
Multilateralism and Its Discontents

José E. Alvarez*

Abstract

The contributions by Gerson and Anderson in the previous issue of EJIL suggest that multilateralism's critics are not merely hard-headed political realists but include both ends of the political spectrum and a wide number of scholars emerging within the international legal academy — including critical legal scholars, feminists, constructivists, liberal theorists, public choice theorists and those within law and economics. International lawyers, who have for too long defined themselves by our opposition to unilateralism, need to define the role and limits of multilateralism as well as of unilateralism. Both multilateral and unilateral processes for law-making and law enforcement may harm mankind and undermine the rule of law. Both Gerson and Anderson are, in radically different ways, warning us against multilateralism that fails to develop an organic relationship between the international and the domestic.

Most of the contributors in this and the last issue of the *EJIL* have ably, even convincingly, denounced unilateralism. Repeatedly, we have put unilateral action, especially that undertaken by the United States, in the dock and convicted such action as an offence to the international legal order. Although we did not manage to define 'unilateralism' coherently or consistently, most of us have long defined ourselves as its opponents and we continue to do so. Allan Gerson and Kenneth Anderson did not follow this script. Discussing the United States' stance on financing the UN, Gerson had the temerity to suggest, albeit indirectly, that international legality – in terms of conformity with the UN Charter — was not the final arbiter of legitimacy. Anderson, discussing the Landmines Convention, attacked another sacred icon, the concept of 'international civil society'. Both seemed inclined to put multilateralism in the dock.

The adverse, even emotional, reactions to Gerson's and Anderson's papers¹ tell us much about the internationalist project and about international lawyers' blind spots. Why do Gerson's and Anderson's views, reminiscent of those expounded by realists for decades, make us so defensive?

* Professor of Law, Columbia Law School. Some of these remarks are adapted from the author's presentation 'The United States Financial Veto' printed in *American Society of International Law, Proceedings of the 90th Annual Meeting, 27–30 March, 1996* (1997) 319.

¹ See papers by Cardenas and Hathaway respectively.

International lawyers share an appealing evangelistic, even messianic, agenda. We are on a mission to improve the human condition. For many, perhaps most of us, this mission requires preferring the international ‘over the national, integration over sovereignty’.² Multilateralism is our shared secular religion. Despite all of our disappointments with its functioning, we still worship at the shrine of global institutions like the UN. As Martti Koskenniemi suggested some time ago, as a group, international lawyers tend to see ourselves as ‘among the avant-garde of liberal modernity — against conservative nationalism, sovereignty and power politics’.³ By putting multilateralism in the dock, Anderson and Gerson were implicitly challenging the notion that bettering the lot of humankind requires expanding the competence and enforcement powers of international institutions. We were offended by the suggestion that we need to re-examine the idea that multilateral approaches, preferably accompanied by institutionalized dispute settlement, are the most enlightened responses to modern dilemmas. We were distressed by the suggestion that we have allowed our evolutionary aspirations and logic to colour our capacity for critical thinking. Like Susan Marks, Gerson and Anderson were criticizing us for acting as if we, the enlightened international elite, know what the ‘end of history’ portends: namely, internationalist institutions responsive to the functionalist needs of the global polity.⁴

The very title of the conference suggests that the burden is on unilateralism to prove its worth. Predictably, most of the papers examine the legality or wisdom of particular (often US) unilateral responses; few ask whether anything other than a unilateral response is actually needed. Gerson and, most especially Anderson, suggest, by contrast, that the burden of proof should be on those responsible for the proliferation of multilateral treaties, regimes and institutions, including some 55 international or regional entities devoted to dispute settlement alone.⁵ Gerson and Anderson force those of us still engaged in the internationalist project to consider what we have wrought in its name. The grains of truth contained in their analyses force us to re-examine our instinctive tendency to criticize unilateral responses simply because these appear to run counter to our professional commitment to further what Bruno Simma has called our global ‘community interest’.⁶

1 Sovereignty Lives: A Reality Check

Gerson’s at times farcical attempts to justify the United States’ *de facto* financial veto over the UN as consistent with the UN Charter is an apt reminder that notwithstanding Louis Henkin’s eloquent attempts to banish the term, ‘sovereignty’ remains the

² Koskenniemi, ‘International Law in a Post-Realist Era’, 16 (1995) *AYBIL* 1, at 1.

³ *Ibid.*

⁴ See Marks, ‘The End of History? Reflections on Some International Legal Theses’, 8 *EJIL* (1997) 449 (criticizing ‘liberal millenarianism’).

⁵ For a list of existing international dispute settlement bodies, including both judicial and quasi-judicial venues, see supplement to 31 *NYUJL* and Pol. No. 4.

⁶ See Simma, ‘From Bilateralism to Community Interest in International Law’, 250 *RdC* (1994, VI) 217.

single most important international institution in existence. Gerson's enumerations of the US Congress's frustrations with the organization is a telling demonstration of a central paradox of our age — one not restricted to the United States — namely that the search for political, military or economic security through transnational institutions to which we transfer competences previously reserved to national institutions generates powerful insecurities and anxieties, even among the leaders of the most powerful nation on earth. The UN financing debate indicates that individuals weaned on more or less transparent democratic institutions are ambivalent or even hostile about being dependent on processes that are perceived to be beyond the influence of domestic political communities.⁷

At the same time, the United States' continued hold over the UN, exercised by financial blackmail as well as by its domination of all aspects of the organization,⁸ reminds us that the so-called 'retreat' or 'demise' of the state has been vastly overstated. It is not merely that many international regulatory attempts can be deconstructed as instruments to enhance state power; it is also that many of these regulatory attempts have generated or encouraged powerful social countercurrents against neo-liberal globalization and in favour of national control or sub-national subsidiarity, including sometimes ugly particularistic appeals to ethnicity. Both UN and business elites now fear, as Richard Falk has noted, 'backlash threats ranging from extremist religions, micro-nationalisms, and neo-fascist political movements'.⁹ The US Congress's shortsighted attempts to penalize profligacy is only one indication that, if there is such a thing as a 'natural direction of history', there is at present no evident steady progression towards greater international legal harmonization or global governance. On the contrary, the very multilateral institutions usually cited as evidence of such a historical progression often engender powerful counter or decentralizing pressures. To state the most obvious political example: the United Nations, intended to institutionalize an effective collective security system, has become the greatest state-producing device in the history of the world. Even now, with decolonization concluded, that organization's charter — especially through its troublesome concept of 'self determination' — is helping to legitimize and encourage the emergence of other states through the break-up of existing ones.

The US Congress's dissatisfactions with the UN also remind us that our most ambitious multilateral projects have repeatedly failed to fulfil the political, economic or social goals assigned to them. The UN collective security system, designed in the wake of the Holocaust, has prevented neither intrastate disputes nor repeated mass atrocities. In the economic realm, free trade/free market forces (including their institutionalized components such as the WTO, NAFTA, and the international financial institutions) have reinforced ethnic self-identification while failing to ameliorate either the gap between rich and poor nations or the gap between rich and poor within nations.

⁷ See Reisman, 'Designing and Managing the Future of the State', 8 *EJIL* 409, at 412 (1997).

⁸ On the latter, see Cardenas, 'UN Financing: Some Reflections', 11 *EJIL* 67.

⁹ Falk, 'World Prisms', *Harvard International Review* (Summer 1999) 30, at 34.

But multilateralism's critics are not merely hard-headed political realists. Developments within the legal academy – within the epistemic community of international legal academics — are undermining confidence in and expectations for the international. The lessening gap between international and domestic legal developments has facilitated academic cross-fertilization. Critical legal scholars as well as other 'new streamers' (including feminists and critical race scholars) have emerged to challenge traditional verities. International lawyers like Martti Koskenniemi question whether the international is the avant-garde of progressive modernity or more like the 'arrière-garde, defending a totalizing uniformity against the pluralism of human experience'.¹⁰ Koskenniemi argues for a 'post realist' sensibility 'that is as alien to suggestions about developing public structures of global "governance" as it is about leaving the "international" as a playing field of market forces'.¹¹ Koskenniemi demands that international lawyers acknowledge that even their so-called objective international legal concepts reflect highly idiosyncratic, political positions. Like Anderson, he argues that international lawyers need to get beyond the traditional dichotomy between Kantian universalism or other types of universalizing rhetoric to give equal time to local, partial and subjective perspectives. Both are suggesting that international lawyers' prescriptions acknowledge complexity much more than they have — calling for international interventionism only when truly necessary, advocating absence of control and free markets only when these best further the betterment of humankind, or striving for national control only when this alternative is best.

Other types of 'crits' have added fuel to the fire and put formerly favoured institutions, including the United Nations, under scrutiny. Feminists have forced us to acknowledge that peacekeepers can rape, that the humanitarian law applied by international war crimes tribunals is gendered, and that even the UN Secretariat can engage in sexual harassment and discrimination.¹² Race crits are beginning to address how 'racist particularisms masquerading as national interest' affect foreign relations, help explain the deference accorded to the (US) executive on such issues (as by national courts), and account for differing perceptions concerning international engagements among distinct domestic audiences.¹³ The categories of race, ethnicity and gender are now being used to 'problematize' both domestic and foreign affairs,

¹⁰ Koskenniemi, *supra* note 2, at 18.

¹¹ *Ibid.*

¹² See Chesterman, 'Never Again . . . and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond', 22 *Yale Journal of International Law* (1997) 299; Ray, 'The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries', 46 *American University Law Review* (1997) 793; Panel on 'Women and the United Nations', in *American Society of International Law, Proceedings of the 90th Annual Meeting, Mar. 27–30, 1996* (1996) 445.

¹³ See Gott, 'A Tale of New Precedents: Japanese American Internment as Foreign Affairs Law', 19 *Boston College Third World Law Journal* 179, at 262 (1998).

and the results have not always been favourable to liberal international institutions.¹⁴ Such perspectives, as well as other forms of 'instrumentalist multiculturalism',¹⁵ may be inspired by contemporaneous developments in political science, especially the rise of the 'constructivist school' which regards the identities of states (and hence of intergovernmental organizations) as historically, culturally, politically and socially determined.¹⁶ Further, these critiques are not limited to elite academics of the West but are echoed and reinforced by those sceptical of US hegemony. To critics like Serge Sur, the choice between US unilateralism and liberal internationalism is fundamentally false as both are dominated by the sole remaining superpower.¹⁷

Nor is the critique of multilateralism limited to those on the left of the political spectrum. Those who defend liberal democratic governance, such as Anne-Marie Slaughter, point to alternatives to both internationalist institutions and old-fashioned interstate diplomacy, suggesting, for example, that transnational networks of domestic actors, both governmental and private (such as central bankers, parliamentarians, insurance brokers or shippers), may accomplish more, more simply than international civil servants.¹⁸ Others have suggested regionalism or even emerging forms of cooperation among 'world cities' as rivals for both 'Utopian globalism and outmoded statism'.¹⁹ For their part, public choice theorists, accustomed to examining 'rent-seeking' behaviour within national legislative politics, are increasingly willing to cast their net wider to examine comparable behaviour at the international level. Anderson is not alone in asking impertinent questions about whether all those human

¹⁴ For examples of race or ethnic-sensitive critiques of international affairs, see Symposium, 'International Law, Human Rights, and LatCrit Theory', 28 *University of Miami Inter-American Law Review* (1997) (criticizing, among other things, the NAFTA); Richardson, 'Gulf Crisis and African-American Interests under International Law', 87 *AJIL* (1993) 42 (discussing African-American perspectives on US foreign relations); Gott, *ibid.* (using the Supreme Court's treatment of the internment of Japanese-Americans to mount a 'race theory critical theory of foreign affairs'); Gordon, 'United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond', 15 *Michigan Journal of International Law* (1994) 519 (criticizing UN interventions in 'failed states'). See also Chua, 'Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development', 108 *Yale Law Journal* (1998) 1 (analysing the ethnic backlash prompted by the free market and its institutions). Critical race scholars have also, to be sure, used international law to mount racial critiques of national laws. See Hernandez-Truyol and Johns, 'Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform"', 71 *Southern California Law Review* (1998) 547.

¹⁵ See Hom, 'International Law Moves in a Cross-Discipline Register', *Proceedings of the 92nd Annual Meeting, American Society of International Law, 1-4 April, 1998*, 9 (1998) at 104-105 (positing critical multiculturalism as an alternative to the vision of legal educators as 'instrumentalist handmaidens of a transnational corporate order').

¹⁶ For discussion of the possible connection between critical race critiques and constructivism, see , Gott, *supra* note 13, at 263.

¹⁷ See Sur, 'The State between Fragmentation and Globalization', 9 *EJIL* 421 (1997).

¹⁸ See Slaughter, 'The Real New World Order', *Foreign Affairs* 183 (September/October 1997).

¹⁹ See Falk, *supra* note 9. Falk also argues that 'coalition diplomacy' under the aegis of regional organizations such as NATO may be a new alternative to traditional UN blue helmets. *Ibid.*, at 31-32. See also Wren, 'UN Troops Have Shifting Role and Strategy in Enforcing Peace', *New York Times*, 3 October 1999 at A19 (suggesting that the UN strategy for dealing with recent regional conflicts, relying on NATO in Kosovo and the Australians in East Timor, shows a significant shift in the organization's approach to peace enforcement).

rights and environmental NGOs are accountable and if so, to whom.²⁰ Finally, those who speak the language of law and economics are beginning to challenge the utility of international organizations on the grounds of efficiency. Thus, Jeffrey L. Dunoff and Joel P. Trachtman have called for re-examining the powers and competences of international organizations in light of the insight that ‘government services should be provided by the smallest jurisdiction that encompasses the geographical expanse of the benefits and costs associated with the service’.²¹ Dunoff and Trachtman argue that this internalization of costs permits the tailoring of services in accordance with local preferences and conditions, thereby increasing social welfare.²² More generally, the law and economics view of the world, grounded in consumer sovereignty or ‘methodological individualism’, rejects the narrow state-centric choices between unilateralism and multilateralism.²³

Whether or not one agrees with these critiques from the left and right, it is clear that what we call ‘multilateral’ responses today remain very much the creatures of what was politically feasible at the end of World War II. Even advocates of ‘community interest’ acknowledge that the UN is in the end a treaty institutionalizing an alliance of the victors of World War II as well as the world’s ‘embryonic constitution’.²⁴ As a result, as Chazournes’ contribution to this issue reminds us, even multilateral organizations, including the UN, the international financial institutions and NGOs, can act ‘unilaterally’ in the sense that what is done in the name of the collective may serve, primarily or exclusively, the interests of a hegemonic state or a group of states and not the real interests of the ‘community’ (always assuming we can identify what these interests are). Even assuming that we agree with Bruno Simma’s goal-oriented definition of the ‘community interest’ (as one characterized by the pursuit of the needs of human beings as a whole and not the idiosyncratic interests of particular governments),²⁵ there is no guarantee that multilateralization secures the advance of the community’s interest in this sense. Acting globally provides no assurance of

²⁰ See Spiro, ‘The New Global Potentates: Nongovernmental Organizations and the “Unregulated” Marketplace’, 18 *Cardozo Law Review* (1996) 957; Benvenisti, ‘Exit and Voice in the Age of Globalization’, 98 *Michigan Law Review* (1999) 501. At the same time, the literature critical of international organizations’ lack of accountability and transparency continues unabated, as do proposals for ‘democratic’ reforms. See ‘A Test Case for the World Bank’, 11 *American University Journal of International Law and Policy* (1996) (discussing the World Bank’s inspection panel and the attendant problems it poses for that institution); Rosman, ‘Public Participation in International Pesticide Regulation: When the Codex Commission Decides, Who Will Listen?’, 12 *Virginia Environmental Law Journal* (1993) 329 (advocating greater public participation in international pesticide regulation); Wirth, ‘Reexamining Decision-making Processes in International Environmental Law’, 79 *Iowa Law Review* (1994) 769 (advocating expanded participation in multilateral intergovernmental processes directed at environmental regulation); Gordon, *supra* note 14, at 581–587 (proposing reforms for a ‘more democratic’ Security Council).

²¹ Dunoff and Trachtman, ‘Economic Analysis of International Law’, 24 *Yale Journal of International Law* (1999) 53.

²² *Ibid.*

²³ *Ibid.*, at 10–11.

²⁴ Simma, *supra* note 6, at 258.

²⁵ *Ibid.* at 233.

international benefit. As Christine Chinkin indicated in her contribution to the last issue of this journal, neither the growing tendency for IO organs to act on the basis of consensus nor the absence of a veto on the Security Council ensures the realization of 'community interests'.

Another familiar pillar of the internationalist sensibility, that the effective realization of human rights rests on international procedures and institutions, is open to question, or at least qualification. While it is undeniable that giving effect to human rights requires at least some international scrutiny since governments guilty of human rights violations are not likely to police themselves, the realization of human rights does not rest on international courts or other modes of international dispute settlement. Despite the proliferation of international tribunals, the efficacy of most rights enjoyed by most individuals, from the economic to the civil and political, continues to rest on local institutions. Even within Europe, despite the undoubted effectiveness of the European Court of Human Rights, local courts, local police, local civil rights organizations, and local press remain the primary vehicles for the effectuation of rights. It is also evident that local institutions, including local courts, are increasingly the venue for the enforcement of international rights. Despite the proliferation of international human rights forums (and perhaps partly because of them), the likelihood that international rights will be enforced by local courts has increased. In any case, the leading international legal instruments that we have, from the Genocide Convention to the International Covenant on Civil and Political Rights, rely on enforcement by local institutions to make the underlying rights real. And even the most powerful supranational institution yet created — the institutions of the European Community — continue to rely on the continuing cooperation of national judges to give effect to Community rights.²⁶

The tendency to stress the virtues of multilateral solutions, narrowly understood to mean liberal institutions on the model of the UN, artificially restricts the range of available prescriptions for modern human rights dilemmas. While it is undoubtedly true that those guilty of war crimes or genocide have historically not been brought to justice within their own national judicial systems, the current obsession with international criminal accountability, shown by the inclination to replicate international tribunals on the model of the ICTR and ICTY, shows a regrettable tendency to cast the issue in an either/or fashion: either an international criminal trial with the full panoplies of international justice or nothing at all. Today, in the wake of the creation of two ad hoc war crimes tribunals by the Security Council and the conclusion of a treaty for an international criminal court, international lawyers seem to be engaged in a familiar exercise of international institution-building while neglecting other methods for promoting accountability, particularly those involving

²⁶ For the classic delineation of this argument, see Weiler, 'The Transformation of Europe', 100 *Yale Law Journal* (1991) 2403.

local institutions or other domestic actors.²⁷ Although rhetorically in these instances we proclaim the need to strengthen the ‘national rule of law’, we rarely take that command seriously enough to defend ‘unilateral’ approaches that might enhance national institutions, even when these may better achieve the ends we ostensibly want.²⁸

Thus, faced with complex situations such as the need to promote accountability for Khmer Rouge era atrocities within Cambodia, a UN expert body recently concluded that since the Cambodian courts were not up to the task, an international tribunal, along the models of the ICTY and ICTR, was needed. Predictably, the government of Hun Sen regarded the suggestion as an affront to Cambodian sovereignty and suggested alternatives, including a South African-style truth commission and a mixed international/national tribunal that would be located in and would genuinely be a part of the existing Cambodian judicial system. To date, the situation has resulted in a stalemate between the Cambodian regime and the UN. As William Schabas has noted, the present stalemate is the product of international lawyers’ bias towards international tribunals and the ‘Cadillac model’ of justice.²⁹ As Schabas indicates, until the Sen government forced the issue, the possibility of using this opportunity to improve the ramshackle judicial system within Cambodia was not given serious consideration; nor was the possibility that such local trials would surely have considerable more resonance within Cambodian society.³⁰

The UN experts’ recommendations for Cambodia ignore lessons from the last time we attempted a comparable internationalist solution. In Rwanda too international lawyers rushed to embrace international trials for the highest level perpetrators. UN members, especially the United States, pushed for trials conducted in a foreign language, by foreign ‘experts’, and in a foreign country that would, at the option of international prosecutors, pre-empt national forms of accountability. High profile international indictments and trials secured most of the attention (and virtually all of the foreign aid funds) — at the expense of national courts and other institutions in the nation where the atrocities occurred. The pursuit of necessarily selective international justice — four expensive trials in as many years by a tribunal whose annual tab now

²⁷ See Antonio Cassese (advancing a variety of reasons for preferring international forms of accountability). For a critique of why the ICC’s concept of ‘complementarity’ may not signal a change from this preference, see Alvarez, ‘Crimes of States/Crimes of Hate: Lessons from Rwanda’, 24 *Yale Journal of International Law* 365 (1999) 476–479.

²⁸ Thus, to take but one prominent example, while the Security Council in the wake of the Rwandan genocide recognized ‘the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects’, the resolution containing these words established an international tribunal (with jurisdictional primacy over national courts) that has managed to absorb most of the intellectual and material capital that could have gone to Rwandan institutions. SC Resolution 955, UN SCOR, 49th year, 3453d mtg, at 1, UN Doc. S/RES/955 (1994) and see Alvarez, *ibid.*

²⁹ Schabas, ‘Looking for Justice’, *National Post*, 23 September 1999.

³⁰ *Ibid.* The Report of the Group of Experts for Cambodia is contained in UN Doc. A/53/850, S/1999/231, 16 March 1999.

exceeds \$50 million — has taken precedence over stemming ongoing violence or bringing the rule of law within reach of the average Rwandan.

The results should give us pause. The many thousands of Rwandans accused of complicity in the genocide of 1994 being detained in overcrowded local jails have little prospect of seeing either a national or an international courtroom. The post-genocidal regime in Rwanda, controlled by the intended targets of the *genocidaires*, is now hardened by years of periodic outbursts of violence that neither it nor the international community seems inclined to control. That government no longer seems as committed as it once was to devoting scarce resources to individual trials and seems more inclined to warehouse the over 100,000 accused without benefit of trial or even formal indictments. The clearest alternative available — release to almost certain retaliatory bloodshed — seems equally undesirable. Even so, the dozens of local trials and subsequent executions that have managed to take place within Rwanda since 1994 have generated far more attention within the country than the remote justice being dispensed by the ICTR. In any case, the ICTR's version of justice is, at least from a Rwandan perspective, seriously compromised since the message that tribunal conveys is that the more culpable governmental elites — defendants like the former Prime Minister responsible for the deaths of thousands — are entitled to all the benefits of international due process and serve their terms in comparatively comfortable prisons made available by UN member states like the Netherlands, while those responsible for lesser crimes, beneath the notice of the ICTR, get (at best) expedited local justice and perhaps the death penalty.³¹

International accountability, ostensibly undertaken on Rwanda's behalf, has fallen far short of the promises of Nuremberg. The anomalies of international versus domestic punishment subvert the prospects for effective deterrence. The selectivity of international trials undermines the credibility of the collective memory that is judicially preserved as well as the possibility of rehabilitation or vindication of victims. Since only a negligible number of victims have been able to tell their stories or to pursue vindication in the ICTR, a true record of the pervasive victimization and complicity that characterized the Rwandan genocide remains unrecorded, while valuable evidence and witnesses vanish by the day. It is equally tough to affirm faith in the national or international rule of law or to promote national reconciliation in an environment where ongoing attempts to pursue the genocide continue, as well as predictable attempts at vengeance. There is understandable reluctance to testify before a foreign tribunal incapable of accordng real witness protection and lingering distrust of judges who come from the same nations that permitted the genocide to occur. The ICTR's trials, conducted without jury or judges from the regions torn by ethnic conflict, lack representative legitimacy. Given the fate of racially charged cases handled by white juries and judges in the United States, why are we surprised if a Hutu should be sceptical of a judicial bench that excludes those from his or her own ethnic group? Is that any more of a surprise than Rwandans' resentment of an international prosecutor's insistence that the international community has the 'right' to try the

³¹ For a fuller critique of the ICTR along the lines suggested here, see Alvarez, *supra* note 27.

highest level perpetrators of the Rwandan genocide? Should we be surprised that Rwandans are not appropriately grateful for the international community's efforts on their behalf and instead appear ill-disposed towards that community's representative, Kofi Annan?³²

As initially occurred with respect to Cambodia, UN members ignored requests by Rwanda's new leaders back in 1994 at the end of the genocide when they sought international assistance to create a tribunal within Rwanda capable of conducting joint national/international trials, for both high level and other perpetrators, involving both Rwandan and international judges, and capable of imposing the death penalty on the most culpable. It did not cross the minds of most members of the Security Council that the poor survivors of arguably the worst genocide in the post Cold War period ought to have a say in how their genocidaires should be judged — or that what the Rwandans were demanding was remarkably similar to what was ultimately done by World War II's victors. Instead, the semi-religious crusade on behalf of international agendas, as for international courts and an end to the death penalty through international legislation, displaced the rightful claims of the victims of atrocity.

The case of Rwanda warns us against top-down, condescending approaches to accountability that fail to resonate locally and only serve to appease Western consciences. Among the lessons of Rwanda are that multilateral solutions can raise issues of fairness and equity — as do unilateral responses. Rwanda should also remind us that multilateral responses and the effort to create them can serve to take attention away from more locally responsive alternatives, including joint international/national trials with genuine local participation. Our commitment to internationalism should not blind us to the fact that in places like Cambodia, as in our own society, criminal justice might best be furthered when those doing the judging are accountable to and representative of local communities.

But the cases of Cambodia and Rwanda (and perhaps Kosovo and now East Timor) share another characteristic: in these instances the international community failed to prevent largely preventable and predictable atrocities due to a failure of collective will. In all these instances, the failure to prevent the underlying atrocities casts a deep shadow over subsequent efforts to enforce accountability. It is difficult, if not impossible, to mount credible prosecution efforts amidst ongoing atrocities or where ethnic antagonists return from testifying in court to communities where they face real prospects of retaliation.³³

More generally, the failure to enforce norms of international law, especially those of such import as the prohibition on genocide, is the multilateralists' Achilles heel. All too often, multilateral enforcement of international norms has not emerged, even by

³² See McKinley, Jr., 'Annan Given Cold Shoulder by Officials in Rwanda', *New York Times*, 8 May 1998, at A9. See also Gourevitch, *We Wish to Inform You that Tomorrow We Will Be Killed with Our Families* (1998) 336–338.

³³ See Lawyers Committee for Human Rights, *Prosecuting Genocide in Rwanda* (1997) 45–46 (noting the ICTR's difficulties in according witness protection and noting that in the first month and a half of 1997 alone, 54 genocide survivors or people linked to them had been killed).

the unrepresentative, unaccountable Security Council. In the wake of such failures, unilateral implementation or enforcement measures have often been used to enforce international norms, the most recent being NATO's bombing of Kosovo.³⁴ In Kosovo particularly the chasm between the interests of human beings (at least those within Kosovo itself) and existing multilateral norms and institutions opened wide — as is suggested by the discomfort among international lawyers prompted by NATO's actions.³⁵

2 Searching for a Bottom Line

The question — is unilateralism or multilateralism a good thing? — cannot be answered in the abstract. It depends — and not always on whether existing international rules sanction the unilateral response or permit the ostensible multilateral action. Some multilateral responses, fully sanctioned by the law, may not be wise, may cause untoward suffering for large numbers of human beings, or may serve to undermine the rule of law itself. One does not have to be a friend of Libya or of Iraq to question the fairness or equitable nature of the Security Council's sanctions in the Lockerbie case or its post-Gulf War's appropriation of the power to determine Iraq's boundaries or that country's security needs. Certainly those Council actions highlighted the Council's legitimacy flaws, including its lack of transparency, representativeness, and checks/balances, while according multilateral blessing to harsh measures that hurt thousands of innocent people. On the other hand, some unilateral responses, as most recently the United States' and its allies' actions in Kosovo, may be needed, even if illegal. Yet, other action, such as the United States' refusal to sign the ICC and Landmines Conventions, may be perfectly legal but imprudent — unless one believes, in the ICC case, that the United States' decision is a principled attempt to protect non-party rights under traditional Vienna Convention rules, or in the case of landmines that US abstention is vital to its legitimate security interests. Yet another set of unilateral actions, such as the Europeans' refusal to follow through with WTO panel decisions or the United States' refusal to pay its UN dues, seem both illegal and imprudent by any measure.

But the nuggets of insight contained in Gerson's and Anderson's respective papers do not obligate me to agree with their conclusions. Contrary to what Gerson suggests, there can be cases of egregious unilateralism even by the United States and contrary to Anderson, there can be meaningful 'democracy' in multilateral forums.

Gerson's defence of the vast majority of the United States' present withholdings is incorrect as a matter of law. Contrary to Gerson, I believe that there has indeed been a remarkable transformation of US attitudes towards UN funding and especially with

³⁴ For examples in the environmental field of the same phenomenon, see Chazournes, this issue.

³⁵ See Simma, 'NATO, the UN and the Use of Force', 10 *EJIL* (1999) 1; Cassese, 'Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', 10 *EJIL* (1999) 23.

respect to whether payment of UN dues is a treaty obligation as fully binding as, for example, one under the NAFTA, a bilateral extradition treaty, or the WTO Agreement. For some 35 years, within the United States, Republicans and Democrats alike adhered to a bipartisan consensus with respect to UN financing. As was most clearly indicated during the 1962 *Expenses* case, the United States government stated that it believed that Article 17 of the Charter meant what it said, namely, that all members are legally obligated to pay for whatever assessments, to be used for whatever purpose, the collective membership determines are owing under Article 17 of the UN Charter, and no UN member can unilaterally ‘pick and choose’ among the activities which the organization is authorized to undertake under that entity’s expansive purposes. More importantly, the United States acted consistently with that belief and paid its dues in full and on time. While, through the late 1970s, the US Congress expressed occasional frustration with the level of US assessments, it disputed only the application of the UN ‘capacity to pay’ formula for determining contributions to the UN regular budget and not the treaty duty to pay what was ultimately assessed. Prior to the 1980s, on the relatively few occasions when Congress threatened to act unilaterally to reduce US contributions, its express intent was always to reach a maximum assessment of 25 per cent — a goal, not in and of itself unreasonable or improper under the Charter, which the United States had expressed to the very first General Assembly.³⁶ Thanks in large part to US leadership, other UN members came to share the United States’ legalistic views on the ‘duty to pay’, even with respect to once controversial peacekeeping expenses.³⁷

US unilateral withholdings, starting in 1979, directed at specific UN programmes (such as programmes involving the PLO), marked the beginning of a significant change. With the exception of two withholdings amounting to trivial sums, namely those relating to the PLO and certain Law of the Sea expenses, the United States made no attempt comparable to those undertaken by Professor Francioni to provide a legal justification even for the first relatively small set of withholdings targeting specific UN expenditures. And after passage of the Kassebaum amendment in 1985 — much larger withholdings directed at forcing the organization to change its methods for voting on its budget — no legal justifications of the kind that Francioni articulates were attempted simply because they were not even remotely plausible. After Kassebaum, US officials began wielding a *de facto* US financial veto with not even the suggestion of a legal justification.³⁸ Thus, with all due respect, Professor Francioni’s scholarly discussions of the validity of *ultra vires* acts or their consequences are

³⁶ See United States Delegate Position Paper: Principal Issues Before Committee 5 (21 October 1946), 1 *Foreign Relations of the United States* (1946) 467.

³⁷ See GA Res. 44/195, 44 UN GAOR Supp. (No. 49) at 277, UN Doc. A/Res/44/195 (1989). See also *Certain Expenses of the United Nations* (Article 17, para. 2), 1962 ICJ 151 (Advisory Opinion of 20 July) (hereinafter *Certain Expenses*). For the immediate aftermath of that case, see Whiteman, 13 *Digest of International Law* (1968) 320–334.

³⁸ For a survey of the 1980s withholdings and their consequences, see Alvarez, ‘Legal Remedies and the United Nations’ A La Carte Problem’, 12 *Michigan Journal of International Law* (1991) 229.

irrelevant to all but a minuscule portion of the massive arrearages that the US owes today.

The United States' shift to a 'politicized' view of its 'option' to pay became clearest in this decade. Allegations of fraud, mismanagement and waste led to passage, in 1994, of a requirement that the United States withhold 10 to 20 per cent of UN assessed contributions absent Presidential certification that the UN had established an 'independent office of Inspector General' charged with certain powers.³⁹ By 1995, Congress unilaterally reduced the US share of peacekeeping expenses.⁴⁰ By mid-decade, as one member of Congress candidly described it, Congress was applying 'a carrot and stick approach to force discipline on the United Nations'.⁴¹

Since that time, the Congress has seen fit to 'discipline' the UN on a continuing basis. Since November 1994, Congress has approved numerous conditions on financing by hefty majorities and some of these conditions have not been enacted into law only because of Presidential vetoes, both actual and threatened. The world in which the United States regarded UN assessments as a solemn treaty obligation comparable to all others of its kind has been replaced by one in which vast majorities in the House of Representatives of the US Congress have tried to condition US payments to the organizations based on (to name but a few salient examples) (1) whether US troops were put under the 'command or operational control' of foreign nationals; (2) whether the UN would reimburse the US government for all services, direct or indirect, volunteered by the US military; (3) whether the US executive had properly consulted with members of Congress regarding peacekeeping operations; (4) whether the US executive had failed to make certain certifications (such as a finding that a particular peacekeeping mission is in the 'national interest', that the UN's Office of Internal Operations was not functioning properly, or that US intelligence information was not being compromised); (5) whether any UN official was suggesting that the organization could impose a tax on US nationals; (6) whether the organization was ensuring 'equal treatment' for US manufacturers and suppliers; (7) whether the organization was either performing abortions or counselling states to change their laws to permit abortion; or (8) whether the organization was not adopting 'zero-based' budgeting such that the organization was absorbing costs attributable to inflation. While not all these threats were formally enacted into law, in most cases the threat alone had the desired effect and many of these conditions remain as formal conditions standing in the way of full payment of arrearages. In addition,

³⁹ Foreign Relations Authorization Act, FY 1994–1995, s. 401(b) (threatening a 10 per cent withholding from the US contribution towards the regular budget for FY 1994 and 20 per cent for FY 1995). Soon thereafter, the General Assembly created an 'Office of Internal Oversight Services'. See GA Res. A/Res/48/218, 14 August 1994. Further US payments to the UN are likely to remain contingent on Presidential certifications of that office's continued effectiveness.

⁴⁰ Congress took this step without seeking agreement from the UN, and if one accepts the premises of the *Certain Expenses* case, *supra* note 37, in clear breach of a treaty obligation. By the end of the decade, the Clinton Administration, bound by Congress's 25 per cent limit, was still trying to get the UN to accept the mandated reduction. From the perspective of the UN, the US still owes 31.7 per cent towards peacekeeping expenses for 1995 and 1996.

⁴¹ 140 Cong. Rec. H2873 (daily ed. 28 April 1994).

most of the new US unilateral withholdings do not pretend to target *ultra vires* actions; the new targets of US ire have been such standard UN activities as the scheduling of further ‘worldwide conferences’. In addition, the US Congress has even attempted to dictate to the organization how it is supposed to use any payments of US arrears, how it is to undertake personnel and fiscal reforms, and whether contributions for peacekeeping can be used for particular peace operations (despite the fact that all such operations must be approved by the Security Council and, of course, by the US executive). One legislative attempt would even have cut US contributions to the UN to resolve debts owed by diplomatic missions in New York City.⁴²

All of these instances have involved explicit or implicit threats to withhold regular budget, peacekeeping, or voluntary contributions (or, often, all three) unless Congress’s conditions were met. By the middle of the 1990s, both assessed and voluntary contributions to all international organizations were no longer considered ‘foreign affairs’ appropriations subject to special considerations (including treaty obligations) but were seen as government expenditures no different from any other. UN appropriations were pitted against the funding of domestic priorities with established domestic constituencies with predictable results. In recent years, Clinton Administration requests to pay assessments to international organizations, especially the UN, have been rejected out of hand, with cut-backs justified, not on the grounds that Professor Francioni might regard as plausible but on far more pedestrian grounds, such as the need to increase appropriations to the US Department of Defense. As the 1990s wore on, the Executive branch found that payments to the UN required a policy rationale; the argument that they were legally owed no longer seems to be worth making.

For much of the current decade then the United States found itself exercising a new *de facto* financial veto broader than any formally sanctioned by the Council’s voting procedures. Today, no aspect of the UN’s operation — from the scope of peace missions to the security of intelligence information, from the treatment of NGOs at UN conferences to the use of UN insignia by US troops assigned to UN missions, from the intricacies of UN employment practices to its accounting procedures, from the day-to-day operations of its Office of Internal Operations to the treatment of private contractors to the UN — is immune from congressional scrutiny and financial threat. This is clearly a change from the heady days when the US Legal Adviser argued to the ICJ that ‘the United Nations can pay for what it is empowered to do’ and ‘what the United Nations can do, it can pay for’.⁴³ For those who believe in the rule of law, it is difficult to see this as anything other than a ‘fall from grace’.

The US defiance of its duty to pay the UN represents unilateralism at its worst. This is unilateral action that undermines the rule of law without aspiring to create a viable

⁴² Many of these provisions were contained in versions of the National Security Revitalization Act (HR 7), the Peace Powers Act (s. 5), the American Overseas Interests Act (HR 1561), and the Foreign Relations Revitalization Act (s. 908). See generally, Washington Weekly Reps., 14 November 1994–18 March 1996. For more recent conditions attached to US payments, see <<http://www.unansa.org>>.

⁴³ *Expenses* case pleadings, ICJ Pleadings (1962) at 424.

new rule in its place (pace Kosovo). This is unilateralism facilitated by the arrogance of power, a tool of 'enforcement' that bears no connection with plausible international norms (pace unilateral enforcement measures discussed by Chazournes or Francioni). This is unilateralism that attempts, with some success, to turn a multilateral forum intended to voice the views and needs of all into a branch office of the US Department of State. Further, this is unilateralism at its most shortsighted as it deprives the United States of standing in an organization that the US needs while forcing reforms that are likely to be ephemeral precisely because they have been dictated instead of arising from true institutional learning or multilateral cooperation. This is unilateralism as blunt club.

But Allan Gerson is on to something when he suggests that international lawyers need to do more than condemn the United States as the leading 'deadbeat'.⁴⁴ While there are probably as many reasons for these UN-bashing attempts as there are members of Congress, for many on Capitol Hill it is not clear why they are permitted (indeed duty bound) to keep the US executive branch and its agencies on a financial tether, yet must renounce this potent policy tool when the executive branch acts, as it increasingly does, in fora that are even less transparent or accountable to the average US citizen, such as the Security Council. From the perspective of many in Congress, it is their business to scrutinize all government obligations, along with all those who make them, along with the expenses they entail. As those who have studied Congress's repeated use of its 'national security appropriations power' would remind us, it has historically not been rare for the Congress to attempt to 'pull the purse strings of the commander-in-chief'.⁴⁵ Today, when the commander-in-chief often acts through UN auspices, should it surprise him (or us) if he feels the pull of Congress nonetheless? When the UN authorizes operations — as in Somalia, Bosnia or Haiti — that appear to some members of Congress uncomfortably close to the onset of hostilities contemplated in the War Powers Resolution,⁴⁶ is it a surprise if the US Congress turns to its purse-strings power to keep these in check? At least some members of the US Congress (and perhaps in other legislatures) believe that by withholding payments to international organizations they are exercising a constitutional prerogative that is the equal to the duty to abide by treaty obligations, if not its moral superior: the duty of a legislature in a democracy to keep law-making institutions, whether national or international, accountable to the taxpayers who ultimately pay the bills.

Many in Congress also believe that US withholdings serve the interests of multilateralism. From their perspective, the US financial veto is responsible for the

⁴⁴ See also Gerson, 'Congress and International Law: The Case of UN Funding — Are We Deadbeats?', American Society of International Law, *Proceedings of the 92nd Annual Meeting, 1–4 April 1998* (1998) 328. Compare Anderson, in the previous issue of this journal, when he argues that US actions are not 'merely a matter of power, guns and butter ... arrogance and obduracy'.

⁴⁵ See Raven-Hansen and Banks, 'Pulling the Purse Strings of the Commander in Chief', 80 *Virginia Law Review* (1994) 833.

⁴⁶ War Powers Resolution, 7 November 1973, Pub. L. No. 93-148, 87 Stat. 555, 50 USC ss 1541–1548 (as amended).

new wariness towards peace operations (by both the Clinton Administration and the Security Council), adherence to 'zero real growth' and now 'zero nominal growth' UN budgets, creation of the equivalent of a UN 'inspector general's' office, the continuance of consensus-based budgeting, closer scrutiny of the participation rights of non-state entities, and improvements in the international civil service — all ostensible improvements in 'multilateralism' or at least plausible attempts toward advancing 'community interests'. These members of Congress do not see a clear distinction between UN withholdings as desirable policy tool and other US actions that many internationalists applaud, such as US unilateral sanctions on human rights violators, Congressional conditions tied to World Bank loans to objectionable regimes, or the use of US force on behalf of community interests (as in Kosovo).

As the case of UN funding reveals, the battle between unilateral and multilateral actions needs to be waged on the basis of ideas and not mere name calling. As Gerson, Anderson and even Hathaway suggest, dualistic values run deep within the United States. Indeed, some believe that suspicion of sources of authority emerging from outside the US legislative or judicial system are inherent to long standing notions of what is required of 'Madisonian democracy'.⁴⁷

Winning the battle on such questions as UN funding requires wrestling with an ideology as well as with power. While international lawyers can do little about the latter, they can and need to do more about the former. Focusing solely on the final results achieved by unilateral versus multilateral approaches can only take us so far. Both unilateral and multilateral approaches can serve the 'public interest' and both can fail. If we wish to justify our preferences for less unilateral approaches, there is no escape from clearly articulating what interests are served by multilateral *processes* as well as what makes for a true multilateral process (if we wish to distinguish the virtues of regional cooperation as under NATO). To those who find the present structure of the UN (and of the Security Council in particular) of dubious legitimacy, for example, it may no longer be sufficient to argue that Kosovo was either a serious breach of international law or a unique circumstance incapable of establishing a new legal precedent.⁴⁸ Faced with the scepticism of critics from the South or of the post-moderns within the legal academy, we need to find new ways to explain the merits of continued Council supremacy over issues of war and peace.

In the meantime, better instrumentalist accounts of the results achieved by both unilateral and multilateral actions are needed. Until we come up with both a definition of multilateralism and a convincing less utilitarian account of its virtues, we need work that is as analytical with respect to multilateral regimes and institutions as is, for example, Philip Alston's critique of US unilateral human rights measures.⁴⁹ Such instrumentalist analyses may prove more convincing than categorical denunciation

⁴⁷ See Turley, 'Dualistic Values in the Age of International Legisprudence', 44 *Hastings Law Journal* (1993) 185.

⁴⁸ Compare the views of, for example, Cassese and Simma at *supra* note 35.

⁴⁹ Alston, 'Labor Rights Provisions in U.S. Trade Law "Aggressive Unilateralism"?', in L.A. Compa and S.F. Diamond (eds), *Human Rights, Labor Rights, and International Trade* (1996).

of unilateral actions simply because these are not sanctioned by post-WWII institutions.

One of the ideological battlegrounds will be the disconnection between ever-expanding forms of international regulation — both hard and soft — and escalating demands for democratic accountability. For too long US international lawyers have ignored the real theoretical and practical challenges posed by the Supremacy Clause of the US Constitution,⁵⁰ not merely in terms of traditional notions of ‘federalism’ or ‘separation of powers’ but given the ‘new federalism’ being touted by the US Supreme Court.⁵¹ Egregious cases of unilateralism like the US/UN funding debacle illustrate a fundamental failing among international lawyers: our compartmentalization of the international from the local and the failure to connect the two, even in the context of states with highly developed legal systems.

Contrary to what some have suggested, making the US Congress more amenable to effectuating existing international obligations as well as to undertaking new ones requires something more than improving how we teach international law in US law schools or greater public relations efforts by Kofi Annan. Despite the reported prevalence of the ‘Yale School’, few members of Congress are ill-informed with respect to what a treaty means; even Jesse Helms knows that a treaty is a species of binding contract and that the breach of one may undermine the legitimacy of others. And while the Secretary-General could do a better job of ‘selling’ the UN to the US public, perennial surveys of the US public continue to reveal substantial support by the US public in support of the UN and payment of UN assessments.⁵² The problems that the United States faces with respect to international obligations run deeper and may require fundamental changes in how the three branches of the US government handle foreign affairs. There are a number of proposals of procedural reforms that might enhance the legitimacy and perceived democratic accountability of international regulation within the US legal system that are worthy of greater study, including enhanced judicial scrutiny of executive action in the field of foreign affairs⁵³ and greater or more formal Executive/Congressional consultation requirements during both the negotiation of treaties and prior to concluding international settlements (as under the WTO).⁵⁴ Others have argued for expanding the now occasional practice of including members of Congress or members of non-governmental organizations on US treaty negotiation teams,⁵⁵ providing greater access to information to interested

⁵⁰ The Supremacy Clause places treaty obligations of the United States on a par with federal legislation, as ‘law of the land’ superior to the laws of the states of the United States and to prior federal legislation. See United States Constitution, Art. VI; Restatement of the Law Third, Foreign Relations Law of the United States, ss 111 and 115 (1986).

⁵¹ See Bradley, ‘The Treaty Power and American Federalism’, 97 *Michigan Law Review* (1998) 390.

⁵² See United Nations Association, *Crisis and Reform in United Nations Financing* (1997) 13–14.

⁵³ See Paul, ‘The Geopolitical Constitution: Executive Expediency and Executive Agreements’, 86 *California Law Review* (1998) 671.

⁵⁴ See Smith, ‘Executive-Branch Rulemaking and Dispute Settlement in the World Trade Organization: A Proposal to Increase Public Participation’, 94 *Michigan Law Review* (1996) 1267.

⁵⁵ See Note, ‘Discretion and Legitimacy in International Regulation’, 107 *Harvard Law Review* (1994) 1099, at 1110.

domestic groups (including state officials) before treaty negotiations are finalized, or expanding the opportunity for public notice and comment to interim drafts of proposed forms of regulation prior to adoption within international organizations.⁵⁶ While all of these proposals would lessen the dominance of the US executive with respect to foreign affairs and, at least in the short term, complicate the conclusion or implementation of international obligations, that is indeed the point. It may be that US officials, including members of Congress, will see international obligations, including the duty to pay UN dues, as no different from other legal obligations imposed by law only when international norms begin to look more like other US laws that now earn their routine respect.

At the same time, we should not fall into the opposite error of mythologizing domestic democratic governance. While Anderson is right to castigate international lawyers for uncritically embracing NGOs as the embodiment of ‘international civil society’, his critique compares the international negotiations on landmines to ‘genuinely democratic, domestic societies’ presiding over genuinely ‘vigorous and diverse civil society’. Ironically, Anderson is as sanguine with respect to the latter as international lawyers have been with respect to ‘international civil society’. While there are undoubtedly differences between the levels of democratic participation seen within advanced industrial states such as the United States and the levels of non-state participation within international organizations and negotiations, around the globe the number of ‘genuinely democratic, domestic societies’ is still not vast — certainly if we are willing to scrutinize closely many of those governments whose commitments to genuine pluralistic politics is less than secure (as in much of Latin America, Africa and Asia even today). Further, the ranks of truly ‘liberal’ democracies may be shrinking, not growing.⁵⁷ A comparison between the level of ‘genuine participation’ between many domestic systems and that evident in the Landmines Convention negotiations would not necessarily lead to a preference for the former. And even with respect to states such as the United States with a centuries old commitment to ‘democracy’ there are doubts about the existence of open, meaningful political choice amidst a free market in ideas, when it comes to electoral politics. At the moment, the United States’ next Presidential election may present the electorate with a choice between two scarcely distinguishable candidates, both of whom have amassed such massive contributions (especially from powerful corporate interests) that the voices or views of others appear scarcely to be heard. Further, the next United States President will be elected, if history is any guide, by less than half of those eligible to vote. These realities need to be considered when we compare the democratic legitimacy of international negotiations to the ostensibly richer context within democratic states.

As Susan Marks has pointed out, international lawyers need to adopt a more critical approach to liberal democracy.⁵⁸ There is, after all, some irony when one considers the subject of Anderson’s critique: landmines. One suspects that if the world’s population

⁵⁶ *Ibid.*, at 1112.

⁵⁷ See Zakaria, ‘The Rise of Illiberal Democracy’, 76 *Foreign Affairs* (1997) 22.

⁵⁸ Marks, *supra* note 4, at 471.

were presented with a fair and open plebiscite after a thorough articulation of positions by both sides with respect to the landmines issue, the results would be overwhelmingly in favour of the ban now contained in the Landmines Convention. While Anderson is right to criticize that convention as the result of the intervention of political pressure groups, one wonders whether the result reached lacks democratic legitimation in this larger sense. One also wonders whether, when one strips away the trappings of domestic democratic governance, the substance of the legislative decisions reached by national parliaments (including by the US Congress) are better or worse in terms of reflecting the actual wishes of the majority of those governed than the results of multilateral negotiations on issues such as ozone or landmines.⁵⁹ While Anderson is right to suggest that domestic civil society is something different from democratic processes, one wonders if the distinction matters all that much when it comes to the actual work product produced by domestic legislatures. We also need to ask which voices of domestic civil society are actually heard within the government branches charged with making or interpreting the law. Anderson may be correct when he argues that the legislative products of the US Congress are given democratic legitimacy by a thriving civil society, but he fails to consider whether the legitimacy conveyed is more symbolic than real — and whether it is less real than that of international civil society upon the landmines negotiations. Viewed in this light, I would not be as ready to dismiss the possibility of more democratically accountable multilateral processes as Anderson is. Putting their political viability to one side, far reaching reforms to enhance the democratic legitimacy of existing international organizations, including proposals for restrictive guidelines on the use of the Permanent Veto, NGO access to WTO proceedings, or a directly elected second chamber of the General Assembly ought not be dismissed out of hand.

The examination of the role and limits of unilateralism should be the beginning of a conversation about the twin related democratic deficits facing international regimes: one increasingly felt within states (even rich ones) and one most acutely borne by those states and interests not now adequately represented within international venues. Conceivably, if both of these deficits were truly rectified we would not need future conferences on the ‘role and limits of unilateralism’.

⁵⁹ Compare Hathaway’s remarks on the prospects for gun control legislation, *supra*. The Anderson reference is to the contribution by Kenneth Anderson now at 11 *EJIL* 91.