

COSMOPOLITANISM, LAW AND THE CHALLENGE OF GLOBALISATION

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I. INTRODUCTION

‘[The whole idea of humanity] is an ideal of our reason. In this idea all the millions of rational beings on this earth are one, and this includes the past and the future ... It is this idea then that underlies the wishes and efforts of the cosmopolitan.’

Drost von Muller 1797¹

In July 2011, the Venice Academy of Human Rights held a week-long summer school on the subject of ‘Human Rights and the Cosmopolitan Idea(l)’ at San Nicolo Monastery, organised by the European Inter–University Centre for Human Rights and Democratization.² A group of forty scholars, academics, lawyers and post-graduate students from all parts of the world gathered to study and listen to four highly respected professors who have a special interest in international law and human rights: David Held, a political scientist from the United Kingdom;³ Boaventura de Sousa Santos, a legal sociologist from Portugal;⁴ OnumaYasuaki, a international legal scholar from Japan;⁵ and Abdullahi A. An-Na’im, a Sudanese-born academic who teaches in the United States.⁶ As a participant I studied, and engaged with these professors by raising questions about their theories and interpretations of international society.

This paper will evaluate critically the cosmopolitan legal theories raised at the Venice Academy with an emphasis on the tension and conflict between traditional Western liberal cosmopolitanism (‘global citizenship’ and world governance) and ‘subaltern’ cosmopolitanism (which prioritises the plight of economically and culturally oppressed peoples, such as Indigenous

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1 Drost von Muller, ‘Thoughts on Cosmopolitanism and Patriotism’ (1797) cited in Kevin Paul Geiman ‘Enlightened Cosmopolitanism: The Political Perspective of the Kantian “Sublime”’ in James Schmidt (ed), *What is Enlightenment? Eighteenth Century Answers and Twentieth Century Questions* (University of California Press, 1996) 520.

2 .The six-day programme, at the Venice Academy of Human Rights from July 11-16 2011, was comprised of 36 hours of lectures, seminars and discussions rounds. I would like to thank Venice Academy for the reading materials provided to me as a participant and will acknowledge the source such material, including articles and book chapters.

3 At the time of the conference David Held was Graham Wallas Professor of Political Science, London School of Economics.

4 Professor of Sociology, School of Economics University of Coimbra, Portugal; and Distinguished Legal Scholar at the University of Wisconsin-Madison Law School.

5 Emeritus Professor at the University of Tokyo.

6 Charles Howard Chandler Professor, Emory University School of Law.

peoples and people living with HIV/AIDS requiring access to anti-retroviral drugs⁷). Despite major epistemological differences and cultural backgrounds, these four professors agreed that a more egalitarian and just international economic, political and legal order needs urgent attention in these harsh neo-liberal times of global market forces.⁸

Part II of this article will consider the extent to which 21st century liberal cosmopolitan scholarship – exemplified by David Held’s *Cosmopolitanism: Ideals and Realities*⁹ – is part of an historical human rights tradition spanning 2500 years of Western legal and political science, from classical Greece to the 20th century. Held’s thesis is that the post-World War II international legal architecture is a potentially solid foundation on which to build a coherent international order based on the cosmopolitan principle that every person has ‘equal moral worth’, rights and duties, regardless of culture, tradition or difference.¹⁰

Part III of the article considers alternative views to conventional Western liberal cosmopolitanism which is based on a world-view of global citizenship and global governance. Part III will assess critically the unorthodox jurisprudence of Boaventura de Sousa Santos.¹¹ Neo-liberal globalization, Santos argues, is responsible for an unsustainable divide between the global ‘North and South’.¹² Santos claims that globalisation ‘from above’ is responsible for most human rights abuses in terms of economic, social and cultural rights.¹³ Santos further claims that the only form of cosmopolitanism that has any chance of human emancipation is

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- 7 On subaltern cosmopolitanism see Part III below. See, also, Heinz Klug, ‘Campaigning for Life: Building a New Transnational Solidarity in the Face of HIV/AIDS and TRIPS’ in Santos and Rodriguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, 2005) 118-139.
- 8 By global market forces I mean a situation in which international economic motives and corporate profit margins override religious, patriotic, cosmopolitan and other beliefs and values.
- 9 David Held *Cosmopolitanism – Ideals and Realities* (Polity Press, 2010). This book was recommended by the by the Venice Academy for participants to read.
- 10 Ibid, 49, 95.
- 11 Part III will refer to the following works by Boaventura de Sousa Santos: (1) Boaventura de Sousa Santos, *Towards a New Legal Common Sense* (Butterworths Lexis Nexis, 2nd edition, 2002), especially chapters 1, 2, 5 and 9. Chapter 9 was recommended reading from the Venice Academy; (2) Boaventura de Sousa Santos, ‘Human Rights as an Emancipatory Script’ in Boaventura de Sousa Santos (ed), *Another Knowledge is Possible: Beyond Northern Epistemologies* 3-41 (this chapter was also recommended reading from the Venice Academy); (3) Boaventura de Sousa Santos and Caesar A Rodriguez-Garavito, ‘Law, Politics, and the Subaltern in Counter-Hegemonic Globalization’ in Boaventura de Sousa Santos and Caesar A. Rodriguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, 2005) 1-27; and (4) Boaventura de Sousa Santos, ‘Beyond Neoliberal Governance: the World Social Forum as Subaltern Cosmopolitan Politics and Legality’ in Boaventura de Sousa Santos and Caesar A. Rodriguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University press, 2005) 29-68. It should be noted that Santos’s chapter ‘Human Rights as an Emancipatory Script’ draws heavily on chapter five in *Toward and New Legal Common Sense*. Some of his arguments are clearer and more succinct in this chapter published in 2007 and brought up to date since *Toward a New Legal Common Sense* was published in its second edition in 2002.
- 12 Santos, *Toward a New Legal Common Sense*, above n 11, 447-449. The term ‘global south’ has historically been used to describe states such as South Africa, India, Brazil and Egypt that were undeveloped, non-Industrial and non-democratic developing states in the 20th Century. This term is now largely an anachronism. States such as Brazil and India no longer fit into this ‘divide’. Santos’s use of this term is further explained in Part III, ff 143.
- 13 Santos, ‘Human Rights as an Emancipatory Script’ above n 11, 6-11; Santos, *Toward a New Legal Common Sense*, above n 11, 177-182.

‘subaltern cosmopolitanism’.¹⁴ Onuma Yasuaki¹⁵ and Abdullah An-Na’im¹⁶ also question the possibility and desirability of a universal order based on Western liberal cosmopolitan values.¹⁷

My argument is that both liberal and subaltern cosmopolitan theories have much to offer scholars concerned with understanding and remedying human rights abuses that severely disadvantage national minorities and people in the undeveloped world. Held’s suggestions for international legal reform if realized would make global governance far more effective and just. Santos’s criticism of liberal cosmopolitanism cannot be easily dismissed as pure anti-Western rhetoric. Many of Santos’s arguments concerning neo-liberal globalization (market forces) and the ‘emancipatory’ potential of law for oppressed peoples are convincing. Human rights jurists, as explained in Parts II and III, know all too well the practical challenges that have to be overcome for a more just international legal order to be realized.¹⁸ How for example, can short-term and often spurious national interest calculations (economic or political) be effectively challenged? This question cannot be emphasized enough.

II. WESTERN COSMOPOLITANISM AND UNIVERSALISM

A. Origins

Cosmopolitanism and universalism have been expressed in various ways throughout Western civilization, from antiquity to the Enlightenment and modernity. These terms have been used for over 2500 years to explain a philosophical view of humanity where all people are viewed as world citizens, regardless of race, culture or nationality.¹⁹ Most scholars agree that cosmopolitanism had its origins in classical Greece during the 4th century BC.²⁰ Roman jurists such as Cicero went one step further and proclaimed a universal natural law that transcended culture, positive law and state sovereignty.²¹ However, the neo-Marxist scholar Ernst Bloch, in *Natural Law and Human Dignity*, argued that the idea of universalism only occurred after the expansion of the Roman Empire when inter-state trade and commerce needed to be regulated by the Roman law of nations.²²

- 14 Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 8-11. NB: in this work, Santos uses the term ‘insurgent cosmopolitanism’ rather than ‘subaltern cosmopolitanism’ mainly for rhetorical effect. Phenomenologically, both terms are used to describe the same phenomena that is the use/manipulation of law – state, regional, global – to further oppressed peoples’ struggles against neo-liberal globalization. See also Santos, *Toward a New Legal Common Sense*, above n 11, 465.
- 15 Onuma Yasuaki, ‘In Quest of Intercivilizational Human Rights’ *The Centre For Asian Pacific Affairs: Occasional Paper Number 2* (1996) 1. This article was obtained from the Venice Academy, June 20, 2011 and was recommended reading.
- 16 Abdullah Ahamed An-Na’im, ‘Taming the Imperial Impulse: Realising a Pragmatic Moral Vision’ *Economic and Political Weekly*, March 26, 2011, 58. This article was obtained from the Venice Academy, June 20, 2011 and was recommended reading.
- 17 On Western cosmopolitan values see: Held, above n 9, 69-75.
- 18 See Held, above n 9, 210-211. On Western cosmopolitan values see: PART II below.
- 19 For contrasting views on cosmopolitan history and ideology see Held, above n 9, 15; Santos, ‘Human Rights as an Emancipatory Script’ above n, 11, 9-10.
- 20 For a succinct history of cosmopolitan thought – from ancient Greece to the present – see ‘Cosmopolitanism’ explained in the *Stanford Encyclopaedia of Philosophy*, (on-line): <<http://plato.stanford.edu/entries/cosmopolitanism>>. On Hellenic universalism see, especially, Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (MacMillan and Company, 1911) 29-30; David J Bederman, ‘Religion and the Sources of International Law in Antiquity’ in Mark W Janis, *The Influence of Religion on the Development of International Law* (Martinus Nijhoff publishers, 1995) 3-25.
- 21 Cicero quoted in FR Cowell, *Cicero and the Roman Republic* (Harmondsworth, 1964) 354-355.
- 22 On the link between the Roman *ius gentium* and *ius naturale* see, generally, Ernst Bloch, *Natural Law and Human Dignity* (MIT Press, 1988) 19-20.

The challenge of universalism a millennium later was to be similarly supported by medieval Christian jurists²³ who viewed ‘sovereignty’ as necessarily limited.²⁴ The Dutch jurist Hugo Grotius, writing during the European Thirty Years’ War (1618-1648), also believed that certain natural laws existed that should not be violated by rulers and those in authority.²⁵ When rulers exploited and were cruel to their own subjects, third party intervention could be lawful.²⁶

From Antiquity to the Renaissance, cosmopolitan and universalistic thought and a supporting natural law theory challenged the absolutism of the state. The idea of the ‘world citizen’, philosophically and politically, and which is at the heart of cosmopolitan thought, was seriously considered during the European Enlightenment by Immanuel Kant²⁷ and other Enlightenment thinkers, such as Drost Von Muller.²⁸

In this celebrated and humanitarian period of cosmopolitanism, Enlightenment thinkers tried to make people aware of their ‘world citizenship’ status.²⁹ According to Kant, on the political level what was required for a cosmopolitan order to be realized was a federation of republican states.³⁰ This Enlightenment view of cosmopolitanism³¹ was based on a faith in human reason, where ‘the political becomes, by moral necessity, “cosmopolitical.”’³² However, some of Kant’s critics in the late 18th century, often found his view of human nature and reason to be philosophically questionable.³³ Despite such criticism, Kant’s ideals of world citizenship became a source of inspiration for post-WWII liberal and cosmopolitan scholars, whose work will now be addressed.

In the late 20th century cosmopolitan thinking was re-imagined and re-inspired by the post-war international human rights settlement.³⁴ Cosmopolitanism in the 21st Century has been supported and critiqued by various scholars from disciplines such as political science,³⁵ philosophy³⁶ and international law.³⁷ For example, in a philosophical inquiry about the arguments for and against universal values, Kwame Appiah insists that cosmopolitanism is quite a ‘simple idea’.³⁸ It is based on a need to ‘develop habits of co-existence: conversation in its older meaning, of living

23 On the Roman Church and the ‘universalist state’ see, generally, Walter Ullmann, *A History of Political Thought: The Middle Ages* (Penguin Books, 1965) 19-32. On the ‘common law’ of Western Europe see, generally, Kenneth Pennington, *The Prince and the Law 1200 - 1600: Sovereignty and Rights in the Western Legal Tradition* (University of Californian Press, 1993).

24 Jean Bodin, *On Sovereignty – Four Chapters From The Six Books of the Commonwealth* (Cambridge University Press, 1994) 10. See also GR Elton, *The New Cambridge Modern History Vol 11, The Reformation – 1520-1559* (Cambridge University Press, 1958) 449-450.

25 Hugo Grotius, *De Jure Belli Ac Pacis* Book II Chapter XX section XL (Carnegie, 1925) 504.

26 Ibid, 582.

27 On the cosmopolitan right to hospitality see Immanuel Kant, *Perpetual Peace* (Columbia University Press, 1939) 23-27.

28 Geiman above n 1, 517-521.

29 Ibid, 517-521.

30 See Ibid, 517 for Geiman’s discussion of Kant’s major cosmopolitan principles developed in *Perpetual Perpetual Peace* and other works.

31 Ibid.

32 Pheng Cheah, *Inhuman Conditions: On Cosmopolitanism and Human Rights* (Harvard University Press, 2006) 23.

33 Geiman, above n 1, 519.

34 See, generally, Held above n 9, 14-17, 55-56, 239-240.

35 Ibid, 14-17. See also Gillian Brock and Harry Brighouse, *The Political Philosophy of Cosmopolitanism* (Cambridge University Press, 2005).

36 Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (Allen Lane, 2006); Cheah, above n 32; Jacques Derrida, *On Cosmopolitanism and Forgiveness* (Routledge, 1997).

37 Jean L Cohen, ‘Whose Sovereignty: Empire Verses International Law’ in Christian Barry and Thomas Pogge (eds), *Global Institutions and Responsibilities: Achieving Social Justice* (Blackwell Publishing, 2005) 270-279.

38 Appiah, above n 36, xviii-xix

together.³⁹ Appiah, a professor of philosophy, takes a critical view of the universalist position but points out that if relativism⁴⁰ is correct then there would be no need for any dialogue at all.⁴¹

Modern-day cosmopolitans from the discipline of international relations such as Thomas Pogge⁴² and David Held, recognise that there are three major principles owed to the whole of humanity: '(i) egalitarian individualism, (ii) reciprocal recognition, and (iii) impartialist reasoning.'⁴³ Influenced by Stoic philosophy, which 'appealed to notions of nature and reason',⁴⁴ the Enlightenment and 20th century cosmopolitan thinking, Held endeavours to place cosmopolitan theory at the heart of the international system, which, he argues, is in need of a more clearly stated ethical foundation.⁴⁵ Held's pragmatic application of cosmopolitan theory to the many problems confronting the international legal and political system will now be assessed.

B. David Held's Cosmopolitanism: Ideals and Realities

1. Cosmopolitan Reasoning

In *Cosmopolitanism: Ideals and Realities*, David Held develops a convincing justification for cosmopolitanism to inform global governance and decision-making. He argues that the world is no longer made up of 'discrete civilizations' but is multi-polar, where Western hegemony is in steady decline.⁴⁶ This world order requires far more effective institutions of global governance to deal with the complex political, economic and social problems that affect all societies.⁴⁷ It is a world of 'overlapping communities of fate.'⁴⁸ Held's vision of cosmopolitan law transcends conventional conceptions of international law as law between states,⁴⁹ rejecting both positivism⁵⁰ and traditional realism.⁵¹

The United Nations Charter, the European Union, the International Criminal Court and the Nuremberg Judgment are all examples of how the sovereign-centric Westphalian system

39 Ibid.

40 Relativists believe that there are no universal truths comprehensible by any universal understanding. As RW Hepburn writes, relativism is [t]he view that moral appraisals are essentially dependent upon the standards that define a particular moral code, the practices and norms accepted by a social group at a specific place and time ... [T]he relativist argues that there exists no point of view from which these codes can themselves be appraised, no 'absolute' criteria by which they can be criticized.'
R W Hepburn, 'Ethical Relativism' in Ted Honderich (ed), *The Oxford Companion to Philosophy* (Oxford University Press, 1995) 758.

41 Appiah, above n, 36, xviii-xix.

42 Thomas Pogge, *World Poverty and Human Rights* (Polity Press, 2002) 169.

43 Held, above n 9, 15.

44 On Stoicism as a philosophical movement in ancient Greece from fourth century BC see Simon Hawblower and Antony Spawforth (eds), *The Oxford Classical Dictionary* (Oxford University Press, 1996) 1446.

45 Held, above n 9, 39. A summary of Held's arguments are explained in the 'Afterword'. Ibid 239-249.

46 Ibid, 35-36.

47 Ibid, 51, 54-55.

48 Ibid, 35-36.

49 Ibid, 93-103.

50 Henry Wheaton was one of the first Public International Law textbook writers of the 19th century to espouse a positivistic theory of international law, though informed by Enlightenment natural law metaphysics. He nevertheless discarded, as without foundation, Cicero's *universal natural law*. See: *Elements of International Law*, 8th edition, (Carnegie, 1936) Part I, Chapter I, Section 11, 15-16. On positivism and international law theory see, especially, Charles De Visscher, *Theory and Reality in Public International Law* (Princeton University Press, 1957) 51-52.

51 Realism is explained by Chris Bowen in 'International Affairs' in Robert E Goodin and Phillip Pettit (eds), *A Companion to Contemporary Political Philosophy* (Blackwell, 1993) 515-517.

of international relations has changed.⁵² For Held ‘the era of classic sovereignty’ is over.⁵³ A cosmopolitan model of sovereignty needs to be envisaged, in theory and practice.⁵⁴ Held acknowledges that while cosmopolitan principles are universal, ‘cultural and political specificity’ cannot be ignored.⁵⁵ Although cosmopolitan principles have their genesis in the West, this does not make them imperialistic or a repudiation of, say, Islam:⁵⁶ ‘origins and validity are separate issues,’ he argues.⁵⁷ The challenge for Islam Held believes, is to deny the legitimacy of radical fundamentalism and for it to continue to embrace modernity, human rights and democracy as it has done in the past.⁵⁸ The challenge for the West and particularly the United States is to respect and build upon a global ‘rule of law’ rather than to engage in war, which only weakens international institutions. Both Islam and the West, Held insists, must confront their own dangerous ideologies and practices.⁵⁹

Held’s basic argument is that ‘each person [is] an autonomous moral agent entitled to equal dignity and consideration’.⁶⁰ Essentially this is a liberal-universalist view of the individual vis-à-vis the state, now applied to the global world order. According to Held, the transformations that have occurred in global governance since the end of World War II will need even more specific cosmopolitan principles broad enough to accommodate all peoples and cultural traditions.⁶¹ Held explains two meta-principles that could support global governance (at least in theory): the Meta-Principle of Autonomy (MPA)⁶² and the Meta-Principle of Impartialist Reasoning (MPIR).⁶³ The meta-principle of autonomy requires that, for citizens to enjoy free and equal treatment, democratic institutions are vital.⁶⁴ The second meta-principle is a justification for an ‘impartial moral standpoint’⁶⁵ that presumably could be used to guide a future human rights court or Human Security Council,⁶⁶ about deciding particular claims.⁶⁷

Held believes that impartialist reasoning is fundamental to solving international disputes and competing claims. So, for example, if a party claims their particular rights have been violated, before a future higher court of appeal based on impartialist reasoning, these claims should be tested against a ‘larger, human standpoint’.⁶⁸ However, an unresolved contradiction between individual rights and collective rights - a clash of sovereignties - is juxtaposed in the following two sentences:

I take cosmopolitanism ultimately to connote the ethical and political space which sets out the terms of reference for the recognition of peoples’ moral worth [etc] ... [The] connotation of

52 Held, above n, 9, 54-56.

53 Ibid, 240.

54 Ibid, 39-58.

55 Ibid, 21.

56 Ibid, 140-141.

57 Ibid, 16.

58 Ibid, 140.

59 Ibid, 133-134; 137-141.

60 Ibid, 15.

61 Held’s eight principles, which are discussed and explained in Chapter Two, are as follows: (i) equal worth and dignity; (ii) active agency; (iii) personal responsibility and accountability; (iv) consent; (v) collective decision-making about public matters through voting procedures; (vi) inclusiveness and subsidiarity; (vii) avoidance of serious harm; and (viii) sustainability. Ibid, 67-74.

62 Ibid, 82-83.

63 Ibid, 85-92.

64 Ibid, 82.

65 Ibid, 85.

66 On Held’s short term measures for global governance see ‘Directions of Cosmopolitan Politics’. Ibid 251.

67 Ibid, 85.

68 Ibid, 85.

these basic ideals *cannot be separated from the hermeneutic complexity of traditions*, with their unique temporal and cultural structures.⁶⁹

Obviously mindful of avoiding the pitfalls of relativism Held insists that the prevention of ‘serious harm’ should be a priority that over-rides all other interests (national, vested, or otherwise).⁷⁰ One is left wondering what serious harm entails and how impartial arbitrators or judges of the (near) future would be intellectually equipped to deal with ‘the hermeneutic complexity of traditions’;⁷¹ as well as conflicting claims (for example national majorities vis-à-vis oppressed national minorities). Having considered some of Held’s guiding principles and justifications, the next section will evaluate his argument for putting cosmopolitan theory into international practice.

2. *Cosmopolitanism in Practice*

Held’s vision of cosmopolitan law requires the ‘subordination’ of the sovereign state to a higher legal order.⁷² Fundamental to this legal order is the re-conceptualization of citizenship – a Kantian ‘world citizenship’ as opposed to mere national citizenship.⁷³ For this legal order to be functional certain national prerogatives will have to be surrendered in exchange for:

[S]ubmission to ICJ and ICC jurisdiction; the creation of a new international human rights court, and an international environmental court to address legal issues involving the global commons.⁷⁴

Held makes a strong case for such global legal institutions to be implemented. They would, after all, be the logical progression of the UN system. He realizes that for a cosmopolitan legal order to work, it must be supported by political, economic and cultural cosmopolitanism.⁷⁵ So in political terms, global issues such as climate change and poverty cannot be solved unless authority is ‘multi-layered’.⁷⁶ To defend cosmopolitan law, international security forces would also be required.⁷⁷ In economic terms, there must be an institution that regulates human rights law and economic law.⁷⁸ Held directly challenges existing market mechanisms⁷⁹ and claims that poverty can only be tackled by political intervention and *global taxation measures*.⁸⁰ If these essentially liberal cosmopolitan institutions and principles were realized, the territorial state would lose its legitimacy as the only valid authority and place for sovereignty. This would indeed be a world order based on Kant’s philosophy, dusted off and reformulated anew.

The current world order Held believes, is be-devilled with systemic problems. He considers the reasons why the international community has so far failed to solve pressing problems such as climate change and the ever-widening gap between rich and poor countries.⁸¹ Held points to an emerging crisis within the existing international order:

The post-war multilateral order is in trouble. With the resurgence of nationalism and unilateralism in US foreign policy, EU disarray and growing confidence of China, India and Brazil in world economic fora, the political tectonic plates appear to be shifting.⁸²

69 Ibid, 49 (emphasis added).

70 Ibid, 48.

71 Ibid, 49.

72 Ibid, 99.

73 Ibid, 101.

74 Ibid, 104-105.

75 Ibid, 105-112.

76 Ibid, 107.

77 Ibid, 107.

78 Ibid, 108.

79 Ibid, 108.

80 Ibid, 109. For example, a ‘tax on the GNP of countries above a certain level of development’.

81 Ibid, 144-145.

82 Ibid, 160.

In Held's assessment there is much confusion about the respective roles of international organisations in dealing with global challenges,⁸³ including HIV/AIDS.⁸⁴ There is also much 'inertia' by international agencies about solving the most basic causes of human suffering, such as malaria.⁸⁵ Global problem solving is often completely ineffective.⁸⁶ What ultimately is required Held suggests, is a move away from liberal globalisation to a globalisation based on social democracy with much greater regulation of global finance.⁸⁷ Reforming the UN Security Council so that it is more responsive to crises that demand international intervention is also imperative.⁸⁸

3. *A Critique of Held's Liberal Cosmopolitanism*

Regardless of the validity of Held's ideals about international governance the world is still made up of sovereign states: democratic, quasi-democratic and authoritarian. How can democratic governments who so often think in terms of short-term electoral cycles address global issues such as climate change without making unpopular decisions by-passing their citizenry? Held's cosmopolitan principles may be inspiring but at the end of the day 'democratic princes' and 'princesses', to use his language, are accountable to their constituents.⁸⁹ This goes to the question posed at the start of this paper: how can cosmopolitan ideals compete with national interests? This problem cannot be emphasized enough. A concerted effort by democratic governments to break out of populist thinking is a complex challenge that is acknowledged by Held.⁹⁰

There is no doubt that many legal and international political science academics, especially from the positivist and realist schools would find Held's ideas about a future global order to be unrealistic and implausible.⁹¹ Surely an international military force and a global taxation regime would require the surrendering of nation-state sovereignty on a massive and unprecedented scale? In response, Held would claim that the Nuremberg judgment and subsequent war crimes tribunals and the International Criminal Court have already eroded state sovereignty. Further incremental developments towards world governance are obviously possible.

The other problem that has to be addressed is what ideology should inform global governance? Held seems to suggest that social democracy, as developed in Europe, would be the best ideology for democratic global governance.⁹² However, considering that social democracy has had rather limited success in some Western countries, such a global ideological shift seems unlikely to occur. Nevertheless, *Cosmopolitanism: Ideals and Realities* is an optimistic, bold and imaginative thesis, yet grounded in the world's complex empirical order based on an Enlightenment philosophy that recognizes the ability of people to see themselves as *global citizens*;⁹³ that vested interests can be challenged and finally overcome; and that difference can be accommodated and celebrated.⁹⁴

What Held finds redeemable in Western civilization theorists such as Boaventura de Sousa Santos do not. The loss of human dignity caused by neo-liberal globalisation goes beyond the

83 Ibid, 157-160.

84 Ibid, 161.

85 Ibid, 161.

86 Ibid, 162.

87 Ibid, 184-207, 246-249.

88 Ibid, 170-171.

89 Ibid, 210.

90 Ibid, 211-212.

91 See, for example, Jean L Cohen, 'Whose Sovereignty: Empire Verses International Law' in Christian Barry and Thomas Pogge (eds), *Global Institutions and Responsibilities: Achieving Social Justice* (Blackwell Publishing, 2005) 270-279.

92 Held, above n 9, 247-248. NB: Held suggests that it is possible for European social democrats to seek the support of progressive forces in the US to establish new global institutions.

93 Ibid, 41-43, 100-101.

94 Ibid, 101-102.

comprehension of modernism (and Western positivist jurisprudence),⁹⁵ which Boaventura de Sousa Santos claims, is a ‘narrow and reductionist canon that arrogantly discredits, silences or negates the legal experiences of large bodies of [the] population.’⁹⁶ Part III will assess the challenge of ‘subaltern cosmopolitanism’ eloquently described by Santos in his confronting critique of an alternative to Western modernity’s historical narrative, which itself is based on an Enlightenment teleology: the liberal idea of progress.⁹⁷

III. COSMOPOLITAN ALTERNATIVES

A. Santos’s ‘Post-Modern’ Jurisprudence

Boaventura de Sousa Santos compels us to consider an alternative cosmopolitanism to the model proposed by David Held. He provides concrete examples, as explained below, of how ‘subaltern cosmopolitan legality’⁹⁸ can effectively restore peoples’ human dignity.⁹⁹ There is, however, no teleology, or grand narrative or theory that can encapsulate and explain the diversity and complexity of oppressed peoples’ struggles.¹⁰⁰ When Santos explained the interaction between law and globalization in the first edition of *Toward a New Common Sense* in 1995,¹⁰¹ William

95 See, for example, HLA Hart, *The Concept of Law* (Oxford University Press, 1961). For a critique of Hart’s positivism as legal ‘science’ see Melville Thomas, ‘Indigenous Jurisprudence and Legal Education in the 21st Century’ (2005) 4(1) *Independent Scholars’ Association of Australia Review*, 8.

96 Santos, *Toward a New Legal Common Sense*, above n 11, 494.

97 For example, the traditional historical narrative of the origins, development and universalisation of human rights is very much a part of Western legal scholarship and jurisprudence, exemplified by Nick O’Neil, Simon Rice and Roger Douglas’s textbook *Retreat From Injustice – Human Rights in Australian Law* (Federation Press, 2004) 2-10. Their narrative is that human rights first emerged from natural law philosophy in Ancient Greece and later from the Roman Republic and Empire (Cicero). Natural law later gains a theological dimension in medieval Europe (Aquinas), and with the collapse of the Holy Roman Empire natural rights gradually become part of the secular philosophies of the Enlightenment – Locke, Mills, Montesquieu – and in theory and in practice in the *French Declaration of the Rights of Man and Citizen* in 1789. These authors bring the narrative to the present stage by prioritising civil and political rights. Yet collective rights, which are at odds with the Western canon, are questioned: ‘[A]re these rights human rights if they are claimed collectively by communities or groups within a community, or are they better described as peoples’ rights?’

98 Santos and Rodriguez claim that ‘subaltern cosmopolitan legality’ is not a theory but a ‘perspective’ which is about ‘social inclusion’ for the majority of the world’s populace: ‘the plurality of efforts at counter-hegemonic globalization’ they write ‘cannot be encompassed by an overarching theory’. See Santos and Rodriguez, ‘Law, Politics, and the Subaltern in Counter-Hegemonic Globalization’, above n 11, 12-14.

99 Santos, *Toward a New Legal Common Sense*, above n 11, 478-493.

100 Santos and Rodriguez, ‘Law, Politics and the Subaltern in Counter-Hegemonic Globalization’, above n 11, 12-13.

101 Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (Routledge, 1995), 250-378. Note the modified title change with the 2002 edition. On the substantive re-writing of the second edition see Santos, *Toward a New Legal Common Sense*, above n 11, xv-xxiii.

Twining, a professor of jurisprudence, acknowledged the seriousness of Santos's argument that 'modernity is in crisis'.¹⁰²

1. *Subaltern Cosmopolitan Examples*

According to Santos, subaltern cosmopolitan movements, such as the Zapatist movement in Mexico,¹⁰³ adopt counter-hegemonic practices to further their causes.¹⁰⁴ The purpose of 'subaltern cosmopolitan legality', ultimately, is the removal of social fascism¹⁰⁵ and the establishment of a more inclusive and 'convivial' society¹⁰⁶ based on 'transformative justice that transcends the horizons of global capitalism.'¹⁰⁷ Subaltern cosmopolitan legality reflects:

[T]he aspirations of oppressed groups to organize their resistance and consolidate political coalitions on the same scale as the one used by the oppressors to victimize them, that is, the global scale.¹⁰⁸

Subaltern cosmopolitan legality is obviously necessary for the empowerment of the most marginalised people. Santos identifies Indigenous peoples,¹⁰⁹ refugees¹¹⁰ and migrant workers¹¹¹ as highly vulnerable to the exploitative nature of the dominant globalisation.¹¹²

Santos's examples of subaltern legal cosmopolitanism include: Indigenous peoples who attempt to uphold their conception of human dignity against a dominant neo-colonial culture and

102 William Twining, *Globalization and Legal Theory* (2000) 202-3. See also some staggering statistics concerning war and depopulation from 18th to 20th centuries, cited by Santos in *Toward a New Legal Common Sense*, above n 11, 9 (paragraph two). 'Modernity' in this paper means the secular developments in law, science, reason, democracy and state sovereignty from the 19th century – a continuation of the 18th Century European Enlightenment - where reason and science displaced religion and superstition. The expression 'modernity in crisis' means the collapse of Enlightenment humanism, state absolutism, law and science into the barbarism of the 20th Century (the Jewish Holocaust). The 'crisis of modernity' has been disturbingly explained by the Jewish literary critic George Steiner: *In Bluebeard's Castle – Some Notes Towards a Re-definition of Culture* (Faber and Faber, 1971) chapters 1 and 2.

103 Santos, *Toward a New Legal Common Sense*, above n 11, 460-462.

104 *Ibid*, 467.

105 On 'rise of social fascism' see Santos, *Toward a New Legal Common Sense*, above n 11, 447-458.

106 *Ibid*, 469.

107 *Ibid*, 469.

108 Santos, 'Human Rights as an Emancipatory Script', above n 11, 10.

109 Santos, *Toward a New Legal Common Sense*, above n 11, 241-251.

110 *Ibid*, 224-228. Citizenship, Santos argues, needs to be separated from the territorial sovereign-state. *Ibid*, 237. He writes: 'the plight of illegal immigrants and asylum seekers is one of the most dramatic consequences of the impoverishment of the principle of community once it has been reduced to the national community.' *Ibid*, 235. Cf Held, above n 9, 179-180. Held is essentially in agreement with Santos's cosmopolitan view of citizenship. See also Hannah Arendt's seminal work, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich, 1979), 292-293:

The more the numbers of the rightless people increased the greater became the temptation to pay less attention to the deeds of the persecuting governments than to the status of the persecuted..

On the refugee's 'half a right' to exist see Louis Henkin, *International Law: Politics and Values* (Martinus Nijhoff Publishers, 1995) 195.

111 Santos, *Toward a New Legal Common Sense*, above n 11, 221-224.

112 Santos, *Toward a New Legal Common Sense*, above n 11, 179; Santos, 'Human Rights as an Emancipatory Script', above n 11. 8.

transnational companies;¹¹³ HIV activists who have successfully argued against patent protection of HIV drugs in countries such as South Africa;¹¹⁴ transnational anti-sweatshop organizations;¹¹⁵ and small communities, as in Columbia, which have stood up to aggressive state and non-state forces.¹¹⁶ Another instance where cosmopolitan legality has been achieved is when the state, as in Brazil, has been utilized to further political struggles for a redistributive democracy.¹¹⁷ How subaltern cosmopolitanism differs in theory and practice from liberal cosmopolitanism vis-à-vis globalization will now be considered.

2. *The Need for Cosmopolitanism and Globalization 'From Below'*

According to Santos, the Western idea of cosmopolitanism, from ancient Greece to the Enlightenment and on to modernity, is an ideology used to justify colonialism and imperialism.¹¹⁸ He asks: 'who needs cosmopolitanism?' 'The answer', he writes, 'is simple. Whoever is a victim of intolerance and discrimination needs tolerance ... whoever is a non-citizen needs world citizenship.'¹¹⁹ Santos's depiction of the Western globalisation and cosmopolitanism is at times very negative. Santos blames neo-liberal globalization as the major cause of global economic injustice and human suffering.¹²⁰

Globalisation has two conflicting forces in Santos's view: Western globalisation, which is dominant, and counter-hegemonic globalization, which is opposed to global capitalism. The former is comprised of two processes: 'globalised localisms' and 'localized globalisms'.¹²¹ With the first process a particular local entity, such as the English language or Hollywood

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- 113 Santos, *Toward a New Legal Common Sense*, above n 11, 478-479. See also Cesar Rodriguez-Garavito and Luis Carlos Arenas, 'Indigenous Rights, Transnational Activism, and Legal Mobilization: the Struggle for the U'wa People in Columbia' in Santos and Rodriguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality*, above n 11, 241, 248-249, 253-255, 258-261, 263-264. Cf Irene Watson, 'The 2007 Declaration on the Rights of Indigenous Peoples: Indigenous Survival – Where from Here?' (2011) 20(3) *Griffith Law Review* 629
- 114 Ibid, 479-480. See also Heinz Klug, 'Campaigning for Life: Building a Mew Transnational Solidarity in the Face of HIV/AIDS and TRIPS' in Santos and Rodriguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality*, above n 11, 118, 125-129, 131-133, 136-138.
- 115 Santos, *Toward a New Legal Common Sense*, above n 11, 482.
- 116 Ibid, 488-489. Santos's discussion of the peace asserted against all odds by the community of San Jose de Apartado in Columbia in the 1990s is an excellent example of subaltern cosmopolitanism 'from below'.
- 117 Ibid, 490-491. See, especially, Santos's discussion of the Worker's Party (PT) in Porto Alegre, Brazil, where participatory budgeting and taxation (market socialism) were pursued.
- 118 Santos, 'Human Rights as an Emancipatory Script' above n 11, 9.
- 119 Ibid, 460. This passage is also included and expanded in Santos and Rodriguez-Garavito's chapter 'Law, Politics, and the Subaltern in Counter-Hegemonic Globalization', above n 11, 14: [i]n short 'the large majority of the world's populace, excluded from top-down cosmopolitan projects, needs a different type of cosmopolitanism. Subaltern cosmopolitanism ... is therefore of an oppositional variety.'
- 120 In much bolder language than in *Toward a New Legal Common Sense* (2002) Santos in 2007 claimed that because human misery caused by the history of global capitalism has been so extreme, that a global trial of those who have participated in its excesses – states and transnational corporations – is necessary. The trial of global capitalism therefore appears to be a 'human right', according to my interpretation of Santos. See Santos, 'Human Rights as an Emancipatory Script', above n 11, 25: 'The verdict will be enforceable ... and will constitute an ongoing never ending project, the project of a socialist society.'
- 121 Santos, *Toward a New Legal Common Sense*, above n 11, 179; Santos, 'Human Rights as an Emancipatory Script', above n 11. 8.

films is globalised.¹²² The other side of this phenomenon is ‘localised globalisms’, where local conditions are adversely affected by transnational practices which cause ‘*subordinate inclusion*’.¹²³ Globalized localism is imposed by ‘core countries’ such as the United States.¹²⁴ The second form of globalisation is counter-hegemonic and is opposed to the twin processes described above.¹²⁵ It is made up of diverse movements. The World Social Forum,¹²⁶ Indigenous and feminist groups, aligned with international ‘networks’ and NGOs, are part of a worldwide phenomenon of globalization from below.¹²⁷

3. *Universal Human Rights: Another form of Globalization?*

The division between Western globalization and counter-hegemonic globalization results in a similar division in Santos’s sociology between Western cosmopolitanism on the one hand and subaltern cosmopolitanism on the other. Human rights, Santos asserts, are ‘universal only when they are viewed from a Western standpoint’.¹²⁸ The *Universal Declaration of Human Rights* (1948) is dismissed by Santos as being originally drafted without worldwide consensus.¹²⁹ The tension between universal human rights and relativism, he argues, does need to be overcome:

Against universalism, we must develop cross-cultural dialogues on isomorphic concerns. Against relativism, we must develop cross-cultural procedural criteria to distinguish progressive politics from regressive politics, empowerment from disempowerment, emancipation from regulation.¹³⁰

The first step towards a *necessary* ‘cross-cultural dialogue’ on human rights, according to Santos, is the reciprocal recognition of ‘cultural incompleteness and weakness’:¹³¹

[T]he fundamental weakness of Western culture consists in dichotomizing too strictly between the individual and society ... On the other hand, the fundamental weakness of Hindi and Islamic cultures consists in that they both fail to recognize that human suffering has an irreducible individual dimension ...¹³²

122 Santos, *Toward a New Legal Common Sense*, above n 11, 178; Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 7. See also William Twining’s excellent analysis of Santos’s work, above n 102, 5, 221.

123 Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 8 (emphasis added).

124 Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 9; See also Santos, *Toward a New Legal Common Sense*, above n 11, 331-335, where Santos explains the involvement of the US in reforming the judicial system of countries such as Columbia – another form of ‘globalised localism’.

125 Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 9. See also Santos, *Toward a New Legal Common Sense*, above n 11, 180-181.

126 See, especially, Santos, ‘Beyond Neoliberal Governance: the World Social Forum as Subaltern Cosmopolitan Politics and Legality’, above n 11, 61-62 (especially last paragraph, 62).

127 Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 9. In this chapter, Santos describes these movements in terms of ‘*insurgent cosmopolitanism*’, a counter-hegemonic globalization from below’ (emphasis added).

128 Santos, *Toward a New Legal Common Sense*, above n 11, 269; Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 12.

129 Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 13; Santos, *Toward a New Legal Common Sense*, above n 11, 271.

130 Santos, *Toward a New Legal Common Sense*, above n 11, 271-272; Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 14.

131 Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 15; Santos, *Toward a New Legal Common Sense*, above n 11, 272.

132 Santos, *Toward a New Legal Common Sense*, above n 11, 274; Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 17.

Human rights, Santos argues, must therefore be re-conceptualized in terms of ‘multicultural human rights.’¹³³ The need for subaltern cosmopolitanism can only be understood and appreciated, however, when the negative social forces that exclude and oppress are seen for what they are.¹³⁴

Toward a New Legal Common Sense is a subtle and penetrating analysis of Western legal history where Santos turns on its head the liberal progressive narrative about modernity - law, scientism, positivism and inalienable rights.¹³⁵ From the French Revolution in 1789 the West has been heading towards a crisis. The denouement of modernity? - Fascism.¹³⁶ Reborn anew in the late 20th and early 21st centuries, fascism, Santos claims, is now a salient feature of the privatized, quasi-democratic nation-state, which is a source of exploitation, not emancipation.¹³⁷ And the state itself is now an instrument of globalisation and transnational corporations.¹³⁸

4. *Social Fascism and Globalization*

Santos believes that neo-liberal globalisation has directly caused the emergence of social fascism, or ‘pluralist fascism’ that undermines democracy.¹³⁹ People are living in a state of constant ‘anxiety’ due to privatisation and the uncertainty caused by neo-liberalism and privatisation.¹⁴⁰ Social fascism creates societies with the following hierarchies: ‘intimate civil society’ which is made up of the elite who enjoy all rights; ‘strange civil society’ where people are merely afforded civil and political rights but not social and economic rights; and ‘uncivil society’ where no ‘rule of law’ exists at all. It is in uncivil society which is a larger part of impoverished countries, where subaltern cosmopolitanism is most needed.¹⁴¹

While Santos’s anti-universalist claims are questionable¹⁴² he persuasively argues that a purely top-down approach to human rights abuses will not remedy the major violations of human rights effecting millions of people in the ‘global South’.¹⁴³ Influenced by neo-Marxism¹⁴⁴

133 Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 15. Cf M H A Reisman, ‘Islamic Fundamentalism and its Impact on International Law and Politics’ in Mark W Janis (ed), *The Influence of Religion on the Development of International Law* (Martinus Nijhoff Publishers, 1991) 107-133.

134 Santos, *Toward a New Legal Common Sense*, above n 11, 447-458.

135 Santos, *Toward a New Legal Common Sense*, above n 11, 21, 25, 37, 40-41, 43-44, 51; and 436-438.

136 Ibid, 43. Cf Costas Douzinas, ‘The End(s) of Human Rights’ (2002) 26(2) *Melbourne University Law Review* 445, 447-448.

137 Santos, *Toward a New Legal Common Sense*, above n 11, 72-73, 78-79; 447, 449.

138 Ibid, 52-53, 78, 168-169, 198 – 200; 314-315, 453, 455-456.

139 Ibid, 453.

140 Ibid, 455.

141 Ibid, 457. Uncivil society is larger in ‘peripheral’ countries; but note Santos’s discussion of ‘legal plurality’ and what constitutes a very real but unrecognized legal society; see chapter 4, *Toward a New Legal Common Sense*, above n 11, especially 112-113, 117-125, 155-156, 158-162.

142 Santos, *Toward a New Legal Common Sense*, above n 11, 270; Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 25, 29, where he argues that ‘the right to bring historical capitalism to trial in a world tribunal’ must be a tent of ‘Intercultural post-Imperial human rights’.

143 The division between the ‘global North and South’, according to Santos, is not purely a geographical concept, but one he uses as a ‘metaphor’: ‘To use the metaphor of hierarchy in the world system, we have to learn from the South.’ He asks: ‘What can we learn from Indigenous peoples, who in a sense are *the South of the South*?’ Santos, *Toward a New Legal Common Sense*, above n 11, 254 (emphasis added).

144 Santos, *Toward a New Legal Common Sense*, above n 11, 270; Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 25, 29.

and post-modernism,¹⁴⁵ Santos's depiction of the breakdown of modernity is convincing. He claims the world is now in a 'transitional phase' between the collapse of the Enlightenment project and a new uncharted era, 'where there are no modern solutions.'¹⁴⁶

5. A Critique of Santos's 'Post-Modern' Cosmopolitanism

Santos repudiates the idea of any grand narrative or theory to solve social, economic and cultural injustices. Nevertheless he espouses a counter-hegemonic 'narrative' himself – not only is Western modernity (read liberalism) purely exploitative and in crisis, there are emerging signs of disparate subaltern movements and subaltern global resistance.¹⁴⁷ Hence, to my mind, the logic of lumping all things Western into the same basket – market forces, Coca Cola, universal human rights etc.¹⁴⁸ David Held remarked quite correctly at the Venice Academy that Santos appeared 'black and white' in his thinking that the West was 'bad and the rest was good'.¹⁴⁹

David Held has made many of the same criticisms of market forces that Santos does but without the total negation of Western history and liberalism. A major point of difference lies in their understanding of global injustice. Universal human rights are dismissed by Santos as another form of Western imperialism. Subaltern groups can only further their causes if they manipulate legal institutions to further their struggles to achieve some kind of amelioration.¹⁵⁰ Santos is an idealist but his 'solutions' and examples of 'counter hegemonic' globalisation are unlikely to make much difference to the unequal power relations between nation-states, corporations and peoples.

The other criticism of Santos's work concerns his 'reconceptualization of human rights' based on multicultural values. While he argues that collective rights, the right to self-determination and the right to knowledge¹⁵¹ should trump traditional Western liberalism, his utopian vision is open to the charge that, when taken to its logical conclusion, *the individual's* human worth and dignity could ultimately be devalued. The extent to which there is an inherent conflict between individual and cultural rights in theory and practice, will be discussed in the final section of this paper.

145 Santos's sociological jurisprudence, which he describes as 'oppositional post-modernism' is neither 'modernist' or 'post-modernist' in the traditional sense of these words, he claims. Santos believes that the problems of modernity need 'post-modern solutions'. On this see Santos, *Toward a New Legal Common Sense*, above n 11, xvii. To my mind, Santos does not fit into any established/orthodox legal theories, including deconstruction. On post-modernism and deconstructionism and legal theory, generally, see Ian Ward, *Introduction to Critical Legal Theory* (Routledge, 2006) 155-156, 164-173.

146 Santos, *Toward a New Legal Common Sense*, above n 11, xvii

147 Santos, *Toward a New Legal Common Sense*, above n 11, 495.

148 Santos, *Towards a New Legal Common Sense*, above n 11, 178, 269; Santos, 'Human Rights as an Emancipatory Script', above n 11, 7, 12.

149 *Venice Academy of Human Rights*, 'Round Table Discussion' between Santos, Held, Yasuaki and An-Na'im on Thursday 14th July 2011. See link to EIUC and 2011 Venice Academy: http://www.eiuc.org/veniceacademy/index.php?option=com_content&task=view&id=21&Itemid=52.

For a picture of the four professors, scroll to bottom of the page. Held is first right, Santos is second on the right of moderator Emeritus Professor Attracta Ingram. This is my recollection of the robust debate between these professors.

150 Santos, 'Human Rights as an Emancipatory Script', above n 11, 10.

151 Santos, 'Human Rights as an Emancipatory Script', above n 11, 27-31.

B. Cultural Rights vis-à-vis Individual Rights

1. *Theory*

A broad range of scholars support Santos's views about Western hypocrisy and exploitation, questioning the possibility and desirability of a world order based on universal human rights.¹⁵² A conflict between traditional Western political rights and cultural rights and self-determination will continue into the 21st century, Onuma Yasuaki predicted in 1996.¹⁵³ Abdullah A. An-Na'im is also skeptical of universal claims based on shared values. An-Na'im finds that there is no 'moral, political or pragmatic difference between international terrorism in the name of Islamic jihad' and the 'humanitarian intervention claimed by the US in Iraq.'¹⁵⁴ The general consensus among critical scholars is that Western cosmopolitanism is in danger of being used as an imperialistic cloak for Western national interest calculations at the expense of international legal order.¹⁵⁵

Yasuaki, in attempting to bridge this divide between Western and non-Western human traditions, finds that a discourse on universal human rights is possible even though many cultures have not had the tradition of the West with modernization, secularization and individual liberal rights as part of their own heritage.¹⁵⁶ Yasuaki's argument is that 'intercivilizational rights' (akin to Santos's 'multicultural rights') require some Western rights to be modified. Yet how does this world-view make sense of conflicting human rights claims that occur even at the international level? One recent example highlights the problem with this argument.

2. *Practice*

A controversial and very real clash between individual and cultural rights occurred in late 2010, when the General Assembly removed 'sexual orientation' from the prohibition of summary or extrajudicial executions, 'approved by a vote of 79 in favour to 70 against with 17 abstentions.'¹⁵⁷ The amendment made a global minority group 'rightless.'¹⁵⁸ Western states were generally against the amendment, including the United Kingdom and many non-Western states either supported or acquiesced in favour of it.¹⁵⁹ This example demonstrates a continuing conflict between individual and cultural rights that all scholars discussed in this essay have sought to reconcile. When analysed, the arguments supporting this resolution at the General Assembly, in effect, sanctioned the persecution of another historically victimized minority group, mainly

152 Yasuaki, above n 15, 1; Martii Koskenniemi *From Apology to Utopia, The Structure of International Legal Argument* (Finnish Lawyers' Publishing Company, 1989) 500-501; Ratna Kapur 'Human Rights in the 21st Century: Take a Walk on the Dark Side' (2006) 28(4) *Sydney Law Review* 665; Costas Douzinas 'The End(s) of Human Rights' (2002) 26(2) *Melbourne University Law Review* 445; Irene Watson 'The 2007 Declaration on the Rights of Indigenous Peoples: Indigenous Survival – Where from Here?' (2007) Vol 20 No 3 *Griffith Law Review* 629.

153 Yasuaki, above n 15, 13.

154 An-Na'im, above n 16, 57.

155 Cohen, above n 37, 163.

156 Yasuaki, above n 15, 1.

157 See United Nations General Assembly GA/SHC/3997 reported in *UN media release* (on-line), 16 November 2010: <<http://www.un.org/News/Press/docs/2010/gashc3997.doc.htm>> .

158 Hannah Arendt used this term to describe the situation of refugees in *The Origins of Totalitarianism*, above n 110, 293.

159 UN media release, above n 157.

for national-cultural interests.¹⁶⁰ While the Assembly reversed the amendment¹⁶¹ after much pressure from lobby groups,¹⁶² what this shows is that a cosmopolitan legal order based on universal human rights will often be fiercely contested not only in theory but also in state and international practice. National and cultural interest calculations – even blatant nationalism and prejudice – are still arguments used against universalism and cosmopolitanism in the 21st century, even at the level of the United Nations.

IV. CONCLUSION

Cosmopolitanism, whether liberal or subaltern, has much to offer scholars and activists concerned with human rights abuses that affect disadvantaged groups. The example discussed in the last paragraph supports the argument put forward by liberals, that basic human rights – in this case the right to life – must be upheld over religious and cultural nationalism. Herein lies the strength of Held's liberal-humanist perspective of human rights, cosmopolitanism and international law. However, as argued in Part II, David Held does not seem to be as concerned as he should be about the possible conflict between minorities and majorities and the clash of sovereignties. By contrast, Santos finds that oppressed groups can manipulate law for 'emancipatory' purposes.¹⁶³

It is the view of this writer that neo-liberalism, as correctly explained by Santos, has resulted in a situation where international economic motives and corporate profit margins override religious, patriotic, cosmopolitan and other beliefs and values, where only market forces dominate the real pattern of behaviour. This means that Western consumer society, based on a finite materialistic ideology, marginalizes the poor and oppressed of the world.

In conclusion there are challenges that confront both liberal and subaltern cosmopolitanism. Without a natural law theory, cosmopolitans cannot avoid falling back on (or at least they cannot ignore) cultural relativism. Modernist and post-modernist attempts to make sense of this theoretical challenge often lead to the same relativistic logic. Ultimately, a dialogue about rights, duties and responsibilities will always be needed to address social exclusion, marginalization and injustice. My argument, then, is that it is possible to uphold the importance of the 'Nuremberg promise'¹⁶⁴ (exemplified by the International Criminal Court) as the foundation for a 'global rule of law', whilst also acknowledging and supporting the subaltern struggles against globalization and exploitation. Despite epistemological and ideological differences both Held's and Santos's

160 Ibid. The spurious arguments raised at the United Nations were in line with the fascistic rationale for the enactment of homophobic laws in countries such as Uganda. On the rise of homophobia globally see, for example, 'Uganda Parliament Committee Backs Anti-Homosexuality Bill' *Human Rights Watch* (on-line), 12 May, 2011 <<http://www.hrw.org/news/2011/05/12/uganda-parliament-committee-backs-anti-homosexuality-bill>>.

161 See Jodi Jacobson, 'UN Vote Restores 'Sexual Orientation' to Resolution on Extrajudicial, Summary Executions' in *RH Reality Check* (on-line), 22 December, 2010 <<http://www.rhrealitycheck.org/node/15150>>.

162 On the GA resolution and the subsequent expressions of dismay see Anita Snow, 'Gay Rights Row Breaks out over amended UN Resolution', *The Guardian* (on-line) 21 December, 2010 <<http://www.guardian.co.uk/world/2010/dec/21/gay-rights-row-un-resolution>>.

163 Santos acknowledges that while subaltern cosmopolitan legality is 'yet but a bud', it is a reality that he believes requires attention and further investigation. Santos, *Toward a New Legal Common Sense*, above n 11, 495. Many of the subaltern struggles discussed in *Toward a New Legal Common Sense* have been subsequently researched and further explained by scholars sympathetic to Santos's world-view. See also Boavetura de Sousa Santos and Caesar A. Rodriguez-Garavito (eds) *Law and Globalization from Below*, above n 11, 1-27; Rodriguez-Garavito and Arenas above n 113; and Klug above n 114.

164 Richard Falk, *Revitalizing International Law* (Iowa State University Press, 1989) 222. In 1989, Falk described the 'Nuremberg Promise' quite prophetically: [I]n the future international relations would be carried on within the limits set by the Nuremberg Judgment, or else the wrong doers, even government officials not defeated in war, would be subject to some effective procedures of legal challenge.

scholarship is thoughtful and original. Their work should be of great interest to those who advocate a global 'rule of law' in the world's complex empirical order. As Charles de Visscher, the eminent jurist and judge of the International Court of Justice wrote in 1957:

Scientific objectivity forbids accepting [international law] as an accomplished reality. Doctrine does better service to the progress of law when it points out the sometimes openly anti-social consequences of the present distribution of power than when it gives reign to a sort of 'legal totalitarianism' which manifests behind a façade of unreal architecture the present disorder of international relations.¹⁶⁵

So the question is: can cosmopolitanism survive in the world of theory and practice in the 21st century?

165 Charles de Visscher, above n 50, 138.

