

Comment

Aftershocks: Reflections on the Implications of September 11

W. Michael Reisman[†]

The Fundamentalist conservatizers in the Islamic world who support or passively sympathize with those who are attacking us perceive themselves as under a grave threat. To assess the accuracy of their perception, we must look at what they fear. Since 1945, the international legal system, at the initiative of leading Western modernizing states, has established a set of ground rules of political and other social organization based upon what it considers to be universally valid and self-evident principles. These ground rules are embodied in the Universal Declaration of Human Rights. Although the United Nations Charter purported to reserve the domestic jurisdiction of states from international concern, Western governments and the human rights lobby have vigorously diminished the scope of domestic jurisdiction so that it no longer buffers the internal legal arrangements of states from the application of international human rights law. The values we designate as "universal" are, indeed, "universalizable," in contrast with tribal or other ethnically or religiously restrictive values that limit their reach and confine their benefits to members of a particular group. But "universalizable" values are not necessarily universally held. Nor are they "natural."

I.

During the Cold War, fictional accounts of invasion and occupation by

[†] Myres S. McDougal Professor of International Law, Yale Law School. Prepared for delivery as the Adda Bozeman Lecture, Sarah Lawrence College, April 8, 2002. I acknowledge with gratitude the assistance of Claudio Aragón Ricciuto, Yale Law School 2004, in the preparation of this lecture for publication.

the respective enemy became forms of entertainment as well as means of sustaining mass mobilization and willingness to sacrifice. To mention only one example of this genre, this audience will recall the motion picture "Red Dawn" which depicted a brutal Soviet occupation of large parts of North America—replete with commissars in each small town—and heroic guerrilla actions conducted by young Americans from retreats in the Rocky Mountains.¹

The attack on the United States on September 11 has yet to produce a new wave of such films and novels. It's not merely that the entertainment industry has not had the chance to catch up. When it does, the plots will revolve about more sabotage and terrorism, but not about invasion. Even scare fiction requires enough *vraisemblance* to make itself credible—and vendible. We are angry and indignant at the massive violation of our homeland and the murder of fellow citizens and we have no choice but to view ourselves in a war with a formidable adversary who is able to conduct the war in our territory. We require a new infrastructure of defense. But no one, whether in the Defense Department, in Governor Ridge's Office of Homeland Security, in a Department of Homeland Security when it is finally operational or, indeed, in the entertainment industry, which is ever alert for new commercial opportunities, is developing worst-case contingency plans for an invasion by Islamic militants and a long-term occupation, replete with hooded and bearded mullahs conducting forced conversions throughout the population in deconsecrated churches and synagogues that have been converted into mosques. We have been attacked and wounded and anyone who has not retreated into private fantasies accepts—as a real possibility—that we may be attacked and wounded again. But we know we are not going to be invaded. That expectation alone tells us something about the distinctive meaning of this war. This is not a classic type of war whose objective is invasion, occupation and incorporation. Nor are our enemies "mad," a soft psychologistic term we frequently call up when we cannot understand why others are doing the things they do. Nor are they driven by nihilism.

This war departs from the classic model in yet another way. Though we have been attacked, we are not the prime object of this war. This is, in large part, a war *between* Moslems in the Islamic world about the future control and social structure of the Islamic world, stretching from the Maghreb of North Africa and the largely Islamicized areas of sub-Saharan Africa, through the Middle East and the Anatolian landmass, through Central Asia and the Islamic states of the sub-continent, through the Islamic areas of China, and through the archipelagos of South Asia. It is a war about who, among contending Islamic groups, will gain power and control the *dar al Islam*, the values that will govern it and how it will be organized.

1. RED DAWN (United Artists Corporation 1984).

On one side of that Islamic world stand modernizing elites and those strata of the Islamic world who wish to make their space part of the expanding global civilization based upon science and technology. These modernizing elites believe that without such engagement and incorporation, they will be unable to assure to themselves and their populations the material benefits and life-opportunities that are the products of a robust economy within a liberal system of public order. In many of their countries, some modernization has taken place. If its benefits are not widely distributed, images of life in the modern world are. Though many of these images, which are fabricated for advertising and promotional purposes, are extravagantly inaccurate, they are, nonetheless, the pictures others gain and operate with.

On the other side stand Fundamentalist conservatizing counter-elites – variously called “Islamists” or “Jihadists” – whose members’ views cover a spectrum but at the core share the common belief that the civilization of science and technology is antithetical to the true values of their faith; that it will deprive them, individually and collectively, of power; that it will hollow out their religion; and that it will contaminate and corrupt their lives and the lives of their children.

Some of this reaction is familiar from many other situations of social change. Every innovation in social arrangements necessarily terminates existing ones, causing distress and deprivation to those who were secure in the older arrangements but who prove insufficiently adroit to adapt rapidly to new ones. Part of the support for the Fundamentalist conservatizers comes from these victims of rapid social change in the Islamic world. Part comes from people disenchanted with social change. The early phases of modernization are also attended by rampant and ostentatious corruption, which abounds before effective control mechanisms come into operation. Reactions to this unattractive feature of modernization account for some of the support for the Fundamentalist conservatizers, coming from those who are disgusted by the corruption and see it as an inherent – and permanent – part of the modern package. As with every social movement, some support the Fundamentalist conservatizers because they see them as a path to individual or group power. But, let us not delude ourselves: some support the conservatizers because they believe in an orthodox form of their religion and are convinced that it will be eroded and denatured by modernization.

In the long Spanish civil war, which was also a war about modernization, the lines were clearly drawn: you were either for the Roman Catholic Church or against it, for social revolution or against it, for modern values or against them. One of the things that is confusing about the struggle within the Islamic world, in contrast to the comparative clarity of the long and violent war in Spain, is that everyone, modernizers and Fundamentalist conservatizers, radicals and reactionaries, uses the language of Koranic piety. Everyone sounds like a Fundamentalist conservatizer. There are historical reasons for this anomaly. Almost all of

the Islamic states were formed relatively recently, most often through the decisions of external imperial powers rather than as a result of authentic and widely supported nationalist uprisings. The peoples of these new states still lack strong national identification; loyalty systems continue to revolve around the extended family. The only vocabulary of loyalty capable of mobilizing masses of people is the language and symbols of the common religion. Hence every aspiring counter-elite in an Islamic country—whether modernizing or conservatizing—must present itself as more pious than the elite it is seeking to replace, while stigmatizing its competitors as apostates and adulterators of the faith. As for the incumbent elite—whether modernizing or conservatizing—it too has no choice but to present itself as ever more orthodox. Hence an idiosyncrasy of the modern Islamic world is a rather androgynous modernizing elite. It moves comfortably in the West, still seeks to adopt many modern programs, and often depends upon the West for its internal or external security. Yet it often cultivates a religious image in language and costume and, in particular, it indulges (and tries to control) religious institutions. For these elites, truly, the voice is the voice of Jacob, the hands are the hands of Esau.

If this is a war within the Islamic world for control of the Islamic world, why was the United States attacked—our embassies in Nairobi and Dar es Salaam, the USS Cole in the harbor of Aden, the World Trade Center in New York and the Pentagon in Washington? Why are we seen as the enemy? The answer to that question is complex but one distinct part is that we are seen as the indispensable supporter for the erstwhile modernizing elites. Many in the Islamic world believe that without our support, most of the modernizers would quickly flee, fall or molt into conservatizers. The United States was the Great Satan to the supporters of the Islamic Republic because it had reinstated the little Satan, the Shah, in 1954. U.S. support kept him in power until President Carter decided not to come to his assistance in 1979, whereupon he was, as the Iranians say, *bar bahd rafdeh*, gone with the wind. In fact, in the Islamic world, there are no explicitly modernizing leaders who have a solid democratic base of domestic support and, as a result, can survive without internal military suppression or, often, without external Western support. The modernizers know it—just ask Mr. Hamid Karzai who enjoys power, at least to the outskirts of Kabul, thanks to an international force there. The Fundamentalist conservatizers, whether in power or seeking to get it, know it too.

Our policy of support for the modernizers has not always been consistent—in the real world, few polices can be—but it is public and certainly not episodic. Consider the Carter Doctrine which President Carter declared in January, 1980: “An attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States of America, and such an assault will be

repelled by any means necessary, including military force."² On October 1, 1981, President Reagan issued statements that the White House promptly characterized as "The Reagan Codicil to the Carter Doctrine."³ In response to a question, the President said, "...Saudi Arabia we will not permit to be an Iran."⁴ In clarification, the President added that "in Iran I think the United States has to take some responsibility for what happened."⁵ Immediately afterwards, a White House aide explained to the *New York Times* that "the President was now pledging to support the Saudi monarchy against internal as well as external threats."⁶ That codicil is still an essential plank in our foreign policy.

American engagement in the Islamic world once earned it no enmity and condemnation. As long as the Soviet Union existed and pursued an aggressive policy in the Islamic world, the United States was viewed by Fundamentalist Islamic conservatizers as a bulwark against Godless communism. That was then the major enemy and, as it is famously said in the region, "the enemy of my enemy is my friend." Now that the Soviet Union has been tossed onto the rubbish heap of history, there is no longer a fearsome enemy to the north, hence no need for a bulwark. The saying can be abbreviated: the enemy is...the enemy.

What is the war objective of the Fundamentalist conservatizers, these elites of the various groups that we call collectively al Qaeda, but network of like-minded groups scattered about the world, operating as their own "coalition of the willing"? What, for them, would constitute victory? It is not, as I said, the conquest or destruction of the United States. There are two broad war objectives. First, the withdrawal of American support for the modernizing elites, including Israel, whereupon the conservatizers believe the modernizers will flee westward. With Fundamentalist conservatizers at the helm, true Islamic states can then be established in a type of second Caliphate, reviving the old glory of Islam. Second, and this should not be underestimated, recognition of the independent and autonomous legitimacy of Islam and, as a result, an end to the characterization of parts of Islamic dogma and many Islamic mores as violations of universal human rights standards. I will return to this second objective in a moment.

During the Cold War, the prospect of losing a compliant government in a critical geostrategic location could have so changed the power balance that it would have warranted going to war just to prevent it. With the end of the Cold War, much of the geostrategic urgency has receded as concerns have shifted to trade and investment. This development is relevant to our

2. 16 WEEKLY COMP. OF PRES. DOC. 197 (Jan. 23, 1980).

3. W. Michael Reisman, Editorial Comment, *Critical Defense Zones and International Law: The Reagan Codicil*, 76 AM. J. INT'L L. 589, 590 (1982).

4. Transcript of President's News Conference on Foreign and Domestic Matters, N.Y. TIMES, Oct. 2, 1981, at A26.

5. *Id.*

6. Reisman, *supra* note 3, at 590-91.

inquiry, for a victory by the Fundamentalist conservatizers would not signal the end of economic relations between the *dar al Islam* and the *dar al harb*. Remember that the suspension of commercial relations between Iran and United States is neither demanded nor sustained by revolutionary Iran. The Islamic Republic is desperate to trade with the U.S. In a possible future in which our adversaries prevailed in this unprecedented type of war, oil would still be sold and investments might still be made by each side in the world of the other. But their victory would mean a suspension of the vision of a global community based upon a common conception of human dignity. This implication and its ramifications are the true stakes in this war and it brings us to dimension of September 11 that is properly called, in Professor Huntington's term, a "war of civilizations."⁷

II.

Several months before September 11, an acquaintance of mine who does international business in the Middle East was invited to attend an intelligence briefing in Washington given by a retired general who had commanded Special Forces. Overall, the General delivered a gloomy assessment of the deteriorating situation in the region. But the most memorable comment came when he remarked that if, during his active service, he had addressed an assembly of Special Forces and had told them that he needed volunteers for an extremely dangerous mission, he would have expected all hands to go up. If he told them he needed volunteers for a suicide mission, however, no hands would have gone up. In contrast, the General believed that in a comparable group of young Palestinians in which a commander asked for volunteers for a suicide mission, many hands would go up.

The almost simultaneous destruction of the American Embassies in Nairobi and Dar es Salaam on August 17, 1998 was accomplished by suicide bombers, as was the attack on October 12, 2000 against the U.S.S. Cole. Yet it took the morning of September 11, 2001 to compel the American public to begin to come to terms with the implications of an adversary whose critical weapon is cadres committed to suicide missions. Obviously, an open and civil society is ill-equipped to develop defensive tactics against unidentifiable adversaries whose weapon for destroying targets is their own willing self-destruction. But if defense is more difficult, it is certainly possible. The main reason why this has been so traumatic for us is that it is extremely difficult to conceive of and to understand this sort of an adversary, not to speak of devising means for dealing with the new challenge of the adversary and its soldiers during—and after—conflict.

Because our valuation of individual life is so high, we are inclined to

7. See SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996).

view adversaries who accept suicide as part of their mission as psychotic, fanatically and misguided religious, or wickedly brainwashed and manipulated by cynical elites. Or all of the above! For some suicide cadres, those adjectives may be entirely apposite. But these ready explanations we reach for in trying to deal with something we find so incomprehensible—and truth to tell, terrifying—do not explain everything and may, in fact, explain very little. Consider the explanation that attributes suicidal behavior to religious depreciations of the worth of this life in comparison with an assured after-life and its explicit promises of paradise. Some of the religions that our own countrymen practice seriously depreciate this life and offer to those whose current behavior qualifies them for future indulgence different though comparably extravagant promises of a future eternal one. Yet they do not go about engaging in suicide missions.

In the Second World War, the United States encountered in Japan an adversary whose military caste was equipped with a warrior code—*Bushido*—that extolled self-sacrifice. The Kamikaze pilots, the quintessential personal implementation of the war catechism, “[t]o match our training against their numbers and our flesh against their steel,”⁸ were recruited in significant part from the ranks of university students in the waning days of the war, when it had become clear that Japan was going to be invaded. The Kamikaze were, at least, limited to the battlefield and our horror and fascination with the phenomenon ended with the hostilities. I do not believe that we ever really came to understand the phenomenon, perhaps because we did not and have not had to experience a desperate war of self-defense. If we had, we might have come to view “mission suicide” quite differently.

For two generations, our nation has engaged in only “optional” wars, conflicts in which we chose to engage even though we had not been directly attacked and from which, if truth be told, we knew we could withdraw at any time we chose without really fearing—rhetoric notwithstanding—that the dominos would teeter and topple, one after another, until our homeland was finally overrun. When the cost became too high for us in Vietnam and Somalia, for example, we simply withdrew and despite the warnings of the various Chicken Littles in the far reaches of the political spectrum, the dominos did not tumble and the sky did not fall. Since Pearl Harbor, we have not been drawn into a hot war in which we felt that our survival was at stake. Until September 11.

If I may build on Emile Durkheim: in wars in which the survival of the group or the nation is perceived as at stake⁹ and those fighting for it are deeply committed to its survival, I would hypothesize that their willingness to sacrifice themselves for the cause to the point of accepting, if not volunteering for, assignment to suicide missions, will increase rapidly.

8. RUTH BENEDICT, *THE CHYRSANTHEMUM AND THE SWORD: PATTERNS OF JAPANESE CULTURE* 24 (1946).

9. See EMILE DURKHEIM, *LE SUICIDE* (1897).

If, Heaven forbid, the United States were to find itself in that desperate situation, I believe that in any group of American soldiers many hands would go up. Moreover, the vast majority of our public would view those undertaking suicide missions as truly heroic because they were making the *ultimate*, ultimate sacrifice. We would hardly characterize our volunteers as psychologically or emotionally unbalanced, though we might well be inclined to do so if the perceived level of national crisis were considerably lower. To be sure, those undertaking the suicide missions in circumstances of high crisis might find it easier to sacrifice themselves if they believed that they could look forward to an eternal and continuously pleasurable after-life. Yet that expectation could not explain why they were willing, at that point in time, to make themselves into self-destructive weapons. After all, their survival up to that moment demonstrated that in preceding and less critical times, the expectation of paradise had not led them to engage in behavior so imprudent that it would have ensured self-destruction.

If this analysis is correct, some of the suicidal soldiers we encounter or read about—whether of al Qaeda, wherever they operate, or of Hizbollah or Islamic Jihad in the Occupied Territories, or the ordinary *Basiji* in Iran during the Iran-Iraq war from 1980 to 1985—and the members of vast publics in many parts of the Islamic world who canonize them as martyrs and heroes are responding to a perception of an ultimate threat to their community or their values.

What is the basis of their perceptions of threat? Is it a tissue of self-delusions? Or is it based upon carefully and deceitfully crafted lies by cynical and manipulative elites? These questions can only be meaningfully addressed if we try to see the world as others see it and try to see ourselves and what we are doing as others see us. The necessary premise of this exercise is the willingness to acknowledge the potential depth of the words “cultural difference” and “cultural diversity,” a subject about which Adda Bozeman wrote so brilliantly and courageously.

In our popular culture, cultural difference and cultural diversity have been homogenized and pasteurized into a slogan. My ten-year old daughter watches a television show which, in many ways, captures for me America's approach to this profound and complex part of national and international politics. The show, “The Wild Thornberrys,” is about a family that travels around the planet in a motorized home in order to produce TV programs about the different peoples and animals of the world they encounter.¹⁰ The characters in the family are vividly and entertainingly portrayed, but what is most fascinating about the show is that the peoples, and indeed, the animals, that the Thornberrys encounter in their peregrinations are all, *mirabile dictu*, just like us. Aside from the convenient fact that all the peoples and all the animals speak perfectly fluent English, with, of course, charming and stereotypically appropriate accents, they

10. *The Wild Thornberrys* (Nickelodeon Network television broadcast).

think so much like us that the Thornberrys have no trouble understanding and even participating in their always appealing and always innocuous rites and rituals.

The producers of the Wild Thornberrys are, of course, serving up an utterly counterfeit version of reality. This is, indeed, the benign, pre-September 11th version in which cultural difference is "cute" and ultimately ephemeral. In fact, peoples are very different because they are profoundly shaped by the collective experience of culture, class, religion and prior exposure to crisis. As a result, they have very different expectations of past and future, different narratives and stories, and very different value demands. Adda Bozeman wrote of societies that continue to coexist with our own and in which "it continues to be possible to collapse the distance between past and present; mingle experiences absorbed in dream and waking states; and modify oral accounts of life in response to changes of mood or occasion."¹¹ Dr. Nigel Thornberry, *paterfamilias* of the Family Thornberry, manifestly did not read Bozeman, but he and his creators are right about one thing: External differences, the things that the cameras dote on, are indeed only skin deep. He is wrong about the important thing: Inner worlds are vastly different.

I do not believe that our efforts to understand how we are viewed by our adversaries and by those others who in varying degree sympathize with them have gone much beyond the Wild Thornberrys, for the simple reason that the Wild Thornberrys paradigm fits neatly into and confirms our own cultural calculus while never requiring us to encounter the inner worlds of those we are trying to understand. A few examples. Professor Fouad Ajami, writing in the New York Times Magazine shortly after September 11, postulated that Mohammed Atta, along with the other members of his generation, are desperate because they have no jobs or meaningful lives to look forward to.¹² In the same vein, former President Clinton, lecturing in London in December, postulated that the problem arises because we have failed to bring the opportunities of material prosperity to a large part of the undeveloped or, as it is optimistically and euphemistically called, the "developing world."¹³ For Mr. Clinton, only give them an "international New Deal" and the problem will evanesce. Mark Malloch Brown, the Administrator of the United Nations Development Program, said substantially the same thing in October.¹⁴ Tom

11. Adda B. Bozeman, *The Interplay of World and Mind*, in JOURNEYS THROUGH WORLD POLITICS: AUTOBIOGRAPHICAL REFLECTIONS OF THIRTY-FOUR ACADEMIC TRAVELERS 449 (Joseph Krugel & James N. Rosenau eds., 1989).

12. Fouad Ajami, *The Way We Live Now*, N.Y. TIMES, Oct. 7, 2001, §6 (Magazine) at 19.

13. William Jefferson Clinton, *The Struggle for the Soul of the 21st Century*, BBC Richard Dimbleby Lecture (Dec. 14, 2001), available at <http://www.clintonpresidentialcenter.com/dimbleby.html>.

14. Mark Malloch Brown, *Human Security and Human Development in the 21st Century: A Post-September 11 Agenda*, Address at the Centre for Global Governance, London School of Economics (Oct. 25, 2001), available at <http://www.undp.org/dpa/statements/administ/2001/october/25oct01.html>.

Friedman, the New York Times columnist, postulates that popular Islamic dissatisfaction comes from the humiliation caused by a small Jewish state that has been able to implant itself in the region and to withstand the entire Arab world.¹⁵ Similarly, Bernard Lewis, the illustrious Middle East scholar at Princeton, finds the source of popular anger in the bafflement and resentment among members of a proud civilization, once so far ahead of the West, over its repeatedly demonstrated failure to keep up.¹⁶

I suggest that it is both humane and good strategy to start with the rebuttable presumption that one's adversaries are intelligent and sane and that their perceptions are rational within their frame of reference. The Fundamentalist conservatizers in the Islamic world who support or passively sympathize with those who are attacking us do perceive *themselves* as under a grave threat. To assess the accuracy of their perception, we must look at what they fear. And what they fear, in a word, is us. For if this is a war of civilizations, in Professor Huntington's sense, it is a war they believe *we* are conducting *against* them. And there is a basis to their fear.

Since 1945, the international legal system, at the initiative of leading Western modernizing states, has established a set of ground rules of political and other social organization based upon what it considers to be universally valid and self-evident principles. It is the Universal Declaration of Human Rights,¹⁷ concluded by the United Nations General Assembly in 1948, which we now present as the universal "standard of achievement." With minor variations, regional human rights treaties in Europe and the Americas have adopted the principles and even the language of the Universal Declaration. Since 1948, a network of institutions of varying degrees of compulsoriness and effectiveness have worked to implement them. Let me briefly remind you of some of those rights by quoting from the Universal Declaration:

Article 2(1): Everyone is entitled to all the rights and freedom set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁸

Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.¹⁹

Article 16(1): Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to

15. Thomas L. Friedman, *The Core of Muslim Rage*, N.Y. TIMES, Mar. 6, 2002, at A21.

16. BERNARD LEWIS, WHAT WENT WRONG? WESTERN IMPACT AND MIDDLE EASTERN RESPONSE 151-59 (2002).

17. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 at 71.

18. *Id.* art. 2(1).

19. *Id.* art. 5.

found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.²⁰

Article 16(2): Marriage shall be entered into only with the free and full consent of the intending spouses.²¹

Article 18: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.²²

Article 19: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.²³

Article 21(3): The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.²⁴

Article 26(2): Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.²⁵

Article 30: Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.²⁶

These legal formulations of rights and duties are manifestations of a larger worldview, reflecting key value goals of our civilization. In dealing with the traditional societies to which we are trying to apply them, five of our values are critical: power, respect, enlightenment, affection and rectitude or religion:

20. *Id.* art. 16(1).

21. *Id.* art. 16(2).

22. *Id.* art. 18.

23. *Id.* art. 19.

24. *Id.* art. 21(3).

25. *Id.* art. 26(2).

26. *Id.* art. 30.

- As for power, we insist on democratic and representative forms of governance, effective equality and equal access to power for men and women and the freedom of expression without prior restraint, even in matters that are of great sensitivity to others.
- As for respect, we insist on the inherent dignity of all people without regard to race, religion, color, sex, sexual orientation and the entitlement of all to equal respect.
- As for enlightenment, we insist on the freedom of inquiry which may and, indeed, must go into anything of interest to the inquirer; there is no forbidden knowledge.
- As for affection, we insist, as a matter of legal right, on the freedom of the individual to cultivate agapic and erotic relations, whether homosexual or heterosexual, and have developed technologies that can separate sexual activity from procreation, allowing sexual pleasure to be cultivated for its own sake. Our civilization enforces the right of a woman to abort her fetus entirely by her own choice.
- As for the development of personal codes of rectitude, we insist on the freedom of all religions; the obligation to respect them; the separation of the state from religion and the prohibition on the state from supporting any particular and all religions; and the right of religions to seek to proselytize and convert members of other religions. We view the act of voluntary conversion not as apostasy but as an important exercise of an individual human right.

Pericles' Athens was proud that others envied the democracy it practiced and the benefits it brought to its citizens but Athenians never even thought about trying to export democracy, let alone enforce it on others. We, too, are proud of our democracy but, in contrast to Athens, we are committed to a globalization of all of our values. Although the United Nations Charter purported to reserve the domestic jurisdiction of states from international concern, Western governments and the human rights lobby have vigorously diminished the scope of domestic jurisdiction so that it no longer buffers the internal legal arrangements of states from the application of international human rights law. We press them as a precondition for regional and world peace because we believe that democracies do not wage war against each other. We press them as a precondition for economic development, because we assume that it requires a free and open society in order to flourish. These instrumental calculations aside, we also advance our values for their own sake. In the part of the planet which we inhabit, we accept these human rights as basic, necessary and self-evident principles of political and social organization. So

quite naturally, we characterize as pathological and pathogenic many of the cultural practices in other parts of the world that deviate from them.

The values we designate as "universal" are, indeed, "universalizable," in contrast with tribal or other ethnically or religiously restrictive values which limit their reach and confine their benefits to members of a particular group. But "universalizable" values are not necessarily universally held. Nor are they "natural." Many of our values are the result of momentous conflicts in our own civilization. It was the Reformation, an event attended by great violence, that laid the basis for the idea, not self-evident to true believers then or, I daresay, now, that different religions are equally legitimate, can flourish side by side and require the concept of freedom of expression. Civilizations that have not gone through something comparable to the Reformation—one thinks of the systems of public order in Latin America and Asia and not simply in Islam—have great difficulty even understanding the notion of freedom of religion and freedom of expression. Indeed, in certain parts of the world, freedom of religions, in the plural, is viewed as a contradiction in terms: allowing other faiths to proselytize your co-religionists is complicity in apostasy. As for sexual equality and sexual freedom, now so central to individual self-expression in our civilization, these values are viewed in other civilizations as the official installation of a policy of promiscuity and constitute a particularly pernicious form of evil, both corrupt and corrupting.

It is not simply that our civilization makes its commitment and practice of these values manifest and that their often extravagantly enlarged images are aggressively exported as part of the global commoditization of the goods and services we produce or sell. Nor is it only that a globalizing entertainment industry, under the constant imperative of efficiency, must try to operate in every possible market and, with its products, inevitably brings many of our values along. These are, after all, private efforts. The critical factor is that many of these values are also aggressively pressed by our governments and the international institutions they have established as *the* international legal standard. Having universalized the values of our civilization through the human rights treaties, we try to enforce them upon other states through the international and national institutions that have become the infrastructure of the international human rights system. Those parts of the planet in which these values are not being implemented are, by definition, deviant and backward and are targeted for development and social change and, at its most grandiose, "nation-building." While the words "development and social change" have a very positive resonance for us, because we imagine that they augur a greater and greater approximation of "universal" (read "our universal") standards, what they mean to many of those who are being targeted for "development" is a coercive dismantling of their own cultural system, "self-amputations of [their] own being," to use Marshall McLuhan's vivid expression.²⁷

27. MARSHALL MCLUHAN & QUENTIN FIORE, *WAR AND PEACE IN THE GLOBAL VILLAGE* 5 (1968).

McLuhan wrote:

All social changes are the effect of new technologies...on the order of our sensory lives. It is the shift in this order, altering the images that we make of ourselves and our world, that guarantees that every major technical innovation will so disturb our inner lives that wars necessarily result as misbegotten efforts to recover the old images.²⁸

The global conflict that we believe the attacks on September 11 initiated was already underway, though it had only manifested itself until then in episodic explosions far from our homeland: from Lebanon, to Jordan, to Kenya, to Tanzania, to the Sudan, to Saudi Arabia, to Yemen, to New York in an abortive attack on the World Trade Center in 1992 and, finally, with devastating effect, as strikes on the Twin Towers and the Pentagon. It is a misnomer to call it a "war on terror," as if the entire problem is that our adversary does not fight according to Marquis of Queensbury rules (a dimension of September 11 that is of particular interest to the international lawyer and which will be treated in a moment). It is an *internal* war about the modernization of the *dar al Islam*. Insofar as it is a clash of civilizations, it is one which we actively prosecute by the insistence and application of our values. We are the targets of one of the protagonists because we support the other and espouse values that are abhorrent to the other protagonist—the Fundamentalist conservatizers. While we may support modernizing elites in the Islamic world for programmatic political reasons, we press our values for ideological ones. And it is hard to see how we can stop without changing who we are and how we are organized, for while Islam historically allowed for zones of believers and zones of non-believers, our conception of human dignity is inherently universal and presses its exponents to project an demand values worldwide.

As for the Fundamentalist conservatizers, they are fighting a war they cannot win, for even Fundamentalist conservatizers may try to resist Westernization, but they must somehow modernize. Like it or not, populations increase and peoples migrate to ever larger cities, the cradle of modernization. Urbanization breaks down traditional society and modernization begins. In a global system, it is not possible to pick and choose your modernization. It is an inseparable package, a syndrome. But the very futility of the Fundamentalist conservatizers struggle may make it all the more violent.

III.

The image of an "arms race" suggests that there is a single linear

28. *Id.*

progression in the refinement and destructiveness of weapons and that, like competitors in a marathon, adversaries rush along that single line in order to get "the mostest" "firstest." The race between Nazi Germany at Pennemunde and the United States and the United Kingdom in their Manhattan Project to develop and operationalize a nuclear weapon was a classical arms race. The race between the then Soviet Union and the United States to improve their respective nuclear arsenals was also a classical arms race, as each side rushed to improve, qualitatively and quantitatively, the same weapon systems. Given the probable consequences of a nuclear war, it was fortunate that this particular arms race ended in a dead heat. Ultimately, each side accepted the principle of a parity that would preclude a first and effective use. Since parity is parity at whatever level, each side then tried to coordinate the reduction of their respective arsenals to lower and lower levels of parity.

There is, however, another competitive weapons relationship which is not linear but rather dialectical. When one side achieves and operationalizes a superior weapon, the other side, instead of trying to catch up along the same line of development, may resort to a different weapon or mode of warfare in order to counteract its adversary's advantage. The classical example of this is guerilla or irregular warfare, in which one side—let us say American colonists—abandons the formal battlefield where it is outclassed and would be defeated—by Imperial Britain—and resorts to an entirely different form of warfare. This produces what is now called "asymmetrical conflict."

"If you want peace," went the Roman admonition, "prepare for war." The theory behind the development and maintenance of a large arsenal is that it prevents conflict. If A is manifestly more powerful than B, B will not take A on. The political process will then adjust relations between the two to reflect the actual power balance without needing to resort to overt violence. This theory should also apply to the winner of an arms race. The theory is probably correct when neither party *has* to fight, but each is contemplating war as an option only to improve its position marginally and the prospect of loss is also acceptable because it too involves only marginal and tolerable adjustments. It is incorrect when one party believes that its self-preservation is at stake and it must fight. Then, in effect, the weaker party has no choice but to fight asymmetrically.

When a weaker party in that situation resorts to what amounts to forms of asymmetrical warfare, the stronger party says, in effect, "Hey! Fight fair!" Although it is said with full conviction and genuine indignation, it is essentially absurd, for wars are not duels on a field of honor. The issue in war—and especially in wars of self-defense—is not, if it ever was, "how you play the game" but "who wins." Since "fighting fair" means that the weaker party will lose, it would be quite surprising were the weaker party, engaged in a war of self-defense, to take the stronger's insistence on the proper way of fighting very seriously.

In a conventional conflict, superior armaments translate into an

externalization of one's own casualties onto the adversary. For a democratic state, such as the United States, which acts both in its own interest and as the ultimate actor in the maintenance of international order, a superior arsenal is urgent because the tolerance of the American public for casualties is not very elastic. The less urgent the popular perception of the need for war or, put differently, the more optional a particular war appears, the lower the public willingness to accept casualties in its own forces. Asymmetrical warfare reduces the advantages of superior armaments by redefining the arena of conflict to one in which the relevance and utility of the armaments are abridged. As a result the democratic public will be less inclined to participate in what it perceives to be an unnecessary asymmetrical war.

As long as the memory of September 11 remains vivid, we can expect a higher national tolerance for our own casualties. As the memory fades or is counter-balanced by new, fresher images of the collateral damage we are causing, public tolerance for our own casualties may decline. Ironically, it will then be the adversary's capacity and will to deliver further significant blows that will reestablish a high national tolerance for American casualties. This is, alas, a prescription for a long, nasty and inconclusive conflict.

In a curious way, our superior arsenal and our political capacity to apply it depend significantly for effectiveness and legitimacy on an international law of armed conflict that continues to criminalize the party that resorts to asymmetrical war. But that traditional stance of the law of armed conflict may be changing. And that may prove to be a problem for the United States.

The modern international law of armed conflict has two sources. "Hague law," so-called because most of it was concluded at The Hague, was concerned essentially with the rules about how to fight. "Geneva law," in contrast, was concerned essentially with the human rights issues in military conflict, which were expressed in a series of Conventions concluded in Geneva, most recently the four Geneva Conventions of 1949.²⁹ Some scholars believe that the two sources have now merged in what they call "Humanitarian Law," which incorporates both concerns and which expresses them in two Protocols Additional to the 1949 Geneva Conventions.³⁰

29. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T.S. 3316, 75 U.S.T. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

30. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Jan. 23, 1979, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Jan. 23, 1979, 1125 U.N.T.S. 609.

Hague law was concluded in the days of the great European Empires, all of whom thought in terms of weapons development in a linear progression and were engaged in arms races. The implicit ethic of Hague law is that conflict should be symmetrical and that an adversary that does not fight accordingly is not entitled to the protection of the laws of war. The Additional Protocols were negotiated in Geneva after decolonization. A majority of the states represented at the Diplomatic Conference were new, recently independent states whose common experience and shared foreign policy objective was decolonization and the legitimization of that historic movement. Accordingly, the Additional Protocols do not criminalize asymmetrical warfare; they permit one party engaged in what it calls a "war of national liberation" to fight asymmetrically while still benefiting from the protections available under the laws of war. Henceforth the *purpose* of an armed conflict rather than its *mode* of prosecution becomes a critical determinant of lawfulness and the key to who receives – and who is denied – the benefits of the law of war.

One need only look to popular perceptions of the current phase of the Israel-Palestine conflict to see how far the normative field has shifted. The law of war requires combatants to fight in uniform so that they can identify each other and avoid killing civilians. Palestinian youth do not wear uniforms – with predictable consequences. Yet many in Europe and North America sympathize with the Palestinian irregular and resent the uniformed Israeli soldier, precisely because of the apparent lack of symmetry. Children are not to be used as soldiers, yet Palestinian *shabab* are viewed as heroic and Israeli uniformed soldiers who fire upon them – and inevitably on other children – are viewed as child-killers.

The United States is party to the Geneva Conventions; it is not party to the Additional Protocols. But virtually all of the Non-aligned States are parties to the Additional Protocols. This means that there is now a big fault line in the international legal community over the lawfulness of fighting asymmetrically. The fault line manifested itself, most dramatically, in the chorus of criticism worldwide after the announcement of President Bush's policy that those detained in the Afghan conflict, though entitled to be treated "humanely"³¹ were not prisoners of war under the Geneva Conventions.³²

The United States is conducting the current Afghan campaign as an essentially symmetrical conflict. In Operation Anaconda, the adversary complied and *seemed* to be willing to engage us symmetrically. But it is obvious that the adversary's strategic approach will be asymmetrical. This will narrow the superiority of the American arsenal and sooner or later probably lead to greater American casualties. Insofar as the United States

31. Notice on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 67 Fed. Reg. 44751 (Nov. 13, 2001), 3(b).

32. White House, Office of the Press Secretary, Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), available at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>.

remains determined to prosecute the war against the adversary, it will perforce mean reestablishing the conflict as symmetrical by engaging in covert and overt-covert operations in many different countries in which the adversary has cells or operations.

How will these activities be appraised in international law? The Statute of the International Criminal Court will enter into force in three days.³³ Although the United States has indicated that it will not become party to the Rome Statute, it could be subject to the jurisdiction of the ICC. Will the ICC apply Hague or Geneva law to the operations of the United States? Will the criterion of lawfulness be mode or purpose?

IV.

How will the United States deal with an adversary whose soldiers continue to view themselves as actively engaged in war even after they have surrendered or been wounded and taken captive? Over the longer term, the United States might, if it prevails, as it did in Japan and Germany, engage in major social and psycho-social reconstruction. In Japan, the pathogen was clear and could be relatively cleanly resected. Much of the willingness to self-sacrifice was consciously and skillfully inculcated by the elite.³⁴ Kenzaburo Oë, the brilliant Japanese novelist who became an unofficial spokesman for what Japanese call the "mid-war generation" — those who came of age just before the war — relates a terrifying daily ritual that was designed to and must have profoundly influenced the formation of character and individual values.

[T]hroughout the war, a part of each day in every Japanese school was devoted to a terrible litany. The Ethics teacher would call the boys to the front of the class and demand of them one by one what they would do if the Emperor commanded them to die. Shaking with fright, the child would answer: "I would die, Sir, I would rip open my belly and die." Students passed the Imperial portrait with their eyes to the ground, afraid their eyeballs would explode if they looked His Imperial Majesty in the face.³⁵

But as a practical matter, in a worldwide conflict, the strategy of securing total control of an adversary and then transforming, from above, those parts of the political culture that are deemed to be internationally noxious seems grandiose to the point of megalomania. We can, nonetheless, try to encourage such changes within those states that are, in

33. Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9*, 38 I.L.M. 999 (1998).

34. *But see* KLAUS SCHERER, *TODESBEFEHL FÜR JAPANS JUGEND: UBERLEBENDE BERICHTEN* (2001).

35. J. Nathan, *Translator's Note*, in KENZABURO OË, *A PERSONAL MATTER* viii (1968). For a moving depiction of a child's life at the time of Japan's surrender, *see* Kenzaburo Oë, *The Day the Emperor Spoke in a Human Voice*, N.Y. TIMES, May 7, 1995, §6 (Magazine) at 103.

effect, nurseries for the preparation of our adversary's cadres. To an extent, that is a strategy that is being pursued, even now, insofar as the situation allows. The Madrassas in Pakistan that have preached the militant Jihadism of the Deobandi branch of Sunni Islam, which were effectively supported by the Pakistani government, are now targeted. Moslem clerics in different parts of the *dar al-Islam* have convened or been convened to denounce militant jihadism as an aberration and an apostasy. But the strategy is infinitely more difficult to pursue in the current context than it was in a Japan and Germany that accepted unconditional surrender and is further aggravated by the anger in the Islamic world over the failure to find and implement a just solution to the Palestinian problem.

Even assuming that long term achievements on this order are possible, the short-term problem persists: how to deal with soldiers who have been captured. Since the Declaration of St. Petersburg of 1868, the more modern and industrial states have tried to confine the violence inherent in armed conflict by declaring that non-combatants are always illicit targets and that combatants who have been wounded or surrendered become *hors de combat*, "out of combat" or "out of commission" and from that moment are no longer licit targets. Such combatants may be detained as prisoners of war and beneficiaries of an international protective regime until the end of the conflict, at which point they are to be repatriated. But consider the problem of the adversary who is so committed to your destruction that having exhausted his ammunition and supplies and having surrendered, he still continues to wait and plan for an opportunity to kill you. The Geneva Conventions of 1949 and, particularly, Convention No. 3 and the First Protocol Additional to the Geneva Convention do not seem to fit that type of adversary or that type of conflict.

Enlightened penal theory is based on a general community interest in the rehabilitation of convicted criminals so that they can reenter society where they will become productive members rather than continue to be its parasitic burdens or threats to its law-abiding members. But is it appropriate to "rehabilitate" prisoners of war or, as President Bush prefers to call them, detainees? Is it possible? According to the values of which society should the prisoners be rehabilitated? When others have tried to "rehabilitate" our captured soldiers, we call it "brain-washing." If the prisoner is not rehabilitated and continues to seek to destroy you, can that prisoner be responsibly released? If the prisoner is not released, how long will he be held? The usual moment of repatriation, the end of the conflict, may not be realistic, if the individual soldier remains committed to your destruction, if need be by his suicide. Two centuries ago, Napoleon's adversaries could banish him to a distant island. That is no longer feasible. What will be the legal basis of indefinite confinement now? What laws will govern it? Who will supervise it?

V.

During the Cold War, every place in the globe acquired a geostrategic value and had to be secured, lest the enemy take it over and change the power balance. Because neither the United States nor the Soviet Union had the resources to control every inch of their respective spheres, each relied on proxies who did their bidding and, as a result, received their support. Despite the apparent ideological basis of the conflict, each side found itself supporting and, in effect, sustaining in power, local leaders who were glaringly incompatible with the political values that each side espoused as justifying the conflict. The locus classicus was Franklin D. Roosevelt's response to a remark about how awful Nicaragua's dictator, Somoza, was. "He may be an SOB," Roosevelt riposted, "but he's our SOB."

The advantages of inclusive action include greater authority and a larger amalgamation of resources. So hard on the heels of September 11, the United States began to build a coalition which had to be as extensive as the network of the adversary. The frequently repeated expression that in this struggle "you are either with us or against us" concealed the fact that the United States desperately needēd some states more than others, even if their commitment to combating our definition of terrorism was not beyond doubt.

The United States finds that certain states are indispensable to the coalition, while others are of more marginal importance. Pakistan, for example, is central to our strategy. Prior to September 11, the United States held the Pakistani dictator, Parviz Musharraf, at arm's length, as our policy is to support democratic government, while General Musharraf came to power by military *putsch*. After September 11, we embraced Musharraf—now "President Musharraf"—because of Pakistan's geostrategic position in the war against al Qaeda. But there is substantial support in Pakistan for Taliban and for al Qaeda, so too much insistence upon an internal war against fundamentalism in Pakistan might unseat President Musharraf and bring to power a Taliban government, this time controlling a major state with, moreover, a nuclear arsenal. Hence, tactical options with respect to Pakistan must be moderated in order not to compromise larger strategic goals. Nor is it only Pakistan. Prior to September 11, the United States was critical of the brutal campaign that Russia was conducting in Chechnya. After September 11, the criticism was substantially muted, because Russia's support in our war against Al Qaeda was deemed indispensable. Prior to September 11, comparable criticism was directed at China for its treatment of Moslems in Sinkiang Province. It, too, was muted after September 11. There are many other examples of a complex reality requiring that strategy be modulated or adjusted.

During the Cold War, a comparable imperative forced the United States to range itself against the forces of social change in much of Central and Latin America, for fear that the new governments might align themselves with the Soviet Union. Local elites, like Somoza, were able to

drape themselves in the mantle of anti-communism and, thus, to recruit the United States to support their suppression of all demands for social change within their own countries. The result was a deferred explosion. Will the current war put us in the same contradictory position?

VI.

We are engaged in a war with a contending system of public order, but this is not a war between Christianity and Islam. That is precisely the characterization which our adversary would like to have put upon it, for it would facilitate the mobilization of more and more people in the Islamic world. It is a war between different Islamic factions within the Islamic world about whether the Islamic world will become incorporated into the globalizing science-based civilization. President Bush and his advisors have skillfully and largely successfully been able to recruit Islamic leaders within the West, many of whom share his concern and understand the true nature of this conflict. In order to do this, however, President Bush has been obliged, like many of the modernizing elite in Islamic countries, to adopt some of the language of Islamic piety. In my view this is a misguided strategy. The function of international law has historically been to mediate between different civilizations, religions and cultures. Whatever its origins, it has become a transcultural secular dialect. Pretending that it also includes some of the dialect and ideas of different religious systems only acts to undermine the vital function of international law as a secular and mediating force in a multi-cultured world.³⁶

VII.

I would like to conclude this lecture with a brief reminiscence of Adda Bozeman. Like many beginning scholars in my generation, I had studied Adda's "Politics and Culture in International History."³⁷ Her book, "The Future of Law in a Multicultural World"³⁸ troubled me when I read it, though I have since come to conclude that it is a profound meditation on the limits of law in the international system. I admired her "Conflict in Africa"³⁹ for her courage and her willingness to immerse herself in other cultures in order to test the validity of the claim of universality of Western concepts and values and their ready applicability to other societies.

I met Adda in the mid-1970s and we exchanged publications after that. Shortly before she died, she sent me her autobiographical essay "The

36. See Bernard H. Oxman & W. Michael Reisman, *International Decision, Maritime Delimitation between Opposite States*, 94 AM. J. INT'L L. 721, 728-29 (2000) (describing "general international law" as a "secular corpus juris" whose function is to "provide a common standard" and "to play a mediating role between states with different cultures, legal systems, and belief systems.")

37. ADDA B. BOZEMAN, *POLITICS AND CULTURE IN INTERNATIONAL HISTORY* (1960).

38. ADDA B. BOZEMAN, *THE FUTURE OF LAW IN A MULTICULTURED WORLD* (1971).

39. ADDA B. BOZEMAN, *CONFLICT IN AFRICA: CONCEPTS AND REALITIES* (1976).

Interplay of World and Mind,"⁴⁰ with a very kind inscription. In that essay, she reviewed her fascinating life and expressed her intellectual credo. She wrote of,

[M]y belief in the primacy of mind over matter; the co-existence of diverse cultures and mind systems in the world, and the necessity therefore of accentuating the study of ideas and ways of thinking rather than that of economic factors. Singly and collectively, they also reinforced my distrust of claims for the universal validity of one set of social laws, political ideals or ethical norms⁴¹

I regret that Adda was not here to help us reflect, in precisely those terms, upon the implications of September 11, and I hope that the remarks today are understood as in her spirit.

40. Bozeman, *supra* note 11.

41. *Id.* at 462.