

15 of 79 DOCUMENTS

Copyright (c) 2001 The University of Chicago
Chicago Journal of International Law

Fall, 2001

2 Chi. J. Int'l L. 371

LENGTH: 9265 words

ARTICLE AND RESPONSE: The Limits of Pragmatism in American Foreign Policy:
Unsolicited Advice to the Bush Administration on Relations With International
Nongovernmental Organizations

Kenneth Anderson*

* Professor of Law, Washington College of Law, American University, Washington, DC. Professor Anderson was formerly Director of Human Rights Watch Arms Division, and General Counsel for the Open Society Institute/Soros Foundations. He is currently Chairman of the Board of the Media Development Loan Fund, Inc, an international nonprofit venture fund dedicated to promoting independent media worldwide, as well as a member of the advisory board of the Open Society Institute Landmines Project. For Richard Parker, affectionately.

SUMMARY:

... I. INTRODUCTION: THE CONSERVATIVE PRAGMATIC MODEL OF INTERNATIONAL NGOS, OR, TEMPERING NGO EXTREMISM ... I worry, however, that the twin attack I have just made on progressive international NGOs for their desire to manipulate the American polity toward ends that they could not achieve through the US democratic process, on the one hand, and on the failure of American free trade legislation to meet minimum moral and political standards of democratic process, on the other hand, will be seen as trying to have it all--a pox on all parties and the kind of "balanced" approach to liberal internationalists and conservative democratic sovereigntists that is favored in the media. ... However, since international NGOs consist of mere humans who, like anybody else, are unlikely to be able to resist the lure of prestige, power, and access to power, and, further, since many international NGOs are hostile to the very idea of democracy if its results might conflict with their desired results--well, then it is the responsibility of the Bush administration, in the conduct of its foreign policy, to resist for them. ...

TEXT:

[*371] I. INTRODUCTION: THE CONSERVATIVE PRAGMATIC MODEL OF INTERNATIONAL NGOS, OR, TEMPERING NGO EXTREMISM

The attitude of the Bush administration with respect to the vast array of international nongovernmental organizations ("NGOs") that now populate the international scene is, of course, in a process of development. Yet while the Bush administration has identified international issues that raise serious questions of American sovereignty, it does not appear to have understood the importance of international NGOs as international actors carrying forward these issues with one political agenda or another--not merely as followers or

supporters, but as the driving force with respect to many important questions. The overtly realist orientation of the Bush foreign policy team (at least as it exists at this point, being under considerable pressure to moderate itself) may unfortunately be fundamentally, indeed dangerously, ill-suited to understand that in today's world, in matters from human rights to the environment to population policy to adventures in humanitarian intervention, the leadership and driving force behind policy often comes from international NGOs.

This is true notwithstanding that international NGOs do not apparently have the traditional realist indicia of political power. Realism has a tendency to ignore actors whose influence derives from their single-minded attention to ideology rather than from more obvious material factors, preferring to ask, in the classic exchange, "How many legions has the Pope?" even when it is evident that in the democratic world, image and ideas and political fashion matter a great deal in establishing policy. [*372] In that arena, international NGOs do not need legions of their own, if by effective lobbying and the deployment of CNN, they can have NATO's.

To be sure, there are important appointees in the Bush administration that do understand the importance of international NGOs in setting the agendas of international affairs--John Bolton is chief among them. Still, the Bush administration does not appear fundamentally to understand that a long-term, indispensable, though easily ignored, goal of Bush foreign policy ought to be to strengthen the sovereignty of democratic states, including American democratic sovereignty. That unapologetically ideological goal can be accomplished only by redefining the relationship between democratic sovereign states and the *combination* of international NGOs and international organizations. The Bush administration ought to see redefining those relationships--and the articulation of an ideal and ideology of international affairs as the realm of democratic sovereigns, rather than the realm of nascent international organizations benevolently guided by international NGOs--as a major contribution to the strength of democracy in the world today. Yet it must also understand that to do so flies in the face of all that is considered fashionable, hip, progressive, and ordained by history among the international elites. These elites, in thrall to the idea of globalization, form the cohort not merely of international NGOs and international organizations, but also of much of the US foreign policy establishment and, likewise, multinational business. Lack of hipness is today the price of fidelity to American democratic institutions.

Several different tendencies of thought about international NGOs can be discerned among American conservatives, some of which are consistent with each other and others of which are not. There are, to start with, strong conservatives, often religiously affiliated, bearing long hostility toward the sizable mass of international NGOs associated with "liberal" or "progressive" causes. These conservatives often define their attitudes around such "values" issues as population planning and abortion, and the kinds of cultural issues attached to such treaties as the Convention on the Rights of the Child n1 and the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), n2 which, largely due to pressure from these conservative constituencies, have never been accepted by the United States. There are other strong conservatives whose ire toward international NGOs is less attached to issues of values and culture, but for whom the defining issues tend to be environmental regulation, global warming, and the Kyoto Protocol n3 on greenhouse gas [*373] emissions in particular. Sometimes these conservatives

are attached to business interests and sometimes not, but concern about economic growth and the cost of international regulation figures prominently for them. There are still other conservatives whose antipathy toward international NGOs is attached not to a particular set of issues, but is instead generated by a more abstract sense that international NGOs, on a wide range of matters, tend to strengthen international organizations at the expense of American political institutions. For them the issue is sovereignty and the distressing possibility of its erosion--one example is their opposition to the International Criminal Court on the grounds that it represents the strengthening of international governance at the expense of American institutions.

Common to all conservatives who share this hostility towards international NGOs is a concern, eloquently pointed out by such writers as Jeremy Rabkin, n4 Jack Goldsmith, n5 John Yoo, n6 and John Bolton, n7 that international NGOs understand international law to be a means (often social engineering of a liberal character) by which to achieve results that have been rejected by national democratic political processes. In other words, international law and international agreements are seen as a means of doing an end-run around domestic democratic processes. And in the case of the United States, lurking beneath all of these concerns is a sense that the treaty power cannot be used constitutionally to rewrite the domestic political order. In the case of any of these tendencies, of course, the hostility is toward a particular kind of international NGO, broadly speaking, the left-wing, liberal, or progressive do-gooding organization. (After all, the most conservative Christian churches in the United States have historically not infrequently been committed toward activist work abroad. Many of these religious organizations, on some politically neutral definition of "international NGO," would have to count as some of the most successful long-term international NGOs.) The hostility exhibited by many American conservatives is not merely directed toward liberal or progressive do-gooding organizations as such; it achieves a special vehemence on account of the cultural shift within the collective imagination of leftists, liberals, and progressives which today unblinkingly declares that progress must equal universality, which in turn must equal internationalism. n8

[*374] The first of those equalities, progress must equal universality, is at least debatable, as generations of relativists and postmodernists have argued. The second, however, that universality must equal the international, is at best unsupported. After all, one need not be a moral relativist--I, for example, am no relativist--to think it an open question *who* is fit to declare *what* is genuinely universal. Even universalists have to be willing to answer that question, if only by implication, and it is far from self-evident that genuinely universal principles are somehow best discovered and enunciated by international organizations, international NGOs, or anything else at the international level. Why shouldn't the true universals be discovered and enunciated by political organizations far closer to the ground, where people actually live--democratic sovereign states, for example? There is nothing conceptually or practically obvious about believing that the international ought to have the conclusive word on the universal.

Nevertheless, it is sacred doctrine that the international uniquely incarnates the universal; thus, the international must be supported over the parochially national no matter what. It is this cultural shift--the movement from liberal internationalism as a distant dream of utopian crazies to the central ideology of progressivism--that gives, in my experience at international

law conferences, debates over the status of international NGOs a curiously surreal air. The world views of the democratic sovereigntists and the liberal internationalists have moved radically apart--although, in my experience democratic sovereigntists seem better able at least to conceptualize the world as imagined by liberal internationalists than the other way around. Perhaps the asymmetry lies in the hubris of progress as ideology. In my experience, progressivism often has grave difficulties in seeing its opponents' intellectual stance as other than atavistic and benighted. Suffice it to say that it has made debate difficult, and I welcome particularly those who strongly disagree with me, but are willing to debate these matters, because it shows that discussion of these important disagreements is not dead.

For all of the conservative hostility toward international NGOs, international organizations, and international law, however, there are also powerful, even dominant tendencies within the Republican Party and the Bush administration that broadly accept the presence of international NGOs as a part of international life, whether as lobbyists for one view or another, as deliverers of humanitarian relief, as experts in some field, or as organizations with whom practical minded, hardnosed American realists will frequently do business. Let me sketch out an approximation of this conservative realist thinking. Whatever one thinks of such international circuses as the Cairo population conference, the Rio conference on the environment, or the Beijing conference on women, the international aid industry is here to stay, the human rights organizations are here to stay, the environmental organizations are here to stay, and so on. Although, on this view, one may have to fight with NGOs on some fronts, and take a lot of bad press from their friends and allies in the international media, in the end the task is to find common ground to do business with them where possible. It [*375] might even be seen as an essential tenet of committed conservative internationalism, one of those criteria that differentiates conservative isolationists from conservative internationalists. And within the Bush ideology of compassionate conservatism, nothing might seem more natural than to want to cooperate as much as possible with international NGOs. After all, the Bush administration sees volunteer organizations as the key to improving social service delivery in America; why should it be any different abroad? Surely volunteer organizations can do a more efficient job of many things than international organizations can, so why not work with them where possible? It's not as if there is a long list of parties able to deliver medical aid in Chechnya, or run refugee camps in Congo, or vaccinate children in southern Sudan. Whatever the rest of their political agendas, international NGOs are often not only the best positioned to do these jobs, they are the only organizations with any possibility of doing them. And however annoying to American conservatives the sniping from organizations such as Human Rights Watch n9 or Amnesty International n10 on things like the death penalty in America, there is considerable common ground with them on a variety of situations worldwide. In any case, their reporting is an important source of information. Even the environmental organizations--perhaps the most annoying of all to American conservatives--have a point: not even conservatives, one should like to hope, want to see the whales become *extinct*. Greenpeace, perhaps; the whales, no.

Thus, alongside the deep antipathy of some conservatives toward international NGOs, there is also a natural tendency in the Bush administration to want to find ways to work with international NGOs: to use them as providers of services, to take advantage of their expertise and networks, to find common ground with

them in pressuring recalcitrant countries on issues such as human rights and sometimes even the environment, and to obtain their support for administration policies where possible. This tendency toward pragmatic dealings--more hardheaded and willing to offend than the Clinton administration, more assertive of US interests than the Albright tenure, but also pragmatically accepting of a role for international NGOs as legitimate actors in realms of international action and policy--will be referred to here for convenience as the "pragmatic conservative" model for dealing with international NGOs. As a model of behavior toward international NGOs by the Bush administration, the pragmatic conservative model rests, it seems to me, on three fundamental assumptions.

First, however much certain parts of the conservative base reject on principle international NGOs as "partners" with the US government in one matter or another, [*376] international NGOs are independently "legitimate" in some sense. They are a part of the constellation of actors with which the United States must interact; moreover, they frequently are not just important but positive players within international affairs. Not only are they not going to go away, but they are at least to some extent "legitimate" actors with whom the United States not only must, but should, do business.

Second, the proper way to think about international NGOs--the measure and meaning of their legitimacy, so to speak--is the same way that the Bush administration thinks of volunteer organizations within US domestic society. Volunteer organizations, or domestic NGOs, are frequently powerful irritants, sometimes powerful opponents, but oftentimes they provide the crucial margin of support for policy. Even more fundamentally, private voluntary organizations make America the place it is. They are "civil society," the glory of private life in a democratic country, and the task for the Bush administration is to galvanize them into even greater action through such things as revisions to the tax code on charitable donations and through the "faith-based initiatives." And if that is how private voluntary organizations ought to be seen within the United States, then they should be seen the same way, indeed even more so, abroad where the needs for both their contributions and the special benefits of voluntary organizations and civil society are so strikingly evident. International NGOs can thus be seen, within one plausible Bush administration view of the world, as the international equivalent of domestic civil society. In the long run, the development of institutions of civil society is a good thing--even if sometimes they can be a short term, vocal annoyance--because they are a sign of a developing and maturing democracy.

Third, if international NGOs--even ones the administration does not like--are legitimate political actors in the sense of being the sometimes noisy, sometimes rude, sometimes crazy equivalent of domestic civil society, then the pragmatic conservative model for dealing with them essentially ought to be to contain their wilder impulses while continuing to work with them where and as one can. The task of the pragmatic conservative model for dealing with international NGOs is not to oppose them as a category fundamentally (because they are regarded as legitimate domestic pressure groups and NGOs in America), but instead to temper their extreme impulses and encourage them toward sensible actions and advocacy positions. There will always be outliers, organizations with which the US government cannot deal, just as there are within American society. However, an important aspect of American foreign policy must be to engage these new forces of international civil society because, after all, they are a force for bringing into the world of international action the same kinds of vital energies directed

towards voluntary action that are crucial to American democracy. A possible tendency of the Bush administration will be to temper the extremes of international NGOs while basically accepting their view of themselves as a nascent international civil society that is a crucial part of the democratization of the world.

This all sounds plausible initially. I nonetheless urge that the pragmatic conservative view of international NGOs is deeply, fundamentally flawed. [*377] Furthermore, the Bush administration does damage in the short-term to itself and damage in the long-term to the ideal of democracy (and American democracy in particular) by subscribing intellectually or practically to this view. At the same time, adopting a more accurate view of international NGOs is not simply a recipe for what a more strident conservatism might desire. If, as I suggest, one indispensable element of any approach to international affairs ought to be its impact upon American democratic processes, then the processes by which certain matters dear to the heart of conservatism--free trade especially--can barely be described as fulfilling the letter, let alone the spirit, of democratic sovereignty. What is required instead is a view of international affairs, international organizations, international NGOs, international law, and US constitutional law (and the treaty power in particular) that respects and strengthens American democratic processes, without which a specifically *American* sovereignty could not exist.

II. SHORTCOMINGS OF THE PRAGMATIC CONSERVATIVE MODEL AND AN ALTERNATIVE UNDERSTANDING OF INTERNATIONAL NGOS, OR, THE RISKS TO DEMOCRACY WHEN INTERNATIONAL NGOS PROPOSE THEMSELVES AS SUBSTITUTES FOR DEMOCRACY

The fundamental flaw in the pragmatic conservative view of international NGOs is its unthinking acceptance of the idea that international NGOs somehow are the genuine equivalent of domestic NGOs in a democratic society, that international NGOs really are the international equivalent of domestic civil society, and that international NGOs are, as they increasingly call themselves, "international civil society." n11 The names and labels matter. Ideology matters. International NGOs have obtained a very sizable grant of legitimacy from governments and international organizations over the last ten or fifteen years simply by asserting on their own behalf the view that they are not merely private organizations, but that they are, in virtue of being private voluntary organizations, "international civil society" in all the glorious and expansionary meaning that the term acquires through shades of de Tocqueville and Adam Smith. It is not by accident that international NGOs stress their legitimacy as international actors by invoking the lofty claim that they are civil society rather than by stressing, as in an earlier time, their good works and service on behalf of the world's poor and oppressed.

But what is the difference in the claim? Why is it different and more politically reaching to claim the mantle of civil society rather than merely resting, for example, on the laurels of one's service to fellow human beings? The inflation of legitimacy lies, it seems to me, in the implied claim of *representativeness*. When, for example, Jody [*378] Williams, recipient of the 1997 Nobel Prize on the behalf of the NGO campaign to ban landmines, speaks of international NGOs, she speaks of them as representatives of the peoples of the world. n12 The international NGOs, on this view, represent the peoples of the planet in negotiations and discussions with international organizations, with governments, and with multinational corporations. As such they should be

understood as a force for democratizing international affairs and the so-called "international community." I cannot stress enough how widespread is the sense of entitlement that international NGOs feel as a result of simply conceiving of themselves in this way, even when many of those institutions are, at best, nascent. It is a sense of political entitlement that practically requires, in the name of democratic legitimacy, that international NGOs be treated not merely as lobbyists in the corridors, but as official negotiators on behalf of "civil society" and the world's "peoples" in treaty negotiations. Combined with the nearly complete capture by international NGOs of the foreign policy agendas of a number of smaller Western democracies--Canada particularly comes to mind--it is a stunning witness to the power of ideology. It is also a phenomenon that the currently articulated pragmatic conservatism of the Bush foreign policy team seems ill-equipped to recognize, let alone reform, because the premises of its power are not fundamentally material, but those of image, idea, and perception. The Bush administration is (perhaps) capable of rejecting the Kyoto Protocol and of taking the heat for that rejection from its sovereign allies. It does not appear to have, however, grasped the concept that the international NGOs, as much as any sovereign actor, brought the Protocol into being and certainly were as responsible as any sovereign actor for its contents. Nor does the Bush administration yet appear to have any idea how to assess and disentangle the myriad issues with which many of its allies have intertwined their sovereign foreign policymaking and diplomacy with international NGOs.

Whether pragmatic conservatism is capable of conceptualizing international NGOs as a phenomenon that must be addressed in its own right, rather than simply addressing particular issues raised by the treaties, agreements, and policies that international NGOs are able to establish across many different subject areas, American conservatives have come to understand the mechanisms by which international NGOs insert themselves into policy processes. Particularly following the Seattle World Trade Organization ("WTO") debacle, even parts of the traditional liberal foreign policy establishment have begun asking on what basis in theory or in fact international NGOs should be taken as "representing" the peoples of the world. *The Economist*, for example, a magazine that for most of the decade has styled itself as [*379] the voice of enlightened global capitalism finding common ground with globalizing NGOs, practically convulsed in the months following Seattle with articles and leaders attacking international NGO representativeness and accountability. n13 Inevitably, the attacks descended into a manichean division of the world into the "good" NGOs--such as the human rights NGOs who might raise tough questions but do not fundamentally threaten the terms of global capitalism, and indeed find it a useful lever by which to enter new markets (in the manner, that is, of priests accompanying the conquistadores)--on the one hand, and the "bad" NGOs--especially the radical environmentalists, some of whom actually believe their rhetoric about localism--on the other. There is a long way to go in dismantling that claim to representativeness, but at least some of those questions are being put to the international NGOs. And to some degree, the international NGOs have felt themselves on the defensive with respect to the fundamental question that David Rieff asked in a rather lonely fashion for a long time--"So who elected the NGOs?" n14 It is no longer considered, even among doctrinally pure liberal internationalists, a wholly heretical question.

What is less understood, but frankly more important, is the symbiosis between international NGOs and international organizations. It is a process of mutual legitimation in which international organizations treat international NGOs with

all the legitimacy and deference that domestic democratic governments must treat their domestic voters. In turn the international NGOs treat international organizations, even if not precisely the organizations they would like to see now, as the legitimate source of governance on the planet--governance which needs to be reworked and reformed by paying close attention to the NGO agenda, but which is, simply because it is "international," morally and politically preferable to merely sovereign national governments (which, after all, often do not give international NGOs the policies they seek). n15 In the wake of the attacks at Seattle on the WTO, the International Monetary Fund ("IMF"), and the World Bank, this relationship of mutual legitimation--really a passionate romance between international organizations and international NGOs--may be hard to accept. But notwithstanding the attacks on international [*380] organizations, UN Secretary General Kofi Annan, for example, hosted discussions and meetings at every opportunity with international NGOs of every variety, explicitly on the basis that international NGOs are the representatives of the people of the planet. They are that to which international organizations must regard themselves as accountable because they are the voice of the people in some way that merely sovereign governments, even democratic ones, apparently can never be. Likewise James Wolfensohn, president of the World Bank, never makes a policy move without lengthy consultation and input from international NGOs, so much so that many observers have noted that World Bank policy in certain areas is essentially set by the international NGOs. n16 It would not be overstating matters to say that in wide swathes of subject matters, international organizations simply act as bureaucratic clearing houses and organizational facilitators for international NGOs. The two then act together, along with a core of smaller Western states sympathetic to the idea of reducing the power of the large sovereign states--and the United States in particular--to bring along the rest of the world's sovereign states. It is a pattern that has been repeated on a wide range of issues from environmental regulation to women's rights. Attempting to deal with this process on an issue-by-issue or subject matter-by-subject matter basis simply misses the point that it is the infrastructure of the relationship between international organizations and international NGOs.

The IMF and WTO have been slower to come around to the understanding that they owe accountability as much or more to international NGOs, but there is little doubt that over time they will, and for a very simple reason. Every international organization lacks moral and political legitimacy in the only way that matters in the modern world if one's brief is not merely to advise, cajole, jawbone, or chat, but instead to *govern*--which is to say, they all lack democratic legitimacy. The UN and its agencies, the World Bank, the WTO, the IMF--none can lay any claim to democratic legitimacy except through the attenuated mechanism of the democratic legitimacy of the member democratic sovereign states. That lack of direct democratic legitimacy did not matter much as long as these international organizations did not purport to *govern*. But in the post cold war period, the demands placed on these organizations have grown along with their own desire to govern the actions of sovereign states. Thus, the democratic deficit of international organizations has become the primary issue beyond the day to day crises--in part because the day-to-day crises are not infrequently occasioned by the lack of democratic legitimacy. Hence, the behavior of Kofi Annan in praising international NGOs as representatives of the world's people and spending sizable amounts of his time with NGO conferences is very far from simply being a way to placate a group of well organized and vocal critics. It is, much more importantly, a way of building a constituency, of

supporting the [*381] ideological claim of that constituency to be the fount of democratic legitimacy that international organizations otherwise so conspicuously lack. Annan praises the international NGOs as the voice of global democracy because he so desperately needs a source of democratic legitimacy that he can point to. n17 Simultaneously, of course, international NGOs graciously accept the mantle of democracy because it increases their influence enormously.

International NGOs and international organizations are locked in a powerful romantic embrace, each giving to the other and each taking from the other, to the detriment of true democracy. Yet somehow I doubt that the Bush administration at this point in its dealings with Annan and the UN, for example, or in its dealings with various NGOs, genuinely understands the importance of this symbiosis, even though Annan plainly does. Nor does the Bush administration understand the importance of publicly and aggressively breaking the symbiosis in order to stop the evolution of the debate away from the control of the democratic sovereigns, especially the United States.

It is important to be clear about the risks that the symbiosis of international organizations and international NGOs pose. On this point, what matters is not solely the substantive position taken but the process by which it is taken and the process that it implies for democratic sovereign states. For example, I think that the International Criminal Court ought to be undermined by the United States at every real and symbolic opportunity. Among other things, it grossly undermines the constitutional rights of members of the United States political community, otherwise known as its citizens. Similarly, the United States ought decisively to reject treaties such as the Convention on the Rights of the Child and CEDAW that essentially seek to remake American culture and values according to the desires of a strange and remote elite of international NGOs that could never get a hearing within US domestic politics, precisely because our politics are democratic in a way that international NGOs despise. Yet, I imagine, unlike many at the AEI conference, I believe firmly that the United States ought to give up its deployment of anti-personnel landmines because they are an indiscriminate weapon. It should do so without special regard for the fact that it has also been the subject of an intensive international campaign and treaty, n18 but it should do so. I also think that while the Kyoto Protocol [*382] is seriously and unacceptably flawed, evidence of global warming is persuasive and inaction is not acceptable.

One may think one way or another on the substantive issues raised by international NGOs; that is not the point. What is more important is whether the solutions, if any, that one believes ought to be pursued are pursued in a fashion that comports with democratic legitimacy. And it is on this point that the second assumption that I attributed at the beginning of this article to pragmatic conservatism--that international NGOs are essentially the equivalent of civil society in a settled democratic society--collapses. International NGOs may say that their activities of lobbying, persuasion, protest, media manipulation, report writing, etc., are no different in the international field than that which their equivalents perform in domestic democratic societies. This may be true, as far as it goes. The difficulty, however, is that international NGOs perform these activities in an entirely different political structure and environment from domestic organizations--the difference is that one is democratic and the other is not. In a domestic democratic society, we do not look to nonprofit organizations as the proof of our democratic credentials--we look to elections and the ballot for that proof. That frees NGOs to be what they

are--protest and pressure organizations, organizations which are both the glory of a democratic society and its by-product, but which are not the *proof* of it. Citizens' associations, pressure groups, lobbying organizations, and protest organizations are not, in a settled democratic society, accountable to any but themselves and their own principles--nor should they be, because the function of democratic accountability is accomplished by a wholly different mechanism: elections.

In the undemocratic international world, however, matters are entirely different. There are no direct elections. Rather, there is the attenuated, indirect democratic process of sovereign democracies supposedly controlling international organizations. But as these international organizations reach out to seek to govern the behavior of these same sovereigns--to attenuate their sovereignty--then they also lose the ability to rely on them as the *source* of their democratic legitimacy. In the democratic deficit that inevitably develops, it is natural, but wrong, to look to the pressure groups, the citizens' groups, the opposition groups, and the protest organizations, as an alternate source of democratic legitimacy. And the NGOs are only too happy to offer themselves, giving little heed to the fact that by offering themselves as substitutes for democracy, they make it ever more difficult to confront the naked and painful consequences of an international system that has no democratic legitimacy. The system has less democratic legitimacy since embarking on the path of downgrading democratic sovereigns and upgrading the supposed legitimacy of international NGOs. In my view, this system cannot ever become democratic simply because democracy in any meaningful sense is incompatible with the size and number of people on the planet. By offering themselves as substitutes for real democracy in order to further their own influence, international NGOs muddy the waters of the critical question of how much power ought to be assigned to a system of international organizations that [*383] cannot ever be democratic. At the same time, international NGOs actively seek to undermine the processes of democracy within democratic states whenever the results of those democratic processes produce, in the view of the international NGOs, uncongenial substantive outcomes. It is no exaggeration to regard the international NGOs, unlike their domestic counterparts--or unlike the international NGOs themselves when they work within sovereign democratic systems--as not merely undemocratic, but as profoundly antidemocratic.

III. FREE TRADE, OR, SAUCE FOR THE GOOSE

But now there is a serious problem of principle lurking here for conservatives. If there is anything that I have tried to admire in recent years about conservatives, it is an insistence on parity of principle--sauce for the goose, in short. It has seemed to me that conservatives have in recent years been much more insistent on that basic tenet of fairness than have American liberals, for whom every principle is modified by another, often invented specially for the occasion, in order to reach an outcome congenial to their prejudices, culture, and class. Yet it also seems to me that conservatives face a large problem if they agree with the primacy of democratic procedures and adherence to these democratic procedures at the level of the sovereign state, and, in particular, if they claim as conservatives so often and so correctly do, that the Constitutional treaty power cannot be the basis for the wholesale remaking of the domestic political order. It is unacceptable, whether in the case of the reverse discrimination provisions of CEDAW, the "best interests of the child" state empowerment--parental disempowerment standards of the Child

Rights Convention, or the evisceration of American soldiers' US constitutional rights in criminal matters under the ICC statute.

That said, however, it also seems to me plainly unacceptable that free trade (including the stunning amount of rewriting of the rules of commerce, labor standards, environmental standards, and health and safety standards that has arisen and could arise under existing and proposed free trade agreements) should somehow be considered exempt from the principle of democratic procedure and limits on the treaty power, just because free trade is a sacred tenet for many conservatives.

Please do not mistake my point here. I yield to no one in my devotion to Ricardo and the substantive cause of free trade. Free trade should be a central goal of American foreign policy. The North American Free Trade Agreement ("NAFTA"), among many examples, has been a considerable success. It seems to me that the Bush administration has an immediate moral obligation, irrespective of the political cost and the irritation of the senior senator from North Carolina, to achieve access for poor African countries to our markets. But recognition of the efficiencies of an ever expanding common market is not a substitute for the fact that the WTO legislation, for example, was passed in a way that--although it might be sustained in court as meeting the minimum requirements of legality--does not truly square with the [*384] principle of democratic accountability. Conservatives correctly evince great hostility when such high-handed, undemocratic social engineering is proposed to be applied in such matters as children and the family; they should feel the same in the matter of free trade.

Put another way, I have read a large amount of Ralph Nader's voluminous output on free trade. And while I find myself disagreeing with just about every substantive remark he makes about free trade, I also find myself grudgingly agreeing with most of his criticisms about the lack of democratic legitimacy in the way that much free trade legislation has been passed in the United States. Can we really pretend to ourselves or others that the 14,000 or so pages of WTO documents that passed the Congress, where it is clear that no one who took part in the vote had actually read the language being passed, comports with the moral requirements of democratic legitimacy? Worse, those special, streamlined processes for passing free trade bills have as their purpose nothing more noble than *avoiding* the full democratic legislative process. In other circumstances, conservatives touchily but correctly assert this purpose against liberal internationalists, for whom American constitutional and legislative processes really are just an inconvenience on the way to supranational governance. Nor is it an accident that the purpose of avoiding democratic processes in many of these cases is to avoid having a democratic national debate over questions of labor and environmental standards. Regardless of what one thinks of the substantive positions, questions of labor and environmental standards are plainly something of considerable importance to many *citizens* of the United States. Think what one will of what the substantive answers to those questions should be, American conservatives shamed themselves in skipping over the full measure of American democratic debate in order to get the substantive answers that they favored. In doing so, they did their bit to make the sovereign democratic process in America that much less meaningful or worthy of defense. Fast track legislation, which at least operates within the domestic legislative structure in that it requires action by both houses of Congress, barely falls within the realm of what legally and morally ought to be allowed in US

democratic process. Given that, the imposition--either directly by treaty or indirectly through reference to treaty processes embedded in fast track legislation--of exterior treaty processes that purport to override domestic processes have, in my view, no democratic moral authority or legal basis.

It is no answer to say that the process of consolidating many matters together into a single, unreadable and unread, gigantic bill happens many times a year in American democracy--every time that a budget bill is passed, for example. This is not an answer if for no other reason than that those pieces of legislation do not commit the United States to mechanisms and dispute resolution outside its domestic compass. In other areas where conservatives have concerns about American domestic process and sovereignty--the death penalty, for example--they still acknowledge that there is a difference between mechanisms to regulate or even abolish that are constitutionally valid under US law and those that would purport to do it by [*385] imposition of international law from abroad. It is even less of an answer to say, "well, free trade is special." Just as liberal internationalists have a list of issues and causes that are "special," and hence outside democratic purview and answerable only, so to speak, to God, incarnated as one or another international NGO, some conservatives elevate the common market above democracy. In so doing, they not only violate principles of democracy, they also make more opaque, and hence less democratic, the difficult debate as to the necessary *tradeoffs* between the size of the ideal common market--ever larger--and the size of meaningful democracy--a form of government that cannot simply get larger forever. The size of the ideal common market and the ideal democracy are in all likelihood not coextensive. Pretending that they are coextensive in the interests of expanding free trade does a grave disservice to democracy. It also undermines the claim of conservatives that, in attacking social engineering through treaty in other matters, they thereby protect democracy.

I worry, however, that the twin attack I have just made on progressive international NGOs for their desire to manipulate the American polity toward ends that they could not achieve through the US democratic process, on the one hand, and on the failure of American free trade legislation to meet minimum moral and political standards of democratic process, on the other hand, will be seen as trying to have it all--a pox on all parties and the kind of "balanced" approach to liberal internationalists and conservative democratic sovereigntists that is favored in the media. "Balance" is not my interest--consistency of principle and the defense of democratic sovereignty is. The democratic sovereigntists have the better position as against the liberal internationalists--but they undermine it by throwing it over, in the interests of a certain kind of conservatism, for undemocratic approaches to free trade.

IV. CONCLUSION: CULTURE MATTERS

Just as this argument is not a call for "balance" between liberal internationalism and democratic sovereignty, it is also not a call for international NGOs to pack up their tents and go home. Far from it. I understand perfectly well that an international NGO might respond, "Well, it's not our fault that the international system is not democratic; surely it would be worse if none of us existed to pressure the system. Surely we ought to simply do what we do, which is pressure authority of all kinds." The reply ought to be, "Yes, of course, international NGOs should agitate and pressure--but they should not claim to *represent* anyone other than themselves, either explicitly or

implicitly." Nor ought they to do what I regard these days as the "international NGO fudge" on legitimacy. When, for example, interviewed on the issue of their representativeness by an occasionally skeptical media, heads of international NGOs are wont to say, "Oh, no, we represent no one but ourselves; [*386] don't accuse us of overstepping the bounds of our legitimacy." n19 But then they show up the next day at treaty negotiations over one thing or another, demanding to be admitted as negotiators or observers on the grounds that they are representatives of "civil society," and thus representatives of the peoples of the world. One ought not to want it both ways, attractive as the tactical possibility is. My argument is therefore a call to international NGOs to understand the *threat* that they pose to democratic legitimacy as it can and does exist, if they take the rhetoric of international civil society seriously in order to enhance their own prestige and influence internationally. It is a call to understand that democratic legitimacy, such as it is, is invested in democratic sovereign states, like it or not. It is not invested in pressure groups whose function is, after all, to pressure. International lobbying organizations, pressure groups, protest groups, and international NGOs of all varieties ought to resist the blandishments of the civil society ideology as applied to the undemocratic and undemocratizable international realm, because the result of elevating themselves in that way is to undermine such democratic legitimacy as does exist.

However, since international NGOs consist of mere humans who, like anybody else, are unlikely to be able to resist the lure of prestige, power, and access to power, and, further, since many international NGOs are hostile to the very idea of democracy if its results might conflict with their desired results--well, then it is the responsibility of the Bush administration, in the conduct of its foreign policy, to resist for them. The administration could start simply by making clear that it does not accept international NGOs as negotiating partners in treaty making sessions. It could end its funding and attendance at grandiose international conferences that simply subsidize international NGO influence. It could move to end the unhealthy combination of NGOs and US judges making foreign policy through the effectively unchecked process of litigation under the Alien Tort Statute. It could suggest to Kofi Annan that he might do better things with his time than simply seeking to build his own constituency and base of power, in no small part among the international NGOs. It could be much more careful about which international NGOs the United States funds to do good deeds abroad, and it could be much more aware of the advocacy efforts of those organizations. But it ought also to democratize, within US political institutions, the process and debate over free trade, consistently applying principles of democratic sovereignty as to the limits on what can be done by international agreement.

This, however, is a very different agenda than simply responding to one issue or another. What is at stake here is the common process by which international affairs [*387] are conducted, not merely the outcome of any particular substantive question. This kind of abstract thinking about the processing of ideology within international policymaking is not very easy for the realist and pragmatic paradigm to capture. Realism and pragmatic conservatism have difficulty reaching beyond making decisions solely on the narrow merits of individual issues--whether landmines, Kyoto, the ICC, children's rights, etc.--to discern the dismaying pattern of how the process works, much less to take an interest in changing it. Changing things requires an agenda of taking fundamentally symbolic actions of a fundamentally confrontationalist nature. The

pragmatism of the Bush administration recoils from showdowns over symbols that do not seem to yield concrete, material, realist results. This is particularly likely given that the administration has felt the heat over obvious non-starters such as the Kyoto Protocol (which, after all, was rejected 97-0 by the United States Senate and has been ratified by no significant European state). n20 But symbolism, including symbolic confrontation, *is* the point. I submit that the Bush administration will not turn out to have accomplished very much internationally--nothing, at any rate, that could not be turned around in short order by a subsequent administration--unless it puts reform of the *culture* of policymaking in the international arena at the center of its thinking about international affairs, starting with what even ought to be available for discussion within international fora. The symbols matter and the symbolic confrontations matter because culture, obviously, is about symbols.

Lest anyone think that by refusing symbolic confrontations, the underlying issues go away, rethink the lessons of the Clinton administration. On landmines, for example, it became rapidly impossible to conduct even a discussion with the military about the technical possibilities of replacing anti-personnel landmines with something else, in large part because of the symbolic importance the issue had achieved. Within the Pentagon it became a kind of poster child, a symbol of what international NGOs would do if they had their way on *any* issue; there would be no end to their meddling because the issue was not about landmines as a weapon per se but instead about the reach of international NGOs and international organizations in combination over US sovereign affairs. And this was a perfectly rational conclusion since that is what both the international NGOs and international organizations repeatedly asserted. The Clinton administration responded in Clintonian fashion by professing to feel the pain of the landmines ban movement while doing nothing of any consequence. The same pattern of "feel your pain" but do relatively little was repeated in many ways in the Clinton administration's foreign policy. Would it not be healthier, or at least more honest, for the Bush administration to make itself pointedly comfortable with an assertion of unapologetic democratic sovereignty, without making Albright-style speeches about how all of this is *really* in the long term interest of the liberal [*388] internationalist order into which the US would eventually meld itself, and then decide which positions urged by the international NGOs it would agree with and which not?

US administrations over time might find themselves more able seriously to debate the moral issues that international NGOs *do* oftentimes put forth with great eloquence, and even to change policy, if US administrations could draw clear, unequivocal lines based on mutually respected principles of democratic sovereignty. In so doing, they could cease worrying constantly about the unsated and insatiable appetites of international NGOs who want to shift power and governance to themselves and to international organizations. But the progressivist ideology of international NGOs and aspirations of international organizations egged on by European states, eager to lessen American power, does not make that a likely outcome in the foreseeable future.

Yes--one may as well be clear about it--international NGOs really do believe that they and international organizations ought to rule the world (with some help from Ottawa and Paris). Yet the Bush administration's pragmatic conservatism, focusing as it does on discrete, material issues and their outcomes, does not appear to grasp how the diffuse culture of international elites, celebrating the international as morally superior to the merely

democratic sovereign state, can (and often does) decisively set the atmosphere, the debate, and the outcomes of international policy to the detriment of democracy. This happens no matter how firm the US position on any particular international issue. The apparent result combines international NGOs, whose hubris exceeds their accountability, with a Bush administration that cannot understand that a series of individual actions, even sharp and controversial ones, such as throwing over Kyoto, do not add up to a change in the atmosphere of international affairs. Culture matters.

FOOTNOTES:

n1 Convention on the Rights of the Child, General Assembly Res No 44/25, UN Doc A/44/49 (1990).

n2 Convention on the Elimination of All Forms of Discrimination Against Women, General Assembly Res 34/830, UN Doc A/34/830, A/34/L.61 (1981).

n3 Kyoto Protocol to the United Nations Framework Convention on Climate Change ("Kyoto Protocol"), available online at <<http://www.unfccc.de/text/resource/conv/>> (visited Sept 30, 2001).

n4 See, for example, Jeremy Rabkin, *Why Sovereignty Matters* (AEI 1998).

n5 See, for example, Jack L. Goldsmith and John C. Yoo, *Seattle and Sovereignty*, Wall St J A35 (Dec 6, 1999); Curtis A. Bradley and 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 and Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 Harv L Rev 2260 (1998).

n6 See, for example, John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U Penn L Rev 1673 (May 2000).

n7 See, for example, John R. Bolton, *Is There Really "Law" in International Affairs?*, 10 Transnatl L & Contemp Probs 1 (Spring 2000).

n8 See Kenneth Anderson, *Secular Eschatologies and Class Interests of the Internationalized New Class*, in Peter Juviler and Carrie Gustafson, eds, *Religion and Human Rights: Competing Claims?* 107 (ME Sharpe 1999).

n9 See, for example, Human Rights Watch website, available online at <<http://www.hrw.org>> (visited Sept 30, 2001).

n10 See, for example, Amnesty International website, available online at <<http://www.amnesty.org>> (visited Sept 30, 2001).

n11 The academic law literature in favor of this formulation is legion. See, for example, John King Gamble and Charlotte Ku, *International Law--New Actors and New Technologies: Center Stage for NGOs?*, 31 L & Pol Intl Bus 221, 228 (2000), and the citations therein.

n12 See Jody Williams, *Nobel Lecture of Dec 10, 1997*, in *Les Prix Nobel 1997* 401 (Nobel Foundation 1998). Williams ended that lecture by echoing the words of the French ambassador at the close of the Oslo negotiations, who called the

landmines campaign historic "because, for the first time, the leaders of states have come together to answer the will of civil society." Id at 406.

n13 See, for example, *Citizens' Groups: The Non-Governmental Order: Will NGOs Democratize, or Merely Disrupt, Global Governance?*, 353 *Economist* 20 (Dec 11, 1999); *Non-Governmental Organizations: Sins of the Secular Missionaries: Aid and Campaign Groups, or NGOs, Matter More and More in World Affairs. But They are Often Far from being 'Non-Governmental', as They Claim. And They are Not Always a Force for Good*, 354 *Economist* 25 (Jan 29, 2000).

n14 David Rieff, speaking at a panel discussion on landmines and international civil society, Washington College of Law, American University (Feb 25, 1998).

n15 I discuss this symbiosis at greater length in Kenneth Anderson, "*The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society*," 11 *Eur J Intl L* 91, 112-120 (2000); and also in Kenneth Anderson, *After Seattle: Public International Organizations, Non-Governmental Organizations (NGOs), and Democratic Sovereignty in an Era of Globalization: An Essay on Contested Legitimacy* (unpublished ms. 2000), on file with the Chicago Journal of International Law.

n16 See *Citizens' Groups*, 353 *Economist* at 21 ("From environmental policy to debt relief, NGOs are at the centre of World Bank policy. Often they determine it.") (cited in note 13).

n17 As Annan has said directly to the NGOs, with the special reverence of a bureaucrat with something to gain by fulsomeness, "Not only do you [NGOs] bring to life the concept of 'We, the Peoples', in whose name our United Nations Charter was written; you bring to us the promise that 'people power' can make the Charter work for all the world's peoples in the twenty-first century." Kofi Annan, *Address to the Millennium Forum of May 22, 2000*, available online at <<http://www.globalsolidarity.org/artmilfor.html>> (visited Sept 30, 2001).

n18 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 36 *ILM* 1507 (1999).

n19 Peter Melchett, Executive Director of Greenpeace UK, as quoted in Justin Marozzi, *Whose World Is It, Anyway?*, *The Spectator* 14, 14 (Aug 5, 2000) ("Democratic governments are elected and have democratic legitimacy. Other organisations, such as Greenpeace, *The Spectator* and the *Guardian*, do not. We have the legitimacy of our market of who buys or supports us. I don't claim any greater legitimacy than that, nor do I want it").

n20 For a list of signatories, see Kyoto Protocol (cited in note 3).