential non-state actors.*”¹⁰³

¹⁰⁰ See Noll, *supra* note 88, where the author cites Schmitt’s definition of a partisan with ‘*increased intensity of political commitment*’ as one who “*has entered the realm of absolute hostility, in which interplay of terror and counter terror culminates in annihilation*”.

¹⁰¹ *Id.* at 216 where the author admits that “*Partisan warfare evokes partisan warfare even in the theatre of legitimacy*”, thereby leaving little room for objective judgment or placing of responsibility.

¹⁰² *Id.* at 217 where the author uses the instance of the Guantanamo Bay prison facility in Cuba (used by the U.S. to house suspected Al Qaeda terrorists denying them the legal status of Prisoners of War) as being symbolic of a paradigm shift towards a state’s replication of irregular partisan warfare.

¹⁰³ See Thomas H. Lee, *International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign State Equality in a Unipolar World*, 67 LAW & CONTEMP. PROBS. 147, 153 (August 2004). [*Hereinafter* Lee]

While it is true to say that a number of facets of international relations and diplomacy may influence international stability, even the balance of power (between “powerful states”) and the restrictions on its exercise are maintained through the principle of multilateral decision-making,¹⁰⁴ which in turn draws its legitimacy from the ideal of sovereign equality of states.¹⁰⁵

It may be less than fair to say that all of international law is built on multilateralism: it is very much a system wherein the law is ordinarily implemented by states acting collectively and individually,¹⁰⁶ to hold otherwise (i.e. to say that all inter-

¹⁰⁴ The unilateral exercise of “*Westphalian sovereignty*” has been greatly restricted by what Ann Marie Slaughter describes as the “*ineffectiveness*” and “*interference*” challenges, see Ann Marie Slaughter, *Sovereignty, Power in a Networked World Order*, 40 STAN J. INTL. L. 283 at 284 (2004), where the author quotes Keohane (with regard to the first challenge)—“*It is now a platitude that the ability of governments to attain their objectives through individual action has been undermined by international political and economic interdependence*” and argues (with regard to the latter challenge) “*the letter of Article 2(7) remains; the spirit is violated repeatedly and increasingly routinely. All of Human Rights law deliberately infringes on the domestic jurisdiction of every state, denying governments the freedom to torture, murder, and ‘disappear’...their own citizens. Moreover, throughout the 1900’s the Security Council repeatedly found that the conditions prevailing within a state, from starvation in Somalia to political intimidation and massacre in East Timor, a threat to international peace and security sufficient to require collective armed intervention...States can no longer assume that if they refrain from interfering in the affairs of other states, they will remain free from interference themselves*” [hereinafter Slaughter]. See also Cuellar, supra note 4, (“...the US and its Allies supported the creation of an institutional arrangement that was supposed to make unprecedented contributions to collective international security. The UN Charter was central to that arrangement.”)

¹⁰⁵ It is for this reason that sovereign equality is vehemently guarded by states for it gives them the standing to expect and contest for “*basic protections---such as the prohibition of conquest and the preclusion of non-consensual obligations---that help preserve their independence in international affairs,*” see Byers, supra note 7 at 176. The acceptance of sovereign equality has allowed states to deny to the U.S. its desired “*special responsibilities*” (in international security) with regard to the 1998 Rome Statue on the International Criminal Court, see David J. Scheffer, *The US and the International Criminal Court*, AM. J. INTL. L. 93 (1999) 12 at 18-19. The principle also explains how (in the post Kosovo period) 130 states of the G77 were able to adopt declarations (twice) explicitly labeling unilateral intervention as illegal under international law, see Ministerial Declaration, 23rd Annual Meeting of the Ministers for Foreign Affairs of the Group of 77, Sept. 24th 1999, (www.g77.org/Docs/Dec/Decl.1999.html), para 69; Declaration of the Group of 77, South Summit, Havana, Cuba, April 10-14th, 2000, (www.g77.org/Docs/Declaration/G77Summit.htm), para 54.

¹⁰⁶ This is to say that it is not unprecedented for states to acquiesce to unilateral action or even endorse its incorporation into larger multilateral legal systems. For instance, “within a purely consensual system, there is nothing to stop 190 states...from according one state more or different rights than others”, see Byers, supra note 7 at 174 where he cites the UN Security Council (which allows the “*veto*” to the “*permanent members*”) and the World Bank, IMF (which incorporate “*weighted voting, whereby rich states have more say than poorer states*”) as contemporary examples of consensual inequality.

state relations are controlled by multilateralism) would be to stretch sovereignty far too thin.¹⁰⁷ However, the mandate of multilateralism is most certainly established with regard to customary norms¹⁰⁸ and those of peremptory importance or *jus cogens*,¹⁰⁹ which clearly make multilateral action the ground rule,¹¹⁰ and try to avoid their foisting upon a political or ideological minority, for in the long run, it would significantly devalue the concept.¹¹¹ What is basic to any such peremptory norm is that once “*accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted*”, it can be “*modified only by a subsequent norm of general international law having the same character*”.¹¹² Thus, in as much as peremptory norms of international law (for instance, the “*use of force*” and “*non-intervention*”) are concerned, the premise of sovereign equality forms the basis for mandatory and binding multilateralism.

Moreover, the value of sovereign equality against the backdrop of asymmetric warfare and unrecognized non-state actors is found in the need to ensure that Iraq does not recur; to safeguard the territorial integrity of nations. Without this assurance of formal

¹⁰⁷ However, the all too obvious paradigm shift towards multilateral governance is expressed accurately by *Slaughter*, supra note 104 at 285 when she concludes---“*States can only govern effectively by actively cooperating with other states and by collectively reserving the power to intervene in other states’ affairs*”.

¹⁰⁸ See Byers, supra note 7 at 175 where he argues that “*Exceptional rights are even more rare in customary international law, where rules are derived from a combination of state practice and opinion juris (i.e. a belief in the existence of the relevant obligation) and widespread support or acquiescence is required for any legal change*”. See generally, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 7-10 (6th ed., OUP: 2003) (1966) [*Hereinafter* Brownlie].

¹⁰⁹ See Article 53, Vienna Convention on the Law of Treaties, Vienna 23rd May, 1969, UN DOC A/CONF. 39/28; 8 ILM 679 (1980) 6,7 (which provides that a treaty will be void “*if, at the time of its conclusion it conflicts with a peremptory norm of general international law*”) [*hereinafter* VLT]

¹¹⁰ See Shaw, supra note 15 at 97 where the author explains that a most stringent, “*two stage process*” is involved in the establishment of *jus cogens*, in the light of Art. 53 of the VLT: “*first, the establishment of the proposition as a rule of general international law and secondly the acceptance of that rule as a peremptory norm by the international community*”, because “*the establishment of a higher level of binding rules has serious implications for the international law community*”.

¹¹¹ For this reason, the appropriate test would require universal acceptance of the proposition as a legal rule by states and recognition of it as a rule of *jus cogens* by an overwhelming majority of states, crossing ideological and political divides, see IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES, (2nd ed. Manchester, 1984) 218-224. This is also the reason that in *U.S. v. Matta-Ballesteros*, (71 F. 3d. 754, 764 n.4 (9th Circuit 1995)) it was expressly noted that *jus cogens* norms are “*...binding on all nations, and cannot be preempted by treaty*” to prevent scattered interests from affecting its status as law.

¹¹² See VLT, supra note 109.

equality and also the promise of equal treatment before the law, international cooperation would become a myth. The need for sovereign equality, I would stress, is more than ever before; for in its absence international armed conflict and inter-state war would become inevitable.

In furtherance of the same contention, *Lee* alludes to the “*meaningful participation*” by non-permanent members of the Security Council like Germany and Japan as being illustrative of an efficient system even in the absence of formal legal equality.¹¹³ This argument however neglects situations where the permanent members exercise their power-based veto’s to block the interests of other states or competing “*oligarchies*”. In the immediate post-WWII period, the veto was a recognized compromise on the part of states to ensure the cooperation of stronger state parties; its function being to place the burden to prevent conflict on those who held the power to cause large-scale international disturbance. To expect states to compromise yet again and this time to concede to an entirely different system of treatment before the rule of law would be to ask them to give away their sovereignty, not to an international organization but to another “supreme” state. This is a system, which subordinates one state to another and opens up a Pandora’s Box whereby the supreme state can legitimately proceed to pursue its interests even to the detriment of other states. The claim that the unipole would measure out its conduct so as not to tilt the balance (of allegiance owed by weaker states) in favour of competing “*oligarchies*”¹¹⁴ is also suspect, firstly because the larger premise behind this new system is that the interest of the supreme state is weighed over those of others and the rule has been modified to suit its needs; and secondly because, a conflict of interests between this supreme and other states (oligarchies or otherwise) would immediately polarize the international community, creating blocks as the solution when there remains no remedy to be found in equal treatment before the law.

For all the conviction used to challenge the principle of sovereign equality, it needs to be realized that in as much as it may be a legal fiction, its presence is essential because the sense of security that comes with it permeates through and holds together the fabric of international relations.

The argument against sovereign equality seeks to creation exceptions within the law (to make room for exceptionalism on the part of some states) by introducing riders like “*except for the United States and its citizens*” into every international legal obligation or organization to which the U.S. has objected.¹¹⁵ This course of reasoning, according to *Lee* would allow “*the project of international law*” to advance considerably, since the US would have no reason to “*object to international law and no other state could use the United States’ defection from a generally binding rule as precedent for its own defection*”.¹¹⁶ While asymmetric conflict does indeed pose a credible threat to a nation

¹¹³ See *Lee*, supra note 103 at 154.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 150.

¹¹⁶ *Id.*

bound by a state-centric notion of multilateral international law, which does not recognize non-state actors and their motivations, the wisdom of allowing individual state (/s) to chalk out their own methods of preemption is questionable.

It is questionable, because it would be an explicit move towards a power-oriented system of international relations as opposed to the rule-oriented system promoted for the better part of a century now.¹¹⁷ While almost all of international relations and diplomacy has been based on some permutation of the two,¹¹⁸ to “*modify the rule just enough to fit the facts, to ensure that the act [of exceptionalist interventionism or preemptive use of force] will be lawful [for only a certain “supreme state”] in the future*”,¹¹⁹ would be to establish a rationale that expressly endorses a power based mechanism and denounces the pragmatic sanctity of rules in international law. Since other states would oppose the establishment of a Unipolar to whom the normal rules don’t apply, the next issue would be with regard to the superiority or inferiority of some states to others before the rule of law.

The move towards the active acknowledgement of a “*supreme*” state, and thereby “*lesser*” states, would necessitate a reevaluation not only of international cooperation but also the legitimacy of custom as a universally binding principle of international law. What then would international custom evolve through? The conduct of the *supreme* or that of the other states. If the former, then how strictly would it be enforced against others and would defenses like the “*persistent objector*”,¹²⁰ hold up against the mandate of this *supreme*? And if the latter, then how far would it actually be able to bind and transcend the admittedly exceptional interests of the former?

Owing to these and a myriad of other uncertainties, unilateral actions by “supreme state” aspirants have in the recent past met with the thorough disapproval of the international community creating a situation of distrust and diminished diplomatic influence on the part of such state(/s). Riding on its exceptionalist high, the *West* has made a few dangerous assumptions: It has used military/economic power and political influence to further its ‘*national interests*’ to the extent of alienating its peers¹²¹ and it

¹¹⁷ See JOHN. H. JACKSON, *THE WORLD TRADING SYSTEM: Law and Policy of International Economic Relations*, 110 (2nd ed., 1997) (“*To a large degree the history of civilization may be described as a gradual evolution from a power-oriented approach, in the state of nature, towards a rule-oriented approach...these governments have passed far along the scale toward a rule-oriented approach...to ensure that rules are followed*”).

¹¹⁸ *Id.*

¹¹⁹ See Lee, *supra* note 103 at 158.

¹²⁰ See Brownlie, *supra* note 108 at 10.

¹²¹ This alienation is seen in the remarks of the European Union’s External Affairs Minister---Chris Patten when in April 2002 he was quoted saying, “*I see the U.S. unilateralist temptation as one of the central problems, perils, challenges and opportunities confronting the English-speaking peoples of today*”, see Roy Watson, “EU Calls on U.S. to Resist Unilateralist ‘Temptation’”, *Times* (London, 1st may 2002). One instance is seen in the U.S.’s insistence on imposing the death penalty on international terrorists extradited from abroad, which has created a rift with close allies like Europe (whose Supreme Court has prohibited the extradition of terrorists

may well be underestimating the intensity of actions that can follow from a sense of cultural exceptionalism (as opposed to one that arises to further economic and political convictions).¹²² Much like a dictator, a present day “supreme” state would need the legitimacy granted by its peers to be able to hold sway; this is severely damaged by a intentional disregard of their positions.

Indeterminacies like these lead us to consider other more viable options.

(V) CONCLUSION: SAN FRANCISCO OR WESTPHALIA--*Going back to where its safe*

The *second* scenario is one in which this miasma between law and violence is resisted and the UN’s approach to international relations is used to modify the behaviour of individual States and regional alliances to bring them in line with the restrictions that the Charter places on the classical Westphalian notion of international law.¹²³ This conscious

to the U.S. for trial without a commitment to waive capital punishment). Similarly, even the UK and Spain (U.S. allies in the war against terrorism) have maintained their reluctance to extradite terrorists (and even Osama Bin Laden in the event of his capture by British forces) unless the death penalty is waived, see Stern, *supra* note 75 at 290. Germany and France have similarly shown reluctance to hand over information against Zacarias Moussaoui regarding his involvement in the September 11th attacks, for fear that he would face the death penalty if convicted in the U.S., see Peter Finn, “*Germany Reluctant to Aid Protection of Moussaoui*”, Washington Post (11th June 2002). Since, international cooperation is crucial to the effectiveness of U.S. antiterrorism policies, transnational disagreements on issues like the treatment of detainees assume enormous importance. Routine aspects of transnational law enforcement have been complicated by the controversy. For instance, since the prisoners at Guantanamo are nationals of several co-belligerent states, the controversy has triggered diplomatic disputes between the United States and several important allies in the war against terrorism (including the United Kingdom and Australia), see KOH, *supra* note 28 at 1479 (2003). *See also* Manooher Mofidi & Amy Eckert, “*Unlawful Combatants*” or “*Prisoners of War*”: *The Law and Politics of Labels*, 36 CORNELL INT’L. L. J. 59 (2003).

¹²² See JOHN ESPOSITO, UNHOLY WAR: TERROR IN THE NAME OF ISLAM, 43 (2003) citing Sayyid Qutub’s statement that the enemy’s tools are political, economic and religio-cultural and they must be resisted at every level. See also Stern, *Id.* at 112-113, 275 where she argues that Islamic terrorists see liberalism and the western Capitalist construction of society as the cause of the conflict. However, even the U.S. has on occasion traced its freedoms to religion and declared that they are “*not the grant of an government or document, but...our endowment from God*”, see Dan Eggen, “Ashcroft Invokes Religion in U.S. War on Terror”, Washington Post (February 20th 2002), A2.

¹²³ While the latter conception envisioned a highly decentralized world of sovereign states and was in favour of a permissive, voluntary system of law stressing matters of allocation of competence among sovereign states, the Charter paradigm modified some critical aspects---like the status of war, the role of national sovereignty and the degree to which authority structures are decentralized, see R. Falk, *The Interplay of Westphalia and Charter Conceptions of International Legal Order* in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE, 116 (Studies on a Just World Order, No. 2) (R. Falk, Freidrich Kratochwil, Saul H. Mendlovitz eds.) (London: 1985) [*Hereinafter* Falk]

and hard fought shift towards the Charter paradigm needs to be reiterated under present day circumstances.

Writing about exceptionalism, like other subjects, entails some innate and unavoidable worries---like how does one distinguish between “*exceptional*” and “*necessary*”; legally correct and morally justified and so on. But possibly the most ringing question, in my mind was---“so what?”; indeed, how does a state react, how is the vicious cycle of action and retaliation on both sides (be it the US and Islamic extremism or others) get slowed down, if not stopped. Barring any crystal ball analysis, I would argue that to remain safe, foreign policy and international diplomacy must begin with an honest chance to the letter of the law---the Charter paradigm governing international relations;¹²⁴ because while the Westphalian notion rests upon the crucial role of consent in the forming of international obligations,¹²⁵ the Charter system (even while giving respect to this traditional mode of law creation),¹²⁶ allows for the evolution of certain superior norms (such as customary law prohibiting the use of force) which are enforceable upon states despite their express codification in a treaty or agreement.

The first principle which needs implementation in this scheme is the prohibition on war under Article 2(4) of the Charter. This restriction on the capacity of a state to resort to aggression was expressly adopted contrary to the Westphalian spirit which did not prohibit recourse to war.¹²⁷ While there may not be an easy-to-use guide on how to prevent the pervasion of exceptional tendencies in international relations, unilateral recourse to aggression and war must be avoided to provide an atmosphere suitable for dialogue between nations or civilizations as the case may be.

“*Sovereign equality*”, (discussed earlier with respect to *Lee’s* assertions) needs to be reinforced by strengthening the resolve against foreign intervention. The primary purpose of a foreign policy under the multilateral scheme must be the self-improvement of the state and the lives of its citizens through a mutually negotiated system of gains. This immediately requires that nation states not only be self-serving (i.e. focused on negotiating a mutually higher level of security and standard of living for their citizens) but also opposed to unsolicited benevolence abroad. This policy is hardly new to the UN

¹²⁴ This conception of the international legal order however, relies significantly on the ability of the international community to engage in collective action based upon a fair-minded interpretation of some common norms, the most central of which are enshrined in A/2(1) and A/2(7) of the Charter. See *Id.*, where Falk asserts that the principles of “sovereign equality” and “non-intervention” are even common to the Westphalian notion of international law, *Id.* at 127.

¹²⁵ See JAMES L. BRIERLY, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW AND OTHER PAPERS*, 1-67 (1958); PERCY CORBETT, *LAW AND SOCIETY IN THE RELATION OF STATES*, 17-89 (1951).

¹²⁶ See Falk, *supra* note 123 at 127. See also QUINCY WRIGHT, *THE ROLE OF LAW IN THE ELIMINATION OF WAR* (New York: 1961); IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* (London: 1963).

¹²⁷ In line with its emphasis on the subjective determination by states and its deference to state consent, the Westphalian conception vested the decision to wage war in the hands of the sovereign---the highest authority in international society, see *Id.* at 121.

system which is meant to be used as a conduit to successful dialogue on common interests and to maintain a “hands off” policy with regard to the domestic interests of other States.¹²⁸

Exceptionalism displayed upon provocation is one issue but the rule of law faces a greater threat from the exceptionalism that is advanced on its own merit. Thus interventions into foreign States whether on humanitarian or democratic grounds must be by the UN¹²⁹ and not based on the “concern” of individual non-involved States,¹³⁰ because while the former is a useful tool in international conflict resolution, the latter is guaranteed to incur the wrath of national and regional relativist groups like those who see themselves defending Islamic values.

A parallel danger in pursuing unilateral, extraterritorial interventions is that at some stage every state engaged in a “*war against terrorism*” abroad, will be pressured to recast its efforts as part of a territorial defense mechanism¹³¹ ---as is the case with the U.S. and its Department of Homeland Security which threatens the freedoms of a liberal democratic society. The danger of playing such multifarious parts, was aptly enunciated by Hawthorne when he wrote,¹³²

“No man, for any considerable period, can wear one face to himself and another to the multitude, without finally getting bewildered as to which may be true.”

¹²⁸ See Art. 2(7), Charter, supra note 3.

¹²⁹ *Id.*, arts. 41-43.

¹³⁰ See Max Boot, *Neocons*, FOREIGN POLICY (Jan/Feb 2004) 20 at 26 where the author differentiates between the foreign policy approaches of traditional conservatives and neo-conservatives. In doing so, he quotes columnist George Will to stress that while traditional conservatives try to, “*Preserve U.S. sovereignty and freedom of action by marginalizing the United Nations. Reserve military interventions for reasons of U.S. national security, not altruism. Beware...’nation-building*”, “*Neocons, by contrast, are committed above all to U.S. global leadership...*”. Boot further reiterates, “*Neocons believe the United States should use force when necessary to champion its ideals as well as its interests, not only out of sheer humanitarianism but also because the spread of liberal democracy improves national security...*”, at 24. This neoconservative approach to international relations is possibly far more dangerous since it promotes intervention to safeguard against “security threats” as well as on ideological grounds i.e. to promote national ideals abroad.

¹³¹ See DIEGO GAMBETTA, THE SICILIAN MAFIA, 2 (1995), where the author compares the “*protection*” based justifications given by the Sicilian mafia to the exaggerated perception of threats (to national security) that governments use to sell increased domestic security to their citizens.

¹³² See NATHANIEL HAWTHORNE, SCARLET LETTER (Bantam Publishers, Reissue Edition--April 1, 1965)

Now is not the time to go “*abroad in search of monsters to destroy*”,¹³³ because in playing hunters and slayers, states are losing their identities as self-serving units striving for self-improvement. Moreover, such an intrusion especially at this present critical juncture would cause a definite breach of the social compact. It is time for the international system as a whole to take a step back and concern itself with addressing admitted common problems through an increasing number of “*temporary alliances*”¹³⁴ which collectively address the specific issues in question. This is not to say that States need to be isolationist; rather they must base foreign policy on pragmatism and not on the pursuit of contentious ideologies (to which allegiance must be sought at home and abroad).

But what then of exceptionalism?

What then of *Noll's* insistence that,

*“Invoking law – whether in terms of Human Rights or the UN Charter -- against this [sovereign] nomos [which believes in the necessity of a state of exception] would be ridiculous, and will at worst fortify the indistinction between violence and justice. Where the social contract is derogated permanently, violence is no longer a mere ‘possibility’ and it becomes meaningless to speak of a ‘forcible excess’.”*¹³⁵

The answer may well lie in the fact that *Noll's* premise of a present and enduring breach in the social contract (“*where the contract is derogated permanently*”)¹³⁶ isn't entirely established; it is still too early to state with any degree of confidence that the U.N. collective security mechanism has been subverted. Evidence of this is found in the fact that although enough and more concerns have been aired, exceptionalism by itself is not being accepted or internalized by the international community,¹³⁷ quite to the contrary, exceptionalist actions on the part of states are openly rebuked and isolated.

¹³³ See Thomas G. West, *Leo Strauss and American Foreign Policy*, quoting John Quincy Adams, speech delivered on July 4, 1821, (available at: http://www.claremont.org/writings/crb/_summer2004/west.h tml) [*hereinafter* West]

¹³⁴ *Id.* Quoting Thomas Jefferson, Farewell Address where while acknowledging the contribution of France to America's independence, he argued for a future of “*temporary alliances*” so that America would retain freedom of action to “*choose peace or war, as our interest guided by justice shall counsel.*” America's *interest* (national security) was to be limited by *justice* (refraining from violating the rights of other nations).

¹³⁵ See *Noll*, *supra* note 88 at 219.

¹³⁶ *Id.*

¹³⁷ The constant questioning, criticism and rebuke faced by the NATO, the Bush, Blair governments over Kosovo and Iraq are reminders of the international communities disaffection with exceptional unilateral acts becoming the norm, see Raphael Minder, “Barroso Criticizes 'Arrogant' America”, *Financial Times* (UK) (available at: <http://www.commondreams.org/headlines04/0713-07.htm>); “German Leaders Criticize US Stance on Iraq as 'Mistake'”, (available at:

The answer may well lie in pursuing a policy of limited interaction with foreign states whereby States would recognize, appreciate and negotiate the terms and extent of cultural relativism, a reconsideration of immediate and forced imposition of democracy in every society and the State's need to feel secure about its sovereignty. Safety is also to be found in not forcing the hand of foreign religious and cultural institutions but rather by providing incentives and in trusting host nations to use them for the promotion of public welfare as may be deemed fit in every individual State. Thus, in the future, multilateralism must lay significant stress on and provide adequate rope to individual States to pursue independent foreign policy aimed at the self-centered pursuit of improvement of their own societies without encroaching upon the sovereignty and freedoms of other States and non-state actors respectively. While national security measures to safeguard against threats from foreign militia is important, the value and consequences of preemption must be carefully weighed alongside the intelligence gathered as well as the counsel provided by the United Nations.

What needs to be clearly understood is that the pursuit of an exceptional approach to international law and diplomacy will open doors to retaliation while closing doors to co-operative mechanisms. As such it serves neither the multilateral order nor any private aspirations of empire.

It is often argued that the problems caused by exceptional tendencies are not going to be resolved by the application of the international legal principles because they arise out of causes which range from emotion, socio-economic pride to religious fervor, none of which fall within the realm of conduct, rights and obligations that the law would seek to control.¹³⁸ While it is true that not all forms of exceptionalism can be controlled by the direct application of normative international legal principles, walking the legal line with honesty will weed out double standards (which incite extremism), manipulation (which breeds distrust) and suspicion thereby removing opportunities for a rise of exceptional tendencies against the safety of the cooperative multilateral process.

On a personal note, I believe that in allowing exceptionalist activities to create an order which endorses the sidestepping of international legal standards (for reasons ranging from fear to retribution), we effectively turn a blind eye to our misgivings; and the rule of law was never meant for the coward.

<http://english.people.com.cn/200208/28/eng20020828102214.shtml>); "Schroeder Continues to Criticizes US on Iraqi Issue", (available at: http://english.people.com.cn/200209/05/eng20020905_102676.shtml). The same message may lie behind the overturning of Prime Minister Jose Maria Aznar's government in Spain, see Ivo H. Daalder, "The Warning in Spain's Election", NRC Handelsblad, March 17, 2004 (available at: <http://www.brookings.edu/views/op-ed/daalder/20040317.htm>).

¹³⁸ See Stephen D. Krasner, *Realist Views of International Law*, 96 AM. SOC'Y. INT'L. L. PROC. 265, 268 (2002) where he asserts that, "It is naïve to expect that a stable international order can be erected on normative principles embodied in international law".