LEGITIMACY THROUGH DEFIANCE: FROM GOA TO IRAQ

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> [The invasion of Goa] is a question of getting rid of the last vestiges of colonialism in India. That is a matter of faith with us. Whatever anyone else may think, Charter or no Charter, Council or no Council, that is our basic faith which we cannot afford to give up at any cost. . . .[1]
>
> - C.S. Jha, Indian delegate to the Security Council, December 8, 1961

> And the first step is to get the United Nations to prove to the world whether it's going to be relevant or whether it's going to be a League of Nations, irrelevant.[2]

> [T]he purposes of the United States should not be doubted. The Security Council resolutions will be enforced . . . or action will be unavoidable. And a regime that has lost its legitimacy will also lose its power.[3]
>
> - George Bush, September 2002

> Experience brings us to consummated transgression, successful transgression, which preserves prohibition – preserves it in order to derive pleasure from [its violation].[4]
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> - Georges Bataille, 1957

I. INTRODUCTION

"Speaking law to power" – the title of our conference implicitly evokes a valiant image of the international lawyer, striving to turn the ear of power away from the appeals of *realpolitik* and towards the claims of normativity. In this image, lawyers

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[1] U.N. SCOR, 16th Sess., 987th mtg., at 9, ¶ 40, U.N. Doc. S/PV. 987 (1961).

[2] Remarks by the President after Visit with Employees at Nebraska Avenue Homeland Security Complex, Sept. 19, 2002, *at* http://www.whitehouse.gov/news/releases/2002/09/20020919-7.html.

[3] President's Remarks to the General Assembly, Sept. 12, 2002, *available at* http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html.

[4] GEORGES BATAILLE, L'EROTISME 45 (1957) (translations by Nathaniel Berman unless otherwise noted).

present legal ways of framing political problems and those with power either collaborate with them or treat them with disregard. Such legal framing may conform to classical notions of law as a set of formal constraints on power or to Legal Realist-inspired notions of legal policy as structuring the exercise of power.[5] In either case, "speaking law to power" suggests that international norms are either seriously considered by political decisionmakers, invariably leading to adherence to law, or ignored by them, invariably ensuring violation of law.

In this talk, I want to focus on a very different set of phenomena, which I think recent events compel us to consider: those moments when those with power seek to legitimate violations of international norms, *not by disregarding* international law but rather *by virtue of the very fact that their actions violate* international law. This relationship between law and power would be directly contrary to that described in the preceding paragraph: in the moments to which I refer, those who violate international norms listen very attentively to the voice of law, indeed explicitly cite the law's requirements, but they do so in order to justify their actions precisely because those actions depart from those requirements. This relationship may be very difficult for international lawyers to accept; the notion that public awareness of international norms may serve to legitimate their violation puts lawyers in a difficult bind indeed. Nonetheless, I think it is undeniable that a wide variety of international actors over the past century have explicitly presented their actions as departures from

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[5] The Realist-inspired stance was concisely portrayed by Richard Bilder in his seminal article on the role of the U.S. State Department Legal Adviser's Office. Bilder wrote that attorneys in the Office tend to develop "a pragmatic or functional approach to international law – a tendency to view that law less as a body of fixed and unchangeable rules than as a flexible tool for use in forging real solutions to practical problems." Richard B. Bilder, *The Office of the Legal Adviser: the State Department Lawyer and Foreign Affairs,* 56 AM. J. INT'L L. 633, 680 (1962). Abram Chayes described a similar stance in his comments on the role of law during the Cuban missile crisis. Discussing the quarantine of Cuba during that crisis, Chayes compared the role of government international lawyers to corporate lawyers engaged in structuring a corporate decision. *See* Abram Chayes, *Remarks*, 57 AM. SOC'Y INT'L L. PROC. 10, 11 (1963). Despite their anti-formalism, I don't think that either Chayes nor Bilder doubted for a moment that the role of the legal adviser was to guide government action into the channels established by legal principles.

existing law and that they have sought thereby to gain legitimacy for their actions.

Far from signifying ignorance of international norms, such justificatory attempts are only possible in a law-saturated world. Only in a world keenly aware of legal requirements can such justificatory attempts gain their "edge" – their startling project of gaining approbation for their bold defiance of international law, of bidding for legitimacy through defiance. Those who seek legitimacy through defiance endeavor to turn their legitimacy-deficit, the deficiency of their actions when measured against the requirements of international law, into a surplus-legitimacy, a super-legitimacy gained through eliciting admiration of their courage in proceeding despite legal strictures.

I believe that bids for legitimacy through defiance have not been uncommon over the past century, particularly at moments of the highest importance for the international community. Such attempts have spanned the political spectrum – as suggested by my epigraphs, pairing an Indian diplomat at the peak of militant anticolonialism with an American president at the height of imperial unilateralism. Indeed, I think that the appeal of bold defiance of existing norms is one to which most of us are susceptible under the right circumstances – circumstances, to be sure, that will vary radically depending on each person's ethical and political persuasions. Only those who adhere to a strict code of *fiat jus, pereat mundus* will be absolutely immune to such appeals. Nevertheless, despite their importance, range, and appeal, bids for legitimacy through defiance have not been well understood by international lawyers – who mostly continue to adhere to the notion that the attention of the powerful to law leads almost invariably to some degree of collaboration by them with its demands.

When international lawyers have described actors who deliberately violate international norms while nonetheless seeking international approval, they have generally missed the point of bids for legitimacy through defiance. To be sure, attempts to understand intentional violation have proliferated in recent years, along with the increase in deliberate flouting of international norms. A variety of notions have emerged that try to capture the

meaning of recent developments, such as that of "illegal but legitimate"[6] actions or even of the "loss of meaning"[7] of a whole body of international norms. While such notions may accurately describe some recent phenomena, they fail to comprehend the legitimacy bids I have in mind – bids more accurately captured by notions such as "legitimate *because* illegal" or "legitimate because of the *meaningfulness* of the norms violated."

My thesis, then, is that bids for legitimacy through defiance constitute a crucial dimension of the role of law in international relations – one that has been little studied in legal scholarship. In order to bring out the distinctiveness of this dimension, I will compare bids for legitimacy through defiance with some more moderate attempts to gain an international imprimatur for actions that violate existing norms. Unlike bids for legitimacy through defiance, these more moderate attempts, which I call "legal innovation through violation" and "legitimation through competing normative coherence," have been debated by international lawyers. The examples of bids for legitimacy through defiance, to which I will contrast these more moderate bids, will be drawn from the Indian invasion of Goa in 1961 and the American invasion of Iraq in 2003. However, these examples are only illustrative. In fact, I think that once the phenomenon of legitimacy through defiance is recognized, a large field of research will be opened up into a key aspect of the role of international law.

I note at the outset that, in the examples that follow, I will often locate both "defiant" and "moderate" justifications of violation in pronouncements by the same government or even the same government spokesperson. Indeed, the pronouncements of the Indian diplomat C.S. Jha will appear as a veritable encyclopedia of possible justifications. I will turn to an explicit consideration of the meaning of this kind of cohabitation of heterogeneous forms of justification in Parts IV and V.

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[6] INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT 186 (2000).

[7] *See* Michael J. Glennon, *Why the Security Council Failed,* 82 FOREIGN AFFAIRS 16, 24–27 (MAY/JUNE 2003).

II. Innovation through Violation versus Legitimacy through Defiance

International lawyers have long discussed the impact of deliberate violation on normative validity. In relation to treaties, a number of situations may permit a state to violate its obligations, such as material breach by another party, impossibility of performance, and fundamental change of circumstances.[8] In addition, when numerous states adopt practices and legal views contrary to those embodied in their treaty obligations, it may be said that new principles of customary law, contrary to the treaty, have developed – and that the incompatible treaty obligations may be "deemed to have expired by mutual agreement or by desuetude."[9] A similar set of dynamics takes place in the context of customary law.

In a provocative formulation, Anthony D'Amato pointed to the most intriguing aspect of these dynamics with his assertion that "every violation" of customary international law "contains the seeds of a new rule."[10] The persuasiveness of D'Amato's startling phrase derives both from the dual role of states in the customary law process, at once legislators and addressees of norms, and from the decentralized nature of the process. As a result of these two factors, the development of new rules of customary international law "must consist always of violations of previous rules or else the rules would have been frozen many centuries ago."[11] For D'Amato, as long as deliberate violations of existing norms do not depart too radically from existing expectations of acceptable conduct, they may be viewed as "interactions that test the system"[12] or, to rephrase slightly, as bids to create new law.

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[8] Vienna Convention on the Law of Treaties, arts. 59–62, 1155 U.N.T.S., *opened for signature* May 23, 1969 331 (entered into force Jan. 27, 1980).

[9] Restatement (Third) of Foreign Relations Law § 102, reporter's note 4 (1987).

[10] Anthony D'Amato, *The Theory Of Customary International Law*, 82 Am. Soc'y Int'l L. Proc. 242, 246 (1988).

[11] *Id.*

[12] *Id.* at 247.

The success of such bids will depend on whether other states join with the violator in rendering the old rules obsolete. As D'Amato explains:

> So, in one sense a state can violate international law but in another sense it creates the law. Now, how can we reconcile these two possibilities? Well, because of the reactions of other states. You try to do certain things. The United States might take a forceful military position and then maybe back off if it turns out that it doesn't wash with the international community.[13]

Thus, while such violations violate the law "in one sense," they are very much pro-law actions "in another sense" – attempts to participate in the system by engaging in law reform, through inviting other states to adopt a new rule. Only in retrospect, after the "reactions of other states," will we know whether the action in question will be recorded as a violation or as the first such action to be deemed legal under a new rule.

In the passage just cited, D'Amato gives an example of a somewhat isolated attempt to "test the system" through a borderline violation of the prevailing understanding of existing norms. However, one may point to other examples in which states have "tested the system" not to make incremental changes in specific norms, but rather to make large-scale legal change.

Striking examples of such macro-bids to gain acceptance for new legal norms may be found in the attempts, during the 1950s and 1960s, to enshrine anticolonialism in international law – particularly in relation to the use of force. Such attempts were, "in one sense," attacks on existing norms, attacks that took place both in the realm of discourse and on literal battlefields throughout the colonized world. And yet, "in another sense," they were very much attempts to participate in the legal process through law reform.

International debate during the Indian invasion of the Portuguese colony of Goa provides a rich trove of formulations of the

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[13] *Id.* at 246.

meaning of deliberate violation of existing norms. In one formulation, C.S. Jha, the Indian U.N. ambassador, articulated the relationship between the Indian action and prevailing norms in terms strikingly close to those of D'Amato:

> International law is not a static institution. It is developing constantly. If international law would be static, it would be dead driftwood, if it did not respond to the public opinion in the world. And it is responding every day, whether we like it or not. . . . [T]he process of decolonization is irreversible and irresistible . . . . [embodied in] the principles in resolution 1514 (XV). . . . That is the new dictum of international law. That is how international law is made . . . .[14]

In response to well-founded charges of a *prima facie* violation by India of Article 2(4), Jha thus described international law as a set of norms that respond, willy-nilly, to "irreversible and irresistible" forces such as decolonization. Actions that may have once been considered violations of Article 2(4) may no longer be so considered due to such forces. In the "new dictum," a state using force to seize territory it claims to have possessed prior to colonization raises "no question of aggression"[15] – even when that colonial occupation has lasted for 450 years, during which time the claim to sovereignty it embodied was fully endorsed by prevailing international norms.

This argument can be viewed as reflecting a deep commitment to law, a commitment to work within the legal process by seeking to change international norms and to enshrine the new norms in authoritative legal instruments. To be sure, the intense passion with which such arguments were made derived from their fierce opposition to prevailing norms. Far from advocating a marginal adjustment to existing norms, Jha was arguing for the killing off of a whole body of norms in favor of new ones. In one of the many famous passages from his pronouncements in the Security Council during the Goa invasion, Jha declared:

> If any narrow-minded legalistic considerations – considerations arising from international law as written by European law writers – should arise, these writers were, after all,

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[14] U.N. SCOR, 16th Sess., 988th mtg., at 17, ¶ 79, U.N. Doc. S/PV 988 (1961).

[15] *Id.* at 11, ¶ 46.

> brought up in the atmosphere of colonialism. . . .[W]e accept many of the tenets of international law. . . . But the tenet which . . . [supports] colonial powers having sovereign rights over territories which they won by conquest in Asia and Africa is no longer acceptable. It is the European concept and it must die.[16]

Nonetheless, despite the fierce imagery of this passage, it may still be viewed as operating within the law reform context: Jha was advocating the death of the customary law norms that had legalized colonial conquest and their replacement by new norms that legalize military anticolonialism. Rather than a deliberate departure from international legal process, this passage constitutes an argument, however passionate, within it. Specifically, it is an argument that the *prima facie* violation will soon be properly viewed as a wholly legal action – indeed, that the violation is part of the process that will bring about that transformation.

If this passage brings us to the limit of bids for legal innovation through violation, another strand in Jha's pronouncements takes us to a very different kind of bid, a bid for legitimacy through defiance.

> [The invasion of Goa] is a question of getting rid of the last vestiges of colonialism in India. That is a matter of faith with us. Whatever anyone else may think, Charter or no Charter, Council or no Council, that is our basic faith which we cannot afford to give up at any cost.[17]

In this explicit opposition between "faith" and law, Jha no longer presents the invasion of Goa as a matter of participation in the evolution of customary international law. Rather, it becomes a matter of transcendent belief incommensurate with legal requirements. Indeed, Jha's expression of anticolonial faith is intextricably tied to a passionate and eloquent denigration of law: "*Charter or no Charter, Council or no Council, that is our basic faith*." This contempt for law, or at the very least, its subordination, is just as crucial to the rhetorical force of this passage as its proclaimed commitment to the anticolonial creed.

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[16] U.N. SCOR, 987th mtg., *supra* note 1, at 11, ¶ 47.

[17] *Id*. at 9, ¶ 40.

Krishna Menon, Indian Defense Minister during the Goa crisis, gave his own take on the affair in later years – still making the defiance of international norms the explicit keystone:

> Had the Security Council intervened, we would not have stopped the action [to take Goa by military force]. We had learned some lessons. . . . The nation that behaves well is always in a bad position.[18]

Like Jha, Krishna Menon thus explicitly declared India's deliberate intention to violate its obligations under the Charter.

In some contrast to Jha, though, the more roguish Menon's rhetoric was not principally one of lofty commitments to a faith. Menon explicitly emphasized the importance of violation *as* violation – the importance of "not behaving well." This emphasis, implicit in Jha's rhetoric, is stated bluntly by Menon, a practitioner of hardball political strategy. The advantage gained by India's actions, the attempt to gain a "good position" in geopolitical maneuvering, depends on appearing as a nation that does not adhere to prevailing rules. Indeed, it might only be a slight exaggeration to say that, for Menon, the more disapprobation expressed by the Security Council, the stronger India's position would have been.

III. Competing Coherence of Norms Versus Legitimacy through Defiance

I now turn to consider the relationship between legitimacy through defiance and a very different set of bids for international approval for actions that appear as *prima facie* violations of existing norms. These other bids advocate a reordering of the hierarchy of international norms and argue that, within this reordered normative hierarchy, the actions at issue will no longer appear as violations. Such bids share with those for innovation through violation the quest to legalize actions that appear as violations under the prevailing understanding of existing norms. Unlike innovation through violation, however, bids for a reordered normative hierarchy do not require the replacement of old

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[18] Michael Brecher, India and World Politics: Krishna Menon's View of the World 133 (1968).

norms by new and incompatible norms. Rather, they seek to legitimate a competing account of how *existing* norms cohere within the overall doctrinal structure.

In thinking about such bids, I take as my starting point Tom Franck's important insight that the coherence of international norms often play an important role in their legitimacy[19] – but I would lay greater stress on the fact that a number of incompatible accounts may plausibly be given of that coherence. Those who seek to legitimate an alternative account of the coherence of international norms argue that their actions only appear to be violations because of the inferior, prevailing account. The alleged violators contend that a better account of the coherence of the norms would reveal their actions to be in compliance with existing norms.

Such legitimation through competing coherence may take a variety of forms. In what follows, I discuss two of these forms, which I call the "teleological interpretation" and "synergy" variants, and contrast them with my main concern, bids for legitimacy through defiance.

A. Teleology Versus Defiance

The militant anticolonialism of the decades that followed World War II also provides important historical examples of bids for legitimacy through a competing account of the coherence of existing norms. During these decades, anticolonialists sought to legitimate the use of force in the face of Article 2(4) through this technique – as well as through the technique of innovation through violation as described in the preceding section. Plausible opposing positions in debates about the legality of anticolonial armed force were made possible by the text of the Charter itself. The Charter contains *both* rules limiting the use of force *and* passages that may be read as favoring the elimination of colonialism, such as the Preamble and Article 73.

The latent conflict between these two values continually came to the fore during the decolonization decades, as in the

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[19] Thomas Franck, The Power of Legitimacy Among Nations 150–82 (1990). Of course, in bids for innovation through violation, it is precisely the departure of the proposed new norm from existing norms that the violator is seeking to legitimate.

elaborate debates during the Goa crisis. In these debates, delegates offered a variety of competing views about how these values should be hierarchically arranged in order to give the most coherent reading of the Charter. Overtly pro-colonial states denied that the drafters of the Charter had any intention of abolishing colonialism. The United States, by contrast, proclaimed its anticolonialism, but contended that the correct reading of the Charter dictated giving priority to force-limitation norms. In the words of Adlai Stevenson, the U.S. delegate, "[w]e are against colonialism and we are against war: we are for the Charter."[20]

Militant anti-colonialists, by contrast, sought to legitimate the use of unilateral armed force by offering a different account of the hierarchy of the values they asserted were embodied in the Charter. Indeed, C.S. Jha contended that the pro-colonial and U.S. readings were bad accounts because they did not even try to make the various Charter values cohere, but simply privileged a literal interpretation of isolated provisions:

> [T]oo literal an interpretation of the Charter would mean . . . the permanent denial of freedom. . . .A large part of the Charter is devoted to the attainment of self-government or independence by dependent peoples. . . . [T]he Charter is, indeed, silent as to the remedies . . . . [M]any colonial powers and their friends . . . made use, when it suited them, of the provisions of the Charter relating to the non-use of force . . . . To people under colonial rule, this was . . . a misuse of the Charter. They considered that the Charter provisions . . . should not be used for preventing or delaying the freedom of peoples from suppression and foreign domination.[21]

For Jha, the presence of anticolonial values in the Charter meant that Article 2(4) could not be read in isolation. Rather, he argued that the Charter's valorization of self-determination and its silence about remedies for colonialism left room for reasoned argument about the relative priority to be given to self-determination and the non-use of force. And given that the probable

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[20] U.N. SCOR, 988th mtg., at 20, ¶ 92.

[21] C.S. JHA, FROM BANDUNG TO TASHKENT 152, 161 (1983).

outcome of giving priority to the latter would be the perpetuation of domination, the Charter as a whole would be a more coherent document if force-limitation were subordinated to anticolonialism.

To be sure, Jha's charge of literalism against his opponents was unfair. Pro-colonialists could plausibly argue that the Charter did not intend to bring about the end of colonialism. The U.S. could plausibly offer teleological arguments to support its notion that the Charter gave priority to the non-use of force – especially given the specificity of the force-limitation provisions and the generality of the passages that might be read as disfavoring colonialism.

Nonetheless, Jha would have been on very solid ground if he had not framed the issue as teleological interpretation versus literalism, but rather as a debate between *competing ways of giving a coherent teleological reading* of the Charter. All the contending readings, the Indian, colonialist, and American, were plausible ways of making the Charter cohere.[22] Yet, the reading offered by the militant anticolonialists offered a new and compelling account, an account that gained the assent of much of the world, even if it remains highly controversial.[23]

Successful or not, such bids for legitimacy through competing coherence are very much at odds with bids for legitimacy through defiance. When Jha was seeking to establish the legality of the invasion of Goa by offering a competing way of making

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[22] The historical truth is that the Charter's provisions about colonialism codified compromises between pro-colonial states and the pro-decolonization United States – or, more precisely, between pro-colonial states, their sympathizers in the U.S. government, and the pro-decolonization elements in the U.S. government. *See* WILLIAM ROGER LOUIS, IMPERIALISM AT BAY 351–73 (1978). *See also* Nathaniel Berman, *In the Wake of Empire,* 14 AM. U. INT'L L. REV. 1515, 1531–32 (1999).

[23] While most of the world acquiesced in the Indian invasion of Goa, it rejected claims that had a similar structure made by Indonesia over East Timor and Iraq over Kuwait. Of course, the fact that the claims had a similar structure does not make them equally meritorious on the facts. For an analysis of the reasons for the success of the Indians in gaining acceptance for their action, see THOMAS FRANCK, RECOURSE TO FORCE 114–29 (2002). On a somewhat different issue, intervention by a state on behalf of anticolonial forces fighting another state, see the debate joined in *Nicaragua v. U.S.*, 1986 I.C.J. 14 (June 27). The majority implicitly seemed to favor such intervention, *see id.* at 108, while Judge Schwebel vociferously opposed it, *see id.* at 350–51 (Schwebel, dissenting).

the Charter read coherently, he was doing something quite different than when he was declaring, "Charter or no Charter, Council or no Council, that is our basic faith which we cannot afford to give up at any cost." Similarly, when Menon declared that India would not have stopped the invasion even "had the Security Council intervened,"[24] he was not offering a better reading of the balance of Charter values. Rather, he was demonstrating an understanding of the legitimacy to be gained through defiance, an understanding that "[t]he nation that behaves well is always in a bad position." The "lessons" that Menon tells us that India "had learned," were precisely the lessons of the strategic use of bold defiance of existing norms, not their reinterpretation or reordering.

B. Synergy Versus Defiance

A set of arguments structurally similar to those found in the military anticolonialism debates may be found in discussions of humanitarian intervention in international law, particularly during the 1990s. Such debates were made possible by the coexistence in current international law of fundamental norms about *both* force-limitation *and* ending large-scale human rights violations. The question of which set of norms should prevail in a given situation requires, not negating one or the other, but deciding which occupies a higher hierarchical position. The opposing sides in such debates thus offer alternative accounts of how force-limitation and rights-enforcement cohere in the overall legal structure.

If the currently prevailing account gives priority to Article 2(4) at the level of substance and the Security Council at the level of procedure, the competing account attempts to give priority to human rights norms. This competing account argues for the need to "weigh the prohibition of violence" against "other values"[25] and contends that a correct "balancing out of the major

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[24] Brecher, *supra* note 18, at 133.

[25] Jean-Pierre Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter*, 4 Cal. W. Int'l L.J. 203, 256 (1974).

purposes of the Charter"[26] would authorize humanitarian intervention under existing norms. Such arguments would closely parallel the kind of opposing teleological interpretations discussed above in the anticolonial force context. Like advocates of military anticolonialism, advocates of humanitarian intervention would argue that provisions like Article 2(4) must not be read in isolation but rather in a manner that gives coherence to the Charter as a whole.

A quite different form of bids to legitimate a competing account of the coherence of existing norms surfaced in relation to Kosovo. The NATO intervention over Kosovo appeared to be a *prima facie* violation of Article 2(4) and to lack Chapter VII authorization. Some defenders of the intervention, including official spokespeople, did something other than offer a competing teleological interpretation of the Charter. Rather, they combined arguments based on norms and processes embodied in the Charter with those lying outside the Charter – including some of controversial legal status. They sought to efface the Charter-based *prima facie* illegality of the intervention by urging that attention to an expanded notion of relevant normative elements would yield a new normative hierarchy. Such elements included the Security Council resolutions bringing the situation in Kosovo under Chapter VII as well as a variety of extra-Charter factors – the latter including non-U.N. institutions such as NATO and norms about humanitarian intervention that most international lawyers have always viewed as never quite "ripe" enough for customary international law. From a strict Charter perspective, these extra-Charter norms and processes have no validity outside the legal hierarchy established by the Charter – as exemplified in the ban on enforcement actions by regional organizations without prior authorization by the Security Council under Chapter VIII. Nonetheless, the defenders of the intervention argued that Charter and extra-Charter values had interacted in such a way as to reorder the normative hierarchy of the international law of force as a whole. The defenders sought thereby to subordinate some of the formal requirements of the Charter to more controversial extra-Charter norms and processes.

In Bruno Simma's concise description:

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[26] *Id.* at 253.

> Indeed, one is immediately struck by the degree to which the efforts of NATO and its member states follow the "logic" of, and have been expressly linked to, the treatment of the Kosovo crisis by the Security Council. . . .U.S. Deputy Secretary of State Strobe Talbott referred to an "unprecedented and promising degree of synergy" in the sense that the U.N. and NATO, among other institutions, had "pooled their energies and strengths on behalf of an urgent common cause"; as to the specific contribution of the U.N., he saw this in the fact that "the U.N. has lent its political and moral authority to the Kosovo effort."[27]

Simma thus identified NATO as engaged in an attempt to legitimate a competing coherence of the international law of force through "synergy" between Charter and extra-Charter norms and processes. Borrowing the authority "lent" by the U.N., NATO sought to produce a new reading of an expanded body of international norms, both those rigorously entrenched in law and those, like humanitarian intervention and regional enforcement action without Security Council authorization, that have long led a kind of shadowy legal existence.

The success of both kinds of bids for legitimation through competing coherence, like bids for innovation through violation, will only be known in retrospect. Thus, despite his compelling articulation of the "synergy" argument in relation to Kosovo, Simma remained unpersuaded: "[D]espite all this 'synergy,' closeness and interrelatedness of NATO and U.N. engagements in the Kosovo crisis, there is no denying the fact that a requirement of Charter law has been breached."[28] Though Simma rejected this bid, it did persuade much of the world – whether in terms of a legal argument about humanitarian intervention or in the form of the mitigation argument that Tom Franck has put forward.[29]

Again, whatever their ultimate success, such bids for legitimacy through competing coherence are very much at odds with bids for legitimacy through defiance. An attempt to blend *prima*

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[27] Bruno Simma, *NATO, the UN and the Use of Force*, 10 EUR. J. INT'L L. 1, 11 (1999).

[28] *Id.*

[29] FRANCK, *supra* note 23, at 174–91.

facie extra-legal norms and processes with prevailing legal conceptions is very different than an overt attempt to gain legitimacy through defying the legal system. "Synergy" bids, no less than bids for competing teleological interpretations, present actions that look like *prima facie* violations of international law as actually consistent with law, even if they argue for a substantial reconfiguration of the normative hierarchy.

The contrast between bids for competing coherence and for legitimacy through defiance clearly emerges when we turn to U.S. pronouncements about the 2003 invasion of Iraq. A close reading of such pronouncements reveals at least two major strands of justification, a legality strand and a defiance strand. In the legality strand, the U.S. and the U.K. tried to build an argument under existing rules – either the rules as interpreted in the prevailing view or as reordered through the competing coherence technique. The first form of the legality strand consisted of an argument that had been persistently advanced by the U.S. and the U.K. during the dozen post-Gulf War years – an argument based on the continuing validity of Resolution 678 of November 1990, the Gulf War use of force resolution. The argument was that material breaches by Iraq of Resolution 687 of April 1991, the Gulf War cease-fire resolution, served to reactivate Resolution 678 – and thereby to authorize states to forcibly compel compliance. This argument was supplemented by the argument that Resolution 1441 of November 2002, finding Iraq in material breach of its obligations, implicitly provided Security Council approval for such a reactivation of Resolution 678.

The second argument for the legality of the invasion focused on the fact that Resolution 1441 not only found Iraq in material breach of its obligations but also threatened it with "serious consequences." This argument somewhat displaced the centrality of Resolution 678, on which the U.S. and the U.K. had relied for 12 years without any new threats by the Security Council. Reliance on 1441's "serious consequences" language made the pro-invasion argument very much like the "synergy" argument in relation to Kosovo. The U.S. and U.K. were arguing that the Security Council had come as close to authorizing force as possible without making that authorization explicit, and extra-Charter norms

and processes would carry the justification to its ultimate conclusion. Indeed, U.S. officials explicitly cited the Kosovo parallel.[30]

However, there was a quite different strand in U.S. pronouncements, the strand of defiance. In this strand, the failure of the Security Council to authorize the invasion did not provide a half-way justification that could then be supplemented by extra-Charter norms and processes. On the contrary, in the defiance strand the Security Council's failure to authorize was neither glossed over nor minimized – for it served to underscore the moral integrity of those who would undertake an invasion without legal authority. In short, it was the very lack of Security Council approval that provided legitimacy for the invasion, legitimacy through defiance. As Bush declared on the eve of the invasion:

> [S]ome permanent members of the Security Council have publicly announced they will veto any resolution that compels the disarmament of Iraq. These governments share our assessment of the danger but not *our resolve* to meet it.

Many nations, however, do have the *resolve and fortitude* to act against this threat to peace, and a broad coalition is now gathering to enforce the *just demands* of the world. *The United Nations Security Council has not lived up to its responsibilities, so we will rise to ours*.[31]

In a paradigmatic instance of a bid for legitimacy through defiance, Bush thus sought to gain approbation for the position of the U.S. precisely by contrasting it with the position of the Security Council – rather than by any "synergy" with it. Bush painted a tableau in which American "resolve and fortitude" were intended to stand out by virtue of their contrast with the irresponsible irresoluteness attributed to the Security Council.

This pronouncement followed a series of statements by Bush in the same spirit. For example, on September 19, 2002, Bush

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[30] On October 20, 2002 Collin Powell stated: "the President believes he now has the authority and with a new resolution with continued violation on the part of the Iraqis, the President has authority, as do other like-minded nations, just as we did in Kosovo." *See This Week with George Stephanopoulos: National, International Issues Conversation with Colin Powell* (ABC television broadcast, Oct. 20, 2002). *See generally* Glennon, *supra* note 7.

[31] George W. Bush, Address to the Nation on Iraq, 39 WEEKLY COMP. PRES. DOC. 338–39 (Mar. 17, 2003) (emphasis added).

declared that "the first step is to get the United Nations to prove to the world whether it's going to be relevant or whether it's going to be a League of Nations, irrelevant."[32] Again, this statement did not use Security Council resolutions as halfway measures toward a full justification, but rather clearly asserted the right to violate the Charter – indeed, the right to ensure, by undertaking action in defiance of the Security Council, that the U.N. would follow the League of Nations to an untimely grave.[33] This message echoed one that Bush had made before the General Assembly a week earlier, on September 12, 2002:

> We will work with the U.N. Security Council for the necessary resolutions. But the purposes of the United States should not be doubted. The Security Council resolutions will be enforced – the just demands of peace and security will be met – or action will be unavoidable. And a regime that has lost its legitimacy will also lose its power.[34]

In this passage, Bush also asserted the resolve of the United States to proceed *without* the United Nations if a use of force resolution was not forthcoming. Moreover, while the last statement in this passage ("a regime that has lost its legitimacy will also lose its power") may be read as referring to the Iraqi government, it also may be read as directed at the U.N. – whose imminent demise, in the manner of the League, Bush would explicitly threaten to bring about a week later. While in this earlier speech, Bush's references to the League's demise as foreshadowing that of the U.N. were not quite as brutal, they were nonetheless clear.[35]

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[32] Remarks by the President After Visit with Employees at Nebraska Avenue Homeland Security Complex, *supra* note 2, at 2.

[33] *See also* Richard Perle, *Thank God for the death of the UN*, THE GUARDIAN, Mar. 21, 2003 at 26. Perle was chairman of the Defense Policy Board, an advisory panel to the Pentagon.

[34] President's Remarks to the General Assembly, September 12, 2002, *available at* http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html.

[35] In this speech, Bush had stated that "We created the United Nations Security Council, so that, unlike the League of Nations, our deliberations would be more than talk, our resolutions would be more than wishes." Bush thus again implied that if the U.N.'s deliberations proved to be mere "talk," i.e., without an authorization of the invasion of Iraq, it would meet the fate of the League, as he had explicitly stated on September 12th. *Id*.

C. Comparative Defiance

A comparison of the cases of Goa and Iraq can serve to highlight differences among bids for legitimacy through defiance. Like Jha and Menon, Bush asserted that his defiance would continue in the face of explicit U.N. opposition; also like Jha and Menon, his rhetoric implied that it was precisely the defiant nature of illegal actions that would render them legitimate. Yet, in a more radical bid than those of Jha and Menon, Bush raised the ante by declaring that the U.S. would persist in its defiance even though that defiance could bring about the destruction of the U.N.

To be sure, the death of the U.N. in the manner of the League of Nations was also invoked during the Goa crisis. During that crisis, however, it was invoked by a vociferous critic, rather than a defender, of the *prima facie* illegal use of force. Ironically, it was an American, U.N. Ambassador Adlai Stevenson, who raised the specter of institutional demise as a result of the Indian invasion. If the U.N. were to "condone" the action, Stevenson intoned, it would "die as ignoble a death as the League of Nations."[36] The distance between the bids for legitimacy through defiance in the two crises is encapsulated by the fact that bringing ruin to the U.N. was the ultimate charge *against* the defier over Goa, while it was made the ultimate rhetorical flourish *by* the defier over Iraq. Taken together, Bush and Stevenson show the power of bids for legitimacy through defiance, experienced in the ecstasy of the defier and the anxiety of the defied, to shake the international system to the core.

Of course, another striking difference between the two incidents is the relative success of the bids for legitimacy. The Indian bid won the approbation of much of the world. The U.S. bid, by contrast, succeeded mainly in exacerbating tensions between the U.S. and most of its most important allies, indeed, in making Iraq a pawn in the struggle among powerful countries for international leadership.

A variety of factors may account for the difference in the success of these bids for legitimacy, though any such explanations require a measure of speculation. First, the two bids may be distinguished in terms of their relative attention to identifying their

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[36] U.N. SCOR, 987th mtg., *supra* note 1, at 17, ¶ 77.

addressees – a key element in considerations of legitimacy. The Indian bid was well-tailored for a large and growing international constituency, the newly independent, formerly colonized states. By contrast, it is unclear to what international constituency Bush imagined he was playing in defying the U.N. over Iraq – assuming one discounts the "old/new Europe" rhetoric as based more on wishful thinking than on political reality.

It is intriguing in this context to mention some of the conjecture about the "real motives" for the timing of the Indian invasion. Indian rhetoric about Goa heated up shortly after other post-colonial states had criticized India for insufficient anticolonial ardor.[37] The Indian action was thought by some to be a response to this criticism and an effort to reassert Indian leadership of the Third World. The framing of the invasion as defiance of prevailing international norms could only have bolstered this campaign.

A second reason for the relative success of the two bids may be that the rhetoric of defiance is less appealing when coming from a superpower than from a state that can plausibly present itself as championing those historically deprived of power. To be sure, effective defiance requires possession of a certain amount of power. Nonetheless, the ability of India to present itself as undoing a historical injustice and the unseemliness of the U.S. presenting itself as a maverick may do much to account for the divergent reactions to the two bids.

The fact that, at least according to realist theories of international relations, a "single superpower" may be expected to regularly serve its own interests by defying international norms does not serve to make that defiance very attractive. Moreover, from a more arational perspective, since the rhetoric of defiance depends for its force on a flight of passion, such rhetoric is closely tied to the charisma of its speaker. The charisma of the militant anticolonialist, the guise in which Menon and Jha presented themselves, has an appeal that the charisma of the overconfident hegemon, the guise in which most of the world saw Bush, simply does not.

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[37] *See* Quincy Wright, *The Goa Incident,* 56 AM. J. INT'L L. 617, 629 & n. 36 (1962). *But see* the denial of this suggestion by Krishna Menon in BRECHER, WORLD POLITICS, *supra* note 18, at 135–36.

As I stated in my introduction, this close analysis of two examples of bids for legitimacy through defiance should serve to open a whole new field of research into the role of law in international relations. The period between the World Wars, to cite one large research area, was rife with such bids, made by political actors all over the political spectrum. These bids included pronouncements from the left, notably from that portion of the French left disgusted with international law due both to its past use in justification of World War I as a "war of law" and its continued use in defense of colonialism.[38] They also included pronouncements from the right, notably from those on the French right who supported the 1935 Italian attack on Ethiopia by heaping scorn on the "false juridical universalism"[39] of the League. And they included pronouncements from the center, notably from some who defended the 1938 Munich Agreement dismembering Czechoslovakia. The Munich Agreement was a violation of the substantive and procedural norms of the League of Nations. Yet, in an editorial entitled "An Overshadowed Assembly," the Times of London applauded the agreement, arguing that the international conclave in Munich embodied the "spirit of Geneva"[40] – implying that only international law's dead letter remained at the League's Swiss headquarters. For this kind of commentary, the *a priori* illegal diplomatic efforts of the late 1930s – such as the Munich Agreement and similar, abortive attempts to deal with Italy's claim to Ethiopia – rightfully snubbed

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[38] See the following comment by the writer René Crevel, protesting against a French colonial campaign in Morocco, the "War of the Riff": "[T]he government's appeal to the laws of men, to treaties, to conventions – and we understand what they're really worth – forces us to state our contempt for the anti-Riffan enterprise." René Crevel, *Réponse*, 76 CLARTÉ 24 (1925). See also this comment by the anarchist writer Henry Poulaille:

> The war in Morocco? Obviously against. Against all wars. On the subject of this new 'last' war, what happens to the question of *Law?* Is the war in Morocco also a war of law? Then against law.

Henry Poulaille, *Réponse,* 76 CLARTÉ 21 (1925).

[39] *Manifeste pour la défense de l'Occident*, LE TEMPS, Oct. 4, 1935, at 1.

[40] *An Overshadowed Assembly*, Editorial, THE TIMES OF LONDON, Oct. 3, 1938, at 5.

the ossified League.[41] Indeed, from this perspective, it was precisely to the extent that such attempts defied the League's formalistic impasses that they would achieve legitimacy – paradoxically aligning the "appeasers" of the 1930s with the "preemptive attackers" of the 2000s.

Attention to legitimacy through defiance will serve to make legal histories of international relations more complex than narratives that rely on phrases like "the increasing (or declining) importance of law." Rather, violations of law may often serve as evidence of the power of law in public opinion – even if it is the power to give a super-legitimacy to violations. This new perspective may also shed light on the fact that periods in which international law rises to new heights of prestige may also be those in which lawlessness appears to be everywhere – and we need look no farther than the period since 1989 to verify this insight.

IV. Defiance and its Moderate Cousins

As I have noted, the rhetoric of defiance is often found in the company of its more moderate cousins, such as bids for legal innovation through violation and bids for legitimacy through competing coherence. I would insist on the notion that the rhetoric of defiance is of a radically different nature than these more moderate bids, expressing a will to defy the legal system rather than to reform it. Nonetheless, it is rarely found in isolation from them. The divergent rhetorics may be found dispersed among different spokespeople for the same government, they may be found in the pronouncements of a single official or policy text, and, finally, they may appear in a government's rhetoric at different moments of an unfolding crisis. I will consider each of these cases.

A similar set of explanations may be provided for the first two cases, in which contrasting rhetorics are divided among different spokespeople of a single government or cohabit within the pronouncements of a single official. In the case of differences among spokespeople, it may be that the government is divided

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[41] *See id.* To be sure, the Times' position, like that of C.S. Jha, oscillated between defiance and reform. While applauding the bypassing of the League, it also commended the British government for continuing to work within the League when possible and suggested a variety of reform proposals.

about which strategy to adopt; in the case of a single official's pronouncements, it may be that he or she is ambivalent about the competing strategies. It may also be that, in the course of a single speech, a spokesperson gets worked up into an ecstatic moment of defiant faith and then, once the exuberant moment has passed, returns to a more moderate rhetoric. Alternatively, in a more rational vein, it may be that the government or the individual spokesperson is attempting a calculated "good cop / bad cop" strategy: *either* cooperate with us and we'll attempt to work within prevailing legal processes, albeit in the form of seeking to reconfigure them; *or* oppose us and we'll resort to outright defiance, with grave and unpredictable consequences for the current crisis and the system as a whole.

In the case of divergent rhetorics appearing at different moments in the unfolding of a crisis, something else may be at work. During the heating up of a crisis, a moderate, reformist rhetoric may be supplanted by a rhetoric of defiance if the government finds that its bids for reform are not finding a receptive audience. Conversely, after a crisis has reached its boiling point, the government may find that it needs the cooperation of other actors in dealing with its aftermath. It may then move from a rhetoric of defiance to a rhetoric of reform or even a rhetoric of submission to prevailing notions of legality.

The Goa and Iraq crises presented a variety of these relationships between defiance and reform. As I noted at the outset, the pronouncements of C.S. Jha before the Security Council form a veritable encyclopedia of rhetorics, including bids for innovation through violation and for legitimacy through competing coherence, as well as for legitimacy through defiance. It is telling that when Jha reflected years later on his performance during the Goa crisis, he declared that his statements of defiance – the very statements for which he has earned a place in histories of law and diplomacy – had been quoted "out of context."[42] I would argue, however, that the rhetoric of defiance is essentially one that is always "out of context," for it seeks to rend the fabric of acceptable discourse in its bid for a super-legitimacy. One might even say that the central feature of this rhetoric is that it *defies* "context." That one who has employed this rhetoric would seek to

[42] JHA, *supra* note 21, at 159.

domesticate it after the fact is not surprising. But that such domestication would have robbed the statements of their power at the time of their pronouncement is undeniable.

In the Iraq context, as I have noted, the U.S. issued arguments for the legality of the invasion under prevailing legal conceptions and under a competing coherence theory, in addition to the rhetoric of defiance. Moreover, in the year following the fall of Baghdad, the U.S. made a series of attempts to regularize the occupation under prevailing legal conceptions – for example, by seeking to put a Security Council imprimatur on the occupation. Such an after-the-fact imprimatur would have resembled that given by Resolution 1244 to the occupation of Kosovo.[43] However, the resolutions on the occupation of Iraq that resulted from this effort stopped short of transforming the occupation into a Chapter VII operation.[44] This diplomatic disappointment for the U.S. was due to its partial insistence on continued defiance in its refusal to turn the occupation over to a U.N. body, as was done in Kosovo with UNMIK.

In its conduct of the occupation, the U.S. also engaged in a bid for legal innovation through violation. For example, the far-reaching overhaul of the Iraqi economy and polity undertaken by the Coalition Provisional Authority would be impermissible under the traditional rules of occupation – embodied in the mandate of Article 43 of the Hague Regulations to "respect[,] unless absolutely prevented, the laws in force in the country."[45] Rather than engage in outright defiance of the legal system, the U.S. argued that the traditional rules needed to be amended to take account of situations like post-Saddam Iraq. Here the U.S. met with greater success, even though the Security Council called on the occupiers to conform to their obligations under traditional

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[43] *See* S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/Res/1244 (1999).

[44] *See* S.C. Res. 1483, U.N. SCOR, 4761st mtg., U.N. Doc. S/Res/1483 (2003), and S.C. Res. 1511, U.N. SCOR, 4844th mtg., U.N. Doc. S/Res/1511 (2003). While the first resolution was quite careful not to imply an approval of the occupation, the second resolution "*authorize[d]* a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq." Resolution 1511 ¶ 13. The resolution implied that the force mentioned in paragraph 13 was the U.S.-led occupation force. *See id.* ¶¶ 13, 25.

[45] Hague Convention No. IV, Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, art. 43, 36 Stat. 2277, T.S. No. 539.

occupation law, including the Hague Regulations.[46] Despite this call, the international community consented to departures from the traditional legal restrictions on occupiers – for example, in such Security Council measures as its recognition of the American-appointed "Governing Council and its ministers as the principal bodies of the Iraqi interim administration"[47] and in the admission of occupied Iraq to observer status in the WTO.

In both the Iraq and Goa cases, such moves back and forth between defiance and reform, whether of the innovation through violation or the competing coherence variety, highlight the intensely ambivalent nature of bids for legitimacy through defiance. On the one hand, such bids stake their success on deprecation of the legal system. On the other hand, they only derive their force from the existence of that system. Moreover, even those who engage in such bids usually wish to return to the normalcy of the legal system – once their passion wears off or when the set of strategic motivations that impelled them toward defiance are no longer pertinent.

A full understanding of this ambivalence and the force of the rhetoric of defiance would take us out of the realm of law to a broad interdisciplinary study, including such fields as psychology, sociology, and linguistics. In the next section, however, I seek to shed light on these issues not by turning to those realms, but to that of religion.

V. The Theology of Defiance

It is in religion, especially in religion's most ecstatic expressions, that we find the deepest articulations of the kind of human desires that surface in international relations in legitimacy through defiance. Such articulations may be found in a variety of religious traditions. For example, the Jewish Talmud, a legal and theological compendium completed around the sixth century, contains a number of sayings that tend in this direction. Among the more famous: "there are times when the annulment of the Law is its foundation"[48] and "it is time to act for God: thou shalt

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[46] S.C. Res. 1483, *supra* note 44, ¶ 5.

[47] S.C. Res. 1511, *supra* note 44, ¶ 4.

[48] Babylonian Talmud, *Tractate Menahoth* 99b.

abrogate the Law."[49] A similar spirit can be found in some strands of the Islamic tradition. In the words of Al-Junayd, a Sufi mystic of the turn of the tenth century: "God brings upon those that love him a kind of sudden and supernatural madness, in which a man may act and speak against the directions of religion."[50]

The idea of transgression as a mark of the highest religiosity expressed in such pronouncements is well described in the following passage:

> 'Transgressive sacrality' within a religious tradition is something completely different [from heresy] for, though violating the interdictions and observances of the tradition in question, it does not seek to replace the latter. Instead it lays claim to a superior degree and second order of spirituality derived precisely from the violation of socioreligious interdictions whose general validity and binding force is not at all questioned by the transgressor. In fact, transgressive sacrality cannot operate without the existence of such binding and powerful taboos, and often presents itself as an esoteric form of the mother-religion, the latter serving as the exoteric prerequisite and recruiting ground for it.[51]

Such a "transgressive sacrality," which draws its force from violations of "binding and powerful" norms, is strikingly similar to the phenomena I have identified in international relations under the rubric of legitimacy through defiance.

In the twentieth century, one of the most important theorists of these phenomena was Georges Bataille, novelist and heterodox philosopher of religion. Bataille's work took as its central puzzle "the profound complicity of law and the violation of

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[49] BABYLONIAN TALMUD, *Tractate Gittin* 60a. The quoted passage is a deliberate misconstrual of a passage from *Psalms* 119:126, translated in the King James Version as "It is time for thee, LORD, to work: for they have made void thy law." The Talmudic saying reverses the surface meaning of the verse by, among other things, revowelizing the letters for the Hebrew verb "to abrogate."

[50] GERSHOM SCHOLEM, SABBATAI SEVI: THE MYSTICAL MESSIAH 1626–1676 (trans. R. J. Zwi Werblowsky, 1973), *quoting* LOUIS MASSIGNON, I LA PASSION D' ALHALLAJ 36 (1922).

[51] Sunthar Visuvalingam, *Transgressive Sacrality in Hinduism & the World Religions*, *available at* http://www.svabhinava.org/tshwr/TSHWR.html.

law."[52] He examined a variety of societies that engaged in periodic, often collective, violations of some of their central prohibitions – followed by a return to normalcy. A transgressive moment of this kind does not constitute "a return to nature," to a pre-legal moment; rather, it "suspends the prohibition without suppressing it."[53] Indeed, it "preserves the prohibition – preserves it in order to derive pleasure"[54] from its violation. This kind of experience demands "as great a sensitivity" to the grave concerns which motivate the adoption of prohibitions as to "the desire which leads to their violation"[55] – for only those fully aware of the gravity of the prohibitions can achieve the ecstatic religiosity derived from their violation. And only when the prohibition is experienced in all its force can it serve to stamp its violator with "an accursed glory."[56] Those who attain such "glory" achieve in relation to a religious community what successful bidders for legitimacy through defiance achieve in relation to a legal community.

Turning to international relations, we can bring back a number of insights from this brief religious excursus. First, those who seek legitimacy through defiance, like those who participate in "transgressive sacrality," do not usually intend to bring about the destruction of the system whose norms they are momentarily defying. Rather, they need the system to be solidly in place in order for their defiance to appear as such. Moreover, as with transgressive sacrality, defiant international actors usually seek both to defy the existing normative system and to return to that normative system once the crisis has passed. In the international relations context, to be sure, such a desired return to normativity may include a desire for the system to accept some revision of its pre-crisis norms.

Finally, while most participants in "transgressive sacrality" seek to return to the normative system they defy, some religious movements that begin with such exceptional transgressions may

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[52] BATAILLE, *supra* note 4, at 43.

[53] *Id.* at 42.

[54] *Id.* at 45.

[55] *Id.*

[56] *Id.* at 55.

move toward a more permanent antinomian stance. For example, the Talmudic sayings quoted earlier were intended by their authors to apply to quite restricted circumstances, times of extraordinary need. Yet, these restrictions did not prevent later antinomians from citing them in support of a whole theology of "redemption through sin."[57] Such a move from extraordinary transgression to permanent antinomianism occurred in the Jewish messianic movement led by Shabbtai Zvi in the seventeenth century. Zvi originally engaged in public ritual violations at exceptional moments as a way of demonstrating his elevated status.[58] Eventually, though, he and many of his followers adopted a full-fledged antinomian stance, installing permanent violation of their normative system of origin as the foundation-stone of a new religious community.[59]

These alternative variants of transgressive sacrality find their parallels in the case studies I have looked at here. Jha's declamation – "Charter or no Charter, Council or no Council, that is our basic faith" – is a classic example of a defiant stance that depends on the solidity of the normative system for its rhetorical force. Moreover, it is clear, both from Jha's own statements and India's diplomatic stance generally, that the ultimate agenda was a return to the normative system – albeit a reformed normative system.

The Iraq case is more complex. As I have noted, the U.S. engaged both in the rhetoric of defiance and in normative and reformist rhetorics. And yet, as I argued, if we look only at its rhetoric of defiance, we find a more radical stance than that taken by India over Goa – a stance that seems to threaten the destruction of the normative system, or, more precisely, its institutional embodiment, the U.N. This kind of stance resembles antinomian religious movements – movements carried away by the ecstasy of exceptional transgression to a desire for a permanent suspension of the normative system.

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[57] *See* Gershom Scholem, *Redemption Through Sin, in* THE MESSIANIC IDEA IN JUDAISM 78 (1971).

[58] *See id* at 160–63.

[59] *See* GERSHOM SCHOLEM, MEHKARIM U-MEKOROT LE-TOLDOT HA-SHABATAÚT VE-GILGULEHA [STUDIES AND SOURCES IN THE HISTORY OF SHABBATEANISM AND ITS VICISSITUDES] 9–67 (1974).

Indeed, some commentators interpreted the implications of the U.S. stance over Iraq in this antinomian sense. Richard Perle, for example, declared the "death of the U.N." and its replacement by alternative communities, "coalitions of the willing"[60] – particularly those willing to defy the U.N.'s rules. For Michael Glennon, the antinomian implications of Iraq concern not international law generally or the U.N. as a whole, but rather a particular normative regime, the rules about the use of force. Glennon asserted that we have witnessed nothing less than the "death" of this body of rules. For Glennon, the permanent suspension of these rules became undeniable with "the dramatic rupture of the UN Security Council" over Iraq in 2003, when "it became clear that the grand attempt to subject the use of force to the rule of law had failed."[61]

It is undoubtedly too early to tell whether Glennon's obituary for *jus ad bellum* is premature. The above analysis, however, should suggest some caution. First, the U.S. has surrounded its rhetoric of defiance with other, more moderate stances in relation to the force-limitation rules. Secondly, and more fundamentally, the analogy to transgressive sacrality suggests that we must go beyond the very compelling realist analysis Glennon marshaled to bolster his thesis.

For Glennon, the Security Council's "fate" has been "sealed" not by this or that crisis, but rather by a "shift in world power" towards "American unipolarity." Because the U.N.'s rules on force no longer reflect the "underlying" power dynamics of the international system, they have been simply "swept away." These realist theses are at the core of Glennon's argument.

The analysis of trangressive sacrality, however, suggests that it may well be the overt violator of fundamental norms who has the most at stake in maintaining those norms. Even if we try to maintain as realist a stance as possible, we may find that the U.S. can only keep proving to the world its status as the "sole superpower" if it is continually able to assert its prerogative to violate international rules. Once those rules no longer exist, it will have nothing to violate and no way to prove its transcendence of the system. Moreover, the U.S. would seem to have too much at

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[60] Perle, *supra* note 33.

[61] Glennon, *supra* note 7.

stake in maintaining the overall validity of international law and of the U.N. in particular for it to use its 2003 attack on force-limitation norms as the basis for a permanent antinomianism.

We may recast this analysis in even more purely power-politics terms. In order to maintain the distinctive form it has chosen for its hegemony in security matters, the U.S. must keep insisting that the rules are valid, but only for "normal" countries – that is, all countries except the U.S. and those in league with it. In contrast with normal countries, the U.S. transcends those rules; indeed, it will violate those rules precisely in order to ensure that others abide by them. In fact, was this not exactly the form taken by the U.S. justification for its invasion of Iraq?

Nevertheless, the analogy to antinomian movements suggests further complexities latent in the American position. The "coalition" that followed the U.S. into Iraq—the "coalition of the willing" or, in my terms, the "coalition of the defiant" – resembled, at least for the duration of the crisis, an incipient antinomian movement. It consisted of a group of states united by virtue of their willingness to defy international law, at least international law as interpreted by a majority of states and international lawyers. To the extent that the U.S. has a strong stake in maintaining the system it defied in relation to Iraq, the establishment of such an antinomian community poses grave threats. States inducted into such an antinomian community, and even some other states who may take such a community as their model, might well rely on the same defiance of *jus ad bellum* for their own foreign policy interests – even when those interests do not conform to those of the United States.

In the next section, then, I conclude by turning to a fuller discussion of the risks of defiance for the defier itself to which this discussion of the specter of antinomianism has led me.

VI. The Risks of Defiance

This talk has suggested a number of risks for those who stake their legitimacy on defiance of prevailing norms. First, there is the risk of failure of the bid, the risk that other states will simply reject the appeal for super-legitimacy made by the defier. The stakes of such bids are higher than those of more moderate, reformist bids.

Those who engage in more moderate bids risk only being perceived as violators of this or that norm, and perhaps only as tentative violators or even quasi-innocent violators who were mistaken about the law. Those who stake their legitimacy on defiance of the system, by contrast, risk being relegated to the status of pariahs. Instead of the super-legitimacy for which they had hoped, they may find their international status as a whole, not only the status of their specific actions, downgraded to a kind of sub-legitimacy. An example of efforts at such stigmatization is the ironic application of the term "rogue state" to the U.S. by current critics of American power.[62]

Another example was the reaction of President Kennedy to the invasion of Goa, a reaction that makes an explicit link to the religious themes discussed in the preceding section. Referring to the perception, especially in the West, that the state that invaded Goa had previously been lecturing the world about the virtues of nonviolence, Kennedy declared, "People were saying, the preacher has been caught coming out of the brothel."[63] In light of the analysis here, such a statement is not surprising: bidders for legitimacy through defiance, like those who engage in transgressive sacrality, stake all on achieving a super-legitimacy. If they fail, they will not be crowned with a halo of holiness but tarred with the brush of sordidness. While Kennedy's reaction was not shared by much of the world, it does show the risks run by a defiant state.

The second kind of risk is that suggested at the end of the previous section, the risk that the defier will not be able to control the consequences of its defiance. This may take the form of unwittingly licensing other states to defy norms that the defier wishes to preserve, at least for others. It may also take the form of fatal damage to the normative system, rendering a return to normalcy impossible.

One of the ways in which defiance can damage the normative system is through its assault on normative reasoning. Such an assault may have two dimensions. First, it suggests an unreal image of normal legal reasoning. By taking a defiant stance, the

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[62] *See, e.g.,* Burns H. Weston, *The United States: Imperial Rogue State* (2002), *available at* http://www.transnational.org/forum/meet/2002/Weston_USrogueState.html.

[63] Dennis Kux, Estranged Democracies: India and the United States, 1941–1991, 198 (1993).

defier implicitly projects the normal legal system as maintaining a single and unequivocal position on the actions at stake in the crisis. This image of legal reasoning, at least in the U.S., has been rejected by most legal thinkers since Holmes.[64] Such an ossified image of legal reasoning can do much to contribute to the delegitimation of law generally when its operational inadequacies become all too obvious.

Conversely, bids for defiance do not easily accommodate consensual criteria to determine when they are appropriate. The essentially immoderate force of such bids consists precisely in an assertion that the defier is unconstrained by such criteria.[65] Yet, if the appropriateness of defiance in each particular case must be independent of criteria that command community consensus, then the danger of full-fledged antinomianism, without limitation in subject matter or time, seems ever-present.

In conclusion, to seek legitimacy through defiance is extremely risky – legally, politically, morally, and cognitively. At

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[64] *See* OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Little, Brown, and Co. 1946) (1881): "The life of the law has not been logic: it has been experience . . . . [I]t cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." The effect of the elaboration of Holmes' insight by Legal Realism has been to make problematic the whole notion of an exceptional situation that "normal" law cannot handle. As Duncan Kennedy writes:

> In the postrealist legal universe, because the rule itself is so often malleable, so often subject to strategic inflection in the interpretive process, the judges dispose large stakes without worrying about defying their oaths. . . . This means that the Schmittian problem of "the exception" is the least of our difficulties. The temptation of the "exception" is unlikely to be the issue because the judge doesn't need such extreme measures, and the problem of malleability is pervasive rather than limited to situations of constitutional crisis involving '"ways of life." The judges will dispose, at least some of the time, according to criteria other than those built into the materials and the legal tradition.

Duncan Kennedy, *A Semiotics of Critique,* 22 CARD. L. REV. 1147, 1168 (2001). *See also* Kennedy's analysis of antinomianism, which identifies a set of phenomena related to those described in this talk. *Id.* at 1158–61.

[65] Kennedy, *supra* note 64, at 1165.

> Imagine a group that makes choices under a norm of deliberation that is understood as dialogue, in which each participant attempts to win the others over to a position by appealing to mutually acceptable or universalizable principles. When time runs out without agreement, the relationship of the actors is no longer dialogic but strategic.

Id.

the outset of this talk, I noted that the existence of successful bids for legitimacy through defiance places international lawyers in a most difficult bind. Such bids transform the admonitions of lawyers into tools for the powerful to legitimate courses of action that oppose international norms. If, however, we are all susceptible to such bids at various times, then we will have to live with them as part of the human condition. And if we are to give a full account of the role of law in international relations, the role of the lawyer in advising governments, or the paradoxical historical vicissitudes of international law's authority, bids for legitimacy through defiance are a force with which we must reckon.