Chapter Nine
September 11 and International Law

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The established political democracies of North America, Western Europe and the South-West Pacific began their long weekend break from history with the collapse of the Berlin Wall and the dissolution of the Soviet Union a bit more than a decade ago. Those heady days were our Friday afternoon; we happily loosened our ties, kicked off our shoes and enjoyed the prospect of a well-deserved vacation after the horrors and tensions of the previous 75 years. Our relief was immense, and understandably so.

There were some memorable events which soured the mood somewhat. The swelling popular opposition to the dictatorship in Peking was savagely repressed in and around Tian An Men Square, and Kuwait was invaded by Iraq. Many people were optimistic, however, that the Chinese events could still lead to a Russian-style reformation. The successful military liberation of Kuwait supposedly offered the prospect of a "new world order" which, according to President George Bush Snr, meant that the United Nations would be able to "fulfill the historic mission of its founders" in which "freedom and respect for human rights find a home among all nations".[1] Nothing, it seemed, could really spoil our party.

In 1992 the European Economic Community proclaimed the completion of its Single Market project across Western Europe, and the *Maastricht Treaty* establishing the European Union and a single European currency was in the process of receiving ratification. Two years later at Marrakesh, 111 States signed treaties establishing the World Trade Organisation. These developments were salient features of a broader phenomenon which quickly came to be known as "globalisation". One of the best selling non-fiction books of 1992 was Francis Fukuyama's brilliant and passionate *The End of History and the Last Man*. Fukuyama argued that History (with a capital 'H'), understood as human progress towards a final political and economic destination, had concluded with the ideological triumph of liberal democracy. No political or economic theory with the power or appeal to rival the combination of constitutional democracy and market economics (i.e., liberal democracy) as universal doctrines could now emerge or re-emerge. Fukuyama spoke to us with the confidence and much of the spirit of an earlier long weekend – the Edwardian decade.

Long weekends normally conclude, as we know, with the resumption of work on a Tuesday morning. On a Tuesday morning last September, almost 3,000 of the people who turned up to work at the World Trade Center in New York City were massacred before lunchtime. More people were simultaneously murdered aboard the commercial passenger aircraft which were used as the executioners' weapons, and 189 mostly military personnel were killed when the Pentagon building in Washington, DC was unexpectedly attacked. Many more people suffered serious injuries.

Since then we have been back at work, with History apparently in fully functional mode once more. In the meantime, Fukuyama has argued that his thesis on the termination of History remains valid. He writes that "unlike Communism, radical Islam has virtually no appeal in the contemporary world apart from those who are culturally Islamic to begin with". Fukuyama also notes that for Muslims themselves, "political Islam has proven much more appealing in the abstract than in reality", as evidenced by the sharply declining political fortunes of the Iranian mullahs and the evident relief with which the removal of the Taliban regime was greeted by the population of Kabul.[2]

Fukuyama is undoubtedly right as far as radical Islam is concerned. Whatever its potential for terror and mayhem, totalitarian Islamist ideology does not represent a *political* threat to liberal democracy. It is highly unlikely ever to attract broad-based support around the world in the same way that other radically collectivist ideologies, such as Marxism and Fascism, once did.

It does not follow, however, that constitutional democracy and market economics do not face a serious challenge as we enter the 21st Century. Such a challenge is being mounted by an influential coalition of forces, consisting mainly of international law academics, activists from numerous Non-Governmental Organisations (NGOs), international bureaucrats at institutions such as the United Nations and the European Union, national bureaucrats ensconced in agencies with social regulation functions, swathes of judicial officers in Western democracies, a relatively small number of elected politicians, and their journalistic cadre. This coalition takes the shape of an identifiable movement, though it lacks a definite organizational form and is not anything as pedestrian as a conspiracy. It really is a movement in the sense that its diverse components orbit around a number of common principles and objectives.

This coalition dreams of, and works for, the establishment of an order in which International Law assumes a quasi-constitutional form. It seeks to superimpose on States, and especially liberal democracies such as Australia, an additional layer of legal regulation which directs the achievement of certain social, economic and environmental goals. This emerging layer of regulation resembles constitutional law inasmuch as it is said to consist of rules and principles legally superior to "lower" levels of national law, including national constitutional law, and to the extent that its scope *ratione materiae* lies within fields traditionally regarded as belonging to the domestic jurisdiction of States and subject to their exclusive national sovereignty. These international regulations prescribe legally mandatory standards, mainly in areas such as civil, political, economic, social and cultural arrangements, and the natural environment. Usually referred to as the "new International Law", perhaps a better name would be "Imperial International Law".

Imperial International Law goes far beyond the older and more traditional conceptions of International Law. For most of its history, from the emergence of recognizably modern States in the 16th Century until some time after the Second World War, International Law was concerned almost exclusively with regulating contacts *between* States. Thus International Law was concerned primarily with issues relating to territorial claims, navigation, the treatment of aliens, the *jus in bello* and the *jus ad bellum*, diplomatic status, sovereign immunity and international commercial relations. With the 19th Century's scientific and technological revolution came rules coordinating international activity in certain technical areas, such as postal and telegraphic communications and the protection of intellectual property.

The rules and principles pertaining to these issues represent what may be called "Necessary International Law"; i.e., that part of International Law which regulates the unavoidable contacts which States must have with each other on the plane of international relations. They are rules conceived primarily to minimize the risk of armed conflict or, if that fails, to ensure that armed conflict does not degenerate into barbarism. Necessary International Law does not seek to regulate choices which State institutions might make concerning their internal arrangements or the way in which their societies function. To the extent that Necessary International Law is manifested in treaties and customary rules, it results from the exercise of choices by States. Treaties are contracts which States are free to conclude or reject, while customary law emerges from practices which States have adopted and by which they feel legally bound. Rules resulting from treaties and international customs are real law, just as obligations resulting from domestic contracts and customs in some national jurisdictions can be legally binding.

The United Nations was itself established within the conceptual framework of Necessary International Law. The first purpose of the UN, set out in Article 1(1) of the Charter, is to

"maintain international peace and security". This is a purpose arising from the core of Necessary International Law itself.

The Charter also requires the UN to "develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples".[3] This emphasis on the equality of States and the right of all peoples to their self-determination underlines the importance which the Charter's drafters attached to the role of free and equal States in providing the means by which the world's peoples were able to govern themselves. Indeed, the Charter states unequivocally that the UN itself "is *based* on the principle of the sovereign equality of all its members".[4] There is, furthermore, a clear prohibition on any action by the UN which would "intervene in matters which are essentially within the domestic jurisdiction of any state", or which would require the member States "to submit such matters to settlement under the … Charter".[5]

The UN Charter's references to the "promotion" of human rights[6] was originally understood in this context. Thus, the 1948 *Universal Declaration of Human Rights* was adopted in the form of a generally-worded non-binding resolution by the General Assembly and "as a common standard of achievement".[7] Twelve years later, the General Assembly overwhelmingly adopted a resolution in which it reaffirmed the centrality of the right and principle of self-determination of peoples, and declared "by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[8]

The UN was premised upon the ability of all peoples freely to govern themselves in their own States. It is true that the UN always possessed legally coercive powers under Chapter VII of the Charter. These powers, which centre on the Security Council and which are subject to the veto of any permanent member of that body, may be exercised only to "maintain or restore international peace and security", and only where there is a "threat to the peace, breach of the peace or act of aggression".[9] It was not intended to be a vehicle for constructing more enlightened societies.

Imperial International Law is vastly more ambitious, and like many other superficially "progressive" phenomena of the late 20th Century, assumed a definite form in the 1960s. It is characterised by its programmatic nature and by its usefulness as a means of coercively restructuring and regulating societies within liberal democratic States.

It is effective as a tool for re-ordering only the liberal democratic societies, for two reasons. Firstly, because it is only in such societies that the Rule of Law is a powerful institution possessing both political and moral authority. If something is said to be "unlawful" or "required by law", a strong reason is advanced for compliance. If that assertion is endorsed by a duly constituted judicial authority, then not even the State, literally armed with a power to resist, will stand in its way. Outside the sphere of liberal democracies, however, arguments based on law rarely enjoy much weight.

Secondly, Imperial International Law is deployed by those who take a broadly oppositional stance to the society in which they live. They are convinced of their society's fundamentally flawed nature, and frustrated by their ability to remedy the perceived defects by constitutional democratic channels; usually because they find it impossible or irksome to persuade their fellow citizens to their viewpoint. Oppositional political activity, whether based on democratic agitation or appeals to Imperial International Law, is a much rarer commodity outside the sphere of liberal democracy.

Imperial International Law is therefore, at most, a minor irritant to regimes in authoritarian or totalitarian States. All laws are relatively toothless, and opposition is generally clandestine or necessarily cautious. On the other hand, Imperial International Law can provide a useful political weapon on the plane of international relations with which non-democratic States can opportunistically beat the liberal democracies. It is especially useful as a rhetorical weapon against the United States, which is the most powerful liberal democracy and the one most tenaciously

hostile to Imperial International Law because of its radical incompatibility with democratic self-government and federalism.

The emergence of Imperial International Law has deep roots but, as I indicated earlier, became clearly visible in the 1960s. This phenomenon was associated with the radical cultural ferment affecting all the liberal democracies, as well as the emergence of a large number of newly-independent States many of whose constitutional orders quickly collapsed into despotism and who fell within the geopolitical orbit of the Soviet Empire. By the end of the 1960s, these States formed a majority bloc in the UN General Assembly, thereby substantially altering the Organisation's character. It was in 1966 that the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* were opened for signature.

These two immensely important UN treaties go much further than the 1948 *Universal Declaration on Human Rights* in several notable respects. They are much more detailed and prescriptive than the *Universal Declaration*. They provide more than simply "common standards of achievement"; they are legally binding international treaties. Most importantly, they establish an international bureaucracy whose function is to monitor "compliance", issue official (and often highly "creative") comments on the treaties' scope and meaning, and determine complaints of infringement. This bureaucracy can, and frequently does, determine that States are in breach of their treaty obligations. Needless to say, the bureaucracy is dominated by personnel from States where the Rule of Law is either weak or non-existent and whose own record of compliance is abysmal, and by personnel from liberal democracies committed to a programmatic restructuring of their societies by means of Imperial International Law.

It is the liberal democracies which are the most frequent targets of adverse reports and findings. Similar patterns exist with respect to a slew of subsequent UN treaties, dealing with subjects ranging from the basis upon which private associations may select or reject their members, to the relationship between children and their families. Few aspects of our private and civic lives remain unaffected by these Imperial treaties. States are simply required to comply with the treaties, as interpreted by their attendant bureaucracies, regardless of the wishes of the State's population or any internal constitutional arrangements it might possess for distributing and limiting official power.

It might be objected that States, including liberal democracies, are perfectly free to decline participation in these sorts of treaties. That is only partly true. These sorts of Imperial treaties sometimes do not provide for a State to withdraw once it has become a party, even though their interpretation and application is largely dependent on the agendas of unaccountable and ideologically-driven bureaucracies (e.g., the *ICCPR* and its *Second Protocol* on abolishing the death penalty, and the *ICESCR*). This means, of course, that a people through their constitutionally chosen Government are unable to change their mind once a commitment to such a treaty is made. These treaties are therefore rather like marriage contracts before the *Family Law Act* 1975, with the exception that infidelity by the other party is not a ground for dissolution.

Even where, as is often the case, a right of denunciation exists, once a State has become a party the opportunity is lost to make reservations to the treaty, even assuming reservations were permitted at the time of signing or ratifying.

States have sometimes been held to lodge reservations, at the time of signing or ratifying, which contradict a treaty's "object and purpose". Under the general law of treaties, the effect of such a defective reservation is to remove the basis for the State's consent and to render the State a non-party. With respect to multilateral human rights treaties, however, a novel doctrine is emerging according to which the reservation is simply ignored, and the State is held bound by the treaty regardless of the fact that its consent was premised upon the reservation's validity.

Finally, most non-International lawyers are surprised to learn that a State can become bound by the terms of a treaty it has never signed and which it would never desire to sign. This delicious doctrine, you may be unsurprised to discover, has its origins in the 1960s. According to the International Court of Justice, where a multilateral treaty has attracted “a very widespread and representative participation” by States, it may be possible for norm-creating terms of the treaty to develop into general customary rules binding on all States, even those which are not party to the treaty.[10] Thus a State such as Australia, even if it makes a deliberate decision to refrain from joining a treaty forming part of Imperial International Law, may nevertheless find itself bound by the treaty’s substantive clauses. This doctrine, in effect, transforms the signing and ratification of a multilateral treaty into a legislative act.

Of perhaps greater structural significance to the consolidation of a system of Imperial International Law is a now well-entrenched view among academic international lawyers and international bureaucrats that resolutions of the UN General Assembly can have a certain law-making character. Such a view is appealing to those who seek to consolidate Imperial International Law because it bypasses the frustrating and tiresome processes of constitutional democracy. It also appeals to well-meaning international utopians who touchingly regard a World Parliament as a necessarily enlightened and civilized place, and to non-liberal authoritarian States, who still form a numerical majority in the General Assembly[11] and look to shape International Law in a direction more conducive to the preservation of their poverty-generating collectivist or kleptocratic regimes. This expansive view of General Assembly resolutions received a powerful fillip from a notorious 1986 decision of the International Court of Justice. The Court relied heavily on a series of General Assembly resolutions in effectively disregarding an unequivocal condition attached to the United States’ acceptance of the Court’s jurisdiction, in order to find for Nicaragua’s Sandinista regime in its claims that the US had unlawfully used force against Nicaragua.[12]

There are a number of principles which Imperial International Law seeks to promote and which are especially inimical to democratic constitutionalism. These principles are characterised by a collectivist view of social organization which, with the rise of economic globalisation and the manifest failure and implosion of the European Marxist regimes, find significantly diminished support among the citizens of liberal democratic States. This collectivism finds particular expression in the enthusiasm to elevate economic, social or group interests to the status of human rights.

These interests are, because they function squarely within the realm of distributive justice, especially liable to produce an expanded role for government in the regulation of civil society. Imperial International Law is little concerned with the role of individual citizens, but focuses on prescribed groups (especially racial, ethnic and gender) in the consideration of public issues and the assignment of rights and duties. It tends to require affirmative action to achieve proportional representation of “under-represented groups” in public institutions and private associations. Majority rule by citizens, regardless of their “membership” of particular groups, is to be replaced as the main principle of legitimacy by the competing principles of multiculturalism, ethnic proportionalism and power sharing among the various groups.

There is, furthermore, a concerted effort afoot among academic international lawyers to hijack the institutions of globalisation such as the WTO – which are essentially deregulatory in nature – as vehicles to advance the effectiveness of Imperial International Law. In particular, there are serious efforts to make access to the benefits of free trade dependent upon the observance of Imperial International Law’s requirements in the realms of social and environmental regulation. This is a clever move to force States and their peoples to pay a heavy economic price for non-compliance.

Although Imperial International Law is constitutional in that it is, or claims to be, superior to all forms of national law, it is starkly distinguishable from liberal democratic conceptions of

constitutional law. It does not prescribe procedures for the making and, just as importantly, the unmaking of laws by institutions subject to majority control and operating within defined constitutional limits. The élites who constitute the coalition promoting Imperial International Law are uncomfortable with liberal democratic States because they confer legislative authority on institutions the people know, can observe and which they can control. The peoples of these States remain stubbornly attached to traditions and beliefs which tend to frustrate the emergence of more progressive social orders. International bodies and processes have the advantage of being opaque, unfamiliar, remote, overlapping and subject to control by the enlightened élites who promote Imperial International Law. The legal rules they generate also have the advantage of being exceedingly difficult to amend or repeal, and vaguely defined so that they remain highly susceptible to "progressive development" by courts, bureaucracies and academic commentators.

Imperial International Law is not, therefore, truly constitutional. The new order it seeks to impose, supposedly on all States, but in reality only on liberal democratic States, is better described as "post-constitutional". It is also "post-national" and "post-democratic". It is an essential component of a competing "new world order" to that proposed by President Bush Snr some eleven years ago. It is this post-constitutional and post-democratic vision, built around Imperial International Law, which poses the next great *political* challenge to liberal democracy – not radical Islamist fantasies, which nevertheless remain a real threat at the more earthy level of security and defence policy.

The response by the United States, the United Kingdom, Australia and a raft of other liberal democracies to the September 11 acts of aggression dealt a blow to Imperial International Law. After the initial shock had worn off, its exponents were quick to demand that the whole incident be treated merely as a criminal justice problem – rather like a spectacular bank robbery. The attacks showed, according to them, the pressing need for the establishment of more international agencies such as the International Criminal Court. The perpetrators needed to be "brought to justice" before an international tribunal (but not, of course, a US criminal court). Furthermore, any use of force which might be necessary to achieve that sole legitimate objective had first to be authorized by the United Nations.

This approach has a certain superficial appeal. Civilised societies are properly reluctant to use armed force unless there are no alternatives. International criminal law seemingly provided such an alternative in this case.

Yet, the allies were right to reject demands which insisted on treating the armed attacks on the US simply as matters of criminal law. To have accepted this counsel would have betrayed a fundamental misunderstanding of the challenge which now confronts us. It is notorious that Middle Eastern terrorist networks receive extensive support from a number of national governments. This support takes the form of finance, intelligence, logistics, diplomatic cover, training and the provision of bases. Various components of these networks have publicly declared war on the US and its allies, and regularly attack Western civilian and military targets. The motivations are provided by a totalitarian and collectivist political ideology with a religious demiurge, and not criminal gain. This ideology is even more perilous to the peoples of Muslim countries, over whom it aspires to exercise absolute power, than to the Western democracies.

A criminal justice approach tends to produce a focus on the foot soldiers of political terrorism; the ones who leave their "fingerprints" at the "crime scene". The standard of proof, rules of evidence and procedural safeguards properly required at a criminal trial of a particular accused are inappropriate when dealing with the threat of State-sponsored acts of aggression. Adopting a primarily criminal justice approach to the Lockerbie bombing, the UN eventually persuaded Libya's government to surrender two scapegoats for prosecution. Meanwhile the political leaders who funded, planned, organised and ordered the mass murder above Scotland continue to be represented at the United Nations.

It is sometimes argued that international criminal law will act to deter crimes against humanity and war crimes. But what self-respecting suicide bomber or terrorist commander is likely to be deterred by the remote prospect of a jail term?

Any State substantially involved in the attacks on New York and Washington committed an act of aggression against the US. America and its allies were entitled to exercise their inherent right of collective self-defence as recognised by Article 51 of the UN Charter, a central pillar of Necessary International Law.

The attempt to remove the crisis to the realm of Imperial International Law was a move designed to diminish the scope of the Necessary International Law of self-defence, and replace it with an expanded role for international lawyers and international bureaucracy which would limit the freedom of manoeuvre of the world's pre-eminent liberal democracy. It was also an attempt to subject the exercise of the United States' inherent right of self-defence to prior approval by Security Council members such as China and Syria. By responding to the attack pursuant to the traditional requirements of Necessary International Law, the United States also reaffirmed the importance of liberal-democratic patriotism as an effective response to attacks on the State, and undercut those who sought refuge exclusively in opaque and byzantine "international processes".

The terrorist attack which snuffed out more than 3,000 lives last September 11 started a military struggle which will probably end successfully for the liberal democracies. It also signals a new phase in the struggle for the survival of liberal democracy itself against the challenge of post-democratic Imperial International Law.

The ability of all free peoples to govern themselves hangs in the balance.

Endnotes:

1. President George Bush's speech to Congress, 6 March, 1991.

2. Francis Fukuyama, *History Is Still Going Our Way*, in *The Wall Street Journal*, 5 October, 2001.

3. Article 1(2).

4. Article 2(1) (emphasis added).

5. Article 2(7).

6. E.g., Articles 1(3) and 55(c).

7. Preamble.

8. General Assembly Resolution 1514 (XV) of 14 December, 1960, Article 2.

9. UN Charter, Article 39.

10. *North Sea Continental Shelf Cases* (*Germany v. Denmark, Germany v. The Netherlands*), ICJ Rep (1969) 3 at para 73.

11. According to the Freedom House report *Freedom in the World 2001-2002*, which measures the extent to which countries are free according to criteria relative to civil rights and

political rights, there are 86 free countries (45 per cent), 58 countries which are only partly free (30 per cent), and 48 countries which are not free (25 per cent).

12. *Nicaragua v. US*, ICJ Rep (1986) 14.