

Maurice A. Deane School of Law at Hofstra University

Scholarship @ Hofstra Law

Hofstra Law Faculty Scholarship

2002

After/word(s): 'Violations of Human Dignity' and Postmodern International Law

Barbara Stark

Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation

Barbara Stark, *After/word(s): 'Violations of Human Dignity' and Postmodern International Law*, 27 Yale J. Int'l L. 315 (2002)

Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/543

This Article is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.

After/word(s):¹ 'Violations of Human Dignity' and Postmodern International Law

Barbara Stark[†]

I.	INTRODUCTION	316
II.	PIL'S ASSUMPTIONS ABOUT THE NATURE OF INTERNATIONAL LAW	323
A.	<i>Incredulity Toward Metanarratives</i>	324
1.	<i>The Dark Side of the Enlightenment</i>	324
2.	<i>A Postmodernism of Resistance</i>	326
3.	<i>The Limits of Theory</i>	328
B.	<i>"The Cultural Logic of Late Capitalism"</i>	332
C.	<i>Fragmentation</i>	336
1.	Lex Lata—"The Law As It Is"	337
a.	<i>The Fragmentation of International Law in General</i>	337
b.	<i>The Fragmentation of IHL/Human Rights Law in Particular</i>	338
2.	Lex Ferenda— <i>The Fragmentation of the "Law As It Should Be"</i>	344
3.	<i>The Fragmentation of States</i>	347
III.	WHOSE ACTIONS MATTER?	349
A.	<i>Who's at Risk?</i>	351
B.	<i>Who's in Charge?</i>	353
C.	<i>Who Cares?</i>	354
IV.	THE INEVITABILITY OF PIL AND ITS TRANSIENCE	357
A.	<i>PIL's Inevitability</i>	357
B.	<i>PIL's Inevitable Transience</i>	361
V.	CONCLUSION	362

[†] Visiting Professor of Law, Hofstra Law School; Professor, University of Tennessee; B.A., Cornell; J.D., NYU; L.L.M. Columbia. A preliminary draft of this Article was presented at the American Society of International Law Annual Meeting, and I am grateful to the participants, especially Robin Teske and Julie Mertus, for their comments. Thanks also to Fran Ansley for her sharp comments on a later draft, to Lee Robinson, Brian Finlay, and Verena Meiser for extraordinary research assistance, to Sonya Fowler for her expert preparation of the manuscript, and to the University of Tennessee College of Law for its generous support. This Article benefitted enormously from a week-long seminar for university teachers of humanitarian law sponsored by the Graduate Institute of International Studies in Geneva, the International Committee for the Red Cross (ICRC), and the Hauser Foundation. I am deeply indebted to Theodor Meron and Antoine Bouvier for organizing it and to the other participants for their insights and candor. This Article is dedicated to them all.

1. Steven Ratner and Anne-Marie Slaughter describe the often jerky crossover of scholarly innovations (or fads) from domestic law to international law. Steven R. Ratner & Anne-Marie Slaughter, *Symposium on Method in International Law*, 93 AM. J. INT'L L. 291, 301 (1999). While pastiche is ubiquitous in international scholarship, see, e.g., *infra* note 125, the use of gimmicky punctuation to serve double or triple purposes, has been mercifully sparse until now. I set out my purposes in text accompanying *infra* notes 20-21, 43-45.

Martyrs insist in the face of overwhelming force that if there is to be continuing life, it will not be on the terms of the tyrant's law. Law is the projection of an imagined future upon reality. Martyrs require that any future they possess will be on the terms of the law to which they are committed (God's law). And the miracle of the suffering of the martyrs is their insistence on the law to which they are committed, even in the face of world-destroying pain. Their triumph—which may well be partly imaginary—is the imagined triumph of the normative universe—of Torah, Nomos—over the material world of death and pain.

—Robert Cover, *Violence and the Word*²

“You said, ‘Love can do anything.’”

—Manni³

I. INTRODUCTION

In 1999, the American Journal of International Law published a Symposium on Method in International Law.⁴ The organizers sought to “provide a greater grasp of the major theories of international law currently shared by scholars”⁵ and to apply these theories to a concrete legal problem specifically “the question of individual accountability for violations of human dignity committed in internal conflict.”⁶ The seven methods selected, with many lawyerly disclaimers and caveats, were legal positivism,⁷ the New Haven School,⁸ international legal process,⁹ critical legal studies,¹⁰

2. Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1604-05 (1986) (internal citations omitted).

3. RUN LOLA RUN (Sony Pictures Classics 1999).

4. Ratner & Slaughter, *supra* note 1, at 291. The topic remains a subject of ongoing interest. See, e.g., Final Program, ASIL 95th Annual Meeting, *The Visible College of International Law, Does Method Matter?* (the author was the token feminist on the panel this year). See also PETER SUBER, *THE CASE OF THE SPELUNCEAN EXPLORERS: NINE NEW OPINIONS* 87 (1998). In *The Case of the Speluncean Explorers*, published in the *Harvard Law Review* in 1949, Lon Fuller presented a fictitious legal case and created five Supreme Court Justices to serve as mouthpieces for the dominant schools of legal thought at the time. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949). Suber appropriates Fuller's fiction and adds nine new opinions, each reflecting a new school of thought, thus demonstrating our increasing self-consciousness about proliferating methods, including feminism, communitarianism and postmodernism.

The substantive focus of the symposium (and this Article)—accountability for violations of human dignity—is even more timely now than it was then, in view of Serbia's recent surrender of Milosevic and his trial in The Hague. See, e.g., Roger Cohen, *A Time to Judge What Began and Ended in Kosovo*, N.Y. TIMES, July 1, 2001, § 4, at 5.

5. Ratner & Slaughter, *supra* note 1, at 292.

6. *Id.* at 295. This was accepted, according to the organizers, “by all our authors (though in the same sense that the Versailles Treaty was accepted by the Central Powers).” *Id.*

7. Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302 (1999).

8. Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L L. 316 (1999).

9. Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334 (1999).

10. Martti Koskeniemi, *Letter to the Editors of the Symposium*, 93 AM. J. INT'L L. 351 (1999).

international law and international relations,¹¹ feminist jurisprudence,¹² and law and economics.¹³

The next issue of the Journal, appropriately if predictably, carried letters from three respected members of the international legal community, pointing out omissions or diplomatically thanking the co-editors for affirming the authors' own approaches to international law.¹⁴ This Article is like both kinds of letters (but longer) in that I both regret the omission of postmodern international law ("PIL")¹⁵ and thank the co-editors for exemplifying (and, in my view, vindicating) it.

It is unlike both kinds of letters, of course, in that it is not addressed to the co-editors. Rather, it is addressed to an audience which includes those who do not necessarily share the assumptions of the "international legal community,"¹⁶ and who may not be fluent in its dialect. Grounded in PIL's insistence on questioning assumptions and challenging boundaries, finding an accessible vocabulary takes on a terrible urgency in the context of "violations of human dignity." Any legal response to such violations must above all be intelligible to the law's targets and to those who harbor them.¹⁷ While neither can be assumed to be familiar with international law, PIL's affinity for the vernacular makes it more accessible than the often esoteric language of the

11. Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT'L L. 361 (1999).

12. Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379 (1999).

13. Jeffrey L. Dunoff & Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 AM. J. INT'L L. 394 (1999). For the co-editors' succinct description of each method, see Ratner & Slaughter, *supra* note 1, at 293-94.

14. Henry Richardson noted the unfortunate omission of critical race theory/Lat-crit legal theory. Henry J. Richardson III, *Letter to the Editor*, 94 AM. J. INT'L L. 99 (2000). Ariel W. González and J. Patrick Kelly both congratulated the co-editors and expressed concern about methods that deviated from a rule-oriented positivist approach. Ariel W. González, *Letter to the Editor*, *id.* at 100; J. Patrick Kelly, *Letter to the Editor*, *id.* at 101.

15. This acronym fits in nicely with the alphabet soup of UN agencies (WHO, UNIFEM, UNESCO, ECOSOC, etc.) and multinationals (BP, MCI, CNN, etc.), the wordless "newspeak" in which we communicate, or not. See text accompanying notes 17-18, *infra*. It also pleasantly evokes recent drug company advertisements and the promise of a magic "pill," a pharmaceutical solution for a maladjusted world. See, e.g., Zolof (sertraline HCI) ("You know when you can't get over something traumatic from your past."). Advertisement (depicting enormous black shadow with hands looming over tiny, terrified white egg-like creature) on file with *The Yale Journal of International Law*. See also Zolof Homepage, available at <http://www.zolof.com> (last visited May 3, 2002).

16. It is unclear who, exactly, comprises the "international community," but they have been accused of terrible things, including "hesitat[ing] . . . to act in accordance with the values and principles proclaimed in [the Universal Declaration of Human Rights and the Genocide Convention and failing] to prevent or halt the genocide in Bosnia-Herzegovina and later Rwanda." Sven Alkalaj, *Never Again?*, 23 FORDHAM INT'L L.J. 357, 358-59 (1999). Philip Trimble tersely dismisses "the mythical international community." Philip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 816 (1990) ("[W]e have no common, generally accepted world ideology that would give meaning to the term 'international society.'").

17. This is the logic behind the ICRC's educational efforts with respect to customary norms of armed conflict. See J. Kellenberger, Relevance and Roles of IHL and of the ICRC, Address at the ICRC—Graduate Institute Training Seminar on International Humanitarian Law for University Teachers (Aug. 7, 2001) [hereinafter "Training Seminar"].

Symposium.¹⁸ The omission of PIL from the symposium was fitting, accordingly, because PIL did not fit.

Its omission was fitting for other reasons as well. First, as I have explained elsewhere, PIL is the method of choice of the "omitted," the excluded, because it focuses on those at the margins rather than on those at the center.¹⁹ Second, PIL is *necessarily* an "afterword" because it comments on and reacts to the modernity that precedes it.²⁰ Third, related but distinct, PIL comes "afterwards"; that is, *after* the end of the modern international institution-building period which began after World War II and ended with the end of the Cold War. Fourth, more portentously, PIL is "after words"; i.e., it recognizes that words themselves are spent, that the modern emphasis on "mastery/logos" has been displaced by something else.²¹

At the same time, the co-editors' adoption of what Martti Koskenniemi decries as the "shopping mall approach to 'method,' the assumption that styles of legal writing are like brands of detergent that can be put on display . . . to be picked up by the customer in accordance with his/her idiosyncratic preferences,"²² is *itself* postmodern, confirming J.M. Balkin's observation that "the jurisprudence produced during the postmodern era will turn out to display

18. Postmodernism is not generally known for its accessibility. See, e.g., Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*, 96 MICH. L. REV. 461 (1997). But its preference for "mass" culture over "high" culture, Roy Boyne & Ali Rattansi, *The Theory and Politics of Postmodernism*, in POSTMODERNISM AND SOCIETY 10 (Roy Boyne & Ali Rattansi eds., 1990), leads it to use the graphic language of the news, see, e.g., *infra* note 272 ("machete-wielding Hutus"), rather than international law's genteel (and ambiguous) "violations of human dignity." See also Wiessner & Willard, *supra* note 8, at 318 (noting the need for clarification of the term "human rights abuses").

19. See Barbara Stark, *Women and Globalization: The Failure and Postmodern Possibilities of International Law*, 33 VAND. J. TRANSN'L L. 503, 567 (2000). This claim is controversial. It has been argued, for example, that postmodernism is irreconcilable with human rights. See notes 73-74 *infra*. In connection with the problem of individual accountability for violations of human dignity, moreover, many methods would focus on the "omitted," i.e., the victims. These objections are addressed *infra* in Section III.A., *Who's At Risk?*

20. [P]ostmodernism . . . operates in a field of tension between tradition and innovation, conservation and renewal . . . in which the second terms are no longer automatically privileged over the first; a field of tension which can no longer be grasped in categories such as progress vs. reaction, left vs. right. . . . The fact that such dichotomies, which after all are central to the classical account of modernism, have broken down is part of the shift . . .

ANDREAS HUYSEN, *AFTER THE GREAT DIVIDE: MODERNISM, MASS CULTURE, POSTMODERNISM* 216-17 (1986). PIL's relationship to modernism is one of the ways in which it is distinguishable from the "New Approaches to International Law" (NAIL), which David Kennedy describes as "a self-conscious effort to build a collective intellectual project of disciplinary criticism and renewal [which the author calls] 'new approaches' to suggest a big tent, interested in the widest range of innovative energy without predetermining where it would lead." David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335, 489 (2000). PIL is more likely to define itself in terms of its relationship to modernism; unlike NAIL, it puts "new" in inverted quotes. Another distinction between NAIL and PIL is in their relationship to "critical theories." See *infra* Section IV.A., *PIL's Inevitability*. But many elements of the NAIL project resonate with postmodernism, such as their shared attention to the "will to power," their "embrace of the dark side," their skepticism, their resistance to "progress," and their preference for ambivalence. Kennedy, *supra* note 20, at 496-97. See also IHAB HASSAN, *Toward a Concept of Postmodernism*, in THE POSTMODERN TURN: ESSAYS IN POSTMODERN THEORY AND CULTURE 91 (1987).

21. See generally Wiessner & Willard, *supra* note 8, at 321 n.8 (explaining that policy-oriented jurisprudence treats deeds as well as words as indicators of law).

22. Koskenniemi, *supra* note 10, at 352.

elements of postmodernity whether this is consciously desired or not."²³ Does this mean that PIL is merely a "theory," devoid of application to particular problems, as opposed to a "method"?²⁴ Not at all, as this Article will show by applying PIL to the problem posed in the symposium. But first, a story.²⁵

Run Lola Run begins with a phone call in an apartment in Berlin.²⁶ The TV is on. The call is from Lola's boyfriend, Manni, who has left a bag of money on the subway. His drug dealer boss expects Manni to deliver the bag in twenty minutes. Lola tells Manni to wait for her and promises that she'll think of something.²⁷ She runs out of the apartment and we see her running downstairs as a cartoon on the TV.

She runs through the city, bumps into a pedestrian, exchanges words with a passing bicyclist, is almost hit by a car, and dashes into the imposing Deutsche Transfer Bank, where she surprises her V.I.P. father with his mistress. She breathlessly begs him for help; he replies coldly that he is leaving her mother and that she is not even his daughter. Lola runs on, but she is too late. Manni, desperate, has already begun robbing the supermarket next to the telephone booth where he should have been waiting for her. He sees her and signals to her for help. She joins him, and is shot dead by the police a few minutes later.

The scene dissolves in surreal red light, and Lola and Manni are in bed, chatting and smoking. "Manni, do you love me?" she asks. Dismissing his assurances, she announces, "I have a decision to make" as the phone rings and she's off again. This time, however, she gives the pedestrian a wide berth. After her father refuses her request, she snatches a gun from a nearby security guard's holster and repeats her demand, holding the gun to her father's head. She gets the money and completes the gauntlet, arriving at the meeting place on time. Manni joyfully runs toward her and is run over.

23. J.M. Balkin, *What is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1973 (1992). See also *id.* at 1978 (focusing on the ways in which postmodern culture and technology have affected law as an institution); *infra* text accompanying note 102 (arguing that *all* law is postmodern).

24. See Ratner & Slaughter, *supra* note 1, at 292 ("This idea of method is thus distinctly different from abstract theories of international law . . .").

25. This interruption illustrates postmodern method, which privileges disjunction over continuity and storytelling over theory. See HASSAN, *supra* note 20, at 89; see also *infra* text accompanying note 103.

26. RUN LOLA RUN, *supra* note 3. True to postmodern method, the story is appropriated from another genre and another medium. As Stephen Feldman observes, transgressing such boundaries is characteristic of postmodern method. See Stephen M. Feldman, *The Supreme Court in a Postmodern World: A Flying Elephant*, 84 MINN. L. REV. 673, 693-97 (2000). For examples of such transgressions in international law, see, e.g., Stark, *Women and Globalization*, *supra* note 19, at 568 (borrowing from William Butler Yeats, *A Prayer for my Daughter*); Barbara Stark, *What We Talk About When We Talk About War*, 32 STAN. J. INT'L L. 91 (1996) (borrowing from Raymond Carver, *What We Talk About When We Talk About Love*); Barbara Stark, *International Human Rights Law, Feminist Jurisprudence, and Nietzsche's "Eternal Return": Turning the Wheel*, 19 HARV. WOMEN'S L. J. 169 (1996) (incorporating Adrienne Rich, *Turning the Wheel*); Barbara Stark, *Postmodern Rhetoric, Economic Rights and an International Text: "A Miracle for Breakfast"*, 33 VA. J. INT'L L. 433 (1993) (referencing Elizabeth Bishop, *A Miracle for Breakfast*). True to PIL, the story here is not only appropriated from another medium, but from another country, culture, and language.

27. This is the best she can offer to Manni, who reminds her, "You said, 'Love can do anything.'" Lola is a "postmodern woman with a male movie hero's mission," according to Crissa-Jean Chappell, *Crissa-Jean Chappell Tracks Run Lola Run*, FILM COMMENT, Sept-Oct. 1999, at 4.

Again, Lola and Manni are in bed in the red light. "What would you do if I died?" he asks. "You're not dead yet," she replies, as the telephone rings again. Lola encounters the same cast of characters, but this time she is lucky and she makes better choices. After her father refuses to give her money, she dashes into a casino and quickly wins what she needs. Leaving the phone booth, Manni performs a random act of kindness,²⁸ returning a phone card to a blind woman who was in the booth before him. She points to a fleeing figure, who Manni sees is carrying the very bag of money he left on the subway. The movie ends with the lovers' happy reunion, both alive and rich.

Lola, obviously, is an international lawyer confronted with a crisis.²⁹ The ways in which she deals with the people she runs into (or around, or over) are like the methods presented in the symposium. She must make a series of choices and react to an unpredictable series of choices made by others. Each choice becomes part of a story, and *whose* story it is becomes clear only in hindsight. Lola's choices affect the outcome, but they do not determine it.

This Article explains why Lola opts for PIL, which allows her to mix and meld other methods. It does so by appropriating the questions posed by the symposium,³⁰ just as postmodernism appropriates the structures of modernism. First, it explains PIL's assumptions about the "nature" of international law, using *lex lata* (the "law as it is") and *lex ferenda* (the "law as it should be") as examples.³¹ Second, it explains how PIL shifts our focus from the "decision makers"³² in the public eye to those at the periphery, and how even a nameless pedestrian may shape the law.³³

Finally, this article explains why PIL is both inevitable and inevitably transient. Like Lola, the international lawyer dealing with "accountability for violations of human dignity" does not enter the story until something has

28. "Commit random acts of kindness and senseless acts of beauty." Bumper sticker on old blue Volvo in Kroger parking lot, observed by author (July 16, 2001). Robert Cover cites "one of Judaism's oldest rabbinic traditions" for the proposition that the normative world of legal meaning is created through "'strong forces' [such as] Torah, worship and deeds of kindness." Robert M. Cover, *Nomos and Narrative: The Supreme Court 1982 Term, Foreword*, 97 HARV. L. REV. 4 (1983). These "strong forces," needed for "world-creating," are posited in opposition to "weak forces," such as those present in modern liberalism and international law, needed for "world-maintaining." See *infra* text accompanying note 210.

29. The critics seem to have missed this point. But see Chappell, *supra* note 27. Lola's mission, like so many, begins because someone lost a bag of money. Like so many international lawyers, moreover, she is driven not by money, but by love. See *infra* Conclusion. Lola is an *international* lawyer, rather than an international *human rights* lawyer, because, as the symposium and this Article make clear, human rights law is necessary, but not sufficient, in dealing with "violations of human dignity." She must be able to draw on humanitarian law, see *supra* note 17; international law on the use of force, see *infra* note 42; including humanitarian intervention, see *infra* note 94; on international criminal law, see *infra* note 188; on jurisdiction, see *infra* note 191; and on international organizations, see *infra* note 79.

30. Ratner & Slaughter, *supra* note 1, at 298 (setting out the questions to be addressed by the advocates of particular methods).

31. *Id.* ("How does your approach address the distinction between *lex lata* and *lex ferenda*? Is it concerned with only one, both, or neither?").

32. *Id.* ("Who are the decision makers under your method?").

33. *Id.* ("How does [your method] factor in the traditional 'sources' of law, i.e., prescriptive processes?"). See *infra* notes 177-180 (describing the importance of serendipity and transient players in the lawmaking process).

already gone terribly wrong. The international lawyer's chances of success, like Lola's, are not very good.³⁴ Even if she does everything right, she may fail to achieve her objectives. International law is often irrelevant in such contexts or is sacrificed to other interests as a matter of political expediency.

Like Lola in the final scenario, the international lawyer sometimes triumphs. Even if she does, however, her success is transient. At the end of the movie, Lola and Manni are alive and rich, but their happy ending—a successful drug deal—is part of other, less happy stories for other people.³⁵ PIL questions the possibility of "success" in the context of "accountability for violations of human dignity." We cannot rewind the tape; we cannot undo genocide or other atrocities. Is it nevertheless possible to restore order and meaning, or, in the words of the late Yale Law Professor Robert Cover, to affirm "the imagined triumph of the normative universe"?³⁶ Is it possible to reconnect the victim—and perhaps even the perpetrator—to the larger community after "world-destroying pain"?³⁷

In two famous articles, *Violence and the Word*³⁸ and *Nomos and Narrative*,³⁹ Cover shows how violence destroys meaning, isolating the victim and the perpetrator. It is through the "word"—the law and the narratives that drive the law⁴⁰—that we recreate meaning and possibilities for human

34. As Martha Minow notes:

Thus, I do not think it wise to claim that international and domestic prosecutions for war crimes and other horrors themselves create an international moral and legal order, prevent genocides, or forge the political transformation of previously oppressive regimes. Expansive claims may be tempting in order to convince international and national audiences to fund and support trial efforts, but exaggerated assertions are bound to yield critical and even hostile disappointment.

MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 49 (1998).

35. In *TRAFFIC* (USA Films 2000), for example, a newly-appointed drug czar learns how complicated the global drug economy is, and how difficult it may be to separate the good guys (including police who do not know for whom they are really working) from the bad (including his own daughter). This film was based on a more nuanced, less star-studded, BBC mini-series, *Traffik* (BBC television broadcast, 1989).

36. Cover, *supra* note 2, at 1604.

37. *Id.*

38. Cover, *supra* note 2. On Cover's fame, see Aviam Saifer, *Preface*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* vi (Martha Minow et al. eds., 1993) (describing "the tendency, already well underway, for scholars to consider Bob's published work *canonical* . . ." (italics in original); Guido Calabresi et al., *Tributes to Robert M. Cover*, 96 *YALE L. J.* 1699 (1987). For a partial list of the additional journals that have published tribute volumes to Cover, see Samuel J. Levine, *Halacha and Aggada: Translating Robert Cover's Nomos and Narrative*, *UTAH L. REV.* 465, 466 n.2 (1998). I first learned of Cover's work when, as a new law teacher ten years ago, a senior colleague told me "not to miss" the Cover Workshop at the Annual Meeting of the Association of American Law Teachers. There I saw the authors whose books fill my shelves, sitting in metal folding chairs arranged in a huge circle. For law students, the Society of American Law Teachers sponsors an annual Cover Retreat. See, e.g., Corey Norton, *Robert M. Cover Public Interest Law Retreat Explores Progressive Collaboration*, *SALT EQUALIZER*, June 2001, at 4.

39. Cover, *supra* note 28.

40. "No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. . . . Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live." Cover, *supra* note 28, at 4-5. The works of legal scholarship focused on or exemplifying storytelling no longer fit in a symposium, let alone in a footnote. For an earnest effort, see Levine, *supra* note 38, at 467 n.8 (noting that "*Nomos and Narrative* is consistently one of the oldest works cited, and is often acknowledged, explicitly or implicitly, as one of the seminal works in this area of legal scholarship"). See Daniel A.

connection, thus "project[ing] . . . an imagined future upon reality."⁴¹ But law itself is violent, Cover insists. That is, law must be grounded in political power willing and able to impose law through force.⁴²

The task of Cover's martyr, to "insist in the face of overwhelming force that if there is to be continuing life, it will not be on the terms of the tyrant's law,"⁴³ is precisely the task addressed here. Cover's linkage of violence and the law, similarly, is precisely the linkage sought by international lawyers in this context, who often find themselves with plenty of words and enough law to fill multiple symposia, but without the muscle to impose it.⁴⁴ *After words*, in short, how can international lawyers assure the violence to back them up, in a postmodern world where this linkage cannot be assumed?⁴⁵

"Never again!" swore world leaders after World War II.⁴⁶ Drawing on the political will that had been pooled long enough to win the war, they were able to "project . . . an imagined future upon reality"⁴⁷ in the form of an international legal order.⁴⁸ The words of the U.N. Charter⁴⁹ and the Universal Declaration of Human Rights,⁵⁰ along with the conventions which would be drafted to implement them,⁵¹ would assure that genocide and crimes against

Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 807 (1993) (observing that "Robert Cover taught us that law is itself a story").

41. See text accompanying *supra* note 2. "Groping for legal responses marks an effort to embrace or renew the commitment to replace violence with words and terror with fairness. The legal response may seem puny and always insufficient after massacres, state-sponsored tortures, systematic raping of groups of women, bombing of children." Minow, *supra* note 34, at 2.

42. Cover, *supra* note 2, at 1613 *passim*. See also Fareed Zakaria, *There's More to Right Than Might*, NEWSWEEK, July 9, 2001, at 43 (quoting the Greek historian Thucydides, who noted over two thousand years ago that "the standard of justice depends on . . . the power to compel").

43. See text accompanying *supra* note 2.

44. See Trimble, *supra* note 16, at 823 ("A key to restoring credibility to the discipline [of international law] is to connect this branch of law with its political base.").

45. Cover, in contrast, focuses on the American criminal justice system, where this linkage is so entrenched as to be invisible. See *supra* note 2, at 1607.

46. This was the *crie de coeur* of the Military Tribunal at Nuremberg, see *infra* note 139; the drafters of the Universal Declaration, see *infra* notes 48 & 51; the survivors of the Holocaust, see *infra* notes 127-129. See also Charter of the International Military Tribunal, August 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (1945) [hereinafter Nuremberg Charter].

47. Cover, *supra* note 2, at 1604.

48. For an account of the process through which they did so, written by a participant, see JOHN P. HUMPHREYS, *HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE* (1984).

49. U.N. CHARTER.

50. G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

51. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, entered into force Jan. 12 1951, 78 U.N.T.S. 278. While the Universal Declaration was aspirational, it was understood that a legally binding instrument would be drafted later. See COMMISSION TO STUDY THE ORGANIZATION OF PEACE, 2 BUILDING PEACE: REPORTS OF THE COMMISSION TO STUDY THE ORGANIZATION OF PEACE 1939-1977, at 641 (1973). In 1952, however, the U.N. General Assembly decided that two instruments would be necessary "because of the East/West split and the ideological disagreement over the value of socioeconomic rights." David P. Forsythe, *Book Review*, 8 HUM. RTS. Q. 540 (1986). The conventions eventually drafted include: the International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter Civil Covenant]; International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter Economic Covenant]. The Universal Declaration and the covenants drafted to implement it are sometimes referred to as the "International Bill of Rights."

humanity never again took place. Several genocides later,⁵² however, the phrase is fatally tinged with irony.⁵³ But the atrocities do not stop and they cannot be ignored.⁵⁴ As Cover understood, the linkage of violence and the word, the recreation of *nomos*, is an ongoing project. Every new atrocity is a wake-up call, like Lola's ever-ringing phone, exhorting us to begin again.

II. PIL'S ASSUMPTIONS ABOUT THE NATURE OF INTERNATIONAL LAW

While "many doubt whether the term [postmodernism] can ever be dignified by conceptual coherence,"⁵⁵ three concepts widely viewed as characteristically postmodern are particularly pertinent here. First, as Jean François Lyotard explains, postmodernism is "incredulity toward metanarratives."⁵⁶ Second, as critic Fredric Jameson points out, postmodernism is the "cultural logic of late capitalism."⁵⁷ Third, as geographer David Harvey observes, "The most startling fact about postmodernism . . . [is] its total acceptance of . . . ephemerality, fragmentation, discontinuity, and the chaotic."⁵⁸ These three distinct but related concepts, like Lola's three scenarios, embody PIL's assumptions about the nature of international law, as well as its multiple and contradictory possibilities.

PIL's "incredulity toward metanarratives" leads it to question international law's reliance on the Enlightenment and to challenge Western hegemony. By situating international law within the "cultural logic of late capitalism," PIL shows how international law shapes, and is shaped by, commodification and globalization. PIL's "total acceptance of fragmentation" highlights the fragmentation of international law in this context, shatters the underlying assumption of a universal standard, and suggests that to the extent international law blames violations of human dignity on the fragmentation of states, it takes a very statist perspective.

52. See MINOW, *supra* note 34, at 27-29 (describing "[t]he failure of international bodies to craft a legal response to the mass murders in Cambodia, South Africa, and Kurdistan, just to name a few").

53. See Alkalaj, *supra* note 16 (noting the ineffectiveness of the United Nations); Makau Wa Mutua, *Never Again: Questioning the Yugoslav and the Rwanda Tribunals*, 11 TEMP. INT'L & COMP. L. J. 167 (1997). Cf. Cover, *supra* note 28, at 7 ("[Since *Roe v. Wade* and *Furman v. Georgia*,] both for opponents of abortion and for opponents of capital punishment the principle that 'no person shall be deprived of life without due process of law' has assumed an ironic cast. The future of this particular precept is now freighted with that irony no less than with the precedents of *Roe* and *Furman* themselves.").

54. "Yet silence is also an unacceptable offense, a shocking implication that the perpetrators in fact succeeded, a stunning indictment that the present audience is simply the current incarnation of the silence of bystanders complicit with the oppressive regime." MINOW, *supra* note 34, at 5. See also *infra* Part I.C.2, *Lex Ferenda* (explaining why atrocities cannot be ignored in various contexts).

55. Boyne & Rattansi, *supra* note 18, at 9.

56. JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* xxiv (Geoff Bennington & Brian Massumi trans., 1984).

57. See FREDRIC JAMESON, *THE CULTURAL LOGIC OF LATE CAPITALISM* (1991).

58. DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* 44 (1989).

A. *Incredulity Toward Metanarratives*

1. *The Dark Side of the Enlightenment*

Like international human rights law, postmodernism is often linked to the discovery of the death camps after World War II.⁵⁹ International law responded by drafting new laws that drew on the Enlightenment.⁶⁰ Postmodernists such as Theodor Adorno, in contrast, questioned the role of the Enlightenment project itself in the Holocaust.⁶¹ The "final solution" was not, after all, a barbarian rampage but an orderly, systematic "scientific" program of genocide—authoritarian, bureaucratic and perversely "rational."⁶²

The dark side of the Enlightenment was the reification of reason and the march towards a universal society.⁶³ This was all too evident to Adorno in contemporary Stalinism and fascism.⁶⁴ As recent observers have noted, the

59. Human rights law and postmodern theory were both reactions to the camps, drawing on very different traditions. For postmodernism's pre-World War II antecedents, see NIETZSCHE AS POSTMODERNIST: ESSAYS PRO AND CONTRA (Clayton Koelb ed., 1990). For an even earlier iteration, see MARTHA NUSSBAUM, LOVE'S KNOWLEDGE (1990) (describing ancient Greek skeptics).

60. See *supra* text accompanying notes 46-51. "International law has seen itself as the voice of civilization, of the center, of the modern, of the future, and of universal humanism and progress against, or in dialog with, the voices of the non-Christian world, the primitive, underdeveloped, non-Western, outlaw world of those who do not yet see things from a high place." Kennedy, *supra* note 20, at 359. See generally ZYGMUNT BAUMAN, MODERNITY AND THE HOLOCAUST (1989).

61. See THEODOR ADORNO & MAX HORKHEIMER, DIALECTIC OF ENLIGHTENMENT (John Cummings trans., 1972). See also GILLIAN ROSE, THE MELANCHOLY SCIENCE: AN INTRODUCTION TO THE THOUGHT OF THEODOR W. ADORNO 19 (1978) ("Nietzsche, according to Adorno, refused 'complicity with the world' which . . . comes to mean rejecting the prevalent norms and values of society on the grounds that they have come to legitimise a society that in no way corresponds to them—they have become 'lies.'") (citations omitted). According to John Gray, the Enlightenment contemplated "the creation of a single worldwide civilization" and the United States, "the last great power to base its policies on this enlightenment thesis," seeks the global domination of democratic capitalism, a "single universal free market." JOHN GRAY, FALSE DAWN: THE DELUSIONS OF GLOBAL CAPITALISM 2 (1998).

62. See JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED (1998) (arguing that states seek to make the life of society "legible" in order to make it controllable by political power). According to Rorty, the notion of humans as rational "accounts for the residual popularity of Kant's astonishing claim that sentimentality has nothing to do with morality, that there is something distinctively and transculturally human called 'the sense of moral obligation' which has nothing to do with love, friendship, trust, or social solidarity." Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 111, 122 (1993) (Stephen Shute & Susan Hurley eds., 1993). Santos argues that law is the "alter ego" of science. BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION 4 (1995).

63. One commentator describes how Nietzsche exposed the Enlightenment "as the unity of reason and domination." ROSE, *supra* note 61, at 20. In *In the Wake of Empire*, similarly, Nathaniel Berman links the surrender of Germany on May 8, 1945 to anti-French (anti-colonial) riots in Algeria. Nathaniel Berman, *The Grotius Lecture Series*, 14 AM. U. INT'L L. REV. 1521 (1999).

64. Both espoused noble ideas which masked a very different reality. Human rights advocates note a disturbingly similar gap between theory and practice. Alves describes a "deeply humanistic form of rational environmentalism, difficult to oppose, that now seems to prevail among all actors—no matter how sadly limited the implementation of its recommendations may have been so far" (emphasis added). J. A. Lindgren Alves, *The United Nations, Postmodernity, and Human Rights*, 32 U.S.F. L. REV. 479, 496 (1998). This may be understood as part of a general disillusionment. "In Europe at the start of the 20th century most people accepted the authority of morality . . . Reflective Europeans were also able to believe in moral progress, and to see human viciousness and barbarism as in retreat. At the end of the century, it is hard to be confident either about the moral law or about moral progress." JONATHAN GLOVER, HUMANITY: A MORAL HISTORY OF THE 20TH CENTURY 1 (2000).

dangers are not limited to those particular totalizing cultures. The dark side of the Enlightenment can be seen, for example, in what Richard Falk describes as "the dirty hands of our own governing process when it comes to such matters as . . . the moral scandal of financing and promoting terrorism in Central America."⁶⁵

The Enlightenment made "man" rather than God the center of the universe. But critics have charged that its purportedly universal, objective, rational subject is in fact a Western white man,⁶⁶ and its promised Utopia the universalization of Western culture.⁶⁷ Just as the Enlightenment sought to justify the power of Western culture,⁶⁸ and its devastating legacy of imperialism, post-Cold War international law seeks to justify the power of late capitalism,⁶⁹ which seems to be conspicuously less vigilant about "violations of human dignity" if cheap oil is at stake.⁷⁰ By challenging the Enlightenment metanarrative, PIL challenges Western hegemony, culturally and politically.⁷¹

65. RICHARD FALK, *EXPLORATIONS AT THE EDGE OF TIME: THE PROSPECTS FOR WORLD ORDER* 10 (1992). See, e.g., *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985) (rejecting claim against the Reagan Administration for torts arising out of United States covert action in Nicaragua). None of the participants discussed United States involvement in Central America, for example, because merely "training" terrorists is not a violation of humanitarian law, as the International Court of Justice observed in *Nicaragua v. United States Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (Judgment). The United States was outraged, however, when it learned that the capacity to train terrorists was not the exclusive prerogative of superpowers. See, e.g., *The System Strikes Back*, WALL ST. J., Aug. 21, 1998, at A14 (endorsing U.S. bombings in the Sudan and Afghanistan and urging "follow-through"). Even though Osama bin Laden had the money to train terrorists, he never sought to justify such training in the name of "democracy" or any other "right." Rather, he invoked "Islam." As Karen Engle notes, "[C]ulture and universal rights provide the discourse for a number of debates. In these debates, culture is both as indeterminate and as powerful as rights." Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT'L L. & POL. 291, 293 (2000).

66. This Western-centricism is reflected in the notion that "[w]hat [is] good for [America is] good for the world." Berman, *supra* note 63, at 1532 (quoting Abe Fortas). "Postmodernism questions the integrity, the coherence, and the actual identity of the humanist individual self For postmodernism, this humanist individual subject is a construction of text, discourses, and institutions. The promise that this particular human agent would realize freedom, autonomy, etc. has turned out to be just so much Kant." PIERRE SCHLAG, *LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND* 24 (1996).

67. See, e.g., Edward W. Said, *Yeats and Decolonization*, in NATIONALISM, COLONIALISM, AND LITERATURE 69-71 (Terry Eagleton et al. 1990) ("By the beginning of World War I, Europe and America held 85% of the earth's surface in some sort of colonial subjugation. This, I hasten to add, did not happen in a fit of absentminded whimsy or as a result of a distracted shopping spree.").

68. See, e.g., Kennedy, *Thinking Against the Box*, *supra* note 20, at 441.

69. See JAMESON, *supra* note 57; cf. Eve Darian-Smith, *Power in Paradise: The Political Implications of Santos's Utopia*, 23 L. & SOC. INQUIRY 81, 86 (1998) (concluding that Santos's goal "is, above all, modernist: it conceals relations of power in the march toward emancipation of the oppressed").

70. See, e.g., Glenn Frankel, *Nigeria Mixes Oil and Money: A Potent Formula Keeps U.S. Sanctions at Bay*, WASH. POST, Nov. 24, 1996, at C1, C4 (describing how Nigeria avoided sanctions after hanging the writer Ken Saro-Wiwa and eight other political activists); Nadine Gordimer, *In Nigeria, The Price for Oil is Blood*, N.Y. TIMES, May 25, 1997, at A11 (arguing that "the questions of freedom of the press and expression in Nigeria have become an issue for Nigerians and for those of us . . . who know that if, in what is optimistically called the Global Village, the lines go down in one street the power failure is the responsibility of all inhabitants"); and Seymour M. Hersh, *Overwhelming Force*, THE NEW YORKER, May 22, 2000, at 48 (describing attack, in violation of the Geneva Conventions, on Iraqi troops that had already surrendered). See also Norman Kempster, *Rights Group Calls U.S. Blind to Saudi Abuses*, L. A. TIMES, Mar. 28, 2000, at A4 (reporting that Amnesty International accuses the U.S.

2. *A Postmodernism of Resistance*

Such challenges are crucial in the context of individual accountability for violations of human dignity because they make us question our own assumptions on an ongoing basis. A key premise of the post-war international order⁷² was that human rights law would prevent such violations. PIL questions this premise, but does not necessarily reject it.

While postmodernism may lead to "the black hole of relativism,"⁷³ there is a "postmodernism of 'resistance' as well as a postmodernism of 'reaction,'" as Roy Boyne and Ali Rattansi observe.⁷⁴ Thus, PIL accepts the premise that more human rights means fewer violations of human dignity but it does so *contingently*, always insisting that the premise be recognized as "tentative, relational and unstable."⁷⁵ PIL is grounded in what Katherine Bartlett has called "standpoint epistemology," that is, critical assessment based on

of ignoring human rights violations by Saudi Arabia because of its economic clout). As I have argued elsewhere, to the extent international law conflates "free market democracy" with human rights, it conflates profit with human good. Stark, *Women and Globalization*, *supra* note 19, at 550. Profits are human goods, some of our law and economics friends quickly counter. While it is clear that this is sometimes true, at least for some, it is equally clear that it is not always true for everyone. *See id.* at 513-14 (describing human cost of structural adjustment programs in Mexico). The tail is wagging the dog when *Freedom* has, quite literally, become a product: a perfume manufactured by Tommy Hilfiger and advertised by silhouettes of "freedom"-loving young people, arms raised in triumph, at what looks like a rock concert (or an Amnesty International benefit). *See Press Release*, July 30, 1999, *Tommy Hilfiger to Join Forces with Virgin Recording Artist Lenny Kravitz for Fall 1999 Freedom Tour*, available at <http://www.tommy.com> (last visited Sept. 10, 2001).

71. Some of the other methods do the same, depending, of course, on who is wielding them. *See, e.g.*, Charlesworth, *supra* note 12, at 383 ("International law asserts a generality and universality that can appear strikingly incongruous in an international community made up of almost two hundred different nationalities and many more cultural, religious, linguistic and ethnic groups.").

72. *See supra* notes 50-51. This was the law adopted to effectuate the post-war "Never again!" *See supra* Part I. As the United Nations High Commissioner for Human Rights recently reiterated, "[I]nternational criminal law to deter genocide, war crimes, and crimes against humanity. . . will only be effective if accompanied by measures to deliver all human rights to all people." Mary Robinson, *Genocide, War Crimes, Crimes Against Humanity*, 23 *FORDHAM INT'L L. J.* 275, 283 (1999). *See also* STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 24-25 (1996) (concluding that application of Western norms is "ethically appropriate because of the fundamental universality of human rights law. . . [as evidenced by] the acceptance by States of a right of oversight by international organizations over domestic human rights practices, the signature by non-Western States of numerous human rights conventions, and UN attempts to expand these norms. . .").

73. Alan Stone, *Questions and Comments*, in *HUMAN RIGHTS AT HARVARD* 55, 59 (1997). While some postmodernists relentlessly challenge normativity, *see* Pierre Schlag, *Foreword: Postmodernism and Law*, 62 *U. COLO. L. REV.* 439, 444-45 (1991), others concede that the processes of questioning, trashing, deconstructing, "always do stop." J.M. Balkin, *Tradition, Betrayal and the Politics of Deconstruction*, 11 *CARDOZO L. REV.* 1613, 1627 (1990).

74. BOYNE & RATTANSI, *supra* note 18, at 29. *See also* Koskeniemi, *supra* note 10, at 360 (stating that to describe legal method as style "may be assumed to lead to an 'anything goes' cynical skepticism, the giving up of political struggle and the adoption of an attitude of blasé relativism. This would, however, presuppose the internalization of an unhistorical and reified conception of the postmodern in which the truth of skepticism would be the only truth not vulnerable to that skepticism."). As Glover similarly notes, "People's projects of self-creation may be guided by quite different values from [Nietzsche's]." Glover, *supra* note 64, at 17.

75. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 586 (1990).

ongoing experience and critical reflection informed by that experience.⁷⁶ PIL observes, for example, that human rights law has tacitly expanded to include neo-liberal trade rights.⁷⁷ Thus, entrepreneurs have had the "right" to mine diamonds that fund civil wars in Africa.⁷⁸

Interrogating the premises of international law reminds us of our own complicity and our own historical roles in the nightmare we come to judge.⁷⁹ It reminds us that the dark side may not be that which we can project onto the Other, the demonized war criminal,⁸⁰ but part of the human heart.⁸¹ It exposes such projections as an exercise of power, and even a denial of the Other's humanity.⁸²

76. Katherine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990). As I have explained elsewhere, "postmodernists can and do support human rights, but they make the linkage between rights and concrete experience explicit and direct, insisting on contingency and ongoing interrogation. Thus, while postmodernism does not preclude a bottom line, it insists on bottom lines that are unstable and that may vary from place to place and over time to reflect shifting consensus and ongoing dialogue." Stark, *Women and Globalization*, *supra* note 19, at 555-56. See also Diane Otto, *Rethinking the "Universality" of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1, 5 (arguing for "universality understood as dialogue, in a sense of struggle, rather than as a disciplinary civilizing mission of Europe").

77. Stark, *Women and Globalization*, *supra* note 19, at 532-40.

78. See, e.g., Robert Block, *You Can Learn A Lot About a Diamond If You Smash It Up*, WALL ST. J., July 12, 2000, at 1 (describing the dilemma of De Beer, the world's largest diamond company, which is trying to develop a method for determining the origins of diamonds so as to avoid "blood diamonds," gems that come from African war zones.) The article reports:

In the past, Liberia, Namibia and Mobutu's Zaire have been caught up in such conflicts. Now it is Angola, Sierra Leone and the renamed Democratic Republic of Congo that are being ripped apart by wars funded indirectly by engagement rings, necklaces and diamond tiaras. The industry is under pressure from human rights groups, the World Bank, the United Nations and policy makers in Washington to squeeze the illicit trade in these diamonds out of the business.

Id. See also Blaine Harden, *The Dirt in the New Machine*, N.Y. TIMES MAG., Aug. 12, 2001, at 35 (explaining why high-tech corporations need coltan, which is plentiful in what is left of Congo).

79. See, e.g., José Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 440 (1999) (noting that in addition to the complicity of the colonizers, see *infra* note 222, "the circle of blame extends much wider and includes Kofi Annan, who ignored warnings of the impending genocide; all members of the UN, and particularly the Security Council, who, in the wake of the fiasco of Somalia, failed to send the 5,000 troops that, it is estimated, might have prevented the vast majority of the killings. . . .").

80. See *Special Report: Milosevic, The Face of Evil*, NEWSWEEK, Apr. 19, 1999. As Guido Calabresi observed at the memorial service for Professor Cover at the Yale Law School, "[H]e understood instinctively how destructive passion can be if it does not forgive and even love those individuals on whom it must—on whom it must—turn its fire." Calabresi, *supra* note 38, at 1699-1700.

81. As psychologist Alan Stone notes, "You have to admit that your group is capable of equal violence . . . horrors are perpetrated by all sides." Stone, *supra* note 73, at 55, 59. See also GLOVER, *supra* note 64, at 7 ("We need to look hard and clearly at some monsters inside us. But this is part of the project of caging and taming them."); Carlos Salinas, *People Like Us*, AMNESTY NOW, Fall 2000, at 12 (describing test in which volunteers were told to shock supposed test subjects—who were really actors—notwithstanding the subjects' screams: "ordinary people, simply doing their jobs, without any particular hostility on their part, can become agents in a terribly destructive process"); cf. Steven Pinker, *All About Evil*, N.Y. TIMES BK. REV., Oct. 29, 2000, at 14 (reviewing JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY* (2000)) (describing test resolution promulgated by UNESCO in 1986 that "it is scientifically incorrect to say that war or any other violent behavior is genetically programmed into our human nature"). As Pinker notes, "Scientists who have dissented from this saccharine view have been picketed, smeared, and likened to Nazis." *Id.* at 14. See generally A GLIMPSE OF HELL: REPORTS ON TORTURE WORLD WIDE (Duncan Forrest ed., 1996).

82. "The response should resist the temptation to dehumanize perpetrators and instead seek to confirm the humanity of everyone—whether by holding all to account under basic norms of human rights, by including all in a process of truth-telling and healing, or by forging connections through rituals

3. *The Limits of Theory*

Postmodern incredulity toward metanarratives also exposes the limits of theory. Philosopher Jonathan Glover expounds upon the theory underlying the linkage of human rights and the prevention of atrocities in a recent book focusing on Bosnia, Cambodia and Rwanda.⁸³ Glover argues that the crimes of genocide, mass murder, disappearance, and torture become possible when their victims are dehumanized⁸⁴ and that dehumanization occurs through repeated and increasingly vicious "violations of human dignity." Indeed, once a certain level of dehumanization is reached, these crimes become almost inevitable.

The relatively petty violations of human dignity through which victims are dehumanized often include mockery and what Glover calls the "cold joke."⁸⁵ These violations may be culturally specific, and what may be an intolerable insult in one culture may be shrugged off in another. As these violations become increasingly egregious, however, they increasingly fall within the prohibitions of well-established human rights law. The exhortations on Hutu-controlled radio to kill Tutsis,⁸⁶ for example, violated article 21 of the United Nations International Covenant on Civil and Political Rights (prohibiting hate speech and incitement to violence).⁸⁷ The camps into which Croat and Muslim civilians were herded,⁸⁸ similarly, violated well-accepted international norms against arbitrary detention⁸⁹ and international standards for the treatment of those in state custody.⁹⁰

and monuments of commemoration, shared resources, or offers of apology and forgiveness." MINOW, *supra* note 34, at 146.

83. See generally GLOVER, *supra* note 64.

84. *Id.* at 35 ("Atrocities are easier if the human responses are weakened. Torturers have to suppress sympathy, or 'squeamishness' as they come to think of it. One way is to stress that victims do not belong. They are usually assigned to some other, stigmatized, group.").

85. "Among the strongest expressions of lack of respect is the cold joke. During the occupation of Kuwait, some Iraqis who had killed a boy told his family they wanted money to pay for the bullet. They could have simply forced Kuwaitis at random to give them money. The added cruel humor in this demand is what makes it a cold joke. The language used by people carrying out atrocities is riddled with cold jokes." GLOVER, *supra* note 64, at 36. ANDREA DWORKIN & CATHERINE MACKINNON, *PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY* (1988) (arguing that pornography should be illegal); Cf. MARI MATSUDA, *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT* (Richard Delgado & Charles R. Lawrence eds., 1993) (arguing that hate speech should be banned).

86. Bill Berkeley, *Radio in Rwanda: The Sounds of Silence*, in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 754 (Henry Steiner & Philip Alston, eds., 2000) [hereinafter *INTERNATIONAL HUMAN RIGHTS IN CONTEXT*] (describing the demonization of Tutsis); Judgment, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, International Criminal Tribunal for Rwanda, Sept. 2, 1998, *reprinted in* *INTERNATIONAL HUMAN RIGHTS IN CONTEXT*, *supra*, at 1181.

87. Civil Covenant, *supra* note 51, art. 20.

88. *INTERNATIONAL HUMAN RIGHTS IN CONTEXT*, *supra* note 86, at 1158 (summarizing testimony before the Trial Chamber of the ICTY as to the "very confined space . . . filth and stifling heat" in which up to 3,000 prisoners were held).

89. Civil Covenant, *supra* note 51, art. 9. *But see* Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986) (upholding the prolonged detention of Cuban refugees notwithstanding the violation of customary international law), *cert. denied*, 479 U.S. 889 (1986).

90. Civil Covenant, *supra* note 51, art. 10.

In short, just as genocide—perhaps the ultimate violation of human rights⁹¹—may be understood as the complete absence of any recognition of human dignity,⁹² at the opposite end of the spectrum, where human rights are fully assured, human dignity is given fullest recognition.⁹³ According to the modern metanarrative, international law discourages genocide, the complete denial of human dignity, on the one hand, by encouraging the fullest recognition of human dignity through human rights law, on the other.

PIL recognizes the persuasive force of this argument, but also notes its limitations. Genocide may be more dependably deterred by *violating* human rights, by imposing curfews or even preventive detention, for example.⁹⁴ Genocide has occurred, moreover, without the apparent accretion of indignities, as in the Polish village of Jedwabne in which half the population murdered the other half.⁹⁵ Genocide may also be accompanied by the most meticulous attention to law, as the Nazis demonstrated and documented through their careful promulgation of regulations and orders governing treatment of the Jews.⁹⁶ Finally, as Adeno Addis and others have noted, there are important aspects of human dignity which are generally ignored by human rights law, such as the collective rights of particular cultural groups.⁹⁷ As Martha Minow soberly concludes, "No one, of course, knows how to deter genocide or mass violence."⁹⁸

91. The ICTR calls genocide "the crime of crimes." Judgment and Sentence, The Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Trial Chamber, International Criminal Tribunal for Rwanda, Sept. 4, 1998, cited in WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 9 n.30 (2000).

92. The victim effectively becomes an object. As Oscar Schachter notes:

We do not find an explicit definition of the expression 'dignity of the human person' in international instruments or (as far as I know) in national law. Its intrinsic meaning has been left to intuitive understanding, conditioned in large part by cultural factors. . . . One general answer to our question is suggested by the Kantian injunction to treat every human being as an end, not as a means. Respect for the intrinsic worth of every person should mean that individuals are not to be perceived or treated merely as instruments or objects of the will of others.

Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848, 849 (1983).

93. See MARCO SASSÓLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR? 100-101 (2000) (noting that some version of the Golden Rule is recognized in virtually every moral tradition on the planet). Freud was more cynical. After demonstrating that this "ideal demand . . . known throughout the world" is counterintuitive if not absurd, Freud concludes "that the ideal commandment to love one's neighbor as oneself . . . is really justified by the fact that nothing else runs so strongly counter to the original nature of man." Sigmund Freud, *Civilization and Its Discontents*, reprinted in THE FREUD READER 750 (Peter Gay ed., 1989).

94. The most extreme example of such prevention is humanitarian intervention in the form of armed force to prevent genocide, as NATO justified its attacks on Serbia in March 1999. The legality of such intervention remains an open question. SCHABAS, *supra* note 91, at 447.

95. JAN GROSS, NEIGHBORS (2001). See also George F. Will, *July 10, 1941, In Jedwabne*, NEWSWEEK, July 9, 2001, at 68. But see Freud, *supra* note 93, at 751-52 (explaining how Jews "have rendered most useful services" to their host countries by providing an outlet for aggression, thus facilitating cohesion among their countrymen). See also STAN MACK, THE STORY OF THE JEWS 140-43 (1998) (describing persecution of Jews in Poland in the 16th and 17th centuries).

96. SUSAN GRIFFIN, A CHORUS OF STONES (1993) (describing the endless detail of Nazi law); TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 201 *passim* (1992).

97. Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 66 NOTRE DAME L. REV. 1219 (1996).

98. MINOW, *supra* note 34, at 145. Nor do we know why some heroically resist. See, e.g.,

In addition, PIL exposes the underlying assumptions of homogeneity on which much of international legal theory is predicated.⁹⁹ PIL recognizes that amnesty, for example, may well be useful, even necessary, in South Africa¹⁰⁰ and a cynical mechanism to immunize violators in Peru.¹⁰¹ The fact that most methods similarly recognize a range of amnesties, rather than a dichotomy between *our* amnesty—compassionate, pragmatic, and just—and *their* amnesty—cynical, self-serving, and unjust (a predictable dichotomy during the Cold War), simply indicates the extent to which “we’re all postmodernists now.”¹⁰²

Finally, by exposing the limits of theory, postmodern incredulity suggests a shift in focus from theory-building to storytelling.¹⁰³ Stories give meaning to phrases like “violations of human dignity” and, as philosopher Richard Rorty explains, stories generate the “sympathy” crucial to a human rights culture.¹⁰⁴

PHILIP HALLIE, *LEST INNOCENT BLOOD BE SHED: THE STORY OF LE CHAMBON AND HOW GOODNESS HAPPENED THERE* (1979) (describing how a tiny French Protestant village saved thousands of Jews during World War II).

99. *But see* Kennedy, *supra* note 20, at 387 (“Never has the U.S. international law tradition seemed as idiosyncratic or been in such sustained methodological and political debate with international lawyers in other traditions. There is no consensus on the meaning or consequences of changes in international society.”).

100. South Africa’s constitutional court explains:

The alternative to the grant of immunity from criminal prosecution of offenders is to keep intact the abstract right to such a prosecution for particular persons without the evidence to sustain the prosecution successfully, to continue to keep the dependants of such victims . . . ignorant about what precisely happened to their loved ones, to leave their yearning for the truth effectively unassuaged, to perpetuate their legitimate sense of resentment and grief and . . . to allow the culprits . . . [to remain] physically free but inhibited in their capacity to become active, full and creative members of the new order.

Azanian Peoples Organization v. The President of the Republic of South Africa, 1996 (4) SALR 637 (CC) (S. Afr.), reprinted in HENKIN ET AL., *HUMAN RIGHTS* 633 (1999). *See also* Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 3 (1998) (delivering a laudatory analysis of the Azanian Peoples Organization decision by a judge who sat on the Appeals Chamber of the ICTY and the ICTR).

101. *See, e.g., Preliminary Observations of the Human Rights Committee: Peru*, U.N. Doc. CCPR/C/79/add.67 (1996), reprinted in HENKIN ET AL., *supra* note 100, at 496 (noting that “the amnesty granted by decree law 26,479 on 14 June 1995 absolves from criminal responsibility . . . all forms of accountability, all military, police and civilian agents of the State. . . accused, investigated, charged, processed or convicted for common and military crimes [from May 1980 to June 1995]”).

102. *See* NATHAN GLAZER, *WE’RE ALL MULTICULTURALISTS NOW* (1997); Schlag, *supra* note 73, at 444 (noting that the law is already postmodern).

103. Rorty describes the process through which he manipulates his students’ “sentiments in such a way that they imagine themselves in the shoes of the despised and oppressed. Such students are already so nice that they are eager to define their identity in non-exclusionary terms . . . Producing generations of nice, tolerant, well-off, secure, other-respecting students of this sort in all parts of the world is just what is needed—indeed *all* that is needed—to achieve an Enlightenment utopia.” Rorty, *supra* note 62, at 127. *But see* SCHLAG, *supra* note 66, at 17, 20 (referring ironically to “those scholars who have figured out what should be done—for example, we should all be *really* nice to each other—but haven’t the foggiest idea of how we should go about doing it”).

104. Rorty argues that resistance to “the human rights culture” is usually traceable to the deprivation “of two . . . concrete things: security and sympathy. By ‘security’ I mean conditions of life sufficiently risk free as to make one’s difference from others inessential to one’s self-respect, one’s sense of worth . . . by ‘sympathy’ I mean the sort of reaction that . . . white Americans had more of after reading *Uncle Tom’s Cabin* than before, the sort that we have more of after watching TV programs about the genocide in Bosnia.” Rorty, *supra* note 62, at 128. As Saskia Sassen and Ted Turner have

A better sort of answer [than philosophy] is the sort of long, sad, sentimental story which begins, 'because this is what it is like to be in her situation—to be far from home, among strangers' . . . such stories, repeated and varied over the centuries, have induced us, the safe, rich, powerful people, to tolerate, and even to cherish, powerless people.¹⁰⁵

Most of the methods set out in the symposium contemplate such stories, but they focus on ferreting out the "true story."¹⁰⁶ PIL, in contrast, focuses on the multiplicity of stories. This does not mean accepting all stories as equally valid,¹⁰⁷ but it does mean recognizing multiple truths.¹⁰⁸

In the recently published story of Konrad Latte, for example, we learn how he—along with about 2000 other Jews—survived World War II in Berlin.¹⁰⁹ As journalist Peter Schneider observes, "For every Jew who survived in Berlin, at least 7 people must have intervened We will never know how many Berliners had the decency and courage to save their Jewish co-citizens from the Nazis—20,000, 30,000?"¹¹⁰ Thus, this story takes its place along with Daniel Goldhagen's stories of *Hitler's Willing Executioners*¹¹¹ and innumerable stories of a fascist state so omnipresent, so relentless, that no German could possibly resist. The new story does not mean

observed, the whole world is watching. See SASKI SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION 93 n.3 (1996); *Sharing the Wealth* (NPR radio broadcast, June 13, 2000) (reporting on advice from Ted Turner and John Chambers to Silicon Valley's newly rich on sharing their wealth, noting Turner's admonition to pay attention to those regions and countries rarely seen on the evening news). See also text accompanying *infra* note 319.

105. Rorty, *supra* note 62, at 133-34.

106. See, e.g., O'Connell, *supra* note 9, at 346-47 (explaining why crimes under the grave breaches regime that are not recognized as such under CIL must be "carefully exclude[d]" from indictments); Wiessner & Willard, *supra* note 8, at 323. But see Charlesworth, *supra* note 12, at 380 (explaining that feminist methodologies "may clearly reflect a political agenda rather than strive to attain an objective truth"). See generally Julie Mertus, *Considering Non-State Actors in the New Millennium: Toward Expanded Participation in Norm Generation and Norm Application*, 32 N.Y.U. J. INT'L L. & POL. 537, 565 (2000) ("People mold their identities and determine their behavior according to what they perceive to be true, not according to what is factually true.").

107. Alvarez, *supra* note 79, at 443 (noting that the "vast bulk of the evidence in the Tadic case came, not in the form of physical evidence, such as contemporaneous written records of atrocities (as at Nuremberg), but rather through the oral testimony of self-interested, live witnesses who replicated inside the courtroom the ethnic divides of the society at large Tadic's judges reacted to these challenges in the time-honored fashion of judges in liberal states—they pretended such strains did not exist"). Cf. Ethan Bronner, *Nemesis*, N.Y. TIMES, Oct. 1, 2000, at 9 (book review of RICH COHN, *THE AVENGERS* (2000) (criticizing the author for his failure to provide footnotes, or any authority, for his account of a plot to poison Nazis after the war and concluding that "[h]e wants only to tell a good story. This is a pity because what could have been a thrilling and authoritative work remains thrilling alone.")).

108. Priscilla Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 598, 636-39 (1994) (describing "what commissions have included (and not included) in their investigations"). *Id.* at 638.

109. Peter Schneider, *Saving Konrad Latte*, N.Y. TIMES MAG., Feb. 13, 2000, at 52 ("Historians estimate that between 5,000 and 10,000 German Jews went underground before and during the war, about half of them in Berlin; about 2,000 Jews actually lived out the war in Berlin . . .").

110. *Id.* See also Roger Cohen, *Germany Quietly Builds Alliance With Israel*, N.Y. TIMES, Mar. 4, 2001, at 1 (noting that "for decades hundreds of German volunteers have traveled to Israel to provide services to Holocaust survivors").

111. DANIEL GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS* (2000) (describing complicity of German civilians in the Holocaust).

that the others are untrue, but it subverts their claims of ubiquity and, in doing so, contributes to a more complex, nuanced understanding.¹¹²

B. *"The Cultural Logic of Late Capitalism"*

In Fredric Jameson's oft-quoted phrase, "postmodernism is the cultural logic of late capitalism."¹¹³ This "cultural logic" has two related but distinct manifestations: commodification and globalization. Commodification refers to the transformation of something which is not commonly sold, traded or otherwise alienated—love, water, rituals of indigenous cultures—into something that is—mail-order brides, bottled water, \$50 per head "performances."¹¹⁴ Globalization, as Boaventura de Sousa Santos explains, is "the process by which a given local condition or entity succeeds in expanding its reach over the globe and, by doing so, develops the capacity to designate a rival social condition or entity as local."¹¹⁵ By packaging culture, commodification makes globalization possible. By creating markets, globalization makes commodification profitable.

Thus, along with dollars, Western culture¹¹⁶ is flowing freely around the world. Along with Coca Cola and Bruce Willis,¹¹⁷ western culture means

112. See also Cohen, *supra* note 110, at 10 (explaining how "Germany has become Israel's most important ally outside the United States").

113. FREDRIC JAMESON, *POSTMODERNISM, OR THE CULTURAL LOGIC OF LATE CAPITALISM* (1991). Pursuant to this logic, free market democracy calls for the elimination of trade barriers and the opening of markets to Western capital. Capital has flowed freely for most of Western history, but the end of the Cold War and developments in finance and technology combined to qualitatively change the game during the past ten years. "Securitization and the ascendance of finance generally have further stimulated the global circulation of capital and the search for investment opportunities worldwide. . . ." SASSEN, *supra* note 104, at 37. See also Peter J. Spiro, *New Players on the International Stage*, 2 HOFSTRA L. & POL'Y SYMP. 19, 21-22 (1997) (describing the revolution in global communications and its impact on financial systems).

114. GLOBALIZING INSTITUTIONS: CASE STUDIES IN REGULATION AND INNOVATION 13 (Jan Jensen & Boaventura de Sousa Santos eds. 2000) [hereinafter *GLOBALIZING INSTITUTIONS*] (describing "vernacularization of historical religious sites for tourists").

115. Boaventura de Sousa Santos, *Oppositional Postmodernism and Globalization*, 23 L. & SOC. INQUIRY 121, 135 (1998). This point is elaborated by Jensen and de Sousa Santos:

Most frequently, the story of globalization is that of the winners, as told by the winners. The victory of their vision of the future is recounted as an inevitability. In the last two decades globalizations follow—to hear the victors tell it—not only from heavy tendencies of economic structures but also from the lucky escape from misguided political vision which sought to achieve social justice and equality via state act and mobilization of the economically and socially disadvantaged after 1945.

GLOBALIZING INSTITUTIONS, *supra* note 114, at 12. SASSEN, *supra* note 104, at 19 ("The most widely recognized instance of Americanization is seen, of course, in the profound influence of U.S. popular culture on global culture."). The end of the Cold War accelerated the rate of globalization. The failure of Soviet communism became the triumph of free market democracy as formerly closed markets opened and capital poured in at previously unimaginable rates. See Nicholas D. Kristof & Edward Wyatt, *Who Went Under in the World's Sea of Cash*, N. Y. TIMES, Feb. 15, 1999, at A10 ("In a typical day, \$1.5 trillion changes hands, an eight-fold increase since 1986, an almost incomprehensible sum, equivalent to total world trade for four months."). As Huyssen argues, "Especially with the help of the new technological media of reproduction and dissemination monopoly capitalism has succeeded in swallowing up all forms of older popular cultures, in homogenizing all and any local or regional discourses, and in stifling by co-option any emerging resistances to the rule of the commodity." HUYSEN, *supra* note 20, at 21.

116. As Professor Falk observes, "'Western' [has been] further deconstructed to be seen as

constitutionalism¹¹⁸ and free market ideology.¹¹⁹ Mass production of goods has been succeeded by the mass production of images¹²⁰ and information, from the Golden Arches to MTV, proliferating in endless iterations around the world. Images of "freedom" and the rhetoric of "rights" are hot commodities,¹²¹ especially when they are linked, implicitly or explicitly, with images of American prosperity.¹²²

Commodification and globalization are in large part responsible for the spread of the "human rights idea."¹²³ They can be constructively exploited, as Amnesty International has effectively demonstrated with its celebrity extravaganzas.¹²⁴ While some modernists may wince at *Rockin' for Human*

'American.'" RICHARD FALK, *EXPLORATIONS AT THE EDGE OF TIME: THE PROSPECTS FOR WORLD ORDER* 49 (1992). For a description of the commodification of international law, see Stark, *supra* note 19, at 553 (describing the International Superstore).

117. Santos defines globalization as "the process by which a given local condition or entity succeeds in expanding its reach over the globe and, by doing so, develops the capacity to designate a rival social condition or entity as local." Sousa Santos, *supra* note 115, at 135. This definition is reiterated in *GLOBALIZING INSTITUTIONS*, *supra* note 114, at 11.

118. VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 249-50 (1999) (noting the role of international and "extra-national" influences on new constitutions).

119. Joseph Hanania, 'Reality' TV? *Televisions Colonized Reality Long Ago*, N.Y. TIMES, Jan. 21, 2001, at A41 (noting that the U.S. Department of Justice sent episodes of *Law and Order* to Russian lawmakers in an effort to educate them about the American criminal justice system as they drafted a new constitution in the early 1990s, "despite the fact that [the show's author] never attended law school, [and] creates legal theories and precedents for the show 'out of whole cloth'"); R.W. Apple, Jr., *In the Television Age Power By Image*, N.Y. TIMES, Jan. 21, 2001, at 1 (explaining why, notwithstanding Gore's popular victory, "in the television age, [images of Mr. Bush speaking from the Oval Office, boarding Air Force One, accompanied everywhere. . . by . . . 'Hail to the Chief'] more than anything else, confer the mantle of authority and legitimacy on [him]"). The President's legitimacy—and approval ratings—reached new heights when he addressed Congress, and the world, on television after the attacks on the World Trade Center and the Pentagon. Howard Fineman & Martha Brant, *Bush's Battle Cry*, NEWSWEEK, Oct. 1, 2001, at 24. See generally HUYSEN, *supra* note 20, at ix.

120. Fredric Jameson, *Postmodernism, or, the Cultural Logic of Late Capitalism*, NEW LEFT REV., July-Aug. 1984, at 59. No one would invest in "Third World markets," for example, but the phrase "emerging markets" has irresistible connotations of getting in on the ground floor. See Nicholas D. Kristof & David E. Sanger, *How U.S. Wooed Asia to Let Cash Flow In*, N.Y. TIMES, Feb. 16, 1999, at A1.

121. David Rieff, *The Precarious Triumph of Human Rights*, N.Y. TIMES MAG., Aug. 8, 1999, at 37 ("In these post-communist, post-modern times, human rights seems to have become the dominant moral narrative for thinking about world affairs.").

122. As Schlag points out, "[O]urs is a world . . . where the value of freedom implies at once the downfall of the Berlin Wall and the imbibing of Pepsi." SCHLAG, *supra* note 66, at 47. See also *supra* note 70 (describing *Freedom Perfume*). Thomas Friedman cites advertisements throughout his paean to neoliberalism, THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 381 (1999) (noting without irony that "[f]or some reason, advertising copywriters have a tremendous insight into globalization").

123. Anthony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT'L L. & POL. 243, 250 n.14 (2000) ("Indeed it can be argued that human rights itself is a manifestation of globalization in that it is a universal language that creates communities and affiliations which transcend borders."). As Cover stressed, "It is the thesis of this Foreword that the creation of legal meaning . . . takes place always through an essentially cultural medium." Cover, *supra* note 28, at 11.

124. E.g., *Screen Rights: Before Night Falls*, AMNESTY NOW, Summer 2001, at 11 (describing Winona Ryder, Dennis Hopper and Gary Oldman co-host benefit screening of Julian Schnabel's *Before Night Falls*, "based on the autobiographical memoir of writer and activist Reinaldo Arenas, who was persecuted and imprisoned by the Cuban government for his writings, his politics and his homosexuality"); *Stand and Be Counted* (The Learning Channel television broadcast, Aug. 21-22, 2000) (featuring musician David Crosby interviewing artists who use their talents to push for social change).

Rights,¹²⁵ it raises consciousness and it raises money, with which Amnesty can continue to ratchet its public visibility in a series of high profile advertisements. Indeed, this has been understood since the beginning of the human rights movement which emerged not from the Holocaust but from mass-marketed *stories* of the Holocaust,¹²⁶ the carefully-edited *Diary of Anne Frank*,¹²⁷ Elie Weisel's *Night*,¹²⁸ and the grim lyricism of *The Sorrow and the Pity*.¹²⁹ Commodification contributes to respect for human dignity, it can be

125. *Rockin' for Human Rights*, AMNESTY ACTION, Spring 1999, at 10 (describing the Pay-Per-View cable network national premier of *The Paris Concert for Amnesty International: The Struggle Continues*, featuring Bruce Springsteen, Peter Gabriel, Tracy Chapman, Alanis Morissette, RadioHead and Shania Twain, among others, in a sold-out event to celebrate the 50th anniversary of the Universal Declaration of Human Rights, also describing tie-in with the Body Shop and Best Buy music and appliance chain). The appropriation of human rights culture, which is in turn promoted by this appropriation, illustrates what Jameson calls "pastiche":

Pastiche is, like parody, the imitation of a peculiar mask, speech in a dead language; but it is a neutral practice of such mimicry, without any of parody's ulterior motives, amputated of the satiric impulse, devoid of laughter and of any conviction that alongside of the abnormal tongue you have momentarily borrowed, some healthy linguistic normality still exists.

Jameson, *supra* note 120, at 64. Examples are ubiquitous. *E.g.*, Slaughter & Ratner, *supra* note 1; Koskenniemi, *supra* note 10; Slaughter & Ratner, *infra* note 143 (co-editors' unattributed reference to Marshall McLuhan's "The Medium is the Message"); Pinker, *supra* note 81 (describing *All About Evil*, a play on *All About Eve*). Another example is an old Saturday Night Live satire on the "feel good" politics of the *We Are the World* recording. In the parody, famous rock stars get together to "free the chickens" ("All chickens should be free-range chickens!"). Yesterday's parody is today's pastiche. Factory farming of chickens (as well as other animals) has in fact become an active campaign, not only by animal rights groups, see PETER SINGER, *ANIMAL LIBERATION* ii-iii (2d ed. 1996), but by those alarmed at the spread of disease among such animals in the recent hoof and mouth disaster in Europe. See *e.g.*, Olivia Ward, *Paying the Price of Progress*, THE TORONTO STAR, April 1, 2001 (noting links between factory farming and foot and mouth, as well as mad cow, disease). In *Chicken Run* (DreamWorks 2000), a cartoon rooster with the voice of Mel Gibson inspires a barracks full of cartoon chickens to escape their black-booted oppressors, who have installed an ominous death machine that will efficiently make them all into chicken pot pies. See also The Producers or, if tickets are unavailable, see Marc Peyser, *'Producers' Tickets Here!*, NEWSWEEK, June 18, 2001, at 54 (reporting that Mel Brooks thanked Hitler for being a "funny guy" at the Tony Awards).

126. "The very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative." Cover, *supra* note 28, at 10. As a corollary, when stories are *not* told, normative force is not imposed. As Glover notes, "history is highly selective . . . [S]ome places . . . are either hardly mentioned or quite unmentioned. This does not reflect a view that the history of some parts of humanity is unimportant, but rather the limitations of what is well or availably documented." GLOVER, *supra* note 64, at 2. Where are the made-for-TV movies about Rwanda?

127. See Ralph Blumenthal, *Five Precious Pages Renew Wrangling Over Anne Frank*, N.Y. TIMES, Sept. 10, 1998, at A1 (describing Otto Frank's censorship of the diary of "the Jewish girl in Amsterdam who put an indelible human face on the Holocaust").

128. ELIE WIESEL, *NIGHT* (1958).

129. *THE SORROW AND THE PITY* (Cinema 5 Distributing 1971). See also Paragraph 175, a documentary by Rob Epstein and Jeffrey Friedman describing the fate of German homosexuals under the Nazis, reviewed in *Review/Film*, WALL ST. J., Feb. 23, 2001, at W4 (including the testimony of a survivor who "recalls, with hushed horror, a 'singing in the forest' that was, in fact, the screaming of gay men being hanged. Another man is more succinct. 'I am ashamed,' he says, 'for humanity.'"). See generally YEHUDA BAUER, *RETHINKING THE HOLOCAUST* (2000) (exploring the difficulties of writing about genocide). But see NORMAN G. FINKELSTEIN, *THE HOLOCAUST INDUSTRY: REFLECTIONS ON THE EXPLOITATION OF JEWISH SUFFERING* (2000) (arguing that the real threat to the sanctity of the memory of the victims of Nazism is not from Holocaust deniers, but from self-proclaimed guardians of Holocaust remembrance).

argued, through high-grossing movies like *Schindler's List*,¹³⁰ and tourist attractions like the Holocaust Museum.¹³¹

At the same time, the commodification of justice detracts from its legitimacy.¹³² Thus, ironically, commodification cheapens justice, even if it costs billions. As commentator Charles Krauthammer notes, for example, Milosevic lost the election because the "U.S. poured millions of dollars into the democratic opposition"; he was arrested after "the U.S. Congress had stipulated that unless Serbia showed cooperation . . . the U.S. would withhold \$50 million in reconstruction aid"; and he was surrendered on the eve of the donors' conference on whether to grant aid.¹³³ As Krauthammer says, "Money talks. . . . These are the forces that brought Milosevic to justice."¹³⁴ Justice may be blind, but as Manni realizes in the last scenario (when the blind woman points to the fleeing figure with his bag of cash),¹³⁵ it pays to keep an eye on the money.

But the cultural logic of late capitalism takes on a life of its own, not subject to anyone's control.¹³⁶ The impact of an image, technologically enhanced, simultaneously available everywhere, whether "true" or not,¹³⁷

130. SCHINDLER'S LIST (Universal Pictures 1993). As of August, 2001, *Schindler's List* had grossed \$317,100,000 worldwide, in addition to \$44,364,000 from U.S. rentals. *Business Data for Schindler's List*, available at <http://us.imdb.com/Business?0108052> (last visited Aug. 10, 2001).

131. As of Feb. 2002, the Holocaust Museum in Washington had been visited by 17.3 million people since opening in April 1993. *United States Holocaust Memorial Museum General Museum Information Press Kit*, available at <http://www.ushmm.org/museum/press/kits/general/fact.htm> (last visited Feb. 25, 2002). See also Celestine Bohlen, *From a Mural, New Life in a Debate Over Memory*, N.Y. TIMES, June 24, 2001, at WK4 (describing revival in Poland of a "Jewish culture without Jews" attributable, in part, to tourism, which will draw an anticipated 50,000 visitors to a Jewish center in Poland that "seeks to recreate the past shared by Poles and Jews as seamless and painless—which it most clearly was not. But still, there is an attempt to acknowledge the role of Jews and Jewish culture in Poland, and can that be bad?"). Commodification takes a further ironic twist here as communities realize the benefits of atrocity tourism and monuments to victims become an important part of rebuilding the economy.

132. See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 150 *passim* (1990) (discussing coherence, that is, a principled and consistent approach to norm enforcement, as a factor in legitimacy).

133. Charles Krauthammer, *Milosevic in the Dock: At What Price?*, TIME, July 9, 2001, at 32 (noting that Milosevic was surrendered the day before a donors' conference "of Western nations . . . to consider the Serbs' request for \$1.25 billion in reconstruction aid").

134. *Id.* See also Andrew Purvis, *Long Walk to Justice*, TIME, July 9, 2001, at 30, 31 (Following Milosevic's surrender, the Yugoslav representative was blunt. "'We did it,' he told the donors' conference. 'Now it's your turn.' The assembled governments responded with pledges of almost \$1.3 billion in aid. Whether such a price was worth the incarceration of Milosevic is a question that only the shades of his victims are entitled to answer.").

135. See *supra* text accompanying note 28.

136. See, e.g., Mark Ashurst, *Now, a 'Quiet Revolution': Mobile Phones Leapfrog an Obstacle to Development*, NEWSWEEK, Aug. 27, 2001, at 32 (describing boom in mobile phones, along with the liberalization of Africa's airwaves, as a politically "potent combination"). There are still contexts in which the media is controlled by the government and propaganda, masquerading as news, is all that is available. Even for Milosevic, however, this became problematic. See Peter Maas, *Radio Wars*, BRILL'S CONTENT, March 2001, at 108 (describing Milosevic's failure to silence a U.S.-supported radio station).

137. A cropped photo featured on the cover of TIME, May 1, 2000, for example, showed a gun apparently aimed at Elián González. In fact, as the uncropped photo showed, the gun was aimed at the fisherman trying to prevent federal agents from returning Elián to his father. Michael R. Francher, *Much Debate, Discussion behind the Decision to Place THAT Photo of the Raid*, SEATTLE TIMES, April 30, 2000, at A19.

drives the law.¹³⁸ Rhetoric, especially powerful visual images, generates the political will to link violence and the word. This may result in punishment for those who violate human dignity, as the footage of the death camps did at Nuremberg.¹³⁹ But it may also make such violations possible. Thus, the image of the American soldier being dragged along the street in Somalia,¹⁴⁰ appearing on millions of screens throughout the country, discouraged intervention in Rwanda.¹⁴¹ As in *Lola*, only in hindsight does any result seem inevitable.

C. *Fragmentation*

According to David Harvey:

[T]he most startling fact about postmodernism [is] its total acceptance of the ephemerality, fragmentation, discontinuity, and the chaotic But postmodernism responds to that fact in a very particular way. It does not try to transcend it, counteract it, or even to define the "eternal and immutable" elements that might lie within it. Postmodernism swims, even wallows, in the fragmentary and the chaotic currents of change as if that is all there is.¹⁴²

PIL's "total acceptance of . . . fragmentation" illuminates the instant context in three specific ways.¹⁴³ First, it focuses us on the fragmentation of the law,

138. See, e.g., Joseph Hanania, *The Power of Images Paid for by Politicians*, N.Y. TIMES, Oct. 15, 2000, at AR 29 (noting that Adlai Stevenson "refused to appear in television advertisements, saying they showed contempt for the American people and proclaiming, 'This isn't Ivory Soap versus Palmolive'"). Those who control the media may effectively control the "political will." Thus, a free press is a potentially powerful antidote. Even if the press is "free," however, it must be able and willing to enter a particular area. See, e.g., *NPR Profile*, *supra* note 104 (Ted Turner castigates Silicon Valley, noting that CNN has gone to more than 18 states where there is virtually no other Western presence). Even if a "free" press is in a particular area, the result is unpredictable, as shown in Somalia. See *infra* note 140.

139. For a first-hand account of the viewing, and immediate impact, of the films, see TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 187 (1992) (concluding that, although the viewing "contributed little to the determination of their individual guilt," it "certainly hardened sentiment against the defendants generally").

140. Michael Elliot, *The Making of a Fiasco: Somalia: An Inside Look at how Washington Blundered Into a Misguided 'Two Track' Policy*, NEWSWEEK, Oct. 18, 1993, at 34 (describing how "the world watched a happy crowd drag the stiff, nameless corpse of an American soldier through the streets of Mogadishu"); *Bloodbath: What Went Wrong?*, NEWSWEEK, Oct. 18, 1993, at 32 (picture showing the body of a U.S. serviceman dragged through the streets); Reid G. Miller, *Last 1,100 U.S. Troops Withdraw from Somalia*, CHICAGO SUN-TIMES, Mar. 25, 1994, at 3 (describing the completion of U.S. military withdrawal from Somalia). For a gripping account of the failed mission in Somalia, see MARK BOWDEN, *BLACK HAWK DOWN* (1999).

141. As Philip Gourevitch explains:

The desertion of Rwanda by the U.N. force . . . can be credited almost single-handedly to the United States. With the memory of the Somalia debacle still very fresh . . . [i]t hardly mattered that Dallaire's call for an expanded force and mandate would have not have required American troops, or that the mission was not properly peacekeeping, but genocide prevention.

PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* 150 (1998).

142. HARVEY, *supra* note 58, at 44.

143. More generally, international law itself can be understood as a fragment of a particular political, historical context. Thus, just as violations of human dignity do not occur solely *because* of the law, they cannot be prevented solely by law. This may be more obvious to non-lawyers than to lawyers, whose knowledge of the law may make them prone to solipsism. Postmodern skepticism regarding the

addressing the issue of accountability for violations of human dignity, particularly the humanitarian/human rights law divide. Because of this fragmentation, which is exacerbated by the multiple bodies interpreting and applying the law, *lex lata* ("the law as it is") is problematic in this context.

Second, PIL's acceptance of fragmentation encourages a closer look at *lex ferenda*, or "what the law should be," particularly the underlying assumption of a universal standard. Even if there is a universal hunger for *nomos*, the project of imagining it is necessarily culture-specific. The law *should* be fragmented, accordingly, but coherent within a particular context. Finally, PIL's acceptance of fragmentation highlights the fragmentation of states themselves, in which some argue the problem is grounded. That is, the collapse of the nation state leads to violations of human dignity because there is no effective police authority to prevent them.

1. Lex Lata—"The Law As It Is"

a. The Fragmentation of International Law in General

As Pierre Schlag and others have pointed out, the law is *already* postmodern.¹⁴⁴ Many of the features associated with postmodernism, "the increasing fragmentation and heterogeneity of culture, the weakening of traditional historical narratives, the devolution of the modernist syntheses, the increasing speed, proliferation and succession of forms of life, the new modes of critical practice and techniques—are all already present in the law."¹⁴⁵ These features are even more "present" in international law.¹⁴⁶

Unlike domestic law, international law *remains* fragmentary: there is no Supreme Court to reconcile warring districts,¹⁴⁷ no legislature to fill in doctrinal gaps. Indeed, international "law-making" is often so contentious that no law is made at all; in many areas there are more gaps than law.¹⁴⁸

modern equation of knowledge and understanding, or truth, may be particularly useful here. See Anne-Marie Slaughter & Steven R. Ratner, *The Method is the Message*, 93 AM. J. INT'L L. 410, 417 (1999) (describing common call for empirical research).

144. Schlag, *supra* note 73; J.M. Balkin, *What is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1973 (1992) (noting that "jurisprudence produced during the postmodern era will turn out to display elements of postmodernity whether this is consciously desired or not").

145. Schlag, *supra* note 73, at 444. See also Diana Marie Amann, *Under Deconstruction: International Criminal Law in a Postmodern World*, 3 GREEN BAG 369, 370 (2000) (arguing that the ICTR and the ITCY, in taking the position that "people who share . . . the ethnicity of their persecutors could be victims of genocide, as long as they 'indeed constitute a stable and permanent group and were identified as such by all,'" echoed the postmodern view that ethnicity is socially constructed). But see Deryck Beyleveld & Roger Brownsword, *The Implications of Natural Law Theory for the Sociology of Law*, in POST-MODERN LAW: ENLIGHTENMENT, REVOLUTION AND THE DEATH OF MAN 126 (Anthony Carty ed., 1990) (suggesting fundamental inconsistencies between postmodernism and human rights).

146. As Dean Farer notes, for example, "the inchoate character of the 'global community'" is a barrier to extrapolating international criminal process from the process at the national level. Tom J. Farer, *Restraining the Barbarians: Can International Criminal Law Help?*, 22 HUM. RTS. Q. 90, 96 (2000).

147. The jurisdiction of the ICJ is based on the consent of states. Statute of the International Court of Justice, June 26, 1945, art. 36(2), 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179 [hereinafter ICJ Statute].

148. The law on terrorism, for example, does not address the issue of non-state-sponsored

International law is unapologetically¹⁴⁹ “discontinuous”; the decisions of the International Court of Justice have no precedential value,¹⁵⁰ and those of the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹⁵¹ and the International Criminal Tribunal for Rwanda (ICTR)¹⁵² are similarly *ad hoc*.¹⁵³ Treaty law applies only to the specific subject the particular treaty addresses and is binding only on the parties to the treaty. While customary international law (“CIL”)¹⁵⁴ applies more broadly, states may persistently dissent from CIL and exempt themselves from its coverage.¹⁵⁵ Many of the broad general principals that comprise CIL, moreover, such as the duty to avoid harm to neighboring states,¹⁵⁶ prove difficult to apply in specific cases.¹⁵⁷

b. *The Fragmentation of IHL/Human Rights Law in Particular*

The law governing individual accountability for violations of human dignity in internal wars is so fragmentary that it is incoherent.¹⁵⁸ As the

terrorism. Frederick L. Kirgis, *Terrorist Attacks on the World Trade Center and the Pentagon*, ASIL INSIGHT, Sept. 2001, available at <http://www.asil.org/insights/insigh77.htm> (last visited Sept. 14, 2001) (noting that while the UN Charter did not contemplate such a situation, an argument could be made that “article 51 [allowing use of force in self-defense] could extend to such a case if the government is knowingly harboring the terrorists”).

149. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989) (explaining that international law scholarship is utopian when it ignores politics and apologist when it does not). As suggested throughout this Article, in my view international law is far less consistent and coherent. I agree with Professor Koskenniemi, however, that it is “ultimately doubtful whether any meaningful distinction between international law, politics and morality can be made.” *Id.* at 8.

150. ICJ Statute, *supra* note 147, art. 59.

151. Statute of the International Criminal Tribunal for the Former Yugoslavia, annexed to Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993) [hereinafter ICTY Statute]. The Security Council adopted the Secretary General’s draft of the Statute without change in Resolution 827, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

152. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

153. ICTY Statute, *supra* note 151, art. 1; ICTR Statute, *supra* note 152, art. 2.

154. Treaty and custom are the two major sources of international law. ICJ Statute, *supra* note 147, art. 38. CIL has two elements: 1) state practice and 2) *opinio juris*, or the state’s belief that such practice is legally mandated. CIL is under attack from old civil law states like France, which are skeptical as to its content, Louise Doswald-Beck, IHL as Customary Law, Training Seminar, *supra* note 17, and from old common law states like the United States, which are skeptical as to its capacity to bind. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998). CIL also evokes protest from new states that chafe at being bound by law which they had no role in making. See, e.g., J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449 (2000).

155. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

156. *Trail Smelter* (U.S. v. Canada), 3 R.I.A.A. 1905, 1907 (1941), reprinted in BARRY CARTER & PHILLIP TRIMBLE, INTERNATIONAL LAW 1074 (3d ed. 1999).

157. See, e.g., *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 865 (E.D.N.Y. 1984) (concluding after lengthy analysis that punitive damages are “essential and proper” in order to give effect to the international prohibition against torture).

158. For a thorough and rigorous exegesis of violations of human dignity in internal wars, see

symposium demonstrates, the sharpest legal minds in international law are unable to agree on what the law is, let alone its meaning, impact, or application.¹⁵⁹

First, there are two distinct bodies of international law purporting to apply here, international humanitarian law ("IHL")¹⁶⁰ and international human rights law. Neither is particularly clear in this context. Notwithstanding *lex specialis*; the general rule that the more specific law will apply, the more specific IHL is riddled with exceptions in the context of internal armed conflict.¹⁶¹ As set out in the four Geneva Conventions,¹⁶² for example, only common Article 3 applies to *internal* armed conflicts.¹⁶³ Common Article 3 only applies, moreover, if the armed conflict occurs "in the territory of one of the high contracting parties." In addition, it only applies to "persons taking no active part in the hostilities," thus eliminating the prisoner of war regime applicable in international armed conflicts.¹⁶⁴ IHL is further muddled because "conflict not of an international character" is nowhere defined.¹⁶⁵

RATNER & ABRAMS, *supra* note 72, at 95-107.

159. Slaughter & Ratner, *supra* note 143, at 410 *passim* (describing gaps and convergences). See also RATNER & ABRAMS, *supra* note 72, at 104 (suggesting that the principles of *nullum crimen sine lege* are "perhaps clearer today" than they have ever been, but not so clear as to permit definitive conclusions).

160. IHL "can be defined as the branch of international law limiting the use of violence in armed conflicts by: a) sparing those who do not or no longer directly participate in hostilities; b) limiting the violence to the amount necessary to achieve the aim of the conflict, which can be . . . only to weaken the military potential of the enemy." SASSÓLI & BOUVIER, *supra* note 93, at 67. But see Chris Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 50 (1994) (challenging the notion that the laws of war "humanize" war and concluding that such law "privilege[s] military necessity at the cost of humanitarian values").

161. But see, e.g., Turku Declaration, art. 3, U.N. Doc. E/CN.4/Sub.2/1991/55 (1990), (establishing minimum humanitarian standards, e.g., prohibiting "violence to the life, health and physical or mental well-being of persons, in particular murder, torture, mutilation, rape, as well as cruel, inhuman or degrading treatment or punishment and other outrages upon personal dignity"). For a description of "minimum humanitarian standards," explicitly grounded in "situations of internal violence that pose the greatest threat to human dignity and freedom," see *Report of the Subcommission on Prevention of Discrimination and Protection of Minorities*, U.N. Doc. E/CN.4/1998/87 (1998).

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

163. For cases setting out the explicit rules of common Article 3 and of Protocol II, see SASSÓLI & BOUVIER, *supra* note 93, at 206. The statute for the ICTR explicitly provides for prosecution of persons who have committed or ordered to be committed "serious violations of Article 3 common to the Geneva Conventions . . . and of additional Protocol II." ICTR Statute, *supra* note 152, art. 4. See generally LAW AND CIVIL WAR IN THE MODERN WORLD (John Norton Moore ed., 1974); Tom Farer, *Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife*, 82 HARV. L. REV. 511 (1969); and RICHARD FALK, *LEGAL ORDER IN A VIOLENT WORLD* (1968). For a rigorous analysis of the role of the U.N. up through the mid-70s, see Oscar Schachter, *The United Nations and International Conflict*, in LAW AND CIVIL WAR IN THE MODERN WORLD, at 401.

164. "Those placed hors de combat by . . . detention, or any other cause, shall in all circumstances be treated humanely." ICTR Statute, *supra* note 152, art. 3.1. There are no "combatants" in internal conflicts.

165. THOMAS BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* 257 (1995).

Optional Protocol II, specifically focused on non-international conflicts (whatever they are), is further limited to conflicts among "organized armed groups, which, under responsible command, exercise such control over part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."¹⁶⁶ Article 1.2, however, explicitly exempts "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of this similar nature, as not being armed conflicts."¹⁶⁷ As Theodor Meron notes, as long as there is a state, it will characterize an armed conflict within its borders as a "disturbance."¹⁶⁸

While conventional human rights law¹⁶⁹ is not explicitly limited to peacetime, during conflict it is subject to derogation under Article 4 of the International Covenant on Civil and Political Rights¹⁷⁰ and Article 4 of the International Covenant on Economic, Social, and Cultural Rights.¹⁷¹ Specified rights, e.g., the right to life or freedom from arbitrary detention, are nonderogable,¹⁷² but even these may be balanced against the humanitarian law defense of "military necessity."¹⁷³ While peremptory norms, i.e., *jus cogens* norms, from which no derogation is permitted,¹⁷⁴ remain in effect, reliance on other CIL during conflict is problematic.¹⁷⁵

The circumstances, if any, under which individuals may be held accountable is similarly a matter of continuing controversy.¹⁷⁶ States may be

166. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), of June 8, 1977, art. 1.1. *See also* RATNER & ABRAMS, *supra* note 72, at 93-94 (explaining the process through which Protocol II was drafted and its scope).

167. Protocol II, Article 1.2. *See also* RATNER & ABRAMS, *supra* note 72, at 99 ("[D]eveloping world states were unenthusiastic about Protocol II, suggesting again its lack of acceptance as existing custom.").

168. Theodor Meron, Training Seminar, *supra* note 17. *See, e.g.*, Judgment, The Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Chamber, International Criminal Tribunal for Rwanda, Sept. 2, 1998, reprinted in INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 86, at 1187 (2000) (noting that the Chamber "concluded that it had not been proved beyond a reasonable doubt that acts of the defendant were committed in conjunction with an armed conflict").

169. This refers to the body of treaty law addressing human rights, especially the "International Bill of Rights," which consists of the Universal Declaration of Human Rights, *supra* notes 50-51; the Civil Covenant, *supra* note 51; and the Economic Covenant, *supra* note 51.

170. The Civil Covenant, *supra* note 51, art. 4.1, provides that "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed," the State may derogate from certain rights. Art. 4(1) prohibitions on discrimination, genocide, torture and slavery may never be abrogated. HENKIN ET AL., *supra* note 100, at 325-6.

171. Economic Covenant, *supra* note 51, art. 4.

172. Civil Covenant, *supra* note 51, art. 4.2.

173. SASSOLI & BOUVIER, *supra* note 93, at 161-62. This highlights the fundamental paradox of humanitarian law: there is nothing "humanitarian" about combat, no greater violation of "human dignity" than a bullet ripping open a human body.

174. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 65.

175. As a matter of law, however, this regime has not yet been adopted. Meron, Training Seminar, *supra* note 168. Meron has proposed a regime for the lacuna in which neither IHL nor human rights law apply. For a thoughtful discussion of this gap, grounded in permissible derogation, the lack of accountability under human rights law for non-state armed groups, and the lack of specificity of existing human rights rules, see SASSOLI & BOUVIER, *supra* note 93, at 532-37.

176. "[D]uring internal conflict, the ICTY has found that individuals may be held responsible for violations of Common Article 3 of the Geneva Conventions, for the violations of the laws and

liable under the Geneva Conventions, the human rights treaties, or CIL, and there is some precedent for individual civil liability in connection with *jus cogens* violations.¹⁷⁷ But individual criminal liability is a matter of domestic law¹⁷⁸ and the statutes of the *ad hoc* tribunals.¹⁷⁹ While the Nuremberg Tribunal established liability for crimes against humanity, it expressly limited liability to those involving interstate aggression. Thus, Nuremberg provides no authority for imposing liability in the context of internal armed conflict.¹⁸⁰

Finally, growing numbers of international¹⁸¹ as well as national tribunals¹⁸² address all of these issues, and the relations among them are unsettled. The ICTY¹⁸³ and ICTR¹⁸⁴ interpret both bodies of law as well as their own statutes.¹⁸⁵ Several states have asserted universal jurisdiction over

customs of war and for crimes against humanity." O'Connell, *supra* note 9, at 343.

177. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (finding jurisdiction under Alien Tort Claims Act in connection with torture and resultant death in Paraguay of plaintiffs' son and brother); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (holding Karadzic liable for official torture under Torture Victim Protection Act), *cert. denied*, 518 U.S. 1005 (1996). Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, U.N. Doc. A/RES/34/180 [hereinafter *Women's Convention*], contemplates private actors as violators, according to *Committee on the Elimination of Discrimination Against Women*, U.N. General Recommendation No. 19, Violence Against Women, U.N. Doc. A/47/38, at 1 (1992), reprinted in HENKIN ET AL., *supra* note 100, at 361.

178. See, e.g., *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985) (recognizing Israel's right to prosecute German war criminal under the universality principle). See also *infra* note 186.

179. JORDAN PAUST ET AL., *INTERNATIONAL LAW AND LITIGATION IN THE UNITED STATES* 27 (2000) ("The statutes of the two *ad hoc* tribunals were the first . . . to explicitly define violations of common Article 3 committed during an insurgency as 'war crimes.'"). See David Wippman, *Atrocities, Deterrents, and the Limits of International Justice*, 23 *FORDHAM INT'L L. J.* 473, 488 (1999) (describing the "general deterrent effect" of international criminal prosecutions as "modest and incremental, rather than dramatic and transformative").

180. Can criminal liability be imposed in the absence of domestic law without violating the notice requirements, or the bar on *ex post facto* laws, set out in the ICCPR and generally accepted as CIL? See Ratner & Abrams, *supra* note 72, at 21-22 (explaining why criminality in this context turns on CIL). Crimes against humanity as set out in Article 7 of the ICC are subject to criminal penalties. See HENKIN ET AL., *supra* note 100, at 627; *War Crimes Tribunals: The Record and the Prospects: Prosecutor v. Duško Tadić*, 13 *AM. U. INT'L L. REV.* 1441 (1998). This is both under- and over-inclusive; that is, it includes crimes that may not be "violations of human dignity" but it does not include all violations of human dignity.

181. [Criminal tribunal] judges are likely to fit their approaches to the dynamics of the situation rather than to an ill-suited text. Their rulings may have the welcome effect of extending punishment to a greater number of atrocities—increasing both the possibility of reparation and the potential for deterrence. . . . These rulings enlarge international jurisdiction. They permit fledgling entities to exercise the repressive power of an amalgamation of states in ways never before permitted, against the most disdained individuals.

Amann, *supra* note 145, at 373.

182. See *infra* note 186. Cf. Martha Minow, *Introduction: Robert Cover and Law, Judging, and Violence*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 1, 6 (Martha Minow et al. eds., 1992) (describing how Cover "detailed the concurrency—and the seeming redundancy—among judiciaries able to hear the same cases or issues. . . . Cover celebrated this redundancy. According to Cover, the availability of multiple judicial settings offers a check against errors, a guard against bias, a challenge to ideological blinders, and an opportunity for innovation.").

183. See ICTY Statute, *supra* note 151, art. 3 (violations of the laws or customs of war), art. 4 (genocide), art. 5 (crimes against humanity).

184. See ICTR Statute, *supra* note 152 (the text of articles 3, 4, and 5 are the same as the corresponding articles in the ICTY Statute).

185. Article 3 (Crimes Against Humanity) of both the ICTR Statute and the ICTY Statute gives the Tribunal jurisdiction to prosecute persons responsible for "the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic,

jus cogens violations¹⁸⁶ as well as other violations of human rights law. The proliferating truth commissions—part tribunal, part public confessional—do not always attempt to sort out what the law is.¹⁸⁷

The applicable law, in short, is relatively recent, unsettled, and shows few signs of stabilizing. In fact, the Rome Statute of the International Criminal Court (ICC) in 1998, which will come into force in July 2002, may make international criminal law even more ambiguous.¹⁸⁸ While many consider the provisions of the ICC Statute to state existing customary law,¹⁸⁹ this is difficult to reconcile with several major states' refusal to ratify it, including the United States, China, and Russia,¹⁹⁰ reflecting a lack of consensus on central issues. The United States refuses to ratify the ICC, for example, in part because of concerns about exposing U.S. nationals, particularly those in the military, to criminal prosecution before tribunals hostile to the United

racial or religious grounds: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; other inhumane acts.”).

186. Australia, Belgium, Canada, Denmark, France, Germany, Israel, Italy, Spain, Switzerland and the United Kingdom have asserted criminal jurisdiction over “enemies of all humanity.” Douglass Cassel, *The ICC's New Legal Landscape: The Need to Expand U.S. Domestic Jurisdiction to Prosecute Genocide, War Crimes, and Crimes Against Humanity*, 23 FORDHAM INT'L L. J. 380-81 & nn.11-21 (1999). This may be problematic. See, e.g., Alfred P. Rubin, *Pinning Guilt on Pinochet*, 6 ILSA J. INT'L & COMP. L. 371, 372 (2000) (arguing that “if Spain can try Pinochet for violations of the Spanish version of international criminal law, then Iran can try Salman Rushdie under the Iranian version of international criminal law”); Dan Bilefsky, *Human Rights Law May Give Belgium Political Headache*, WALL ST. J., July 5, 2001, at A9 (noting that the law giving Belgium courts jurisdiction over crimes against humanity, wherever committed, and without immunity to serving heads of state, has produced at least one “political headache”: Palestinians filed a lawsuit against Ariel Sharon). The United States is among the countries that have opened their courts, at least with regard to civil liability. William Glaberson, *U.S. Courts Become Arbiters of Global Rights and Wrongs*, N.Y. TIMES, June 21, 2001, at A1 (describing the “growing use of the American legal system” to adjudicate “rights and wrongs all over the globe”); Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations*, 27 YALE J. INT'L L. 1. See, e.g., *Kadic v. Karadzic*, 70 F. 3d 232 (2d Cir. 1995) (holding Alien Tort Claims Act affords jurisdiction for genocide, war crimes and crimes against humanity). See generally Beth Van Schaack, *The Civil Enforcement of Human Rights Norms in Domestic Courts*, 6 ILSA J. INT'L & COMP. L. 295 (2000). For an example of domestic legislation establishing universal jurisdiction for “grave breaches,” see text of the *Moniteur Belge*, 16 juin 1993 (Act of June 16, 1993), reprinted in Sassóli & Bouvier, *supra* note 93, at 580-84.

187. See, e.g., Hayner, *supra* note 108 (noting distinction between “truth phase” and “justice phase”); David Weissbrodt & Paul W. Fraser, *Report of the Chilean National Commission on Truth and Reconciliation*, 14(4) HUM. RTS. Q. 601 (1992) (comparing several past commissions). In Guatemala, for example, the Commission was unable to subpoena witnesses or compel the production of documents. Jan Perlin, *The Guatemalan Historical Clarification Commission Finds Genocide*, 6 ILSA J. INT'L & COMP. L. 389, 391 n.9 (2000). See Human Rights Committee, General Comment No. 20, at 30, U.N. Doc. HR 1/GEN/1/Rev. 1 (1994) (“Amnesties are generally incompatible with the duty of States to investigate [acts of torture]; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future.”).

188. Rome Statute of the International Criminal Court, A/CONF.183/9, July 17, 1998, available at <http://www.un.org/law/icc/statute/rome.htm>. See David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999). See generally Panel, *The International Criminal Court: Contemporary Perspectives and Prospects for Ratification*, 16 N.Y.L. SCH. J. HUM. RTS. 505 (2000) (discussing contemporary perspectives and prospects for ratification).

189. As Louise Doswald-Beck explains, this is supported by the negotiating history of the Rome Statute, in which the delegates expressly note that they are attempting to crystalize customary international law. Doswald-Beck, Training Seminar, *supra* note 17.

190. For a list of the parties, see *The Coalition for the ICC Home Page*, available at <http://www.iccnw.org> (providing ongoing updates) (last visited July 30, 2001).

States.¹⁹¹ If the United States agreed that the U.S. military would be subject to such prosecution under CIL,¹⁹² however, its opposition would be academic.¹⁹³

While it may be argued that the elements of a crime should be distinguished from jurisdiction over the alleged perpetrator, the relationship between the violation of the law and a state's willingness to punish that violation is all too clear in this context. As Lord Browne-Wilkinson opined in the *Pinochet* case:

[Before the coming into force of the Torture Convention] . . . there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime.¹⁹⁴

This doctrinal parsing reflects (and sustains) a fatal disconnect, a gap, between violence and the word. The law is as variable as the political will to impose it. *Lex lata*, accordingly, remains fragmentary and discontinuous. Recognizing the absence of any firm legal ground, international lawyers answer strategically when asked, "What is the law?"¹⁹⁵ They hope that a few key convictions,¹⁹⁶ in conjunction with the willingness of at least some national courts to assert jurisdiction¹⁹⁷ and the revelations of the truth commissions,¹⁹⁸ will help some of the victims, their families, and

191. Madeleine Morris, *The Jurisdiction of the International Criminal Court Over Nationals of Non-Party States*, 6 ILSA J. INT'L & COMP. L. 363 (2000) (suggesting that there are two functions of ICC jurisdiction, determination of individual criminal liability and determination of lawfulness of states' acts, and urging "robust jurisdiction" for the former but a more flexible jurisdiction in connection with the latter). See generally Michael Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67 (2001). Some in the United States are also concerned about charges against highly-placed government officials, or former officials. Compare Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFFAIRS, 86 July/Aug. 2001, at 86 (arguing against a broad policy of universal jurisdiction), with Nicole Barrett, *Holding Individual Leaders Responsible for Violations of Customary International Law: The U.S. Bombardment of Cambodia and Laos*, 32 COLUM. HUM. RTS. L. REV. 429 (2001) (arguing that Kissinger can be held responsible for deaths resulting from the U.S. bombardment).

192. The U.S. has quite emphatically refused to do so. But see Monroe Leigh, *The United States and the Statute of Rome*, 95 AM. J. INT'L L. 124, 126-27 (2001) (describing U.S. position that U.S. military would not be subject to prosecution under CIL as "very controversial" and noting that "remarkably—[that position] has never been backed up by citation of legal authority, or by an opinion of the legal adviser of the Department of State, or the attorney general").

193. Postmodern rhetoric (about "justice" and "vengeance" and "American interests") has effectively drowned out modernist debates about legal semantics (elements of crime, evidentiary burdens) for the time being, at least. HASSAN, *supra* note 20, at 91 (pointing out that "rhetoric" is characteristically postmodern, while "semantics" is characteristically modern). Cf. Harbury v. Deutch, No. 96-00438, 1999 U.S. Dist. LEXIS 22414 (D.D.C. Mar. 23, 1999) (unpublished opinion refusing to dismiss claim against individual employees of the CIA accused of responsibility for torture and execution in Guatemala).

194. Regina v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte [1983] 3 W.L.R. 1456 (1998), reprinted in HENKIN ET AL., *supra* note 100, at 661.

195. See, e.g., Ratner & Slaughter, *supra* note 1.

196. There is obviously a range of opinion as to the particular convictions which might be "key." See *infra* text accompanying notes 296-301.

197. See *supra* note 186. For detailed analyses of four recent cases establishing precedent for prosecutions before national courts, see RATNER & ABRAMS, *supra* note 72, at 168-178 (describing prosecutions in Argentina, Ethiopia, post-communist Germany, and Rwanda).

198. Judge Richard J. Goldstone, *Foreword* to MINOW, *supra* note 34, at xii ("Its success has

communities come to terms with what has happened to them. Perhaps there will be *enough* violence to deter some violations of human dignity, and to leave some perpetrators with a lifelong apprehension of retribution,¹⁹⁹ however uncertain in form.

2. Lex Ferenda—*The Fragmentation of the "Law As It Should Be"*

Lex Ferenda poses a very modern question: What *should* the law be? The question assumes an answer, that there is *some* law that will effectively prevent, deter or punish violations of human dignity.²⁰⁰ PIL does not preclude the question posed by *lex ferenda*, but it questions the modern premise,²⁰¹ and again insists on the contingency of any answer.²⁰²

Even if the premise is wrong, however, the question may still be worth asking. This is the demand of Cover's martyrs, "insist[ing] on the law to which they are committed";²⁰³ that is, the restoration of *nomos*, a normative universe. It is important to note that the project here is not the *creation* of *nomos*, requiring the strong forces which "*create* the normative worlds in which law is predominantly a system of meaning rather than an imposition of force."²⁰⁴ Rather, we are concerned with its restoration, requiring the "weak forces" which Cover identifies with liberalism. As he explains,

The universalist virtues that we have come to identify with modern liberalism . . . are essentially system-maintaining "weak" forces. They are virtues that are justified by the need to ensure the *coexistence* of worlds of strong normative meaning. The systems of strong normative life that they maintain are the products of "strong" forces: culture-specific designs of particularist meaning.²⁰⁵

Cover's weak, system-maintaining forces are similarly the virtues of international law. They are justified, as they are in liberalism, by "the need to ensure the *coexistence* of worlds of strong normative meaning."²⁰⁶ PIL contemplates the restoration of *nomos* within the framework of international law. PIL will neither support nor allow a *nomos* grounded in caste²⁰⁷ or

succeeded by far my expectations. . . . over 7,000 applications for amnesty. Submissions and evidence from over 20,000 victims. The evidence has stopped denials of the many serious human rights violations committed by the apartheid security forces.").

199. See, e.g., Robinson, *supra* note 72, at 277 (welcoming "the fact that national judicial authorities are increasingly taking the position that grave human rights violations must be accounted for, irrespective of the amount of time that may have elapsed or the standing of the individual concerned").

200. Slaughter & Ratner, *supra* note 143, at 415-16.

201. The law may be unable to effectively prevent, deter or punish violations of human dignity in a particular context: "Is it meaningful even to image the healing of a nation riven by oppression, mass killings, torture?" MINOW, *supra* note 34, at 8. For a depiction of one creative alternative to impotent law, see NEAL STEPHENSON, CRYPTONOMICON 401 (1999) (describing the Holocaust Education and Avoidance Pod (HEAP)).

202. See *supra* Part II.A.2, *A Postmodernism of Resistance*.

203. See *supra* text accompanying note 2.

204. Cover, *supra* note 28, at 12.

205. *Id.*

206. *Id.*

207. Civil Covenant, *supra* note 51, art. 2. ("Each State . . . undertakes to respect and to ensure to all individuals . . . subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as . . . birth or other status.").

women's subordination,²⁰⁸ for example. But PIL, unlike liberalism and modern international law, recognizes that international law also incorporates "strong forces [or] culture-specific designs of particularist meaning."²⁰⁹ PIL recognizes that international law is not "neutral," but a culture unto itself.²¹⁰

International lawyers are always concerned with at least two "cultures," the national and the international,²¹¹ and often even more where violations of human dignity are alleged.²¹² From a PIL perspective, international law must resonate within and across the borders of these cultures.²¹³ *Lex ferenda* is necessarily fragmented because its objective is to restore an inevitably fragmented normative universe.²¹⁴ Even if the law cannot effectively address violations of human dignity, it may still be important to try—for a multiplicity of reasons, reflecting the range of "culture-specific designs of particularist meaning" whose coexistence it seeks to assure.²¹⁵ Professor Minow, for example, notes the need to avoid complicity.²¹⁶ Lawrence Weschler reports the consensus of atrocity scholars that public "acknowledgment" is

208. See Women's Convention, *supra* note 177 (affirming women's equality). See also Civil Covenant, *supra* note 51, art. 2; Economic Covenant, *supra* note 51, arts. 2, 3.

209. Cover, *supra* note 28, at 12.

210. The theme of the Annual Meeting of the American Society of International Law in 2001 was *The Visible College of International Law*, an explicit attempt to identify an epistemic community of international lawyers that transcends national boundaries. While the co-chairs cited Oscar Schachter, *The Invisible College of International Law*, 72 Nw. U. L. REV. 217 (1977), the theme could also be understood as a reaction to the previous year's groundbreaking effort to open the meeting to new participants.

The "strong forces" that constitute this culture surely include the norms set out in the UN Charter and the International Bill of Rights, *supra* note 51. The meaning of these norms, and whether other norms might be included, is hotly disputed. From a PIL perspective, these norms should be questioned, like the weak forces of liberalism, when they *behave* like strong forces.

211. For a useful and cogent introduction to the comparative method, and the need for such a method when multiple cultures are involved, see Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43 (2000). See also Koskeniemi, *supra* note 10, at 357 ("For international law in all its stylistic variations always involves translation from one language to another. Through it, the languages of power, desire and fear that are the raw materials of social conflict are translated into one or another of the idiolects expounded in the contributions to the symposium.").

212. In the former Yugoslavia, for example, the national "culture" included groups sufficiently distinct to form the five separate entities of Croatia, Bosnia-Herzegovina, the Federal Republic of Yugoslavia (Serbia and Montenegro) and Macedonia. LORI F. DAMROSCH ET AL., INTERNATIONAL LAW 261 (4th ed. 2001). As Cover elegantly put it, "The imperial [world-maintaining mode] is an etude on the theme of diversity." Cover, *supra* note 28, at 16.

213. "Each group must accommodate in its own normative world the objective reality of the other." Cover, *supra* note 28, at 28-29 (describing the relationship between the Mennonites and the state). See also Trimble, *supra* note 16, at 845 ("Rhetorical strategies must be tailored to culture and subculture.").

214. As Cover concludes, "The interdependence of legal meanings makes it possible to say that the Amish, the Shakers, and the judge are all engaged in the task of constitutional understanding. But their distinct starting points, identifications, and stories make us realize that we cannot pretend to a unitary law." Cover, *supra* note 28, at 33.

215. See generally Jonathan A. Bush, *Nuremberg: The Modern Law of War and Its Limitations*, 93 COLUM. L. REV. 2022, 2070 (1993) (reviewing TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (1992)) (arguing that "judicial processes are a critical tool in ending and preventing violations of international law . . . providing catharsis, honoring victims, stigmatizing tyranny, restoring legality, 'bearing witness,' or otherwise having dignitary functions").

216. See MINOW, *supra* note 34, at 49.

psychologically crucial for most, if not all, victims.²¹⁷ Asked why he participated in a UN fact-finding mission to Rwanda, William Schabas responded simply: "It seemed important to let the Rwandans know that [Westerners] were interested in their stories."²¹⁸ Professor Schabas left it to those who came forward to decide why it was important for them to do so.

From a PIL perspective, *lex ferenda* should be particularly open to challenge from the bottom, from those who have been subordinated and claim that the law perpetuates that subordination, but considerably more skeptical regarding challenges from above. Recognizing that the omission of rape as a war crime perpetuates the subordination of women, for example, is a good reason²¹⁹ for expanding the law to include rape as a war crime.

PIL's acceptance of the fragmentation of the normative universe multiplies such challenges. The conviction for war crimes of four Rwandans by a Belgian court in June, 2001, for example, was both an effective exercise of universal jurisdiction and a painful reminder of imperialism.²²⁰ The normative universe is fragmented here into that of the Tutsi victims in 1994 and that of the larger Rwandan population (including the Hutus) throughout its colonial history.²²¹ *Lex ferenda*, accordingly, should recognize the challenges of both subordinated groups.

From a PIL perspective, the Belgian trial both vindicated international law by punishing the 1994 violations of human dignity, and simultaneously recalled international law's role in colonialism, which institutionalized the violations of human dignity in which the 1994 violations were arguably grounded.²²² *Lex ferenda* could address this dilemma in several different ways. It could indicate a preference, for example, for trials before international tribunals over trials before the courts of former colonial powers. But there may well be cases where such courts should assume the

217. LAWRENCE WESCHLER, *A MIRACLE, A UNIVERSE: SETTLING ACCOUNTS WITH TORTURERS* 3, 4-5 (2d ed. 1998), reprinted in HENKIN ET AL., *supra* note 100, at 632-33.

218. Observation made to Author at Lillich-Newman Human Rights Symposium, University of Cincinnati (Oct. 6, 1997). See also WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* ix-xi (2000) (describing the personal origins of the "passion" that drives what he modestly characterizes as a "rather dry and technical study").

219. As Martha Nussbaum has observed in her qualified endorsement of postmodernism, "Getting rid of transcendent standards doesn't mean getting rid of good reasons." Martha Nussbaum, *Valuing Values: A Case for Reasoned Commitment*, YALE J. L. & HUMAN. 197, 202 (1994).

220. "Critics said it set a dangerous legal precedent, and accused Belgium—the former colonial power in Rwanda—of imperialism masquerading as justice." Bilefsky, *supra* note 186, at A9.

221. INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 86, at 754, 1178 *passim* (2000). See also Aleksandr I. Solzhenitsyn, *THE GULAG ARCHIPELAGO 1918-1956*, at 3 (Thomas P. Whitney trans., 1973) ("The Universe has as many different centers as there are living beings in it. Each of us is a center of the Universe, and that Universe is shattered when they hiss at you: 'You are under arrest.'").

222. Alvarez observes that the West's complicity in the 1994 killings in Rwanda is a discomfiting fact. The scale and seriousness of that complicity take various forms. At one level, certain European powers, namely the colonizers of Rwanda who imported their racist notions of 'superior races' to Rwanda, need to accept their responsibility for creating the 'tribalism without tribes' that help to make genocide possible and continues to characterize Rwanda today. Much greater blame can be attributed to those, like the French, who, in the 1990s and through the 1994 killings themselves, continued to befriend and arm the [Hutu] government. Alvarez, *supra* note 79, at 440.

responsibility and the expense of such prosecutions precisely because of their historical complicity. The argument that international law is an imposition of Western will²²³ neither precludes application of that law nor requires the refutation, or denial, of its characterization as another iteration of "victor's justice."²²⁴ Rather, the argument demands a more complex understanding of international law. *Lex ferenda* should incorporate that understanding, but *how* it does so in a particular case may best be left open. Like Lola, international lawyers sometimes must rely on inspiration.²²⁵

3. The Fragmentation of States

The fragmentation of states is often viewed as the underlying cause of the "internal conflicts" in which violations of human dignity occur with grim regularity.²²⁶ Fragmentation of states may allow violations of human dignity,²²⁷ or may result from them. It is unclear who "civilians" are or who constitutes a "stable and permanent group."²²⁸ This is blamed not on international law, but on international politics. The conventional story is that the superpowers supported strong-arm regimes that were able to hold diverse states together. With the fall of the Soviet Union and the withdrawal of the U.S., "the center does not hold, things fall apart,"²²⁹ from Tito's Yugoslavia to Mobutu's Zaire.²³⁰

223. For a detailed account of the ways in which human rights law suffers from Western bias, see Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (1996).

224. For a court's attempt to "appraise the legality of a major belligerent policy pursued by the victor," see Richard A. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759 (1965) (describing Japanese court's decision that the use of atom bombs by the United States was illegal).

225. See *supra* text accompanying notes 27-38 (describing how Lola robs her father's bank in the second scenario and wins the money in the third). Lola's earlier inspiration (to commit a violent act) is clearly less auspicious than her later one (to rely on luck).

226. "Because states are no longer classified as clients of one of two rival superpowers, decisions about whether to intervene, and what to do, depend on the unique situation rather than on established criteria. Furthermore, various actors, now free from hegemonic bonds, may respond unpredictably." Amann, *supra* note 145, at 372. See also Turku Declaration, *supra* note 161, art. 18 ("The decrease in the number of international armed conflicts has been offset by an increase in the number of civil wars and other situations of violence inside countries. Quantifying the scale of the problem is difficult as there is no firm agreement on the factors to apply in deciding which are the most serious situations. If the factor of number of deaths is used, then, according to some researchers, in 1996 there were 19 situations of internal violence in which at least 1,000 people were killed . . . and which, cumulatively . . . had led to between 6.5 and 8.4 million deaths.").

227. As the U.N. High Commissioner for Human Rights Mary Robinson noted, "Where domestic law and order has broken down, individuals may feel that they can commit even the most atrocious crimes without fear of legal sanction." Robinson, *supra* note 72, at 277.

228. Amann, *supra* note 145. See also William A. Schabas, *Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda*, 6 ILSA J. INT'L & COMP. L. 375 (2000) (examining the conflicting interpretations by different trial chambers of the ICTR with respect to the categorization of groups protected by the prohibition against genocide).

229. WILLIAM BUTLER YEATS, *THE SECOND COMING* (1922). The phrase was appropriated by the Nigerian novelist Chinua Achebe for his classic about colonialism. CHINUA ACHEBE, *THINGS FALL APART* (1958).

230. See *Mobutu's Xanadu*, N.Y. TIMES MAG., Sept. 26, 1999, at 82 (describing Gbadolite, a remote village in the Congo, an eerie wasteland which dictator Mobutu once filled with three palaces, a high-rise luxury hotel and conference center).

From a PIL perspective, however, this is a very statist view, which is not surprising since the nation state remains the major player in the modern story. The particular agendas of particular nation states are complicated,²³¹ but none happily relinquish sovereign prerogatives. While rumors of the demise of the sovereign state may be premature,²³² proliferation of political forms is clear, from increased fragmentation on the one hand, such as the continuing breakdown of the already fragmented former Yugoslavia, to growing numbers of regional arrangements on the other, such as the ongoing consolidation of authority by the European Union, North American Free Trade Agreement, and Organization of the Petroleum Exporting Countries. The question thus becomes whether there are legal institutions capable of ensuring the accountability of these new political institutions. As described above, such institutions are emerging rapidly in the international law context.²³³ In addition, national courts are redefining their roles, effectively functioning as transnational legal institutions.²³⁴

Moreover, while fragmented states may be dangerous places, few are in the same league for sheer murderousness as the Soviet Gulag.²³⁵ Violations of human dignity may well be easier to conceal in a unified state, especially in a state less concerned with avoiding such violations than with hiding them.²³⁶ Some of the violations of human dignity in the strong-arm regimes before the end of the Cold War are now coming to light.²³⁷ While many warn about the

231. Fragmented states, by definition, do not have coherent "agendas" although some may be closer to developing them than others. M. Sassoli, Protection of Civilians and Other Protected Persons in IHL, Training Seminar, *supra* note 17 (Aug. 9, 2000). But "strategic partnerships"; i.e., military and economic alliances driven by Cold War ambitions and fears, shaped the world up until ten years ago. How does the West want to shape the world now?

232. See, e.g., LOUIS HENKIN, INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS 24-26 (1990) (discussing the "mythology of 'sovereignty'"); GLOBALIZING INSTITUTIONS, *supra* note 114, at 18 (describing the "hollowing out of state sovereignty" by transnational corporations or transnational social movements).

233. *Supra* notes 183-185 (describing *ad hoc* tribunals).

234. *Supra* note 186.

235. For the numbers of prisoners in Gulag corrective labor camps and colonies, reaching a peak of 2,561,351 in 1950, see EDWIN BACON, THE GULAG AT WAR: STALIN'S FORCED LABOUR SYSTEM IN THE LIGHT OF THE ARCHIVES 24 (1994) (analyzing statistics released after the collapse of the Soviet Union from the Moscow state archives). See also Solzhenitsyn, *supra* note 221 (providing the first account of Stalin's prison camps smuggled to the West, for which the author was awarded the Nobel Prize in literature); TILL MY TALE IS TOLD: WOMEN'S MEMOIRS OF THE GULAG (Simeon Vilensky ed., 1999) (describing sixteen life stories of women arrested in the 1930s at the height of the Stalinist purges).

236. Zimbabwe, for example, recently expelled the foreign press. *Zimbabwe Tells 2 Foreign Journalists to Leave*, N.Y. TIMES, Feb. 18, 2001, § 1, at 13 (describing how officials ordered two journalists to leave and said they planned to expel others). See also Rachel L. Swarns, *Zimbabwe Arrests 4 Over News About Police*, N.Y. TIMES, Aug. 16, 2001, at A4 (describing the arrest of four journalists from the nation's only remaining independent newspaper). See generally Dave Kopel, *Ripe for Genocide*, NAT'L REV., Feb. 21, 2001 (describing the deterioration of the situation in Zimbabwe).

237. The question of violations of human dignity in strong-arm regimes is being explored by the proliferating truth commissions sponsored by successor regimes. See, e.g., Hayner, *supra* note 108, at 653-55 (discussing truth commissions in Latin America). In addition, a range of regional and international organizations have sponsored investigations. See, e.g., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE SITUATION OF HUMAN RIGHTS IN CHILE (1985); *Report Prepared By The Special Rapporteur On The Situation Of Human Rights In Chile*, U.N. ESCOR, Hum Rts. Comm., 36th Sess., U.N. Doc. E/CN.4/1362 (1980); INTERNATIONAL COMMISSION OF ENQUIRY INTO THE CRIMES

obvious risks of rogue states with nuclear weapons,²³⁸ the United States remains the only country that has actually attacked another state with such weapons.²³⁹ There is no question that fragmented states create many problems—including some life-threatening problems—for their populations. But it is unclear whether increased “violations of human dignity” are among them, especially if we are only considering violations committed “under a commander in charge” as required by Protocol II, rather than violations in general.²⁴⁰

III. WHOSE ACTIONS MATTER?

The Symposium asked, “Who are the decision makers? . . . In other words, whose actions matter in each method’s universe?”²⁴¹ PIL challenges the assumptions in these questions by suggesting that the “decision makers” are not necessarily the ones “whose actions matter.” PIL focuses not on those at the center, but on those at the margins, at the periphery.²⁴² Thus, those “whose actions matter” are not necessarily the judges and the statesmen (sic) in the public eye, but those who are barely visible at the edges.²⁴³ This

OF THE MILITARY JUNTA IN CHILE, THE CRIMES OF THE CHILEAN MILITARY JUNTA IN THE LIGHT OF CHILEAN LAW (1974) (describing the human rights violations of the military government in Chile). National authorities and NGOs have also contributed to the effort. *See, e.g.*, Greg Brosnan, *Four Men Convicted in Murder of Guatemalan Bishop*, WASH. POST, June 9, 2001, at A14 (describing the conviction of four men for the 1998 murder of the bishop who led the Truth Commission blaming the military for most of the 200,000 deaths in Guatemala’s civil war); *see also* Commission for Historical Clarification, *Guatemala Memory of Silence*, available at <http://hrdata.aas.org/ceh/report/english/toc.html> (last visited July 27, 2001) (reporting on human rights violations and making recommendations to preserve the memory of the victims and to “foster a culture of mutual respect and observance of human rights”).

238. For the text of the arguments as well as the advisory opinion of the International Court of Justice in the proceedings on the legality of the threat or use of nuclear weapons, *see* THE CASE AGAINST THE BOMB (Roger S. Clark & Madeline Sann eds., 1996). For the individual opinions of the judges in the Nuclear Weapons advisory opinion, *see* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (July 8), available at <http://www.icj-cij.org> (last visited May 2, 2002).

239. *See* JOHN HERSEY, HIROSHIMA (1948); THE COMMITTEE FOR THE COMPILATION OF MATERIAL ON DAMAGE CAUSED BY THE ATOMIC BOMBS IN HIROSHIMA AND NAGASAKI, THE PHYSICAL, MEDICAL, AND SOCIAL EFFECTS OF THE ATOMIC BOMBINGS (Eisei Ishikawa & David L. Swain trans., 1981) (assembling a compilation of effects of the atomic bombs); Falk, *supra* note 224, at 759 (analyzing the decision of the district court of Tokyo in which it concluded that the United States had violated international law by dropping atom bombs on Hiroshima and Nagasaki).

240. Protocol II, *supra* note 166.

241. Slaughter & Ratner, *supra* note 143, at 412.

242. Saskia Sassen, *Toward a Feminist Analytics of the Global Economy*, 4 IND. J. GLOBAL LEGAL STUD. 7, 31 (1996) (“Because globalization is creating new operational and informal openings for the participation of non-State actors and subjects . . . women and other non-state actors can gain more representation in international law; contribute to the making of international law; and give new meaning to older forms of international participation . . .”). *See also* Berman, *supra* note 63, at 1524 (explaining how we can “both . . . mourn legal history’s horrors and . . . believe in law’s ever-present emancipatory potential”).

243. *See, e.g.*, Mertus, *supra* note 106, at 538-41 (describing “kitchen tablers,” a group of women in “a certain small kitchen in Belgrade” in the winter of 1994, *id.* at 538, as “outsiders to political power,” *id.* at 539, who nonetheless went on to “participate in the drafting of language for the nongovernmental and governmental statements at United Nations world conferences on population and development, housing, or women’s rights . . . and at international meetings of activists, scholars and diplomats in Geneva, Strasbourg, New York and Rome.” *Id.* at 540.). There are, of course, others at the

includes the victims, but it may also include powerful players who seek the relative privacy of the margins precisely for the purpose of avoiding accountability.²⁴⁴ Those whose actions matter may also include those who are invisible, like the filmmaker, or those whose significance only becomes clear in hindsight.²⁴⁵

In *Run Lola Run*, a few of the people Lola runs into, peripheral to the main story, are followed by fast montages showing their futures, which change in each version. The irritated pedestrian, for example, is followed by a series of photos showing her holding up a winning lottery ticket, hugging a fat happy man, and with the same man on a boat, beaming.²⁴⁶ The postmodern recognition that everyone has a story, and that every story has a narrator, shifts the focus from the positivists' analyses of functional processes and even the "thick" descriptions of the New Haven School, to serendipity (who has a friend in the media²⁴⁷ or the arts?²⁴⁸ Whose story appeals to those in power?)²⁴⁹ and to transient players, like the "teenagers who brought Milosevic down."²⁵⁰

edge. As Professor Mertus notes, "One set of actors that remains outside the equation, however, includes . . . terrorists, and other splinter factions." *Id.* at 544 n.21. "Terrorists" are not addressed in this Article because they presuppose a more stable, less-threatened state than the state presumably seeking to quell "internal armed conflict" in the symposium hypothetical.

244. See Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women's Rights*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 143 (Dorinda Dallmeyer ed., 1993). In Glover's words:

[Gorbachev's decision to withdraw forces from Eastern Europe represented] the eventual breakthrough into world politics of something once confined to people trapped and remote from power. It was the success, delayed by three-quarters of a century, of the attitude expressed by the German soldier at Christmas in 1914: 'We don't want to kill you, and you don't want to kill us, so why shoot?'

GLOVER, *supra* note 64, at 232-33.

245. In the shifting spacial and social relations of globalizations, the less powerful cannot be conceived of as passive bystanders. The rise of globalized localisms, be they the English language, fast food, the Hollywood star system, or the new intellectual property rights, and their specific impact upon the rival local conditions across the globe generate resistances.

GLOBALIZING INSTITUTIONS, *supra* note 114, at 13.

246. In another version, we see her (less happily) holding a toddler and shouting at a social worker in the doorway of a squalid apartment, then reaching out as the social worker leaves with the child, then running with a baby snatched from a carriage, pursued by two angry men.

247. See Alkalaj, *supra* note 16, at 360 (describing the role of the media, along with NGOs, in advancing human rights in international politics); Hanania, *supra* note 138, at 29 (describing Lyndon Johnson's strategy of targeting ads at the news media, which "has been a staple of campaigns ever since").

248. See, e.g., Robert Schneider, *A Massacre, Still Fresh, Remembered*, N.Y. TIMES, Nov. 5, 2000, at A5 (describing Oliver Py's play *Requiem for Srebrenica*, about the execution in July 1995 of 7000 Bosnian Muslim men by Bosnian Serbs, which the U.N. peacekeeping force entrusted with the task of protecting them was unable to prevent).

249. See, e.g., Douglas Waller, *Senator No*, TIME, May 29, 2000, at 45 (describing Senator Jesse Helms's sympathy for Madeline Albright, after hearing her story of fleeing Czechoslovakia as a girl).

250. See, e.g., Andrew Purvis, *The Gen Y Revolution*, TIME, June 26, 2000, at 40 (describing the estimated 30,000 young Serbs who have joined the informal movement known as Otpor, Serbian for "resistance": "[T]he group is generating as much anti-Milosevic heat as anything since the end of the NATO campaign a year ago. Otpor has few leaders, relying instead on an informal web of student connections . . . [It] has no political ambitions . . . just a desire to be a catalyst.").

Lola also reminds us that sometimes those in charge remain behind the scenes, like the filmmaker himself, the hidden subject.²⁵¹ As in a movie, moreover, the idea of "accountability for violations of human dignity" depends on an audience. A trial, or truth commission, is in fact a performance, a very public form of "justice." Who scripts this performance and who plays the crucial roles?²⁵² Who are they trying to mobilize, placate, or warn?²⁵³

A. *Who's at Risk?*

This ever-changing cast must begin with the actual victims (if any survive), those whose human dignity has in fact been violated. Who are their lawyers? Where can they seek relief, or compensation for its violation? Who is left out, ignored by the law?²⁵⁴ Violations of women's human rights, such as rape, for example, were historically neither violations of humanitarian law nor of human rights law, because the state was not the perpetrator.²⁵⁵

The stories of Bosnian women and girls repeatedly raped and often impregnated horrified feminists and women's groups.²⁵⁶ They brought the

251. See Pierre J. Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991); see also Nicholas Onuf, Book Review, 83 AM. J. INT'L L. 630, 632 (1988) (reviewing DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987)) ("The message is that reading and tracing are uncontentious activities and the author an innocent facilitator. This, of course, is the typical modern rhetorical strategy of absenting oneself from the text. Yet Kennedy is not a modern and cannot stay away; his ever-changing voice mimics the voices typically heard in each of his doctrinal eras."). The filmmaker determines which characters are important, and which are expendable. Unlike world leaders, however, Tom Tykwer, who wrote and directed *Lola*, never lets viewers forget that "we're watching a movie. We, like *Lola*, are made of movies." Chappell, *supra* note 27, at 4. Cf. *WAG THE DOG* (New Line Cinema 1997) (presenting a fictional account in which the government passes off fake war, produced by a manic Dustin Hoffman, as the real thing in order to distract the public from some political embarrassment).

252. International lawyers may be constrained by the specific legal context, e.g., a proceeding before a tribunal, evidence given before a Truth Commission, a proceeding in domestic court, which effectively determines their audience. Those international lawyers who formulate or implement policy, similarly, are expected to decide upon and target the audience to whom their argument should be addressed—whether the public, the press, foreign media, or domestic Congress. See, e.g., Slaughter & Ratner, *supra* note 143, at 421 ("Koskenniemi characterizes the symposium as a competition to determine 'who is going to be the diplomat's best helper.'").

253. The question of "impact" is similarly problematic. As Professor Mertus notes, "the success of interpretive communities is hard to gauge with any degree of precision." Mertus, *supra* note 106, at 543.

254. PIL is more willing than most methods to challenge existing categories of the law because of its propensity for transgressing boundaries. See Feldman, *supra* note 276. But see Charlesworth, *supra* note 12, at 393 (discussing ways to make international criminal law more responsive to women).

255. *Id.* at 386.

256. See, e.g., Gayle Kirshenbaum, *Women of the Year: Jadranka Cigelj and Nusreta Sivac*, MS., Jan.-Feb. 1997, at 64 ("[Cigelj and Sivac,] themselves survivors of this violence, labored to present their own stories and to gather those of more than 400 others who were detained, tortured, starved, and raped Devastated physically and mentally, both women found strength in telling their stories to the media. They helped make an award winning documentary, *Calling the Ghsst*. They submitted testimony to the [ICTY]."). See also Tamar Lewin, *The Balkans Rapes*, N.Y. TIMES, Jan. 15, 1993, at B16 (describing Catherine MacKinnon's work with Kareta, a Croatian women's group); MINOW, *supra* note 34, at 6. See generally *Letter dated February 2, 1993 from the Permanent Representative of Denmark to the United Nations, addressed to the Secretary-General*, U.N. SCOR, Annex I, at 2, U.N. Doc S/25240 (1993) (regarding European community investigative mission into the treatment of Muslim women in the former Yugoslavia); *id.*, Annex II, at 12 (containing Declaration on the follow-up to the Warburton mission adopted in Brussels on Feb. 1, 1993).

rapes to media and government attention through a variety of stratagems.²⁵⁷ Michigan law professor Catherine MacKinnon, for example, called the media and delivered moving sound bites while also suing in U.S. district court.²⁵⁸ Feminist groups throughout Europe lobbied their governments and the ICTY.²⁵⁹ This was a laborious, multipronged effort, raising the consciousness of participants at multiple levels.²⁶⁰ The victims' stories, strategically publicized and disseminated, resulted in provisions recognizing rape as a war crime in the statutes of the ICTY²⁶¹ and the ICC,²⁶² as well as the ICTR.²⁶³

Feminists have criticized these provisions because they characterize rape as a crime against "dignity," reflecting the notion of rape as a crime against the honor of the woman's husband and community, rather than as a violation of the woman's rights.²⁶⁴ As Charlesworth notes, furthermore, their inclusion may have little impact on deeply gendered social structures.²⁶⁵ In fact, the consequences for the perpetrators have been negligible.²⁶⁶ Nevertheless, the stories of a group of seemingly powerless victims, far removed from the decision makers, helped shape the law.²⁶⁷

257. As Glover notes, "there were at least 17 rape camps, where Bosnian women and girls were held for weeks and repeatedly raped. A European Community investigation later estimated that 20,000 women had been sexually violated. Some of the victims were as young as three or four." GLOVER, *supra* note 64, at 127. Cf. Laura Flanders, *Rwanda's Living Casualties*, MS., Mar.-Apr. 1998, at 27 (describing the rapes of an estimated 250,000 to 500,000 women and girls in less than 100 days).

258. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). See also, Roy Gutman, *Accountability Closes In on War Crimes; U.S. Jury Award to Bosnian Woman Sets a Precedent*, PITTS. POST-GAZETTE, Aug. 13, 2000, at A18 (reporting that federal jury awarded Bosnian rape victims \$745 million, which, according to Catherine MacKinnon, establishes "that you can sue for rape as an act of genocide").

259. See Feldman, *supra* note 26. But see Glover, *supra* note 64, at 5 (quoting Selma Hecimović, who looked after Bosnian women who had been raped: "At the end, I get a bit tired of constantly having to prove. We had to prove genocide, we had to prove that our women are being raped, that our children have been killed. Every time I take a statement from these women, and you journalists want to interview them, I imagine those people, disinterested, sitting in a nice house with a hamburger and beer, switching channels on TV").

260. Liberal scholars similarly "credit private political actors with shaping international norms and mobilizing public opinion behind them through skillful symbolic action." Slaughter & Ratner, *supra* note 143, at 418.

261. ICTY Statute, *supra* note 151, art. 5(g).

262. ICC Statute, *supra* note 188, art. 20(e).

263. ICTR Statute, *supra* note 152, art. 3(g). See, e.g., Patricia H. Davis, *The Politics of Prosecuting Rape as a War Crime*, 34 INT'L LAWYER 1223 (2000); Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97 (1999). "Prosecutors consistently failed to specifically pursue crimes of sexual violence against women until [June 1997] when chief prosecutor Louise Arbour revised an indictment . . . to include charges of sexual violence." Flanders, *supra* note 257, at 29.

264. George Abi-Saad, a former judge on the ICTY, has described the rape of a sixty-year-old woman, the wife of a village elder, by Serbian troops, in front of her husband and the village. George Abi-Saad, *The Place of IHL in Contemporary International Law and the UN System*, Training Seminar, *supra* note 17 (Aug. 7, 2000). See The High Commissioner's Position Paper on the Establishment of a Permanent International Criminal Court, ¶ 39, June 15, 1998 (suggesting that sexual assault be given its own article under the Rome Statute).

265. Charlesworth, *supra* note 12, at 393, *passim* (noting that "international law rules . . . tend to privilege a certain set of experiences and filter out many issues that touch women's lives in particular").

266. "Five years after the event, nearly all the rapists remain free 'as do the commanders who exploited rape as a weapon.'" MINOW, *supra* note 34, at 6 (characterizing the effort as "incomplete if not failed").

267. Tamara L. Tompkins, *Prosecuting Rape as a War Crime: Speaking the Unspeakable*, 70

B. *Who's in Charge?*

PIL is less interested in nuanced and sophisticated descriptions of legal doctrine than in the acts of powerful players at the margins, where "human dignity" is not discussed. The forced return of Haitian refugees to a country where they faced almost certain persecution and death, for example, was not considered a "violation of human dignity."²⁶⁸ As an outraged international human rights community pointed out, their return clearly violated the right of non-return, or *non-refoulement*, i.e., the rights of refugees everywhere to *not* be sent back to the hell they have fled.²⁶⁹ Yet those who made the decision to return the Haitians were able to remain at the periphery, largely insulated from legal repercussions.²⁷⁰

Less dramatically, because there was no action comparable to the forced return,²⁷¹ but perhaps more disturbing, because there was *no* violation of international law,²⁷² the U.S. refusal to support sending U.N. troops to

NOTRE DAME L. REV. 845 (1995). See Adrien Katherine Wing & Sylke Merchán, *Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America*, 25 COLUM. HUM. RTS. L. REV. 1, 8 (1993). See also Control Council Law No. 10, adopted pursuant to the Nuremberg Charter. Control Council for Germany, Law No. 10, Dec. 20, 1945, art. II, reprinted in YOUNGINDRA KHUSHALANI, DIGNITY AND HONOUR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS 23 (1982) (including rape as a crime against humanity); Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425 (1993). See generally HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS (2000).

268. Harold Koh noted the parallel to "the infamous Voyage of the Damned—the ill-fated voyage of the *St. Louis* in 1939—when the U.S. rebuffed fleeing Jewish refugees who had arrived at New York and Miami harbors, forcing many back to die in Nazi gas chambers. Harold Hongju Koh, *Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT'L L. J. 1, 7 (1994) (citing GORDON THOMAS & M. MORGAN WITTS, VOYAGE OF THE DAMNED (1974)). See generally Feature: *The Haitian Centers Council Case*, 35 HARV. INT'L L. J. 1 (1994). For the events leading up to the exodus, see ALEX DUPUY, HAITI IN THE NEW WORLD ORDER (1997).

269. U.N. High Commissioner for Refugees Responds to U.S. Court Decision, 32 I.L.M. 1215 (1993). See Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150, art. 1(B)(6). The United States became a party to the Refugee Convention when it acceded to the U.N. Protocol Relating to the Status of Refugees, Jan. 11, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967); Koh, *supra* note 268, at 3 (citing 1981 opinion of the Office of Legal Counsel (OLC), which had concluded "that our treaty obligations under Article 33 applied, even outside the United States, to Haitian refugees stopped by U.S. Coast Guard cutters on the high seas").

270. See *McNary v. Haitian Centers Council*, 503 U.S. 1000 (1992). Indeed, the use of the French term itself seemed to effectively preclude the sound bites on which widespread domestic outrage seems to depend.

271. "The bystanders say, truthfully 'I did not commit any atrocities.' But at what point does passive collaboration become ethically questionable or downright indefensible?" Susan Rubin Suleiman, *Remembering and Forgetting the Holocaust*, HUMAN RIGHTS AT HARVARD, *supra* note 73, at 51. By preventing Haitians from "fleeing not just to the United States, but to any of the scores of islands between the United States and Haiti. The order thus rendered the Coast Guard agents of the brutal Haitian dictatorship by directing them to return fleeing refugees to the hands of their persecutors." Koh, *supra* note 268, at 7.

272. But see Neil A. Lewis, *Did Machete-Wielding Hutus Commit Genocide or Just 'Acts of Genocide'?*, N.Y. TIMES, Aug. 26, 2001, at 7 (excerpting documents disclosed a week earlier by the National Security Archive revealing debate among high-level officials in the Clinton administration about avoiding the word 'genocide' as "that might increase legal and political pressure to act"). Glover argues:

There is a legal obligation to take action against genocide and the Clinton administration was worried about this. State Department officials were instructed not to use the word

Rwanda to prevent the ensuing genocide carried no legal liability.²⁷³ In both cases, powerful leaders were able to avoid the charge of violating "human dignity" by what Glover calls "a passive response."²⁷⁴ While the appearance of power is often desirable, its invisibility may be even more so. Thus, some of the major players remain behind the scenes, like film makers, directing the action, calling the shots, but invisible and unaccountable.

C. *Who Cares?*

In addition to the players, i.e., those at risk and those in charge, PIL recognizes that there is always a larger audience to be addressed.²⁷⁵ This audience is necessarily fragmented,²⁷⁶ consisting most immediately of a judge, jury, or tribunal, but also of politicians, their constituencies, nongovernmental organizations (NGOs)²⁷⁷ and, crucially, the media and media consumers, all of whom function on national and international levels. In addition, these

'genocide' about Rwanda The Security Council followed the American lead and avoided using the word 'genocide.' The upshot was humanitarian aid instead of effective police action.

GLOVER, *supra* note 64, at 122.

273. LINDA MELVERN, *A PEOPLE BETRAYED: THE ROLE OF THE WEST IN RWANDA'S GENOCIDE* (2000) (describing the role of the Western nations in Rwanda's genocide, drawing on interviews with peacekeepers and previously unpublished records of private security council deliberations). As Professor Drumbl argues, "international lawyers would do well to think hard about the alternative paradigm of crisis prevention. This means reflecting upon proactive devices that can stop genocidal crises from occurring or re-occurring." Mark A. Drumbl, *Punishment, Post-Genocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. Rev. 1221, 1326 (2000).

274. As Glover notes, "of course, understanding is not enough to stop the horrors. But the alternative, the passive response, helps keep them going." GLOVER, *supra* note 64, at 5. See also Samantha Power, *Accessory to Murder?*, N.Y. TIMES, Feb. 11, 2001, § 7, at 33 ("'[A]ccountability' was a concept that the last administration rightly pursued for the perpetrators of genocide but wrongly evaded itself.").

275. As Jeremy Greenstock notes

The consequences of conflict affect us all: for example, in Britain, ninety percent of the heroin on the streets of our major cities is grown in Afghanistan, under the cover of the generation-long conflict there. Across the countries of Europe, there are now several hundred thousand citizens of the former Yugoslavia who have fled to seek sanctuary from repeated conflicts there There is also a moral dimension. People in the United States, Britain and elsewhere are increasingly unwilling to ignore the suffering of people in other parts of the world.

Jeremy Greenstock, *International Human Rights and Standards*, 23 FORDHAM INT'L L.J. 398, 399 (1999).

276. See *supra* Part II.

277. See Report on the Review of Arrangements for Consultation with Nongovernmental Organizations, U.N. Doc. A/49/215 (1994), at 12, reprinted in INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 86, at 493-94. See, e.g., *Consultative Relationship Between the United Nations and Non-governmental Organizations*, E.S.C. Res. 1996/31 (affirming consultative status provisions). For an excellent overview, see Michael Posner, *Foreword: Human Rights and Nongovernmental Organizations on the Eve of the Next Century*, 66 FORDHAM L. REV. 627 (1997) (describing the growth of NGOs since the 1960s, and noting the pivotal role of Amnesty International). See also Afra Afsharipour, Note, *Empowering Ourselves: The Role of Women's NGOs in the Enforcement of the Women's Convention*, 99 COLUM. L. REV. 129 (1999); Diane Otto, *Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society*, 18 HUM. RTS. Q. 107 (1996); Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611 (1994). But see Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations in the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957 (1996) (discussing the lack of accountability of NGOs).

international audiences operate within the globalized and commodified contexts of CNN, the internet, and satellite media. These audiences are increasingly sophisticated, skeptical as to any metanarrative,²⁷⁸ alert to spin.

Law matters,²⁷⁹ but the question "Who is accountable?" quickly becomes politicized.²⁸⁰ Who can be blamed? Who can profit from prosecuting?²⁸¹ War crimes, of course, have always been politicized.²⁸² This is precisely the impression that "objective" and consistent international law is intended to overcome.²⁸³

This is complicated by the presence of many players with conflicting objectives.²⁸⁴ The surviving victims or their families may seek to identify the responsible individuals, to punish and to deter.²⁸⁵ Or they may simply seek official, formal acknowledgment of the crimes committed against them.²⁸⁶ Perpetrators may seek amnesty or forgiveness. Victims and perpetrators may overlap. The state may seek to impose liability on individuals in order to exonerate a people.²⁸⁷ Where there would be no state left if all violators were imprisoned,²⁸⁸ in contrast, it may instead push for "truth and reconciliation."²⁸⁹

278. See *supra* Part II.A.

279. While noting that law reform is a contested strategy among feminists and that some "might point to the greater value of political campaigns or media coverage in reducing the oppression of women," for example, Charlesworth nevertheless insists that "claims based on international law can carry an emotional and moral legitimacy that can have considerable political force." CHARLESWORTH, *supra* note 12, at 393.

280. For a comprehensive history of how political leaders have dealt with war criminals since 1815, see GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE* (2000) (arguing that despite their dubious achievement, trying war criminals is better than vengeance). See also RATNER & ABRAMS, *supra* note 72, at 147 (suggesting that "the lack of fundamental elements of due process make [certain politicized prosecutions] poor precedents . . .").

281. MUTUA, *supra* note 53.

282. BASS, *supra* note 280.

283. The ICTY's international mandate puts it at "less risk of becoming politicized." BILEFSKY, *supra* note 186. See also Chuck Sudetic, *Justice is Better than Revenge*, N.Y. TIMES BK. REV., Oct. 29, 2000, at 29 ("Liberal states are unlikely to shoot war criminals, although they can be tempted by that prospect. Rather, even when liberal decisionmakers are painfully aware of the risk of acquittal, delay and embarrassment posed by a war crimes tribunal, domestic norms push them to apply due process beyond their own borders.").

284. Drumbl refers to the growing academic field of comparative genocide studies, which acknowledges that "each genocide is unique. This uniqueness manifests itself in the differences of experiences of genocide survivors, the levels of social mobilization of aggressors, the public or secretive nature of the aggression, and the historical context from which the violence emerged." Drumbl, *supra* note 273, at 1224.

285. RICHARD J. GOLDSTONE, *FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR* 135 (2000) (urging the United States to support the International Criminal Court "to cause would-be war criminals to reconsider their ambitions, knowing that they might otherwise be hunted for the rest of their days and eventually be brought to justice"); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 27 (2001) (explaining how to make "accountability fashionable").

286. HENKIN ET AL., *supra* note 100, at 633.

287. GOLDSTONE, *supra* note 285 (explaining that by establishing individual guilt, the society at large is exonerated).

288. Cassese, *supra* note 100.

289. See generally Lorna McGregor, *Individual Accountability in South Africa: Cultural Optimum or Political Facade?*, 95 AM. J. INT'L L. 32 (2001) (analyzing program for individual accountability in South Africa).

National authorities may well be in the best position to weigh these alternatives,²⁹⁰ inviting popular input as authorities did in South Africa.²⁹¹ But national authorities are also likely to have the most at stake.²⁹² "Accountability" may become a mechanism for purging the opposition, obtaining foreign aid,²⁹³ and securing their own authority. "Exoneration" may enable a regime to assure the loyalty of powerful groups, or even to avert a coup.²⁹⁴

This is further complicated, paradoxically, by the need to provide a broader, global audience²⁹⁵ with an unambiguous spectacle, a moral drama.²⁹⁶ Lawyers not only need to prevail on the legal merits, but need to generate, or sustain, the political will to assure the violence that Cover explains is necessary to enforce the law. This requires publicity and skillful handling of the media.²⁹⁷ Drafting an indictment for Milosevic, for example, was only a preliminary step. It is doubtful that he would have been arrested without relentless marketing.²⁹⁸

290. Jonathan Charney, *Editorial Comment: International Criminal Law and the Role of Domestic Courts*, 95 AM. J. INT'L L. 120, 123 (2001) (arguing that "the real and more effective success [of the ICC] will reside in the active dockets of many domestic courts around the world, the ICC having served first as a catalyst, and then as a monitoring and supporting institution").

291. See Azanian Peoples Organization v. The President of the Republic of South Africa, 1996 (4) SALR 637 (CC) (S. Afr.), reprinted in HENKIN ET AL., *supra* note 100, at 633 (describing the process through which the new Constitution was drafted). See also Cassese, *supra* note 100, at 3 (examining conditions under which participation is feasible).

292. See, e.g., Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991) (arguing that authorities have a duty to prosecute); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449 (1990) (arguing that States have a responsibility to prosecute certain violations).

293. See *supra* text accompanying notes 133-134 (describing surrender of Milosevic by Serbia on the eve of a donor conference).

294. See *supra* note 101 (describing amnesty in Peru). But see Tina Rosenberg, *In Chile, The Balance Tips Toward the Victims*, N.Y. TIMES, Aug. 22, 2000, at A20 (describing a "new assertiveness" on the part of the reformist government following the arrest of Pinochet in Britain).

295. Rieff, *supra* note 121, at 40 (arguing that the human rights movement "must take its case to the public, not just rely on its influence and its certainty that it does an enormous amount of good in the world").

296. Those who hid Jews in Berlin, for example, show "that the supposed choice between unquestioning obedience and death-defying resistance is much too crude: you could resist without automatically risking your life. It is surprising but true that—with one exception—none of the 50 people who helped Konrad Latte paid for it with their lives, or even by imprisonment." Schneider, *supra* note 109, at 53. See also Drumbl, *supra* note 273, at 1225 (arguing that the "key variable that should determine policy responses to genocide is the social geography [demographic composition, dynamic group relationships, and political culture of the collectivity that exist after the genocide has ended] of the post-genocidal society"). Professor Minow describes six inquiries that should shape responses to genocide. MINOW, *supra* note 34, at 133-35. See generally Stone, *supra* note 73, at 49 ("[R]emembering may only shift the patient from an ambivalence and moral uncertainty to hatred, which becomes a psychological cage . . . this has been hard for Holocaust victims; it is hard for any victim.").

297. Harold Koh describes the breakdown of students into four litigation teams in connection with the *Haitian Council* case, one of which "took care of communications, press management, lobbying, and spin control." Koh, *supra* note 268, at 6 n.21.

298. See, e.g., *Milosevic: The Face of Evil*, *supra* note 80 (describing cover story in Newsweek on *The Face of Evil*). The ad hoc tribunals themselves, similarly, had to be "sold." This was accomplished through a very political combination of rhetoric, diplomacy and compromise. See, e.g., Matthew Kaminski, *Milosevic's Strategy to Center on Politics*, WALL ST. J., July 5, 2001, at A9 (describing the resultant mix in the tribunal's law "of the Anglo-American common law and continental

Like a filmmaker, an international lawyer needs to take a pro-active stance with respect to the question, "Who cares?" The question becomes a question of marketing: "Who *needs* to care" to generate the requisite political will²⁹⁹ and how can this audience be *made* to care?³⁰⁰

IV. THE INEVITABILITY OF PIL AND ITS TRANSIENCE

The symposium's final question—"Why is [your method] a better method than the others?"—is carefully posed in the alternative: "Why is your method better at tackling *some* subject areas than others?" The co-chairs recognize the necessary contingency of any thoughtful response. From a PIL perspective, however, even what is "better" at tackling *some* subject areas remains a contingent determination. What is "better" for *whom*? Even narrowing the question to "which is better to assure accountability for particular kinds of violations?" gives rise to at least seven plausible answers, as set forth in the symposium.

Precisely because there are an indefinite number of plausible answers, PIL is inevitable as long as international law is functioning within the "cultural logic of late capitalism."³⁰¹ Whatever one's method of choice, at some point its limitations, or the obvious advantages of some other method, will induce a switch. While every method assumes a world view, PIL moves among them like a cable subscriber with a remote control. At the same time, however, PIL is inevitably transient, always changing form.

A. *PIL's Inevitability*

While the International Legal Process school provides a rational approach to decisionmaking,³⁰² and law and economics offers tools of measurement,³⁰³ PIL offers ambiguity.³⁰⁴ While the New Haven school provides a way to track consensus,³⁰⁵ PIL offers marginality.³⁰⁶ While

European civil law systems").

299. One increasingly obvious response to this question is: the American public. Michael Wines, *A World Seeking Security Is Told There's Just One Shield*, N.Y. TIMES, July 22, 2001, § 4, at 1.

300. See Koh, *supra* note 268, at 14 n.50 (describing plea by actress Susan Sarandon and actor Tim Robbins for Haitians before a worldwide television audience during the Academy Awards). See also *supra* note 125 (describing *Rockin' for Human Rights* concert). Filmmakers rely on advertising, stars and critical "buzz." Twykor had plenty of the last. See, e.g., Janet Maslin, *In a Race With Death, There's Only One Sure Winner*, N.Y. TIMES, June 18, 1999, at E10 (describing *Run Lola Run* as "hot, fast and post-human"); Stuart Klawans, *Born Cool*, THE NATION, July 12, 1999, at 34 ("Lola dashes through the film like a punked-out Road Runner, pursued not by Wile Coyote but by an accident prone Fate, whose assaults are as reversible as the workings of Acme Products."); Chappell, *supra* note 27.

301. JAMESON, *supra* note 57. If you are taken hostage in Latin America or relocate to rural China, it might be a different story. Then again, it might not. See, e.g., Kirk Semple, *The Kidnapping Economy*, N.Y. TIMES MAG., June 3, 2001, at 46 (describing how kidnapping is financing Colombia's civil war). See also PROOF OF LIFE (Warner Bros. 2001) (fictional account of ransom negotiation of a kidnapped American executive).

302. See O'Connell, *supra* note 9, at 337-38.

303. See Dunoff & Trachtman, *supra* note 13, at 394-95 (noting, however, that the authors are unable to "reach positive conclusions" because of the lack of actual data).

304. See *supra* Part I.C.1.

305. Wiessner & Willard, *supra* note 8, at 319.

feminist theory offers a normative polestar,³⁰⁷ PIL offers ambivalence.³⁰⁸ While critical theory provides tools to rigorously deconstruct international law,³⁰⁹ PIL goes to the movies.³¹⁰ Who needs it?

Most international lawyers, sooner or later, seek alternatives to whatever method(s) they employ. None of the methods in the symposium claims to be timeless, eternal, or "true," and no one cares. PIL is implicit in the structure of the symposium itself, which recognizes that no method trumps; none can possibly exclude all the others or those still to come. As even the positivists Simma and Paulus concede, "of course, the time when the claim of positive science to objective knowledge remained largely unchallenged is over, and there is no way back to yesterday's certainties behind the insights of critical theory, be it late—or postmodern."³¹¹ PIL is the portal to all that lies beyond the various "modernisms" set out in the symposium.³¹²

Unlike the methods in the symposium, PIL explicitly situates analysis in the spatial and historical context of globalization.³¹³ The "spatial context of globalization"³¹⁴ includes not only geography (Where are these violations occurring?³¹⁵ How close to Europe? How far from any U.N. "peacekeepers?") but technology³¹⁶ (Is the violation of "human dignity" on CNN?³¹⁷ Or is it

306. See *supra* Part III.

307. See Charlesworth, *supra* note 12, at 379 ("insist[ing] on the importance of gender relations as a category of analysis").

308. See *supra* Part I.A.2.

309. See Koskeniemi, *supra* note 10, at 354-56.

310. See *supra* text accompanying notes 25-29 (summarizing *Run Lola Run*). In my human rights class, students receive extra credit for analyzing the human rights issues in the following: *WELCOME TO SARAJEVO* (Miramax Films 1998); *Z* (Columbia Pictures Home Entertainment 1969); *GET ON THE BUS* (Columbia Pictures 1997); *THE OFFICIAL STORY* (Almi Pictures 1985); *EL NORTE* (Cinecom International Films 1983); *MEN WITH GUNS* (Sony Pictures Entertainment 1998); *BEFORE THE RAIN* (PolyGram 1994); *LAMERICA* (New Yorker Films 1994); *THE SORROW AND THE PITY*, *supra* note 129. Except for the last, these films are not documentaries. Nor are they entirely fictional. Rather, they transgress genre boundaries in classic po-mo style. For a discussion of various examples of boundary crossing, see my previous articles cited in *supra* note 26.

311. Simma & Paulus, *supra* note 7, at 307.

312. The "modern methods" would include Positivism, the new International Legal Process, Law and Economics, and International Relations and International Law. Critical Legal Theory, Feminist Jurisprudence, and the Yale School, in contrast, are sometimes "beyond" the postmodern portal. Their inclusion in the symposium no more preempts a fuller discussion of PIL, however, than the inclusion of the new International Legal Process, Law and Economics, or International Relations preempts the fuller discussion of Positivism.

313. "Geography and space are only two dimensions of the total manifold of events that define a particular situation or conflict." Wiessner & Willard, *supra* note 8, at 321.

314. "Yet it seems obvious to me that the most important work of perpetuating and normalizing the astonishing distributional inequities of our current world is done by the spatial division of the world's political cultures and economies into local and national units and by the conceptual separation of a political public law that operates nationally from an apolitical private law which operates internationally. We now think it obvious that poverty is a local problem, while wealthy people live more and more globally. But spatial and conceptual issues of this type are simply off the map of the discipline's concerns." Kennedy, *supra* note 20, at 479.

315. Ian Fisher, *Ethnic Fencing*, N.Y. TIMES MAG., May 21, 2000, at 59 (describing the crowded camps in Burundi into which the Tutsis have "herded more than 300,000 Hutus").

316. See generally Spiro, *supra* note 113, at 21-22 (describing the revolution in global communications).

317. See *Sharing the Wealth*, *supra* note 104 (describing Ted Turner's ambitious coverage when he was at the helm).

only available through an obscure listserve?).³¹⁸ The "historical context of globalization" refers not only to the post-Cold War triumph of "free market democracy," but also to the transposition of Cold War conflicts to other contexts.³¹⁹

"Modern" analyses are more constrained. They may take globalization into account,³²⁰ but they do so hegemonically, subsuming it to their own metanarratives.³²¹ The conceptual frameworks of modernity can no more represent globalization than texts can represent the polymorphous information streaming through the internet. PIL, in contrast, *plays* with the frameworks of modernity, recognizing them as human inventions, always subject to reinvention. This may lead to the "black hole of relativism,"³²² but it can also lead to the transformative politics³²³ of critical theories³²⁴ such as feminism,³²⁵ critical legal studies,³²⁶ critical race theory,³²⁷ and postcolonialism.³²⁸

318. Robert Soloman from the U.S. mission to the U.N. made a presentation on the possibility of a cyber war attack against the United States to a group of 30 law teachers from 28 countries. At its conclusion, a law professor from Kenya curtly observed, "While I understand the United States' concerns, I am unable to share them because 90% of my country is without electricity." Patrick Lumumba, Training Seminar, *supra* note 17.

319. Engle, *Culture and Human Rights*, *supra* note 65, at 329 ("[T]he Cold War debate over the priority of economic and social versus civil and political rights is very much alive in the culture debate; the debate over culture in many ways provides a new focus for old debates."). See also GLOBALIZING INSTITUTIONS, *supra* note 114, at 15 (describing "those who seek to identify the replacement for Cold War conflicts in the clash of civilizations, pitting the West against the 'Confucian-Islamic connection'") (citing Samuel Huntington, *The Clash of Civilizations*, FOREIGN AFF., Summer 1993, at 22). Memories of Cold War roles similarly persist. See, e.g., Kennedy, *Thinking Against the Box*, *supra* note 20, at 438 ("It seemed for a time that the Yale School supported American Cold War interventionism, while the Columbia School did not."). This does not suggest, of course, that all Cold War contests are resolved or transposed.

320. See, e.g., Simma & Paulus, *supra* note 7, at 316 ("As long as no alternative legal processes that would be universally acceptable are in sight, the old ones will simply have to do. And yet, the vision of an international law more amenable to the realization of global values remains compatible with the regime of traditional sources."); Wiessner & Willard, *supra* note 8, at 333 (setting out "Alternatives and Recommendations in the Global Common Interest").

321. See, e.g., José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EUR. J. INT'L L. 183 (2000). Even when modernists critique the law, when they argue that the law should be *less* raced, or *less* gendered, or that it should better incorporate the interests of the subordinated, they are well within classic discourse. See, e.g., Barbara Stark, *Urban Despair and Nietzsche's "Eternal Return": From the Municipal Rhetoric of Economic Justice to the International Law of Economic Rights*, 28 VAND. J. TRANSNAT'L L. 185 (1995) (arguing from a critical race perspective that ratification of the Economic Covenant is in the interests of African-Americans); Stark, *Turning the Wheel*, *supra* note 26, at 178-80 (arguing from a feminist perspective that ratification of the Economic Covenant is in the interests of U.S. women); Trimble, *supra* note 16, at 814 (observing that "when Chen refines [the content of the New Haven School's eight values] they turn out to be synonyms for Western, liberal, constitutional values").

322. See *supra* note 76. As noted *supra* note 73, some postmodernists concede that the process of deconstructing "always do[es] stop." J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, *supra* note 73. This is not the same as closure. Some of us stop sooner than others because in some contexts some of us have less choice. See, e.g., Catherine MacKinnon, *Theory is Not a Luxury*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW, *supra* note 244 (arguing that postmodern "indeterminacy" is irrelevant to rape victims in Bosnia).

323. This includes scholars who argue that even the most well-intentioned reforms replicate the hierarchies of privilege and subordination that infuse the deep legal structure of international law. This is obviously not a bright line, and the boundaries are more fluid in international law than in domestic law. See, e.g., LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS* (1990). Nevertheless, such scholars are more postmodern than, for example, the new international legal process, because they are challenging the boundaries of law itself. See, e.g., Charlesworth, *supra* note 12.

As Professors Balkin and Schlag note, all law produced during the postmodern era will show signs of postmodernism.³²⁹ PIL is inevitable as a *method*, a strategic choice,³³⁰ because PIL offers the fullest access to the methods set out in the symposium³³¹ and, at the same time, the fullest array of tools with which to unpack the metanarratives of which these methods are a part.³³² Like *Lola*, PIL asks: Whose story is it? Who is appropriating it for what purpose? Who will get the money at the end? Who will survive?

PIL is the idiolect of our time. We need only note the fragmentation and discontinuity of our own discourse, and our apparently happy acceptance of that fragmentation, as evidenced by the symposium itself. Incredulity toward metanarratives is apparent in the U.S. resistance to the ICC (and its preference

324. See J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 765 (1987) (explaining common attributes of critical theories). Cf. Kennedy, *Thinking Against the Box*, *supra* note 20, at 489. ("For many young scholars and students, 'critical legal studies' seemed at once passé, dangerous, too politicized, too much associated with a 'line' of some sort.")

325. See Christine Chinkin, *A Gendered Perspective to the International Use of Force*, 12 AUSTL. Y.B. INT'L L. 279 (1992). See also Shelly Wright, *Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions*, 12 AUSTL. Y.B. INT'L L. 241 (1992). Charlesworth explains: "Feminist methods emphasize conversations and dialogue rather than the production of a single, triumphant truth. They will not lead to neat 'legal' answers because they are challenging the very categories of 'law' and 'non-law.'" Charlesworth, *supra* note 12, at 379.

326. See DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987); KOSKENNIEMI, *supra* note 149. See also Koskenniemi, *supra* note 10, at 357 ("For international law in all its stylistic variations always involves translation from one language to another. Through it, the languages of power, desire and fear that are the raw materials of social conflict are translated into one or another of the idiolects expounded in the contributions to the symposium.")

327. See, e.g., Ruth E. Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT'L L.J. 301 (1995); Ruth E. Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT'L L. & POL'Y 903 (1997). See also Hope Lewis, *Lionheart Gals Facing the Dragon: The Human Rights of International Black Women in the United States*, 76 OR. L. REV. 567 (1997); Henry J. Richardson III, "Failed States," *Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 TEMP. INT'L & COMP. L.J. 1 (1996) (examining international law's role in regards to the plight of "failed states"); Berta Esperanza Hernández-Truyol, *Borders (En)Gendered: Normativities, Latinas, and a Latcrit Paradigm*, 72 N.Y.U. L. REV. 882, 892-911 (1997) (examining the similarities and differences between Latina/o normativities and non-Latina/o normativities).

328. See, e.g., Dianne Otto, *Postcolonialism and Law?*, in *THIRD WORLD LEGAL STUDIES*, at vii (1998-99) (introducing interdisciplinary volume "ask[ing] why the attainment of 'independent statehood' has changed only the guise of European domination rather than its substance"). But see GAYATRI CHAKRAVORTY SPIVAK, *A CRITIQUE OF POSTCOLONIAL REASON: TOWARD A HISTORY OF THE VANISHING PRESENT 1* (1999) (noting that "postcolonial studies . . . can become an alibi").

329. Schlag, *supra* note 73, at 440; see Balkin, *supra* note 23, at 1973.

330. "[T]he underlying premise of the symposium is that the practice of a particular method is a matter of choice . . . and that it is a choice that should be as self-conscious as possible." Slaughter & Ratner, *supra* note 143, at 423.

331. As Professor Kennedy notes, "most international lawyers now see themselves as pragmatists who embrace all camps in moderation." Kennedy, *supra* note 20, at 397. "[W]hen confronted with a concrete issue, no single theoretical approach or method seems adequate. A range of feminist theories and methods are necessary to excavate the issues There are various layers of practices, procedures, symbols and assumptions to uncover and different tools and techniques may be relevant at each level." Charlesworth, *supra* note 12, at 381.

332. Stephen M. Feldman, *Playing With the Pieces: Postmodernism in the Lawyer's Toolbox*, 85 VA. L. REV. 151, 152 (1999) (observing that some modern scholars have "partially accepted the postmodern insight that all substantive ends and legal processes reflect distinctive cultural values and social positions but that they domesticate [such] postmodern insights by putting them in the lawyer's toolbox, to be taken out and used only when needed").

for *ad hoc* tribunals). It is equally apparent in the widespread criticism of that resistance, which scoffs at the United States' invocation of its major metanarrative, the Constitution, as disingenuous if not hypocritical.³³³ Even as we dismiss *Lola's* plot and gimmicky premise, its focus on money and its reliance on slick camera work, we might note the commodification of our own discipline as we advertise³³⁴ and produce videos.³³⁵ The American Society of International Law has hired its own media specialist.³³⁶ *Nuremberg* was made into a mini-series last summer.³³⁷

B. PIL's Inevitable Transience

PIL is inevitably transient because, like postmodernism in general, it "swims, even wallows, in the fragmentary and the chaotic currents of change as if that is all there is."³³⁸ There is no eternal and universal "justice" to be meted out; there are only victims, alleged war criminals, witnesses, judges and lawyers together trying to "project . . . an imagined future," a normative universe,³³⁹ grounded not in some glorious abstraction, but in painstakingly constructed, albeit flexible and contingent, norms of human dignity.

PIL precludes another Nuremberg.³⁴⁰ The circumstances of Milosevic's surrender,³⁴¹ as well speculations as to his sanity,³⁴² have already assured that his trial in the Hague will be very different. Whatever the outcome, moreover, no one will be hung since Europe has rejected the death penalty.³⁴³ That the international community may "never again" experience the moral certainty of Nuremberg is not necessarily bad.

333. John F. Murphy, *The Quivering Gulliver: U.S. Views on a Permanent International Criminal Court*, 34 INT'L LAW. 45, 48-51 (2000). See also *supra* notes 179-83.

334. Every week I receive glossy, often lengthy "reports" from law schools throughout the country, expounding on the world-renowned scholars now appearing in their international programs. See, e.g., GLOBAL LAW (N.Y.U. School of Law, New York, N.Y.), Spring 2001, at 2-3 (describing additions to "Global Law Faculty," including Jurgen Habermas, "one of the most important moral philosophers of the twentieth century," and Ratna Kapur, "India's leading feminist scholar and activist").

335. *Public International Law Video Course* (WLT Distribution 1996) (video series on public international law developed by Elizabeth Defeis, distributed in twenty countries, in three languages).

336. See, e.g., AMERICAN SOCIETY OF INTERNATIONAL LAW, 2000 ANNUAL REPORT 3 (2000) (describing the addition of a Media Outreach program funded by a \$300,000 grant from the MacArthur Foundation).

337. *Nuremberg* (TNT television broadcast, July 16-17, 2000). The miniseries was based on ROBERT PERSICO, *NUREMBERG: INFAMY ON TRIAL* (1994).

338. Harvey, *supra* note 58, at 44.

339. Cover, *supra* note 2, at 1604-05.

340. But see Cohen, *supra* note 4 ("Robert Kempner, who was a prosecutor at the Nuremberg trials, called those proceedings 'the greatest history seminar ever held.' The Hague and Mr. Milosevic are unlikely to be far behind.").

341. See *supra* notes 133-134.

342. Lawrence Weschler, *The Defendant*, THE NEW YORKER, July 16, 2001, at 27 (noting that both of Milosevic's parents were suicides and raising the question whether Hitler, if he had been tried, would have been found insane).

343. European Union in the U.S., *EU Policy & Action on the Death Penalty*, available at <http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm> (last visited May 10, 2002) (affirming that the "EU is opposed to the death penalty in all cases").

The question remains, however, whether there is *enough* certainty to inspire and legitimate the violence of the law, to draw states together to impose their collective will.³⁴⁴ This is the question that Lola, and all international lawyers, must grapple with in the surreal red light between nightmare and action,³⁴⁵ and it is a question inevitably answered piecemeal, on the run, as we draw on experience and count on luck, hoping to prevent another death.

V. CONCLUSION

What saves *Lola* from mere cleverness is that she is not running for money; she is running for love, to save Manni's life, to affirm and sustain her connection with another human being.³⁴⁶ Like saving Manni, the issue of accountability for violations of human dignity is ultimately one of human connection. The international law project is to reconnect the victims, and sometimes even the perpetrators, to the community, and, in doing so, to reestablish that community and a normative universe in which it can thrive.

PIL reminds us that identities of "violinator" and "victim" may be problematic, that the notion of some *nomos* embracing them both may be even more so, and that in a postmodern world, all such constructions are inevitably unstable and tentative. This does not, of course, preclude the effort.³⁴⁷ On the contrary, it heightens the importance of the work, and the sense of urgency and purposefulness of those who undertake it. Run Lola run.

344. The UN treaty barring children under eighteen from combat, for example, has been signed by seventy-one States. The biggest problem, however, is not with States but with rebel groups. Jo Becker of Human Rights Watch, and chair of the coalition to stop the use of child soldiers, explains how the treaty puts pressure on rebels to do the same: "Most rebel groups are fighting to become a government You can make an argument to them that if you're using child soldiers you're discrediting yourself." The law matters, in short, to the extent international lawyers can make it matter. *Children of War*, N.Y. TIMES UPFRONT, Nov. 27, 2000, at 16.

345. See *supra* text accompanying notes 27-28 (describing Lola and Manni chatting in bed in surreal red light).

346. Cf. Cover, *supra* note 2, at 1605 n.10 (noting that the martyr's triumph "may be seen as a triumph of love or of law or of both, depending upon the dominant motifs of the normative and religious world of the martyr and her community").

347. As Lola proves, "love can do anything," sometimes. RUN LOLA RUN, *supra* note 3. Her triumph, of course, "may well be partly imaginary." Cover, *supra* note 2, at 1604.

