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# Two Liberalisms

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## Abstract

*There is much talk in international law about 'liberalism'. The term means many things but is too often taken to mean only one. This essay is intended to act as an historical gloss on some contemporary debates featured elsewhere concerning the meanings of liberalism and the possible consequences of adopting liberal positions in international law. The author aims to accomplish three ends here. First, he distinguishes between two different but familiar liberal conceptions of international community. The author calls these Charter liberalism and liberal anti-pluralism. Secondly, the author discusses the tension between these two conceptions during two periods of innovation in the international system, namely, the late-Victorian era and the Conference at San Francisco to establish the United Nations Organization. Thirdly, he turns to the contemporary version of liberal anti-pluralism and contrasts two variants of this new liberal anti-pluralism, mild and strong, before showing how each of them constructs the problem of the 'outlaw state'.*

## 1 Two Liberalisms

In this essay, I want to describe some of international law's encounters with liberalism. In particular, I contrast two of the ways in which liberalism has supplied international law with a theory of political community among states. In doing so, I focus on the differences between two liberalisms. I characterize these as *Charter liberalism* and *liberal anti-pluralism*. I associate Charter liberalism with the reluctance of the United Nations to question seriously the democratic or humanitarian credentials of its members. Liberal anti-pluralism finds its most prominent manifestation in the recent work of Fernando Tesón, Michael Reisman, Thomas Franck, John Rawls and Anne-Marie Slaughter where, in each case, the internal characteristics of a state has the potential to determine that state's standing in the family of nations.

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This paper can be distinguished from other essays, both in this volume and elsewhere, whose main purpose is an evaluation of a recent strain of liberal anti-pluralism.<sup>1</sup> My aim is not to critique international law's new liberalism (though there is plenty to be said along these lines) but rather to trace its ancestry and reveal some of the consequences of its adoption. The object is not to hold scholars up for vilification as 'liberals' but to demonstrate first, that they belong to only one particular liberal tradition and secondly, that this tradition itself divides on a number of key questions.

Another purpose of all this is to suggest that one interpretation of new liberal anti-pluralist work is ahistorical. This is the criticism of these writers that they seek to introduce divisions and distinctions between states, abolished in contemporary international law. I think this criticism misses the prevalence of anti-pluralism in both theory and practice throughout the life of modern international law. In fact, international law since, at least, the beginning of the nineteenth century has been structured around a tension between pluralistic conceptions of community and theories based on the sorts of distinctions reintroduced by Tesón *et al.*<sup>2</sup>

Many years ago, Robert Frost defined a liberal as someone unable to take his own side in an argument.<sup>3</sup> In a similar vein, Flanders and Swann wrote in one of their operettas that 'eating people is wrong' in a parody of one particular, liberal gentleman who was able to see virtue in almost all other forms of human behaviour.<sup>4</sup> In a different key altogether, Francis Fukayama announced in 1989 that history had ended and went on to say that 'liberalism remains the only coherent political aspiration'.<sup>5</sup>

When we think about liberalism today we seem to be confronted with at least these

<sup>1</sup> For a constructivist take on liberal theory from the IR side, see e.g. Chris Reus-Smit's essay in this symposium. See also José Alvarez's doubts about the explanatory and predictive power of liberal anti-pluralism in this volume, 'Do Liberal States Behave Better: A Critique of Slaughter's Liberal Theory', 12 *EJIL* (2001) 183. Other commentaries from international lawyers include Marks, 'The End of History? Reflections on Some International Legal Theses', 8 *EJIL* (1997) 449; Kingsbury, 'Sovereignty and Inequality', 9 *EJIL* (1998) 599; and Kennedy, 'The Disciplines of International Law and Policy', 12 *Leiden Journal of International Law* (1999) 9. See also Byers and Chesterman, "'You, the People": Pro-Democratic Intervention in International Law', in Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance and International Law* (2000). These critiques are not the subject of this paper.

<sup>2</sup> The thesis here is deliberately parsimonious. I want to show that there are similarities between these various anti-pluralisms, not that they are the same. Each is hostile to a common egalitarian conception of international law that relies on sovereign equality as a foundational norm but beyond this there are clear dissimilarities. Note, however, the tendency of each successive generation of anti-pluralists to disassociate itself from the preceding one. In the case of the Victorians, the Chinese were rebuked for mistaking unequal treaties for 'the offspring of the piratical bloody-mindedness of our earliest forerunners in the China trade'. See R. Gilbert, *The Unequal Treaties* (1929) at 5. Meanwhile, Anne-Marie Slaughter cautions us to appreciate the distinctions between the democratic governance standard and the standard of civilization that underpinned these unequal treaties. See Slaughter, 'International Law in a World of Liberal States', 6 *EJIL* (1994) 503.

<sup>3</sup> Quoted in Nagel, 'Moral Conflict and Political Legitimacy', 16 *Phil. & Pub. Affairs* (1987), at 215.

<sup>4</sup> From Flanders and Swann's song, 'The Reluctant Cannibal'.

<sup>5</sup> Francis Fukayama, *The End of History and the Last Man* (1992).

two competing images.<sup>6</sup> First, there is a 'classical' liberalism emphasizing the virtues of tolerance, diversity and openness together with an agnosticism about moral truth. This classical version is epitomized by Nagel's indecisive liberal and Flanders' and Swann's ironic injunction against cannibalism. John Stuart Mill's work is imbued with some of this ethos of tolerance and, more recently, John Gray, the English political philosopher, has referred to it as the 'modus vivendi', i.e. the idea of liberalism as a procedure for organizing relations among diverse communities.<sup>7</sup> It is also reflected in a disinclination within at least one *liberal* strand of international law to make judgments about the politics of the state. The UN's approach to membership after about 1950 as anticipated in the *Admissions Case* is an example of this strain of liberalism.<sup>8</sup>

However, there is a second image of what it means to be a liberal. This is liberalism (sometimes characterized as neo-liberalism) endowed with a sort of moralistic fervour, a conviction and, at times, an intolerance of the illiberal. Louis Hartz, in his study of American liberalism, described it as 'this fixed, dogmatic liberalism of a liberal way of life' and traced its roots in American liberalism's lack of internal enemies and resultant lack of plausible alternatives.<sup>9</sup> This liberalism produces a profoundly illiberal 'conformitarianism' according to Hartz. In various writings about international affairs, Francis Fukayama's liberal triumphalism is the starkest example of this liberalism but it is there, also, in Fernando Tesón's strident Kantian theory of international law, Michael Reisman's peremptory dismissal of the illiberal in his pro-democratic intervention work and in Anne-Marie Slaughter's distinctions between liberal and non-liberal states.<sup>10</sup> It is the liberalism of certainty, or what I want to call 'liberal anti-pluralism'; a liberalism that can be exclusive and illiberal in its effects. In international law, it differs from the Charter liberalism identified above most obviously in its lack of tolerance for non-liberal regimes.

To illustrate the difference between these two liberalisms consider John Rawls. Rawls, in his recent book on international law, which I take up later, might be

<sup>6</sup> I say 'at least' because there are many ways to distinguish liberalisms ranging from Isaiah Berlin's *Two Views of Liberty* to the disputes between egalitarian liberals (represented by the John Rawls of *A Theory of Justice* (1971)) and libertarians represented by the likes of Robert Nozick or Frederick Hayek.

<sup>7</sup> John Gray, *The Two Faces of Liberalism* (2000). Louis Hartz located this liberalism in a European tradition in which there was a 'sense of relativity . . . acquired through an internal experience of social diversity and social conflict'. *The Liberal Tradition in America* (1955) at 14. This view of liberalism emphasizes the idea of open political process and pragmatic compromise over the competing idea of absolute rights and legal standards. It is liberalism as a mechanism for making political choices in a world of disagreement as opposed to liberalism as a system designed to erase those disagreements altogether.

<sup>8</sup> *Membership Case*, ICJ Reports (1948).

<sup>9</sup> Hartz, *supra* note 7, at 8–9. Curiously enough Hartz associates this with the constitutional fetishism which sees the Supreme Court 'resolve' moral dilemmas for the nation. It may be that this escape from politics and ethics is peculiarly American. It is no surprise given this tradition that the end of history and the triumph of liberal democracy have been proclaimed by American scholars nor that these American scholars have embraced a sort of legalism to pursue liberal ends at the international level.

<sup>10</sup> Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law* (1992) 46; Tesón, 'The Kantian Theory of International Law', 92 *Columbia Law Review* (1992) 53, at 54; Slaughter, *supra* note 2.

characterized as an old liberal in style and a new liberal in substance.<sup>11</sup> His tone is full of the sort of equivocation often found in liberal scholarship. He says at one point, ‘we . . . conjecture . . . that the resulting principles will hang together. . . Yet there can be no guarantee.’<sup>12</sup> This sounds like Nagel’s caricature of liberal coyness, and such phrases are scattered throughout *The Law of Peoples*. On the other hand, Rawls’ distinction between ‘decent’ and ‘outlaw’ peoples places him in the camp of the new liberals. In substance, Rawls’ *Law of Peoples* is a philosophical justification for one form of liberal anti-pluralism or the liberal intolerance of intolerant governments.<sup>13</sup> This, in turn, can be distinguished from Rawls’ liberal pluralism found in the sketch of international law in *A Theory of Justice* where an international original position produces the norms of classical, Charter liberalism, most notably an equality of nations, ‘analogous to the equal rights of citizens in a constitutional regime’.<sup>14</sup>

The way liberalism splits into these two traditions — an evangelical version that views liberalism as a comprehensive doctrine or a social good worth promoting and the other more secular tradition emphasizing proceduralism and diversity — is reflected in some of the major debates in international studies. I now want to show in more detail how these two liberalisms play out in international law.<sup>15</sup>

To begin with, the whole discipline often has been characterized as ‘liberal’, emphasizing the liberal qualities of rule of law, autonomy, rights and equality. This liberalism is reflected in various doctrines and principles within the international legal order e.g. the territorial integrity of states and their entitlement to sovereign equality. According to this liberal view of international law, states in the international system are in an analogous position to individuals in a domestic political order. Orthodox international law, then, is based on a classical liberalism transplanted onto the

<sup>11</sup> See John Rawls, *The Law of Peoples* (1999).

<sup>12</sup> *Ibid.*, at 99.

<sup>13</sup> It is this combination of liberal doubt combined with theoretical certainty that Leah Brilmayer and others have found so exasperating. Brilmayer finds in it a lack of methodological rigour and a closed view of international justice. See ‘What Use is John Rawls’ Theory of Justice to International Relations?’, 6 *International Legal Theory* (2000), at 36–39.

<sup>14</sup> John Rawls, *A Theory of Justice* (1971) 378. For a similar conclusion from the international law side, see Franck, ‘Is Justice Relevant to the International Legal System?’, 64 *Notre Dame Law Journal* (1989) 945. For a critique of this application of Rawls to the international system, see Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (1988) at 58–71.

<sup>15</sup> From the international relations side, liberalism has been conventionally understood as a response to the realist tradition in IR scholarship. The realist–liberal divide was the key debate in IR theory for a substantial part of the post-war era. However, this liberalism is, itself, highly unstable. For example, it is both derivative of and distances itself from the Wilsonian liberalism of the inter-war period (itself disparaged by realists as ‘legalist-utopianism’). This liberalism fragments into quite distinct intellectual projects. Michael Doyle has pointed to three quite different liberal traditions in IR drawn from Kant, Machiavelli and Schumpeter. See Doyle, ‘Kant, Liberal Legacies and Foreign Affairs: Part 1’, 12 *Philosophy and Public Affairs* (1983) 205, at 216–217. Jim Richardson has referred to ‘competing liberalisms’ (see ‘Contending Liberalisms: Past and present’, 3 *European Journal of International Relations* (1997) 5–34). Others contrast the strong neo-Kantian version with a weaker liberal institutionalist version (the former emphasizing the prospects of pacification and the latter having the more modest goal of deeper cooperation).

international relations between nation-states.<sup>16</sup> I want to call this *Charter liberalism* because the principles underlying this approach find their highest expression in the text of the UN Charter.<sup>17</sup> The point of this approach is to treat all states equally, to allow them each the same rights afforded to individuals in a liberal society (i.e. domestic jurisdiction, equality, non-intervention) and to, if not celebrate, at least tolerate the diversity produced by these norms.<sup>18</sup> This Charter liberalism is based on a norm of inclusion entwined with a policy of strategic engagement. Undemocratic or illiberal states are admitted into international society so that society might be universalized and those states domesticated.

As Wolfgang Friedmann put it: 'the most basic principle of international law is the equal claim to integrity of all states regardless of their political or social ideology.'<sup>19</sup> It almost goes without saying that this liberalism gives ontological priority to the state; it is states that are given rights and immunities not individual human beings. This is the liberalism that José Alvarez refers to when he contrasts Anne-Marie Slaughter's work with 'the pluralistic project that has characterized contemporary international law'.<sup>20</sup>

Compare, then, this 'pluralistic project' of the Charter with liberal anti-pluralism, where the idea is to *distinguish* between states on the basis of their internal characteristics. As Slaughter notes: 'Liberal theory permits more general distinctions among different categories of states based on domestic regime type.'<sup>21</sup> This new liberal anti-pluralism lays emphasis on the rights of individuals themselves and the norm of democracy as defining qualities of a workable international order. To this extent, international human rights law with its intellectual roots in the enlightenment and its emphasis on popular sovereignty and civil rights is the engine of this new liberal anti-pluralism. This liberalism (which includes neo-Kantianism, liberal internationalism and democratic governance theory) seeks to undermine the present (over?) inclusive orientation of the international legal order and replace it with one in which the status of states is determined by their adherence or non-adherence to certain individual rights (say, free expression) and international norms (say, the embryonic standard of democracy). According to the strong version of this anti-pluralism, the sovereign equality that underpins the Charter conception of liberalism has become an absurdity. Aaron Fellmeth, for example, describes as a 'superannuated mystery', the

<sup>16</sup> For a fuller analysis, see Simpson, 'Imagined Consent: Democratic Liberalism in International Legal Theory', 15 *Australian Yearbook of International Law* (1994) 103–128.

<sup>17</sup> It is often associated with something called 'classical international law', but this phrase carries with it other implications. See Simpson, *supra* note 16, at n. 2. What is sometimes called the classical era in international law was actually highly illiberal in its attitude to non-European states.

<sup>18</sup> Articles 1(2), 2(4) and 2(7) are the most obvious textual props of this liberalism but the way that Article 4 has been interpreted has also been a key element of this liberal approach.

<sup>19</sup> Friedmann, 'Intervention, Civil War and the Role of International Law', in Richard Falk (ed.), *The Vietnam War and International Law* (1968) 151.

<sup>20</sup> Alvarez, *supra* note 1, at 239.

<sup>21</sup> Slaughter, *supra* note 2, at 509: 'The most distinctive aspect of Liberal international relations theory is that it permits, indeed mandates, a distinction among different types of states based on their domestic political structure and ideology.'

moral theory by which ‘the integrity of a fascist dictatorship is entitled to as much respect as the government of a social democracy’.<sup>22</sup>

In this liberal anti-pluralism individuals are given ontological priority. Indeed, Tesón calls this ‘normative individualism’.<sup>23</sup> I term this theory of liberal international law, ‘liberal anti-pluralism’ in order to emphasize both its roots in a liberal-humanitarian tradition and some of its ‘illiberal’ implications.<sup>24</sup> Georg Schwarzenberger, in an important book about the League of Nations, neatly summed up this difference. When one of the representatives at the Conference to establish the League of Nations spoke of admission to the League being open to ‘free’ states, Schwarzenberger remarked that the word ‘free’ was ‘somewhat ambiguous, as it does not necessarily refer to the internal conditions of an applicant state, but may be read as synonymous with “independent” or “sovereign”’.<sup>25</sup> The ambiguity identified by Schwarzenberger is in some respects an encapsulation of the two liberal approaches to liberty in international law discussed in this essay.

It is impossible to do justice to the many nuances of these two liberalisms and to the part they play in various aspects of international law. In this paper, then, I want to concentrate on the question of status and membership of the international community. This essay is about liberalism as a theory about how political community should be constituted, who should be part of that community and who should be excluded. The debate over regulation of membership in the international community

<sup>22</sup> Fellmeth, ‘Feminism and International Law: Theory, Methodology and Substantive Reform’, 22 *Human Rights Quarterly* (2000) 658, at 703, n. 171.

<sup>23</sup> Tesón, *supra* note 10, at 54.

<sup>24</sup> José Alvarez has characterized this as Illiberal Theory and it is illiberal from the perspective of the state system since it accomplishes that very illiberal result, the exclusion of certain entities from a political order on the basis of their ideological position. From a different perspective, it is, of course, highly liberal. It promotes liberalism within states. In many ways, this debate over terminology strikes at a deeper dilemma for liberalism. To what extent should it tolerate illiberal elements in its midst. The original idea of the liberal state was to produce a tolerant polity rather than one that merely replicated its absolutist predecessors by replacing one absolute truth with another. See e.g. John Stuart Mill’s defence of dissent. My choice of language in relation to ‘pluralism’ will also strike some people as peculiar. Surely, it is the new liberals that deserve the label ‘pluralists’. It is they who have developed models which take seriously the preferences of non-state actors in the system. In addition, their support for democracy within states signals a preference of the sort for pluralism that functions best in such polities. These claims are plausible and perhaps the new liberals are right to be proprietorial over the label ‘pluralist’. This paper, though, is about states and inter-state relations. It compares two approaches to state heterogeneity, one of which (Charter liberalism) seeks to preserve diversity among states, the other of which, liberal anti-pluralism, favours systems of like-minded democratic states. All of this makes John Rawls’ work a little difficult to situate. I have labelled him an anti-pluralist yet his whole life’s work has been dedicated to a defence of pluralism and the construction of a decent society in the face of the fact of pluralism. His work on the international order is pluralist in one sense. He wants to accommodate illiberal but decent states in his Law of Peoples. Reasonable states (illiberal and liberal) can and do disagree; it is up to a reasonable law of peoples to ‘find a shared basis of agreement’ (Rawls, *supra* note 11, at 530) between these peoples. This marks Rawls out from, say, Fernando Tesón for whom decency and republican democracy are identical. On the other hand, Rawls is a liberal anti-pluralist because his project violates the basic principle of Charter liberalism, i.e. the sovereign equality of states. Outlaw states and burdened states do not enjoy sovereign equality.

<sup>25</sup> G. Schwarzenberger, *League of Nations* (1949) 88.

since the middle of nineteenth century can be seen partly as a conversation between these two liberalisms. The remainder of this paper is given over to a discussion of three periods in which this debate was brought sharply into focus. In the first, the late Victorian era, some international lawyers justified the exclusion of certain states from the inner circle of international law by virtue of their lack of civilization or inability to protect the liberal rights of non-citizens. The failure of entities such as China and Korea to embrace liberal norms marked them out for exclusion from the core. This view, though, came under increasing challenge from liberalism's universalist face, one that sought to extend membership of the international community as widely as possible. This was the liberalism of tolerance and diversity (or liberalism in its anti-colonial mode).

A second moment of controversy occurred at San Francisco in 1945, when, again, there was disagreement about the extent to which the international community should be inclusive and heterogeneous in nature. Here the liberalism of state diversity and sovereignty came into conflict with liberal anti-pluralism and its pursuit of democratic standards within states. What eventually prevailed was a Charter liberalism that advocated flexibility in the standards required for the admission of states to the United Nations community.

Finally, I look at the new liberal anti-pluralists: Rawls, Franck, Reisman, Tesón and Slaughter and their challenge to what Anne-Marie Slaughter calls the 'prevailing account of liberalism in international law' (Charter liberalism) which, she says, denies 'the possibility of distinguishing between states or looking within them'.<sup>26</sup>

To recap, then, I set up an initial tension between two forms of international community. The first is a charter-based liberal international law in its pluralist mode emphasizing the sovereign equality of states, their rights to domestic jurisdiction and their right to what I call existential equality, a subset of sovereign equality that allows states to choose their own form of government and that underpins the heterogeneity of the international legal order. The opposite of this is the anti-pluralism that denies certain states the right to participate fully in international legal life because of some moral or political incapacity such as a lack of civilization, the absence of democracy or aggressive tendencies. I begin with the late-Victorian period in which there was a clash between these two approaches to structuring the international community. On the one hand were those who advocated the expansion of the international order through a policy of openness and universalism. On the other hand, there was the continuing exclusion of certain sovereign states from the family of nations on the grounds that these states lacked civilization (as well as the support for these practices on the part of a number of late-Victorian international legal scholars).

<sup>26</sup> Slaughter, 'A Liberal Theory of International Law' (8 April 2000, paper delivered at ASIL 2000, on file with author).

## 2 Unequal Sovereigns

The mid to late nineteenth century was an era of liberal governance within Western Europe. New regimes in Europe became more tolerant and less authoritarian in relations with their own citizens. Revolutionary Europe cast aside the old guard of absolutist monarchies and religious dynasties.<sup>27</sup> However, at the same time, these liberal states demoted non-liberal societies such as China, Korea and Japan to second-class status because of a perceived lack of civilization. Indeed, their treatment of non-European civilizations compared rather poorly to those of their illiberal predecessors. Some writers, for example, have argued that the ‘Grotian’ period, say, 1645 to 1815, was a period of equality both within Europe (between nation-states) and between Europe and other civilizations. Bull and Watson describe the pre-1815 period as one in which ‘European states sought to deal with Asian states on the basis of moral and legal equality, until in the 19th century this gave way to notions of European superiority’.<sup>28</sup> Prior to 1815 international law embraced civilizations of different stripes. True, relations between empires and other civilizations were conducted at a different level to those within Europe. Nonetheless, equality appeared to be a mark of these various relationships.<sup>29</sup>

During the early to mid-nineteenth century this changed, and countries and empires began to be distinguished on the basis of ideological credentials. ‘Civilization’ was the key term in this period. One attribute of civilization was the possession of a liberal or at least pseudo-liberal legal order in which alien (read Western) nationals would be afforded full liberal rights. Those entities excluded from the system were thought incapable of ensuring this level of protection and were thus deprived of certain sovereign rights and jurisdictional immunities in ‘unequal treaties’ and capitulations.<sup>30</sup> The full story of international lawyers and the standard of civilization against which non-Western states and cultures were to be judged is told in Gerrit Gong’s 1980 study of the topic and in Tony Anghie’s recent article on international law’s encounter with the peripheries.<sup>31</sup> What follows, then, rehearses these studies but does so from the perspective of the two liberalisms I have discussed so far.

The Victorian anti-pluralists divided states into those entities entitled to full

<sup>27</sup> E.J. Hobsbawm, *The Age of Revolution: Europe 1789–1848* (1962).

<sup>28</sup> Hedley Bull and Adam Watson (eds), *The Expansion of International Society* (1984) at 5.

<sup>29</sup> According to Alexandrowicz, prior to 1815: ‘The Law of Nations was inherently a universal concept, conditioned by its affiliation with the law of nature and by the highly important and worldwide relations on a footing of equality between the European powers and the East Indian and North African rulers joining in a great trade adventure.’ See Alexandrowicz, ‘Empirical and Doctrinal Positivism in International Law’, 47 *British Yearbook of International Law* (1977) 286, at 288.

<sup>30</sup> Generally speaking, the term ‘capitulations’ is used to refer to the system of consular jurisdiction operated by the Western powers in Turkey. It refers to the immunities from jurisdiction enjoyed by Western European, American and Russian foreigners in Turkey. The phrase ‘unequal treaties’ is applied to relations between these powers and East Asian states. These unequal treaties contained provisions on the enjoyment of extraterritorial jurisdiction but also included arrangements for the transfer of territories (see e.g. Hong Kong).

<sup>31</sup> Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law’, 40 *Harvard International Law Journal* (1999) 1 and Gerrit Gong, *The ‘Standard of Civilization’* (1980).



sovereign equality (European states) and those possessing some lesser form of sovereignty (unequal sovereigns). This division grew out of a belief that a European system of governance was unsuited to other cultures. W.E. Hall's *International Law* is typical:

It is scarcely necessary to point out that as international law is a product of the special civilization of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognized by countries differently civilized, such states only can be presumed to be subject to it as are inheritors of that civilization.<sup>32</sup>

John Westlake made the point more colloquially when he compared the late-nineteenth-century society of states to a group of persons simply 'interested in maintaining the rules of good breeding'.<sup>33</sup>

At first, Christianity was the test of 'good breeding'. Wheaton's *Elements of International Law*, published in 1836 and translated into Chinese in 1864, characterized international law as Christian, civilized and European and marked out the standard to which the Asian empires had to aspire if they were to be admitted to the international legal community.<sup>34</sup>

What was interesting about some of this work was the recognition that states could be part of the international law community while at the same time excluded from the inner circle or family.<sup>35</sup> Westlake seems to envisage a sort of staggered admission policy: 'Our international society exercises the right of admitting outside states to parts of its international law without necessarily admitting them to the whole of it.'<sup>36</sup> So, relations with China and Japan were more or less normal apart from the extraterritorial jurisdiction enjoyed by the civilized powers, and Turkey was admitted to the public law of Europe and a member of the European political system in 1854 but did not yet enjoy full jurisdictional sovereignty.<sup>37</sup> The Scottish jurist, James Lorimer, took this idea furthest in his portrait of an international order organized around three concentric circles with the inner circle composed of civilized European states, the

<sup>32</sup> William Edward Hall, *International Law* (6th ed., 1880) at 39. In another text by the same author, the word 'civilized' appears five times in the first five pages, Hall, *A Treatise on International Law* (1880).

<sup>33</sup> John Westlake, *International Law* (1894) at 6.

<sup>34</sup> It was translated into Chinese in 1864 and was regarded by the Chinese and Japanese as an authoritative source of international law doctrine and standards. See Gong, *supra* note 31, at 18 and 26.

<sup>35</sup> Oppenheim, for example, noted that: 'There are states in existence, although their number decreases gradually, which are not, or not fully, members of that family. Oppenheim, *International Law* (3rd ed., 1912) 33. The distinctions between statehood, membership and sovereignty are hazy in all this. The Victorian publicists accepted that the entities on the periphery were states and possessed some sort of unequal sovereignty but did not concede that statehood entitled them to full participation in the international system.

<sup>36</sup> Westlake, *supra* note 33, at 82.

<sup>37</sup> *Ibid.*

middle circle consisting of the barbarian Turks and an outer sphere of savages to which no recognition was owed.<sup>38</sup>

But what was ‘civilization’? Civilization was a usefully elusive term. As one writer put it: ‘It is difficult to indicate with precision the circumstances under which such admission takes place in the case of a nation formerly barbarous.’<sup>39</sup> According to Gerrit Gong, a civilized state was one that accorded basic rights to its citizens. The capitulations or unequal treaties of this period, partly, were attempts to apply liberal standards of law to the internal affairs of sovereign states.<sup>40</sup> To this extent, the standard of civilization can be perceived as an early example of liberal anti-pluralism since the result was the exclusion from the system of those states that failed to meet the (liberal) standard. Of course, there are significant differences, too. The imposition of liberal standards by the core on the periphery extended only to the treatment of Western aliens in these nineteenth-century cases. There was no attempt to widen the application of the standard of civilization as there is in the case, say, of contemporary democratic governance theory. It is also true that the Western powers were more concerned with the protection of commercial and diplomatic interests than with the export of human rights.<sup>41</sup>

Nonetheless, this late-Victorian practice can be viewed as a precursor to the current liberal anti-pluralist movement in international law in its willingness to apply standards of political and legal practice universally, and in its readiness to deny admission to the international community to those states that fail to meet the required standards.

To conclude, the early part of the nineteenth century introduced a formal distinction between sovereign entities that are not quite part of the society of

<sup>38</sup> James Lorimer, *Institutes of the Law of Nations* (1883) 101–103. Whatever the standard of civilization, and however systematized, it remained the case that colonized peoples (or savages) could not reach it. These peoples were the same and different. They wanted what the core already had. There was the same ‘yearning for freedom’, but they would not get it or were not ready for it. As Peter Fitzpatrick puts it, the colonies were ‘called to be the same yet repelled as different, bound in an infinite transition which perpetually requires to attain what is intrinsically denied to it’. See Fitzpatrick, ‘Nationalism as Racism’, in Peter Fitzpatrick (ed.), *Nationalism, Racism and the Rule of Law* (1995) 11.

<sup>39</sup> Smith, *International Law* (4th ed., 1911), at 35.

<sup>40</sup> The Sublime Porte (Turkey) is a curious case. On one hand, Turkey was admitted to the Family of Nations in 1856 under the terms of the Treaty of Paris. However, it was this treaty that converted the capitulations from unilateral privileges given by the Ottoman rulers to Western citizens into international obligations (see e.g. Article XXXII). Thus, it was precisely in the Victorian period that Turkey’s second-class status within the family of nations was confirmed. A.D.F. Hamlin’s explanation is revealing. He claimed that Turkey’s admission into the European family of nations was a favour. Turkey had been admitted to ‘a quasi-equality with the nations about her . . .’ and now possessed what Hamlin described as ‘qualified membership in the political family of nations’ (23 *The Forum* (1897) 523, at 530, quoted in Nasim Sousa, *The Capitulatory Regime of Turkey* (1933) 168). These extraterritorial powers held by the Western states in Turkey had existed for centuries (Sousa, *ibid.*, at 3–12). For an early example of an unequal treaty, see e.g. the Treaty of Nanking 1842 at [www.isop.ucla.edu/eas/documents/nanjing.htm](http://www.isop.ucla.edu/eas/documents/nanjing.htm).

<sup>41</sup> See generally Gilbert, *supra* note 2.

states and those, mostly European, states at the centre of this society.<sup>42</sup> These non-European or outsider states possess a form of sovereignty but they exercised it very much on the margins. There was a core of states within a right-thinking international society regulated by European public law and a periphery of states to which different rules applied. Those civilizations and empires on the periphery were denied full membership on account of a lack of civilization. International lawyers played their part in developing justifications for the imposition of this policy and in elaborating it.<sup>43</sup>

This story continued into the early twentieth century with, for example, the exclusion of Soviet Russia from the League of Nations and Korea from the Second Hague Peace Conference but by this time there was a counter-veiling 'Charter' liberalism which sought the expansion of the international community and the bestowal of full sovereign rights equally on *all* states within the system.<sup>44</sup> The portents of this are found in the general widening of membership in the various conferences held and treaty bodies created at the turn of the century.<sup>45</sup>

By the late nineteenth century Japan had become a full member of the international community by adopting the European standards implicit in international law and, in being admitted, Japan also effected a radical modification of these same standards. International law was now open to non-Christian, non-Western states.<sup>46</sup> The standard of civilization was secularized and the tests for its attainment were presented in more functional terms. The requirement of civilization was softened and formalized. It became 'civilization of such a kind only is conditional as to enable the respective

<sup>42</sup> The idea of partial sovereignty may not make sense to contemporary international lawyers who have a tendency to see juridical sovereignty as an all-or-nothing concept. However, the Victorians had no such doubts about packaging sovereignty in this manner. Oppenheim describes this clearly enough in the first edition of his great work: 'Statehood alone does not include membership of the Family of Nations' (Oppenheim, *International Law*, vol. 1 (1905), at 109). Statehood at that time did not automatically bring with it the various benefits which accrue now.

<sup>43</sup> The standard of civilization in academic writing had a curious two-way relationship in relation to the doctrines and practices with which it is associated. On the one hand, the scholars of the period purported to describe the diminution in sovereign status caused by the imposition and acceptance of a series of intrusive practices and doctrines (e.g. capitulations). The result of these practices was inequality. On the other hand, the continual labelling of entities as 'uncivilized' or peripheral or dangerous led to a belief that these entities were not entitled to the protections and privileges of sovereignty that might have rendered illegitimate the sorts of extraterritorial intrusions occurring throughout the nineteenth century.

<sup>44</sup> Obviously something of an anachronism in this context.

<sup>45</sup> Lande, 'Revindication of the Principle of Legal Equality of States 1871–1914', 62 *Political Science Quarterly* (1947) 401. The first Geneva Convention in 1864 hosted 14 states, whereas the 1908 equivalent included 35 states. Similarly, in the short time between the First and Second Hague Peace Conferences, the number of delegates expanded from 26 to 44. The story was similar in the constitution of technical bodies. Fourteen states attended the 1863 Postal Union. By 1914, there was universal membership of the Universal Postal Union.

<sup>46</sup> On Turkey, though, see Oppenheim, *supra* note 35, at 34, where he claims Turkey is still not a member of the society of states or the Family of Nations because it was only semi-civilized. At this time, there was still no place for China (despite it having been invited to The Hague) because it remained subject to unequal treaties and extraterritoriality. See Gong, *supra* note 31, at 28.

State and its subjects to understand and to act in conformity with the principles of the laws of Nations'.<sup>47</sup>

At the same time, some international lawyers, writing in the late-Victorian era, were by now rejecting the idea of international law as a closed system.<sup>48</sup> Many late-nineteenth-century writers were keen to present themselves as open-minded and cosmopolitan in comparison with more backward contemporaries. Lawrence, for example, embraced a form of secularism: 'We have therefore in our definition, spoken of it as "the rules which determine the conduct of the general body of *civilized* states". But we have not thought fit to follow the example of some writers, and limit still further to *Christian* states'.<sup>49</sup> Writers such as Lawrence favoured a liberal international order in which states were admitted on the basis of some formal capacity rather than internal political organization.

By the time of the Versailles Conference, then, there were two clearly competing positions. These are summarized in Georg Schwarzenberger's book on the League of Nations.<sup>50</sup> For Schwarzenberger, one of the key debates at Versailles concerned the future structure and membership of the new international organization. He organized these debates around two poles. He described these as homogeneous universality 'a collective system [comprising] communities of a certain constitutional structure only' and heterogeneous universality where the system or organization 'does not apply such standards'.<sup>51</sup> These two theories of community draw on the debates of the late-Victorian age and anticipated the discussions at San Francisco. They, also, derive from the two liberalisms I discuss in this paper, Charter liberalism (the liberalism of inclusion and pluralism) and liberal anti-pluralism. On the one hand, Schwarzenberger's heterogeneous universality was favoured by states' representatives who believed that 'sovereignty' ought to be the sole test of membership.<sup>52</sup> Entities that were sovereign and independent were entitled to the same rights as other similarly situated states in the international system. The core liberal ideals of liberty and equality were bound up in this idea of sovereignty. States, like individuals, were entitled to full status regardless of constitutional structure or political belief.

This liberalism was challenged at Versailles by those delegates who sought to enforce liberal standards *within* states. These liberal anti-pluralists included those, like Lord Robert Cecil, who insisted that the admission of new states should be made conditional on these states abiding by certain standards in relation to minorities,<sup>53</sup> and others such as M. Viviani, the French representative at the First Assembly, who

<sup>47</sup> Oppenheim, *supra* note 35, at 31.

<sup>48</sup> Wheaton made much the same point in his fourth edition (1904) following the significant changes wrought by the Meiji Restoration.

<sup>49</sup> The contrast is with Theodore D. Woolsey, *Introduction to the Study of International Law* (2nd ed., 1864) 22 (emphasis in the original).

<sup>50</sup> G. Schwarzenberger, *The League of Nations and World Order* (1936).

<sup>51</sup> *Ibid.*, at 4.

<sup>52</sup> See e.g. 'The Argentine Proposal, First Assembly', Plenary Meetings, 261–262, in Schwarzenberger, *supra* note 50, at 62–63.

<sup>53</sup> 'Records, First Assembly' (1920), Plenary Meetings, 406–407, in Schwarzenberger, *supra* note 50, at 60.

argued that: 'A nation desirous of entering here must have a free and responsible government; it must be a democracy.'<sup>54</sup>

The result of the jostling between these positions was not entirely clear. The League of Nations Covenant at Article 1(2) implies that the League was to be a closed system of like-minded states. A central qualification of membership was to be 'self-government' meaning democratic government. However, the practice of the League tells a different tale. In the two decades of its existence the organization embraced a more pluralistic approach to membership with the admission of Abyssinia, the toleration of an authoritarian Italy and the decision to include Bolshevik Russia. As Schwarzenberger puts it, 'the practice of the League tended away from the principle of homogeneous universality . . . as it was envisaged by the authors of the Covenant, towards that of heterogeneous universality'.<sup>55</sup>

### 3 Peace-loving Nations

In the negotiations at San Francisco these two liberalisms clashed again. Once more there was the liberalism of inclusion and universality, a liberalism that sought to extend the parameters of international legality in institutional design to all peoples and all states. This project emphasized the civilizing effect of an international liberal legal order. Merely to participate in such an order was to be subject to positive influences. It was imperative, according to advocates of this view, that all states be admitted to the new international organization. At the same time, there was another liberalism, a more forthright anti-pluralism that sought to exclude enemy states and undemocratic states from the brave new world of a United Democratic Nations.<sup>56</sup> This early liberal anti-pluralism had its roots in a reluctance to accord UN membership to certain categories of illiberal states (these included the enemy states (Japan, Germany), states who had failed to embrace democracy in the post-war era (notably Spain) and even, in some cases, states which had remained ambivalent during the war (e.g. Argentina)). These instincts were developed into a conception of international society that wished to make democracy a condition of entry into the system.

Perhaps naturally, in 1941, a clear distinction was being drawn between enemy states and allied states. To this extent, these early proposals were engineered in an atmosphere of moral and political differentiation rather than sovereign equality and

<sup>54</sup> 'Records, First Assembly' (1920), Plenary Meetings, at 575, in Schwarzenberger, *supra* note 50, at 88.

<sup>55</sup> *Ibid.*, at 94.

<sup>56</sup> It is not always clear which of these liberalisms was being favoured in the various statements made around this time. Clearly, an optimistic democratic liberal would argue that if the extension of liberal democracy around the world is inevitable then there is no choice to make between the liberalism of accommodation and the liberalism of certainty. Liberalism can be both insistent on certain internal standards being met and aspire to universality and inclusion.

pluralism. The Washington Declaration, for example, adopted this adversarial, wartime rhetoric in its reference to ‘savage and brutal forces’ and ‘enemies’.<sup>57</sup>

In preparations for the meeting that produced the Atlantic Charter, Roosevelt continued to take up this theme but this time gave it a liberal-democratic twist. He claimed that the meeting between him and Churchill would instil hope in the peoples of the world that ‘the English-speaking democracies’ would construct a new world order based on freedom and equality.<sup>58</sup> This was repeated (but with the (diplomatic) deletion of the term ‘English-speaking’) at Teheran on 1 December 1943 when the Three Powers agreed to welcome all nations ‘into a world family of Democratic Nations’.<sup>59</sup> The Moscow Declaration itself underwent several redrafts in order to avoid the impression that ‘sovereign equality’ was to apply to the defeated enemy states.<sup>60</sup> The Russians themselves had surprisingly little to say at this early stage on the question of pluralism though at Dumbarton Oaks they called for the exclusion of fascist states from the organization.<sup>61</sup>

A more pluralistic orientation was present in a number of the pre-San Francisco statements. In Moscow, Anthony Eden, the UK Foreign Minister, was already warning against establishing an international organization in which ideology determined membership. He wanted included in the Charter a general principle that there would be ‘no great power interference with forms of government’.<sup>62</sup> The Chinese, no doubt remembering their experience with the standard of civilization, went further and in the Dumbarton Oaks Conversations called for equality of races in the UN Charter.<sup>63</sup> A number of NGOs in North America also took the position that universal membership was desirable.<sup>64</sup> The American–Canadian Technical Plan, for example, argued against a democracy requirement because of its fear that ‘a union of democratic states might find itself confronted by a union of non-democratic states; and recent history has shown that a union of like-minded states of a certain mind may lead to union of

<sup>57</sup> Washington Declaration (Declaration of the United Nations, 1 January 1942). This was signed by 26 belligerents; 21 more states signed the Declaration prior to San Francisco.

<sup>58</sup> Ruth B. Russell, *A History of the United Nations Charter: The Role of the United States 1940–1945* (1958) 34.

<sup>59</sup> *Department of State Bulletin* IX, at 409. The Berlin Conference 1945 reiterated this position by calling for the admission of those erstwhile enemy states which had become democracies: L.M. Goodrich and E Hambro, *Charter of the United Nations: Commentary and Documents* (2nd ed., 1949) 57. The British, too, lacked enthusiasm for the idea of universality though their worries were directed at their Great Power allies. Churchill was secretly fearful of the potential ‘disaster’ if a ‘Russian barbarism overlaid the culture and independence of the great ancient states of Europe’ (see *Hinge of Fate* (1948–1954) 561). Churchill was more interested in regional security organizations than in any ideal of a universal international organization.

<sup>60</sup> Russell, *supra* note 58, at 134. Article 4 refers to ‘the principle of sovereign equality’ as the basis for the new organization.

<sup>61</sup> *Ibid.*, at 424.

<sup>62</sup> *Ibid.*, at 138. It is likely that this was directed at the fear of Soviet interference with the liberated states of Eastern and Central Europe.

<sup>63</sup> *Ibid.*, at 424.

<sup>64</sup> See ‘American–Canadian Technical Plan’, United States Technical Plan, UNCIO III, at 79, Doc. 2 6/7, 23 April 1945.

like-minded states of another mind'.<sup>65</sup> This was mirrored in a statement made at The Inter-American Conference on Problems of War and Peace held in Mexico City in 1945 where the principle of universality was unanimously adopted as an aspiration of the new international organization.<sup>66</sup>

It was inevitable, then, that these two conceptions of international organizations would result in a measure of equivocation in the lead-up to the San Francisco Conference itself. The Uruguayan Government, for example, produced a statement in 1944 that anticipated the ambivalence of many of the delegations at San Francisco. The anti-pluralism of statements such as 'in the democratization of international society it would recognize the most perfect system of maintenance of peace and security' is tempered by a more pragmatic position on membership calling for a more universal system in which 'a specific form of government' would not be required.<sup>67</sup>

Early drafts of the UN Charter at the State Department also tried to have it both ways, envisaging a distinction between membership and participation with the latter being reserved for 'properly *qualified* states'.<sup>68</sup> Article 1 of the Draft Constitution stated that the new organization would 'reflect the universal character of the international community', but Article 1(2) went on to say that 'all qualified states . . . shall be members of the International Organization'.<sup>69</sup> This ambiguous formulation was a condensed version of the tension between the two modes described above and set the scene for a debate between the anti-pluralists and the pluralists during the drafting of the Charter at San Francisco and in the 'Admissions' period. It also resembled the formulae of Oppenheim and Westlake and their distinctions between statehood and 'full' membership of the international community.

At the beginning of the San Francisco conference itself, M. Rolin, the Belgian delegate, set out two of the questions to be resolved by the Committee on Membership:<sup>70</sup> 'Does the Committee consider that the Organization should eventually be universal?' and 'If the Committee considers that members to be admitted are states, does it wish to mention the nature of their institutions?'<sup>71</sup> By the end of the Conference Rolin commented that the questions facing Committee I/2 on membership were the profoundest difficulties of substance facing the Commission.<sup>72</sup>

Delegations were divided on these questions at first. States that supported

<sup>65</sup> *Ibid.*, at 80.

<sup>66</sup> N. Bentwich and A. Martin, *A Commentary on the Charter of the United Nations* (1950) xix.

<sup>67</sup> 'The Position of the Government of Uruguay Respecting the Plans of Postwar International Organization for the Maintenance of Peace and Security in the World', UNCIO III, at 32. Doc.2 G/7, 28 September 1944. A democracy principle might, they argued, be 'abusively applied' and result in an 'indirect form of intervention'.

<sup>68</sup> Russell, *supra* note 58, at 351 (emphasis added).

<sup>69</sup> *Ibid.*, at 352.

<sup>70</sup> There were other questions to consider here, but these are the two that matter most from the point of view of this study. Interestingly, one of the other questions turned on the use of the word 'state' in the term 'peace-loving states'. Some delegations worried that thus usage failed to foresee 'the further incorporation of other communities': UNCIO VII, at 288. Doc. 1074, I/2/76, 18 June 1945.

<sup>71</sup> UNCIO VII, Doc. 195, I/2/8, 10 May 1945. The word 'political' was inserted in the subsequent meeting of the Committee: UNCIO VII, at 19, Doc. 202 I/2/9, 10 May 1945.

<sup>72</sup> UNCIO VI, at 114, Doc. 1167 I/10, 23 June 1945.

universality did so on several grounds. The Venezuelans took it for granted that universality was to be preferred ‘in view of the actual interdependence of all countries in the modern world’.<sup>73</sup> The Uruguayans spoke forcefully in favour of the *obligation* to become a member of the United Nations,<sup>74</sup> while the Brazilians preferred a system in which membership was open to ‘all sovereign states that now exist’.<sup>75</sup> The Guatemalans called for ‘absolute universality’<sup>76</sup> and the Egyptians spoke against the exclusionary technique.<sup>77</sup>

The Western European states adopted a less inclusive position at first, drawing inspiration from the early meetings of Churchill and Roosevelt. The Netherlands, for example, argued that new states should have ‘political institutions which ensure that the state is the servant of its citizens’. Adopting a democratic peace perspective, the Dutch delegate saw democratic government as proof of a state’s likely international behaviour.<sup>78</sup> The French were concerned to promote a measure of solidarity among member states of the United Nations. New states, they asserted, should meet certain conditions ‘in order to guarantee the existence of certain common ideals and a community of political principles shared by members of the organization’.<sup>79</sup> Indeed, the French wanted ‘proof’ of ‘peace-lovingness’ in the institutions of a state. This view was shared by other delegates from the developing world, though the criteria were often modified. The Haitians, for example, proposed an amendment to Article 2(1) which required states to ‘exclude from their relations racial or religious discrimination’.<sup>80</sup> The Chileans thought that ‘membership should be open to all states that love peace and the democratic system’ because ‘democratic principles are essential to peace’.<sup>81</sup> The *Spanish Case* gave the delegates a concrete case to debate. This issue arose in the First Commission at San Francisco where a number of states used Franco’s Spain as an example of the sort of entity that would not gain admission to the Organization at least until it ‘stripped itself of Fascism’.<sup>82</sup> The Ukrainian representative, advocating an even more searching test for Spanish membership, asked: ‘Can we

<sup>73</sup> UNCIO VII, at 19, Doc. 202 I/2/9, 10 May 1945.

<sup>74</sup> UNCIO VII, at 288, Doc. 1074 I/2/76, 18 June 1945 and 10 May 1945.

<sup>75</sup> Brazilian Comment on DO at UNCIO III, at 236, Doc. 2 G/7(e)(1), 2 May 1945.

<sup>76</sup> Guatemalan Observations on International Organization, UNCIO III, at 257, Doc. 2 G/7(f), 23 April 1944.

<sup>77</sup> Egyptian Tentative Proposals on DO, UNCIO III, at 447 Doc. 2 G/7(q).

<sup>78</sup> UNCIO VII, at 19, Doc. 202 I/2/9, 10 May 1945.

<sup>79</sup> UNCIO VII, at 19, Doc. 202 I/2/9, 10 May 1945. See also Norway’s Proposals, UNCIO III, at 359 Doc. 2 G/7(n), calling for the admission of governments harmonious with the aims and purposes of the organization.

<sup>80</sup> UNCIO III, at 52, Doc. 2 G/7(b)(1), 5 May 1945.

<sup>81</sup> Comments of the Chilean Government on IO, UNCIO III, at 284 and 294, Doc. 2 G/7(i), 2 May 1945. A third group of states thought the question was somewhat moot given that universality was not to be achieved until much later. A selective organization was eventually to give way to one based on true universality, but it was thought to be precipitate to claim universality so early in the organization’s life.

<sup>82</sup> French delegate M. Paul-Boncour, UNCIO VI, at 129, Doc. 1167 I/10, 23 June 1945.



admit among us representatives of Franco's government which violated the basic principles of constitutional freedom?'<sup>83</sup>

The Drafting Subcommittee dealing with the issue of membership rejected the anti-pluralist approach on two, potentially contradictory grounds. The Committee's ambiguous final statement was to haunt the UN in its early years. The Subcommittee was against referring to a requirement that states have 'democratic institutions' on the grounds that 'this would imply an undue interference with internal arrangements'.<sup>84</sup> This view was adopted by the full Committee on membership.

On the other hand, the absence of any specific provision to this effect also retained an element of flexibility and elasticity in the adjective 'peace-loving'. This was thought to be a positive feature since it allowed greater discretion to the member states in assessing membership claims.<sup>85</sup> Unfortunately, this proposal did not anticipate that the very flexibility of the provision would permit states to incorporate highly intrusive and ideological criteria into their assessments of prospective members in the early life of the organization.

The universalist, pluralist position prevailed in the end. The dominant principles of the San Francisco discussions were universality and equality.<sup>86</sup> Delegates were concerned not to place too much emphasis on the internal politics of a state.<sup>87</sup> The Report of the Rapporteur in Committee is important here:

The Committee did not feel that it should recommend the enumeration of the elements which were to be taken into consideration. It considered the difficulties which would arise in evaluating the political institutions of States and feared that the mention in the Charter of a study of such nature would be a breach of the principle of non-intervention, or, if preferred, of non-interference.<sup>88</sup>

<sup>83</sup> UNCIO VII, at 19, Doc. 202 I/2/9, 10 May 1945. The Polish Government later brought before the Security Council the question of Spain's membership of the UN requesting that measures be imposed on Spain on the basis that the Franco Government was a threat to the peace. The Council appointed a subcommittee which concluded that Spain was a 'menace to international peace and security'. The matter was taken no further after the Security Council refused to adopt the recommendations of the Committee.

<sup>84</sup> UNCIO VII, at 37, Doc. 314 I/2/17, 15 May 1945.

<sup>85</sup> *Ibid.*

<sup>86</sup> Some vestiges remained of the war-time anti-pluralism. First, at San Francisco, a decision was made to distinguish the original from elected members. This was not merely a procedural distinction because only elected members were subject to a potentially qualitative admission process. The original members were those states which had declared war on one of the two remaining Axis Powers (Germany and Japan) and who had signed the 1942 Declaration by the United Nations as well as those states which had participated in the San Francisco Conference and subsequently signed and ratified the Charter (Article 3 and Article 110). Prospective members were obliged to seek a recommendation from the Security Council followed by admission by the General Assembly. Admission was then subject to the state meeting certain requirements laid out in Article 4(1) (see the discussion below). In addition to this, the Charter embodies a distinction between enemy states and allied or neutral states. These enemy states are subject to the provisions of Article 107 permitting UN members to 'take action' against those states providing such action is 'taken or authorized as a result of that war by the Governments having responsibility for such action'. Article 53 makes it clear that such action does not require the prior authorization of the Security Council. Bentwich and Martin, *supra* note 66, at 19.

<sup>87</sup> UNCIO VII, at 288, Doc. 1074 I/2/76, 18 June 1945.

<sup>88</sup> UNCIO, Report of the Rapporteur of Committee 1/2 on Chapter III (Membership), Doc. 1178, I/2/76(2), at 3, Documents VII, at 326.

However, in describing all of this, I do not want to suggest that the UN Charter system is therefore incompatible with the liberal anti-pluralism I am about to discuss. After all, there were provisions relating to expulsion and suspension included in the Charter (Articles 5 and 6) and I take up the question of these provisions in the final section.<sup>89</sup> It is also true that, though the delegates at San Francisco rejected an anti-pluralist model for international organizations, their governments, initially, did not embrace the idea of the UN as a universal, non-discriminating body. Individual states in the late 1940s and early 1950s, continued to make decisions about membership on ideological grounds.<sup>90</sup> This anti-pluralism represented something of an anomaly in that it was not accompanied by any conceptual justifications.<sup>91</sup> In 1946, five applications were rejected either by the Soviet Union (Eire, Transjordan and Portugal) or by the Western majorities on the Security Council (Albania and Mongolia). This was repeated in 1947 when applications from Austria, Italy, Hungary, Finland, Bulgaria and Romania were rejected.<sup>92</sup>

The pluralist conception, though, reasserted itself in the *Admissions Case* in 1948.<sup>93</sup> In the opinion of the Court handed down on 28 May 1948, the nine majority judges began by restating the two competing approaches to membership in international organizations articulated in the San Francisco discussions:

two principal tendencies were manifested in the discussions. On the one hand, there were some that declared themselves in favour of inserting in the Charter specific conditions which new members should be required to fulfil especially in matters concerning the character and policies of government. On the other hand, others maintain that the Charter should not needlessly limit the Organization in its decisions concerning requests for admission.<sup>94</sup>

The Court favoured the second tendency, holding that member states were ‘not

<sup>89</sup> A provision on withdrawal was not included. The delegations at San Francisco tended to divide on the reasons for omitting a mechanism for withdrawal. The US, for example, believed that such a provision would be otiose since the right to withdraw from an international organization was an incident of sovereignty. Other states were more concerned to ensure that the organization remained universal to avoid the mistakes of the League of Nations. There was a real fear at this time that the experience of the League of Nations might be repeated with mass withdrawals eventually crippling the organization or states forming competing organizations. Securing a universal basis for membership became vitally important to this group and it was only with some reluctance that they accepted the need for Articles on expulsion and suspension. For a general discussion of withdrawal, see Goodrich and Hambro, *supra* note 59, at 142–144.

<sup>90</sup> For discussion, see Bentwich and Martin, *supra* note 66, at 3.

<sup>91</sup> The US, for example, was still fully committed on paper at least to the idea of universality. See the Remarks of the Deputy US Representative on the Security Council (Johnson), 28 August 1946, 524–526, *Documents on Foreign Relations*, vol. VIII (American Peace Foundation, 1948): ‘[The UN] should in its first year, seek as great universality as possible.’

<sup>92</sup> Goodrich and Hambro, *supra* note 59, at 129. The US and the UK opposed Bulgaria, Hungary and Romania because of ‘alleged flagrant violations of human rights’.

<sup>93</sup> *Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports (1948), at 57. Six judges dissented.

<sup>94</sup> *Ibid.*, at 45.

juridically entitled to make . . . consent to the admission dependent on conditions not expressly provided by Article 4(1).<sup>95</sup>

In the Court's reasoning, this commitment to pluralism was tied to the scope of a state's domestic jurisdiction under Article 2(7). Article 2(7) of course is fundamental to the Charter. In some ways, it is the expression of pluralism. States are not to be judged by their internal practices. This zone of immunity can be breached only if the Security Council acts under Chapter VII or in cases where matters previously thought to occupy this zone are transferred into the international sphere. Article 2(7) on its face is quite unhelpful as a piece of legal draughtsmanship. It does not precisely demarcate the international from the national and it does not provide any guidance as to what might be thought to be essentially within the domestic jurisdiction of a state. Nonetheless, it signals that there is an aspect of a state's internal affairs that remains untouchable by the United Nations in its non-enforcement modes. In this sense at least Article 2(7) can be read as an endorsement of ideological pluralism in the organization.

In the *Admissions Case* the Court preferred universalism to ideology. This was to be the spirit behind future admission decisions and the United Nations' image of itself over the next 40 years. I do not mean to suggest that ideology was left behind. Of course, actual decision-making authority was left in the hands of states and, as Goodrich and Hambro remarked, while those states were restricted in the criteria they could employ in coming to decisions (i.e. they had to meet the conditions set forth in Article 4(1)), 'there is no such limitation . . . on the considerations that may be taken into account and the evaluation of them in determining whether these conditions have been fulfilled'.<sup>96</sup> Sporadically, states continued to do just that in ensuring the exclusion of unfriendly states.<sup>97</sup> Nonetheless, the Court confirmed in *Admissions* that the prevailing norm of membership was to be an inclusive, pluralistic one. In the absence of any possibility of agreement concerning the sorts of qualifications that states might be required to meet, the UN's approach to ideology and membership became both functional (could new states meet their formal international obligations?) and agnostic (was the government in effective control regardless of legitimacy or representativeness?). This reflected at least one powerful strand of thought at San Francisco and it was threatened only intermittently until the rise of the new liberal anti-pluralism 50 years later.

The UN, then, though it began as an association of the victor states in the Second World War, quickly aspired to universality. As Inis Claude wrote: 'The adjectival qualification, peace-loving, was not taken seriously except as a basis for excluding the

<sup>95</sup> The court suggests that the conditions are exhaustive but that they are very wide and allow for a great deal of latitude. '[T]hese conditions constitute an exhaustive enumeration and are not merely stated by way of guidance or example. The provision would lose its significance and weight, if other conditions, unconnected with those laid down, could be demanded. . . The conditions [are] . . . not merely necessary conditions, but also the conditions which suffice.' *Ibid.*, at 93.

<sup>96</sup> Goodrich and Hambro, *supra* note 59, at 132.

<sup>97</sup> See e.g. the US refusal to support Vietnam's application for membership in 1975.

defeated Axis states and Franco's Spain.<sup>98</sup> It is possible to see the period 1945 to 1989 as one marked by a rejection of standards of civilization, culture and democracy as criteria for membership of the international community.<sup>99</sup> Entities meeting certain neutral criteria based on effectiveness and a purely formal promise to comply with international norms were admitted to the system. International community was liberal, then, in the same way that some democracies are said to be liberal: it tolerated highly illiberal elements within its membership.<sup>100</sup> Following the *Admissions Case*, most applications for membership were processed in a routine manner.<sup>101</sup> Even as early as 1945 Josef Kunz, following Schwarzenberger, could claim, plausibly, that: 'Since 1920 positive international law has recognized the pluralism of the legal and value systems of the world.'<sup>102</sup>

## 4 Outlaw States (and the New Liberal Anti-Pluralism)

### A Introduction

In the post-war era, Charter liberalism continued to dominate the way that membership in the international community was structured. In the absence of agreement on a substantive politics of the state, there was, at least, a grudging consensus on the state (in any form) as the legitimate form of representation.<sup>103</sup> Certainly, the advent of the international human rights machinery modified the view that a state's internal affairs were just that, matters for the state alone and not subject to international supervision or surveillance. Areas left to the domestic jurisdiction of states underwent shrinkage as the human rights regime became more and more intrusive. Human rights instruments began to create an expectation that states would conform to certain human rights standards in their domestic practices.

However, the important point to recognize for present purposes is that the human rights system did little to change the practice of universal international organizations in their admissions policies. So, while human rights law seemed to insist on adherence to certain values, the practice of international organizations remained pluralistic.

<sup>98</sup> Inis Claude, *Swords into Ploughshares* (1956) 88.

<sup>99</sup> Civilization remains a test. See the duty to accord minimum standards of civilization to foreign nationals. See *Republic of Guinea v. Democratic Republic of the Congo*, [www.icj-cij.org/icjwww/idocket/igc/igcframe](http://www.icj-cij.org/icjwww/idocket/igc/igcframe).

<sup>100</sup> Norms such as the persistent objector principle are derived from this idea of tolerance. For a criticism of this idea and a call for 'universality', see Charney, 'Universal International Law', 87 *AJIL* (1993) 529.

<sup>101</sup> However, there were cases where the General Assembly effected some analysis of the criteria under Article 4(1). See e.g. 'SC Resolution 167', in Karel Wellens, *Resolutions and Statements of the United Nations Security Council (1946–1989): A Thematic Guide* (1990) 597.

<sup>102</sup> Kunz, 'Pluralism of Legal and Value Systems of the World', 49 *AJIL* (1955) 370, at 372. Kunz dates this movement from 1856 when Turkey joins the European Family of Nations. The key moment may well have been the First World War after which it made little sense to divide the world into barbarians and civilized peoples. The savagery of the war in Europe, as well as the accompanying propaganda, made the distinction between European civilization and non-European barbarism untenable.

<sup>103</sup> See Koskeniemi, 'The Future of Statehood', 32 *Harvard International Law Journal* (1991) 397.

There was no serious attempt made to fix human rights obligations, routinely, to entry requirements into the international community during the Charter era.<sup>104</sup>

Notice that this is not an argument that human rights during this period were wilfully violated or that there is a gap between reality and rhetoric in the area of human rights or that there is no such thing as human rights law.<sup>105</sup> The argument is simply that on the whole the behaviour of a state was not regarded as significant for the purposes of that state's engagement in multilateral organizations.<sup>106</sup> This remained the case in the period up to 1966 (or during what David Forsythe called the standard-setting and promotional phases of the human rights regime<sup>107</sup>). It was the UN's response to *apartheid* in South Africa and white rule in Rhodesia (now Zimbabwe) beginning in 1966 that first saw a link made between internal state practices and status in the international community. Here are found the portents of the anti-pluralism that was to flourish in the post-Cold War era.<sup>108</sup> The forerunners of today's pariah states were Southern Rhodesia and South Africa. For example, as a response to Ian Smith's Unilateral Declaration of Independence in 1965, the Security Council called on states to break off relations with Southern Rhodesia and applied a sanctions regime that became increasingly punitive.<sup>109</sup> In South Africa, the same process occurred.<sup>110</sup> These legal processes, partly, were about imposing liberal values on states but they were ultimately directed at ending *apartheid*, deemed the most egregious and offensive form of racism in existence at that time. In the absence of this special quality (*apartheid*), the internal politics of a state continued to be regarded as irrelevant to a state's or government's status in the international order. The failure to expel, or even to sanction seriously, the likes of Kampuchea, Idi Amin's Uganda or Guatemala spoke volumes for the continuing commitment to inter-state pluralism.

All of this began to change in the late 1980s with the development of norms and practices designed to promote democratic governance. On the normative front, various human rights organs within and outside the UN system articulated new

<sup>104</sup> The Council of Europe is an obvious exception to this norm. However, my primary concern in this thesis is with international or universal organizations rather than regional organizations. The Council experience was only taken seriously as a possible model for international organization by the liberal internationalists in the post-Cold War era.

<sup>105</sup> James Shand Watson, *Theory and Reality in the International Protection of Human Rights* (1999). For an interesting constructivist position at odds with Watson's methodology, see T. Risse, S. Roppe and K. Sikkink, *The Power of Human Rights* (1999).

<sup>106</sup> Perhaps the most egregious example of this was the continued membership of the Khmer Rouge in the General Assembly long after it had been shown that the organization was implicated in a human rights holocaust and after it had been deposed by the Hun Sen Government with the aid of Vietnamese intervention.

<sup>107</sup> See David Forsythe, *The Internationalization of Human Rights* (1991).

<sup>108</sup> For a discussion of the sanctions regime as applied to South Africa, see A. Klotz and N. Crawford, *How Sanctions Work: Lessons from South Africa* (1999).

<sup>109</sup> SC Res. 221 (1966); SC Res. 232 (1966); SC Res. 277 (1970).

<sup>110</sup> See e.g. SC Res. 418 (1977).

democratic standards.<sup>111</sup> In practice, the United Nations entered the business of election monitoring through its Electoral Assistance Division and, in several prominent instances, acted to restore democratic governance through the use of force.<sup>112</sup> In addition, Western commentaries began to adopt a celebratory air in discussing the spread of democracy.<sup>113</sup> Accompanying this body of practice and rhetoric was early jurisprudential work by Henry Steiner and Michael Reisman that became instrumental in proposing a wider link between the internal political arrangements of states and their right to enjoy full sovereign rights within the international community.<sup>114</sup>

In 1990, Michael Reisman declared that undemocratic governments lacked the sovereignty that was a prerequisite to the enjoyment of statehood in the international community.<sup>115</sup> Sovereignty, for Reisman, was possessed by the people of the state not its government. The government could derive authority and thus exercise sovereignty at the bidding or sufferance of the people but governments could not displace that sovereignty with a sovereignty founded on effectiveness alone. The intended effect of all this was the de-legitimization of undemocratic states and governments and the development of a right of unilateral intervention, in certain cases where, for example, elected leaders had been deposed in a military putsch. The legitimacy of such an action, it was true, would depend on the particular context but in no case would the sovereignty of the state operate as an automatic bar to intervention.

Theorizing around this idea has become even more ubiquitous in recent international law scholarship. Either implicitly or explicitly, a new liberal anti-pluralism has been drawn to the idea of separating the globe into zones — the democratic-liberal or decent society operating in a sphere of cosmopolitan law and the failed state/outlaw

<sup>111</sup> See e.g. Human Rights Committee, General Comment No. 25 (57), UN Doc. CCPR/C/21/Rev.1/Add.7 (1996), OSCE Copenhagen Declaration, [www.osce.org/inst/oscepa/copenhagen.htm](http://www.osce.org/inst/oscepa/copenhagen.htm). For an overview, see Cerna, 'Universal Democracy: An International Legal Right or the Pipe Dream of the West?', 27 *New York University Journal of International Law and Policy* (1995) 289.

<sup>112</sup> Most notably in Haiti, S/RES/940 (1994); Sierra Leone, S/RES/1270 (1999) (establishing UNAMSIL); Liberia, S/RES/866 (1993) (establishing the UNOMIL mandate to observe and verify elections); and Angola, S/RES/747 (1992) (supporting elections in 1992). The latest practice in the election-monitoring area occurred in Kosovo (UN Security Council Resolution S/RES/1244 (1999) (on the deployment of international civil and security presences in Kosovo)) and in East Timor (UN Security Council Resolution S/RES/1246 (1999)). See also the parallel developments in the practice of international economic law where the World Bank and the IMF began to attach good governance conditions to loan and credit agreements. The will to continue this active engagement in election-monitoring may depend to some extent on the US Presidential elections with candidate George W. Bush arguing 'against extensive US engagement in nation-building, in democracy promotion', *Guardian Weekly*, 12–18 October 1999, at 35.

<sup>113</sup> Most obviously in Francis Fukuyama's *The End of History and the Last Man* (1992). Some of this enthusiasm remains today. Following the fall of Milosevic, Alexander Lukashenko, the President of Belarus, was described as 'the last unelected leader in Europe', *Washington Post Weekly*, editorial, 12–18 October 1999, at 35.

<sup>114</sup> Steiner, 'Political Participation as a Human Right', 1 *Harvard Human Rights Yearbook* (1988) 77.

<sup>115</sup> Reisman, 'Sovereignty and Human Rights in Contemporary International Law', 84 *AJIL* (1990) 866, at 866.

state surviving in the state of nature.<sup>116</sup> Instead of the pluralistic, procedural attitude of Charter liberalism we have a more judgmental, substantive liberalism.<sup>117</sup> The core norms of the old liberalism, it is argued, no longer capture the reality of the new transnational order (Slaughter), are morally bankrupt (Tesón) or are in the process of radical modification (Franck).

There is, of course, much that could be said about this new liberalism. Questions abound. Where do the new norms come from? How can they best be implemented? Should undemocratic groups within states be tolerated? Is democracy a spreading practice? Is democracy a universally valid value?<sup>118</sup> How is political community physically constituted? Who is admitted into the society? Who is excluded? What are the consequences of exclusion for those states confined to the state of nature or the zone of war?

It is these final three questions that interest me here. I want to conclude this paper, then, with an inquiry into the role of the outlaw state in these liberal anti-pluralist writings. In discussing all this, I want to distinguish between two branches of liberal anti-pluralism. I will call these mild and strong liberal anti-pluralism. In each case, distinctions are drawn between states on the basis of a particular characteristic of these states, often associated with the presence or absence of a liberal political order. In the case of mild anti-pluralism, the distinction between liberal and illiberal states is significant for analytic purposes, but it does not provide an automatic ground for exclusion of that state from the international community or intervention in that state's affairs. Strong anti-pluralists, on the other hand, tend to favour forms of exclusion and are less constrained about recommending military action against illiberal or outlaw or recalcitrant states. I place Anne-Marie Slaughter and Thomas Franck in the mild anti-pluralist camp with Fernando Tesón and, to a lesser extent, Michael Reisman representing strong anti-pluralism. The political philosopher, John Rawls, tends to hover somewhere between the two positions depending on the particular topic under review.

In thinking about pariah states, it is important both to define what is meant by terms such as 'illiberal' or 'outlaw' and also to make some distinctions among the various techniques that might be utilized in modifying their behaviour. Thus far, I have tended to use the terms recalcitrant or outlaw or illiberal state interchangeably. Now, I want to make some preliminary distinctions. Outsider states (to use a neutral term) fall into three categories (these are obviously not mutually exclusive). In the first category are those states that are constitutionally illiberal. The theorists under discussion use the term 'illiberal' to describe a state that fails to offer its citizens a

<sup>116</sup> '[T]he moment of victory of a political force is the very moment of its splitting: the triumphant liberal-democratic "new world order" is more and more marked by a frontier separating its inside from its outside.' Zizek, quoted in Fitzpatrick, *supra* note 38, at 18.

<sup>117</sup> 'The most distinctive aspect of Liberal international relations theory is that it permits, indeed mandates, a distinction among different types of states, based on their domestic political structure and ideology.' Slaughter, *supra* note 2, at 504.

<sup>118</sup> These questions are taken up in some of the essays contained in Fox and Roth, *supra* note 1.

typical range of civil and political rights, lacks a system of government in which authority is dispersed and does not hold free periodic elections in which the government is elected by the citizens of that state.<sup>119</sup> In the second category are those states that fail to play by the rules of the international system. They are illiberal in their external relations. These states include aggressive states (states that threaten the liberal-democratic core, in particular) and, in a more benign variant, states that reject the dominant norms of procedural justice. These states repudiate the international legal order altogether because of its alleged incompatibility with that state's core values.<sup>120</sup> Finally, there is a third conception of the outlaw. This is the state that is worse than merely illiberal, it is genocidal or a gross violator of core security rights (e.g. the right to life, the right not to be tortured). Keeping these distinctions in mind helps explain the different liberal anti-pluralist approaches to community.

Liberal anti-pluralists also suggest a range of methods in approaching the problem of the outsider state. A willingness to employ these techniques can distinguish strong and mild forms of anti-pluralism. The two most controversial techniques are exclusion and intervention because they represent the ultimate sanctions against the outsider state. Exclusion encompasses either denial of admission to membership to a state on the basis of its internal or external behaviour or the expulsion of a member state because of its failure to meet certain democratic conditions. The hope in these cases is that a spell in the wilderness will make the pariah state come to its senses and re-enter international society as a reformed character.

Intervention can be seen as either an alternative or a supplement to exclusion. In this case, the international community or the democratic alliance takes military action either to suppress a threat from the outlaw state against the democratic community or, in a variant of humanitarian intervention, to enforce democracy within a state. The intervention, itself, can be either unilateral or UN-sanctioned. Liberal anti-pluralists diverge quite sharply on the legality of the former.

In the next section, I want to consider in turn these two questions of identity and strategy in a selection of liberal anti-pluralist writings.

## ***B Defining the Outlaw***

Thomas Franck is usually credited with having first proposed a norm of democratic governance in international law.<sup>121</sup> Franck finds support for his thesis that there is an

<sup>119</sup> These criteria are inevitably the subject of much debate. What is the relationship, for example, between liberalism and democracy (Metzl and Zakaria, 'Information Intervention: When Switching Channels Isn't Enough: The Rise of Illiberal Democracy', 76 *Foreign Affairs* (1997) 22). Ought elections to be fair as well as free? Should civil rights have priority over economic rights? What I have done here is to synthesize a common definition from the many circulating.

<sup>120</sup> In other words, a state can adopt illiberal or undemocratic practices internally and/or they can refuse to comply with the rules of the liberal international legal order, i.e. they can be illiberal towards other states.

<sup>121</sup> See Franck, *supra* note 10. The themes in Franck's work have been adopted and expanded in a number of articles. See e.g. Halperin, 'Guaranteeing Democracy', 91 *Foreign Policy* (1993) 105 (arguing that a series of constitutional guarantees should be put in place within the UN system to ensure support for states willing to hold democratic elections. Further arguing that this international guarantee clause should include a promise to defend republican government); and Fox, 'The Right to Political Participation



emerging right to democratic governance in a sequence of human rights norms developed in the post-Charter era and refined in the 1980s and 1990s. These include the right to free expression found in the International Covenant on Civil and Political Rights, the right to self-determination and an embryonic norm of election-monitoring. These norms are said to combine to produce a novel right or 'entitlement' to democracy.

The democratic norm can be used to judge states. Clearly, some states fall short. In the original democratic governance article, however, little is said about the identity of these states.<sup>122</sup> According to Franck, there are about 60 of them in the system.<sup>123</sup> Their number may be diminishing but there are still the 'hard-core abstainers'.<sup>124</sup> These states are not even interested in acquiring external validation from the international community through the use of electoral monitors from the UN. Elections, if they are held at all, are shams.

In his book on 'fairness', Franck sheds more light on his conception of international order distinguishing here not between democratic and non-democratic states but, instead, between those states, whether liberal or illiberal domestically, who are willing to embrace a liberal notion of multilateralism or, as Chris Reus-Smit puts it, a norm of procedural justice in their external relations (i.e. most of the non-democratic states in the UN) and those illiberal states whose 'particular ideology becomes the sole valid norm for judging disputes between nations'.<sup>125</sup> This second group of states has included the Soviet Union (at various times), Napoleonic France and Hitler's Germany and it is in relation to this second group that Tom Franck's anti-pluralism kicks in: 'a global community of fairness could not include any group which believes in an "automatic trumping entitlement"'.<sup>126</sup> For Franck, in his book on 'fairness', the illiberal state becomes an outlaw only if it rejects the rules of the game altogether in its external relations. The merely undemocratic state is not (yet) an outlaw but its government lacks the validation it may need to survive.

It was Anne-Marie Slaughter who developed liberal international law into a

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in International Law', 17 *Yale Journal of International Law* (1992) 539 (arguing that a series of treaties has now created a human right to participate in the political process and that international law is now based on the sovereignty of states and people). See also Fox and Roth, *supra* note 1; and Weller *et al.*, *Documents on Democratic Governance* (1999).

<sup>122</sup> Franck seems to associate them with two bankrupt theories of the state: the dictatorship of the proletariat and forced modernization: *supra* note 10, at 48–49.

<sup>123</sup> This figure is derived from subtracting Franck's list of 130 democratic states from the 190 or so states in the international system. The figure of 130 is, of course, highly contentious. As Franck admits, while these 130 states hold elections, not all of them are fair. Franck, 'Legitimacy and the Democratic Entitlement', in Fox and Roth, *supra* note 1, at 27–28, n. 2. Louis Hartz speaks of the 'impulse [in American liberalism] which inspires it to define dubious regimes elsewhere as "liberal"': Hartz, *supra* note 8, at 285.

<sup>124</sup> Franck, *supra* note 123, at 60.

<sup>125</sup> See C. Reus-Smit, *The Moral Purpose of the State* (1999).

<sup>126</sup> Thomas Franck, *Fairness in International Law and Institutions* (1998) 16.

full-blown theory about transnational legal relations.<sup>127</sup> Her ‘liberalism’ can be contrasted with two competing conceptions of international relations — classical international law and realism. Both are rejected as inadequate because neither is willing, literally, to look into the state. Realism remains tied to the image of the state as monolithic and opaque while classical international law refuses to take seriously the differences between states for the purposes of norm creation and institutional design. In contrast, Slaughter’s liberalism builds on the different behavioural patterns exhibited by liberal and illiberal states to create the basis for an international law of democratic peace. This liberalism takes the relations between liberal states and creates a theory of transgovernmental law around these relations.<sup>128</sup> Slaughter’s liberal theory is about the interaction of the domestic with the international and, in particular, the formation of foreign and economic policy by groups within states and by transnational elites. Work in this mode was inspired by the democratic peace thesis developed in the work of Michael Doyle and Bruce Russett.<sup>129</sup> Liberal international lawyers, such as Slaughter, want to take the insights found in this work and transform them into a wider and more comprehensive theory not only about why liberal states avoid war with each other but about why, and the different ways in which, they get on so well together.

Even though it has received an inordinate amount of attention and criticism, the question of outlawry does not exercise Slaughter much.<sup>130</sup> Nonetheless, it still forms something of a premise for thinking about how liberal theory might work. For the present, it is enough to say that the differences between liberal and illiberal states boil down to the way they are organized internally. The distinction between the internal and external illiberalism has no real purchase for Slaughter and many democratic peace scholars because, following Kant, a state’s internal arrangements will determine how it behaves externally. An illiberal state will by definition behave in an illiberal manner in its foreign policy. But what is an illiberal state? For Slaughter, the distinction between liberal and illiberal states is a simple one and can be disposed of quickly. In her article ‘International Law in a World of Liberal States’ she says:

Liberal democracy can be defined in many ways. As used here, it denotes some form of representative government secured by the separation of powers, constitutional guarantees of civil and political rights, juridical equality, and a functioning judicial system dedicated to the rule of law.<sup>131</sup>

The consequences of this difference interest Slaughter much more than the definitional problems associated with the distinction. I discuss these consequences in the next section.

<sup>127</sup> But see also the important work of Harold Koh, e.g. ‘Why Do Nations Obey International Law?’, 106 *Yale Law Journal* (1995) 2599; and ‘Transnational Legal Process’, 75 *Nebraska Law Review* (1996) 181. For a more detailed description of Slaughter’s oeuvre, see Alvarez, *supra* note 1, at 183–190.

<sup>128</sup> Slaughter, *supra* note 2, at 1.

<sup>129</sup> See e.g. M. Brown *et al.* (eds), *Debating the Democratic Peace* (1996).

<sup>130</sup> In fact, the position of illiberal states within this theory has been modified and rendered less central in later versions of her work.

<sup>131</sup> Slaughter, *supra* note 2, n. 18.

When one turns to consider the likes of Tesón, the picture becomes decidedly murkier on the question of identifying outlaw states. His work features the most robust defence of strong liberal anti-pluralism.<sup>132</sup> I have discussed Tesón elsewhere so this summary will be brief.<sup>133</sup> Tesón's 'Kantian Theory of International Law' is an explicit rejection of the statism inherent in Charter liberalism.<sup>134</sup> The principle underlying Kantian international law is 'normative individualism' not sovereign equality.<sup>135</sup> The individual's democratic and human rights prevail over the state's claims to territorial integrity or political sovereignty. Following Reisman, sovereignty resides with the people and not with the state.<sup>136</sup> The state's sovereignty, such as it is, is derived from the consent of the people. In this way, domestic legitimacy rather than effectiveness or recognition determines international status.<sup>137</sup> Tesón's Kantian conception is thus guaranteed to produce justice at two mutually supportive levels. Just municipal institutions are good in themselves but they also reproduce justice and peace at the international level. Liberal states establish liberal international relations. Equally, a just, liberal international order will support, promote and, occasionally, enforce a just, democratic, domestic order. Free citizens will insist on a just foreign policy while just (international) institutions will insist that citizens are free. The ideal, then, is 'a federation of free states' where the domestic and the international become parasitic on each other to good effect.

For Tesón, the distinguishing features of the outsider state seem initially uncomplicated: 'tyrannical governments are outlaws'.<sup>138</sup> But at other times, Tesón speaks of outlaw states as those states that abuse human rights and/or are aggressive and/or are illiberal in some way. He is less certain, as I will indicate shortly, about whether the Kantian view would treat these differently or indeed how far the liberal states would go in imposing liberalism on the recalcitrant, the aggressive and the nasty.

While Tesón's work is ambivalent on the question of outlaws, John Rawls develops,

<sup>132</sup> I discuss Tesón here because he is the most interesting and radical of the anti-pluralists. For other examples, see Reisman, 'Coercion and Self-Determination: Construing Charter Article 2(4)', 78 *AJIL* (1984) 642. For another example of strong liberal anti-pluralism, see D'Amato, 'The Invasion of Panama Was a Lawful Response to Tyranny', 84 *AJIL* (1990) 516.

<sup>133</sup> Simpson, *supra* note 16, at 116.

<sup>134</sup> Tesón, *supra* note 10, at 54. He says at one point: 'A liberal theory of international law can hardly be reconciled with the statist approach.' Needless to say, this whole article denies that claim. Statism is a liberal theory of international law. Liberalism is as much about non-intervention and self-determination as it is about justice. What Tesón means is that the Kantian theory of international law is irreconcilable with statism, though even this claim is dubious given Kant's own willingness to accommodate the state in *Perpetual Peace*. See also Fernando R. Tesón, *A Philosophy of International Law* (1998).

<sup>135</sup> Tesón, *supra* note 10, at 54.

<sup>136</sup> Reisman, *supra* note 132.

<sup>137</sup> Tesón, *supra* note 10, at 54.

<sup>138</sup> *Ibid.*, at 89.

more explicitly, a tripartite distinction in his *Law of Peoples*.<sup>139</sup> Rawls divides states into three categories: the liberal, the illiberal but well ordered, and the outlaw.<sup>140</sup> He constructs an ideal theory to arrange relations between liberal and well-ordered illiberal peoples and a non-ideal theory to regulate relations between these ‘decent’ states and the outlaw or burdened (failed) states.<sup>141</sup> For Rawls, a form of reasonable intercourse is possible between liberal states and the decent illiberal states and he describes one hypothetical decent illiberal state, ‘Kazanistan’, in order to show how this would work.<sup>142</sup> On the other hand, the outlaw or failed states are simply subject to the dictates of those states in the zone of law.<sup>143</sup> Here Rawls is embracing a distinction made earlier. A state is outlaw not because it is undemocratic or internally illiberal but because it is illiberal in its dealings with other states or because it is a gross violator of human rights.<sup>144</sup> Rawls wants to distinguish decent illiberal states (states that respect human rights and, more importantly, harbour no designs on the territory of other states) and outlaw states (states that are not only illiberal but also aggressive, states that are rational but unreasonable and states that consistently violate core human rights).<sup>145</sup>

The presence or absence of liberalism or democracy in the internal arrangements of the state is not as central here in Rawls’ case as it is in, say, Tesón’s. For Rawls, the outlaw state must be worse than merely illiberal, it must be aggressive externally or vicious internally. This results in a dual test for full legitimacy in each case. The legitimate state is one that is democratic (Franck) or republican (Tesón) or decent (Rawls) internally and abides by the dominant norms of procedural justice

<sup>139</sup> I have drawn this from his essay ‘The Law of Peoples’, found in the book *The Law of Peoples*, *supra* note 11. This essay is an expanded and refined version of the original work found in the 1993 Amnesty Lectures, ‘The Law of Peoples’, in S. Shute and S. Hurley (eds), *On Human Rights* (1993). It is also featured in the recently published S. Freeman (ed.), *Collected Works of John Rawls* (1999).

<sup>140</sup> He includes in this third category failed states or burdened states. These states are outside law not so much because of what they have done but because of what they are no longer able to do, i.e. function as sovereign states.

<sup>141</sup> There is much more to be said about Rawls’ theory, but I want to focus solely on this question. See Brilmayer for criticisms of Rawls that his work is statist and unsystematic, *supra* note 13, at 5–6.

<sup>142</sup> A number of commentators have argued that the world contains no Kazinistans; that the decent hierarchical state of Rawls’ imaginings does not exist. I think an equally large problem for Rawls is that his liberal state does not seem to exist either.

<sup>143</sup> There is nothing new in this tripartite distinction either. James Lorimer was distinguishing between civilized states (Western Europe, North America), barbarians (the Turks) and savages (‘criminal states’ such as Algeria and Egypt) in the late nineteenth century. It is even mirrored in the ABC mandate system. See Lorimer, *supra* note 38.

<sup>144</sup> In this way, Rawls is distinguishing between ‘the fact of reasonable pluralism’ (Slaughter’s zone of legitimate difference, perhaps) and the fact of unreasonable pluralism (the differences between outlaw states and others).

<sup>145</sup> In other words, the possibility of liberalism exists in three spheres. First, the international can be either illiberal or liberal in one of the two ways I have documented, states embedded in their own societies can be either liberal or illiberal and, finally, and critically, states in their posture towards the international can either adopt a liberal mode of behaviour or they can adopt an illiberal, antagonistic aspect towards the international sphere.

operational in the international legal order.<sup>146</sup> Of course, this dual test could result in the exclusion of a liberal state from the system. It is unclear whether Tesón regards this as impossible or merely unlikely. Rawls and Franck both seem to accept that states that are illiberal in their domestic relations can nevertheless adopt liberal practices in their international dealings. It is equally possible that a liberal state might act in a highly illiberal manner internationally (realists, of course built a whole theory of international politics on this supposition). Two examples come to mind. Imperial Germany in 1914 possessed a liberal constitution and yet adopted an extremely war-like, chauvinistic posture in its foreign affairs.<sup>147</sup> Similarly, the Reagan administration was no great respecter of the system of multilateralism and non-aggression, regularly violating international law in the most egregious manner.<sup>148</sup>

### C (Dis)Engaging the Outlaw

Just as definitions of outlawry differ considerably among liberal anti-pluralists, so, too, do the techniques regarded as appropriate for dealing with these outlaws, however so defined. Mild anti-pluralists such as Franck and Slaughter reject both exclusion and unilateral intervention as methods by which states that are merely undemocratic might be brought to heel. At least for the present, according to Franck, an illiberal state that plays by the norms of multilateralism suffers no exile even if it treats its citizens rather poorly and/or refuses to embrace democratic governance.<sup>149</sup> He does anticipate a time when this may change, arguing that the European Union is the model likely to be adopted by international organizations in the future. 'Democracy and human rights are now requirements for admission of a new member to the European Community', he states at one point, before going on to predict the emergence of a similar rule at the international level.<sup>150</sup> For the present, Franck appears to favour engagement rather than exclusion. He is similarly wary of promoting a norm of pro-democratic intervention, preferring to encourage non-forcible measures designed to produce better behaviour on the part of these states.<sup>151</sup> So, the linking of trade to human rights is one suggested avenue for influencing these states.<sup>152</sup> In extreme cases, Franck accepts the need for collective, UN-sanctioned military force, but he cautions: 'entitlement to democracy can only be expected to

<sup>146</sup> I am not certain that even this would be sustainable but at least it accommodates the insight that so many illiberal states continue to embrace judicial or multilateral forms (e.g. Libya at the ICJ) and liberal democracies often adopt such a recalcitrant attitude to liberal international law.

<sup>147</sup> See Doyle, *supra* note 15, at 216–217, n. 8.

<sup>148</sup> See Weston, 'The Reagan Administration versus International Law: *Case W. J. Int'l Law* (1987), at 29.

<sup>149</sup> Perhaps the punishment for failing to achieve liberal democratic governance is the lack of validation and consequently stability within the state concerned. No sanction may be necessary since illiberal governments are so fragile anyway. See Franck, *supra* note 123, at 29.

<sup>150</sup> *Ibid.*, at 42.

<sup>151</sup> For a contrasting view, see Michael Reisman, who disagrees with Franck's mild anti-pluralism, arguing instead that the democratic entitlement can only flourish in cases where unilateral action is permissible. Reisman, 'Sovereignty and Human Rights in Contemporary International Law', in Fox and Roth, *supra* note 1, at 256.

<sup>152</sup> *Ibid.*, at 47.

flourish if it is coupled with a reiterated prohibition on . . . unilateral initiatives.<sup>153</sup> Franck, then, is a mild anti-pluralist because he is a multilateralist on intervention and he is soft on exclusion preferring to wait for the development of EU-style norms before arguing for the exclusion of (internally) illiberal states from the system.

Likewise, Anne-Marie Slaughter believes some form of dialogue is possible between liberal and non-liberal states.<sup>154</sup> To this extent, Slaughter's liberalism is a theory of international relations not a conception of law in a world of exclusively liberal states.

Liberal international relations theory applies to all States. Totalitarian governments, authoritarian dictatorships, and theocracies can all be depicted as representatives of some subset of actors in domestic and transnational society, even if it is a very small or particularistic slice.<sup>155</sup>

Presumably, liberal states could engage with their illiberal counterparts using the (outmoded) techniques of classical international law. In addition, though, non-state actors within the liberal state could influence policy and conditions within the non-liberal state by seeking to open up that state's economy and by targeting humanitarian aid.<sup>156</sup> The aim appears to be the promotion of liberalism by non-forcible stealth. For this to occur, engagement is necessary and desirable. Slaughter's anti-pluralism is mild, because instead of expelling states from the system (Tesón, Rawls) or using military intervention to impose democratic governance from the outside (Reisman), it seeks to engage with outlaw states using a combination of old-fashioned classical international law combined with an ambitious private and public transnationalism of networks.<sup>157</sup>

Indeed, Slaughter appears less and less comfortable with the distinction between liberal and non-liberal states.<sup>158</sup> In the most recent refinement of her Liberal Theory, she has recanted the strong anti-pluralist position, stating that, for the time being at least, 'we should not explicitly limit global institutions to liberal states or develop domestic and international doctrines that explicitly categorize entire states as such' (though she does accept that regional organizations may and do adopt such practices). However, Slaughter continues to ascribe a descriptive role to the distinction between liberal and non-liberal states. Indeed, her general theory of international behaviour mandates her to do this. Thus, the distinction will operate, she claims, 'as a positive predictor of how [states] are likely to behave in a wide variety

<sup>153</sup> Franck, *supra* note 10, at 875.

<sup>154</sup> Slaughter also discusses, albeit briefly, law in a world composed exclusively of illiberal states. This would resemble the realist view of international relations, a world dominated by state actors: *supra* note 2, at n. 58.

<sup>155</sup> *Ibid.*, at 2.

<sup>156</sup> *Ibid.*, at n. 58.

<sup>157</sup> In Slaughter's work, the central distinction is not between liberal and illiberal states but between one-level statist conceptions of international order and those, like her own multi-level liberal theory, which focus on the role of other international and domestic actors acting through and beyond the state.

<sup>158</sup> At the ASIL 2000 Conference, Slaughter gave an indication of the importance of this issue to her audience thus: 'the question that José [Alvarez], if not all of you, has been waiting for: do I still subscribe to a distinction between "liberal" and "non-liberal" states?'

of circumstances, including within or towards international institutions'.<sup>159</sup> I wonder if Slaughter can escape so readily the normative implications of this descriptive theory.<sup>160</sup> If the difference between liberal and illiberal states is so critical to the success and failure of international institutions and processes, then does it not, for example, behove designers of institutions to take the distinction into account in modelling membership criteria and organizational principles?

One subtle suggestion about how a distinction between liberal and illiberal states might be reflected in norm-development is made by James Crawford in his essay on 'Democracy and the Body of International Law', in which he weaves a path between outright exclusion and full engagement, between the Charter liberal ideal where no distinctions are permitted and the liberal anti-pluralist approach where they are mandated.<sup>161</sup> Crawford recommends that a more tempered legal norm be developed that permits engagement with unrepresentative states and governments but requires that parties entering into either contracts or treaties with that state do so at their own risk. Crawford describes these treaties as 'unconscionable transactions with wholly undemocratic regimes'.<sup>162</sup> Successor governments, democratically elected, might then decide to review the transactions of the previous regime. The international system, then, would presumably look upon such review with a degree of tolerance *pace* the classic *Tinoco* approach.

Whichever techniques are preferred, the group of writers I have characterized as mild anti-pluralists accept Franck's central point that democracy is good for international law. They also, however, reject both outright exclusion (for the time being) and unilateral forms of intervention as options for confronting the phenomenon of the illiberal state.

Strong liberal anti-pluralism take a less accommodating position on the illiberal. For Tesón, the resulting constitutional arrangements of Kantian international law are simple enough: 'states observe human rights as a precondition for joining the alliance'.<sup>163</sup> Outlaw states that do not observe human rights become vulnerable to exclusion and intervention. They are excluded from the United Nations (either through an amendment to Articles 4 and 6 of the Charter or through a reinterpretation of the phrase 'peace-loving'), their governments are disenfranchised from

<sup>159</sup> Slaughter, 'Liberal Theory', at 11 (on file with author).

<sup>160</sup> In an essay on 'Government Networks', she believes that "enlargement" through embracing specific institutions in transgovernmental networks can sidestep the often thorny problem of labeling countries wholesale as democracies or non-democracies': see in Fox and Roth, *supra* note 1, at 202. This, perhaps, underestimates the extent to which the form of government in a state will condition the extent to which it will permit such transgovernmental networks to flourish. It may be that the distinction between democratic and non-democratic states is fundamental to the success of such networks rather than rendered irrelevant in the face of them.

<sup>161</sup> Crawford, 'Democracy and the Body of International Law', in Fox and Roth, *supra* note 1, at 108–109.

<sup>162</sup> *Ibid.*, at 110.

<sup>163</sup> Tesón, *supra* note 10, at 87.

representing the state for the purpose of entering into treaties and representatives of this entity are denied diplomatic immunity.<sup>164</sup>

As for intervention and the use of force, liberal states are vested with responsibility for seeking peace and upholding it. But to what extent and for what purposes are they entitled to use force in inter-state affairs? Tesón accepts that force can be used as ‘a last resort . . . in self-defence or in defence of human rights’.<sup>165</sup> Later he admits that, in the case of human rights abuses, only ‘in rare cases [is] intervention acceptable’.<sup>166</sup> It is unclear whether Tesón regards intervention as equally legitimate in cases of self-defence, in action against gross violators of human rights and as a way of establishing republican democracy in illiberal states. His theory would appear to demand that intervention in all three cases be legitimate but there is more emphasis throughout his work on the right of the liberal alliance to defend itself against ‘outlaw dictatorships’ (i.e. those that threaten the liberal alliance) than on the need for intervention to protect human rights or to promote republican values within states.<sup>167</sup>

These distinctions are made more transparent in the work of John Rawls. Rawls describes a non-ideal theory dictating the appropriate policies to be adopted by decent peoples in their relations with those regimes that ‘refuse to acknowledge a reasonable law of peoples’.<sup>168</sup> In contrast to Tesón, the category ‘decent peoples’ encompasses both liberal and illiberal states. Only illiberal states that are either aggressive or are gross violators of human rights are placed in the category of ‘outlaw’. Rawls advocates a system in which these states are denied the benefits of the international economic order (through sanctions) and censured for breaches of human rights. Most importantly, the outlaw states should be refused admission ‘as members in good standing into their mutually beneficial cooperative practices’.<sup>169</sup> Rawls regards the defence of the decent core of states as the primary justification for the use of force by states in that group. In grave cases, force may also be used to protect the victims of these outlaw states. On Rawls’ conception of the international order it is possible to imagine a case where illiberal states (Tesón’s outlaws) and liberal states combine to intervene in those states that Rawls regards as outlaws. Indeed, Rawls’ view of the international order resembles the current operation of the UN Security Council where illiberal states such as China or, perhaps, Russia are accorded high status in actions taken against outlaw states such as Iraq. It is precisely this order that Tesón finds objectionable.

<sup>164</sup> See Vienna Convention on the Law of Treaties, Article 7, 8 ILM (1969) 683; Vienna Convention on Diplomatic Rights and Immunities, 18 April 1961, 500 UNTS 95. The San Francisco delegates did accept the need for provisions dealing with suspension and expulsion. Suspension can only occur where the Security Council has taken enforcement action against a state under Chapter VII. Expulsion is an option where a state ‘has persistently violated the Principles contained in the present Charter’ (Article 6). The language seems to describe only a pattern of outlawry.

<sup>165</sup> Tesón, *supra* note 10, at 90.

<sup>166</sup> *Ibid.*, at 93.

<sup>167</sup> *Ibid.*, at 90.

<sup>168</sup> Freeman, *supra* note 139, at 555.

<sup>169</sup> Note that non-ideal theory also applies to failed states or states burdened by unfavourable conditions. Rawls, *supra* note 11, at 557.



Given these differences, what, then, would be the general consequences of a move from the Charter liberal approach to international community to one favoured by the liberal anti-pluralists? In a recent volume of the *European Journal of International Law*, José Alvarez suggests that an anti-pluralist theory such as Anne-Marie Slaughter's would exclude outlaw states from the international legal order.<sup>170</sup> This view of the outlaw state was advanced at least as early as 1945 in discussions at Committee I/2 where delegates argued against a provision allowing expulsion on the grounds that it would create two zones of international order: a zone of peace (the remaining members of the United Nations) and a zone of lawlessness in which 'expelled members would be free of their obligations' and where the UN Security Council's writ would no longer run.<sup>171</sup> In debates at the same time, there were concerns that a right of withdrawal from the United Nations might allow recalcitrant states to 'menace' the organization from outside and free themselves from the obligations imposed by the Charter.<sup>172</sup> This thinking is reprised in Alvarez's fears that:

the liberals' 'badge of alienage', once imposed, tends to put the target outside of reach or leaves the question to be resolved outside the constraints of law. This kind of liberal theory shrinks, rather than expands, the domain of law.<sup>173</sup>

I wonder, however, whether liberal anti-pluralism intends this or, indeed, whether this must necessarily be viewed as a contraction in the domain of law. In the case of writers such as Slaughter, the idea is not to give illiberal states a 'freer rein' but instead to enmesh them in a system of transnational networks designed to ease them into the liberal-democratic legal order. Thomas Franck, too, seems to prefer continued engagement with undemocratic states (unless by a process of self-exclusion they refuse to abide by the rules of the game). In the case of strong anti-pluralism, outlaw (or illiberal) states are controlled through exclusion followed by a mixture of surveillance and community-sanctioned violence.<sup>174</sup>

This combination of engagement and repression is mirrored in recent international legal practice. In some cases, outlaw or illiberal states are lured into the society of states with a series of incentives (North Korea) or through the operation of private networks (China). In other cases, the techniques of strong anti-pluralism are preferred. In such cases, the outlaw state is declared sovereign *non grata*. The practice in recent years has been to subject these states to quite intrusive forms of regulation coupled with a loss of state immunities and rights. Consider the highly intrusive

<sup>170</sup> See Alvarez, *supra* note 1, at 240.

<sup>171</sup> UNCIO VII, at 113; Doc. 604 I/2/42, 26 May 1945. See also Observations of the Government of Venezuela on the Dumbarton Oaks Proposals, Doc. 2, G/7d, 31 October 1944, UNCIO III, at 193.

<sup>172</sup> See the report of the Rapporteur of Committee I/2, San Francisco, Doc. 606 I/2/43, 26 May 1945, at UNCIO VII, at 120. The Belgians worried that provisions on expulsion would create a 'cleavage' and that expulsion was not the best way to deal with 'dissident states' (UNCIO III, at 331, Doc. 2 G/7(k), 5 February 1945).

<sup>173</sup> Alvarez, *supra* note 1, at 240–241 (footnotes omitted).

<sup>174</sup> John Rawls, too, favours this sort of response though, as I indicated, his definition of the outlaw state is narrower than, say, Tesón's.

regimes established in Iraq and Yugoslavia under Security Council Resolutions 687 and 1244.<sup>175</sup> These ‘outlaw’ states were certainly not freed of their obligations. Indeed, the peace imposed on Iraq in New York and Serbia at Dayton extended the duties of these states well beyond their normal responsibilities as states in international law.<sup>176</sup> Tesón explains their position as analogous to common criminals. These states remain subject to law or, at least, ‘elementary principles’ of criminal law.<sup>177</sup> Pushing this metaphor further one might argue that the outlaw state is incarcerated within a separate legal regime without democratic rights and subject to continual surveillance and occasional disciplinary violence.

The effect of all this is that a thin and fragile system of universal law applicable to all (Charter liberalism) is replaced by two highly developed legal domains. In one domain, the sphere of liberal transgovernmentalism or democratic peace, international law is more pervasive and has more bite than in the classical model. In the other domain, an incipient international criminal law is the mark of what will be a highly regulated sphere of intervention and intrusion.<sup>178</sup> The outlaw state’s fate is much more likely to resemble that of the criminal or deviant in the contemporary state (subject to constant monitoring and occasionally arbitrary violence) than the traditional image of the outlaw cut loose from society and riding into a lawless sunset.

## 5 Conclusion

In this article, I suggest that the constitution of political community in international law can be viewed as a dialogue between two liberal traditions. I describe these as Charter liberalism and liberal anti-pluralism. These international law liberalisms are derived, in turn, from deeper currents in liberal thought.<sup>179</sup> I describe these traditions and their philosophical roots in section 2 above.

I trace this dialogue through two time periods: the late-Victorian era (section 3) and the Conference at San Francisco in 1945 (section 4). In each case, international lawyers argued about the appropriate membership norms in the international community. Throughout most of the nineteenth century, international lawyers supported the idea that there were unequal sovereigns, i.e. entities that possessed some attributes of sovereignty but lacked the capacity to exercise jurisdiction over aliens on their territory. In a period running from around the end of the nineteenth century to the late twentieth century, a liberalism of inclusion (Charter liberalism) prevailed over the idea that states could be arranged according to some hierarchy. The late twentieth century, however, saw the revival of liberal anti-pluralism in the work of several prominent academics and in the practice of states and, to a lesser extent, international institutions. This new liberal anti-pluralism is a powerful force in

<sup>175</sup> S/RES/687 (1991), S/RES/1244 (1999).

<sup>176</sup> See Tom Franck’s analysis of the Iraq ceasefire and peace agreement, *supra* note 126, at 204–211.

<sup>177</sup> Tesón, *supra* note 10, at 89.

<sup>178</sup> I take this term to include the idea of state criminality as well as individual responsibility.

<sup>179</sup> See Hartz, *supra* note 8; Gray, *supra* note 7.

academic work and increasingly, too, seems to animate the behaviour of the international community towards states on the margins (section 5).<sup>180</sup>

These liberal anti-pluralists embrace the empirical and normative distinctions either between liberal and illiberal states or between legitimate and outlaw states. However, the consequences of this distinction vary among the liberal anti-pluralists. While mild anti-pluralists (Slaughter, Franck) are hesitant about either excluding outlaw states from the international system or permitting unilateral intervention in the affairs of these states, the strong anti-pluralists (Reisman and Tesón) have fewer qualms.

Thus, what I have called anti-pluralism varies in its intensity. Some liberal anti-pluralists embrace 'an impulse to impose Locke [or Kant] everywhere'.<sup>181</sup> Where there is a reluctance to accept Locke, diminished status, if not outlaw status, follows.<sup>182</sup> In other cases, liberal anti-pluralism is more tolerant in its acceptance of the illiberal. For Rawls, it is 'Human rights . . . [that] . . . set a limit on pluralism among peoples' and not the presence or absence of republicanism or liberalism.<sup>183</sup> In both cases, I argue, the outlaw state is enclosed in a highly developed legal regime.

However it is conceived, I have tried to show in this article that inter-state hierarchy or anti-pluralism has a long pedigree in international law. Exclusion, civilization, culture and difference are as deeply embedded in the system as universality, legality and equality. So, it should not seem surprising that the new liberal scholarship and practice described here resonate with some of international law's historical projects. There is a respectable line of development in international law that relies on formal distinctions between the core and periphery of sovereign states in the manner of new liberal anti-pluralism.<sup>184</sup>

Against this has been a more inclusive, perhaps over-inclusive, liberal pluralism (or what I have called Charter liberalism) reflected best in the practice of the United Nations in relation to membership but present as a driving force in the late-Victorian expansion of international society and the efforts to ensure that the League of Nations would be a universal body.

The tension between these two liberalisms has been and continues to be a defining quality of the international legal order.

<sup>180</sup> The treatment of the illiberal or undemocratic states varies quite dramatically. In Haiti, the repression of democratic forces led to a full-scale military operation. In the case of China, even mild trade sanctions have been ruled out of the question by powerful trade interests in the West and by the liberalizing tradition in Western foreign policy. Most cases fall somewhere in the middle where the response to a suspended election, a fraudulent poll or a disqualified opposition candidate is a combination of threat and promise. See e.g. the threat of 'strained relations' in the UN official response to the electoral skulduggery in the Ivory Coast. 'Candidates Excluded in Ivory Coast Elections Join Forces', *Guardian Weekly*, 12–18 October 1999, at 36.

<sup>181</sup> Hartz, *supra* note 8, at 13.

<sup>182</sup> In fact, Franck is equivocal on this point.

<sup>183</sup> 'The Law of Peoples', in Freeman, *supra* note 139, at 555.

<sup>184</sup> For a discussion of Grotius and anti-pluralism, see Simpson, 'Out of Law', forthcoming in *Proceedings of the American Society of International Law and Australia/New Zealand Society of International Law Conference*, June 2000. See also Wight, 'Western Values', in Bull and Butterfield (eds), *Diplomatic Investigations* (1966).