

Lecky's circle: thoughts from the frontier of international law II

by James Bacchus

The author, Chairman of the Appellate Body of the World Trade Organization, reflects in the second of a two-part article on what the nineteenth century moral philosopher W E H Lecky can tell us about our own era.

In these first years of the twenty-first century, we are understandably less sanguine and more skeptical than W E H Lecky about the possibilities of progress for humanity. A decade after he died in the reassuring inner sanctum of his book-lined library, the calm certitudes of his Victorian era were shattered by the sudden violence of the First World War. All these years later, in the aftermath of two world wars, in the wake of the Holocaust, and in the shadow of the mushroom cloud, Lecky would perhaps understand the doubts of those today who are less hopeful than he was about the prospects for human progress.

Lecky observed once that, with societies and with eras, there is a “hidden bias of the imagination” that affects the course of events. He believed that there are certain unstated predispositions of civilizations and of times that have a far greater impact on the climate of opinion, and thus on the flow of events, than any display of logic. He believed, too, that this same observation applies equally to individuals. I think he was right. And I am persuaded that, as Lecky no doubt would have acknowledged, this observation applies equally to Lecky himself.

Lecky was imbued with the belief in progress that was characteristic of the Victorian era. He believed in progress because – although he was a rationalist who wrote about the virtues of rationalism – he retained nevertheless the prevailing Victorian belief in God's will. He had faith that Providence was guiding the evolution of humanity toward an ever-larger circle. He was confident that tomorrow would be better than today, because he thought that tomorrow would take us ever closer to the true morality of a true humanity.

Lecky described himself as “half vagabond, half bookworm.” He lived *with* books, and, to a great extent, he lived *in* books. He travelled primarily to go to libraries, and, when at home in London, he spent much of his time in his library. When he finally entered Parliament late in life, he complained that politics was an interruption of his

lifelong devotion to books and literature. Lecky was the kind of man who corrected the page proofs of his latest book while on his honeymoon. (Lecky's obliging wife – a “lady-in-waiting” to Queen Sophia of the Netherlands – evidently tolerated that; my wife, Rebecca, who is not fond of waiting, would not.)

In all his Victorian bookishness, Lecky could not imagine a world in which humanity would not progress. As Donal McCartney has put it, Lecky's books, including the history of European morals in which he gave voice to his view of the ever-enlarging circle of humanity, were “written by one who held a firm belief in the idea of progress. The general theme of the books might be said to have been the story of the gradual triumph of rationalism, liberty and tolerance in European history. There could be no going back on these advances. It had never once crossed Lecky's mind that there could be any retrogression to persecution and intolerance in Western civilization.”

Lecky wrote confidently: “Liberty, industry and peace are in modern societies indissolubly connected, and their ultimate ascendancy depends upon a movement which may be retarded, but cannot be arrested.” We know better. For all our occasional inclinations toward triumphalism, for all our considerable confidence in the manifest potential of both democracy and capitalism, for all our wishful thinking about the “ultimate ascendancy” of all our many hopes for humanity, we definitely know better. The years since Lecky left us have taught us only too well that progress toward a wider circle of humanity is by no means assured. It definitely can be arrested.

NEED TO EXPAND THE CIRCLE

Yet this is all the more reason for us to try to expand the size of our circle. This is all the more reason for us to broaden our “range of duty” in order to broaden the sweep of human concern and, thereby, the scope of human morality. This is all the more reason for us to use human

morality to help us achieve human progress. Here in the twenty-first century, I, for one, do not have the absolute certainty that Lecky had in the nineteenth century about the “ultimate ascendancy” of humanity through continued human progress. The American mind of my time is not the Victorian mind of his time. I have other hidden biases of the imagination. Even so, I choose to imagine the possibility of human progress. More important, I have chosen to spend my life working to make what I can imagine *for* the world a living reality *in* the world. That is what brought me – and what brought others who share my stubbornly optimistic view – to the round table of the Appellate Body of the WTO.

The cosmologists, like the poet, say that, eons from now, the world will end with a whimper, and not with a bang (T S Eliot, “The Hollow Men,” in Oscar Williams, ed, *Immortal Poems of the English Language* (New York: Washington Square Press, 1952) 539, 542). I do not presume to know if they are right. It is not for me to foresee the completion of the human effort in this world. Like Lecky, I trust Providence to tend to our ultimate fate. For my part, I am far more interested in what will happen between now and then to those who live in the world that Providence has entrusted to us. And I am far more interested in fulfilling my own range of duty in the ongoing human effort.

Progress can sometimes be hard to see. While researching once in a library in Paris, Lecky found the minute scrawl of the fabled French diplomat Talleyrand so microscopic that he had to use a magnifying glass to read it. Similarly, sometimes it may seem that we need a magnifying glass to see the crawl of human progress toward Lecky’s enlarged circle. The failures of international dispute settlement are featured in dying color on the bleeding broadcasts of CNN. The successes of international dispute settlement are written in boring black and white in the tedious pages of WTO reports.

Hard as it may sometimes be to discern, human progress is nevertheless possible. We need not be Victorian “men of letters” to believe that tomorrow can be better than today. But, to make progress, we must first be able to see the possibility of progress, and, to see it, we must first be able to imagine it. We must change the hidden biases of our imagination.

In trade, we have imagined progress. This helps explain why there is a WTO. In other areas, we have not yet done so. This helps explain much else. This helps explain, for example, why so many of the nations of the world are only now beginning to see the need for strengthening the authority and the capability of the World Health Organization in dealing with SARS, AIDS, and other global epidemic diseases that do not respect artificial political borders. This helps explain also why we have failed thus far to make concerted multilateral efforts to protect and preserve the world’s environment comparable to those that we have made to expand the world’s trade. There are, of

course, numerous other equally compelling examples that I might use to illustrate all the other ways in which our imagination falls short of our genuine global need. Alas, there are far too many examples of where we are not yet meeting an urgent global need because we do not yet see it.

The right answer for the world is the approach we have taken to finding the right answers at the round table of the Appellate Body of the WTO. Conversation. Deliberation. Mutual criticism. And, as a result, mutual trust. The right approach, in other words, is what Mill and Lecky and Rawls would all call “reasonableness.” The only way to human progress is through human freedom, and the only way to human freedom is through the reasonableness that is the key to freedom.

Admittedly, this may be easier for the seven of us on the Appellate Body than for all the assembled nations of the world in all the various multilateral venues in which they meet and deliberate and pontificate. For all our differences, we seven are in many ways all alike. To borrow trade terminology, the “process and production methods” around the world that eventually brought the seven of us together at our table in Geneva may have differed considerably; yet the seven of us are very much “like products.” Accordingly, the picture we each have of the world is very much alike. If it were not, we would not have been asked by the members of the WTO to sit together and work together around our table.

And yet, as I picture the world, this is true as well of different individuals and of different peoples throughout the world. We are all very much “like products.” No matter our nationality, no matter our ethnicity, no matter our race, no matter our religion, no matter our sex or our age or our circumstance, no matter the vast cultural and other differences that may often divide us, we humans are, nevertheless, all “like.” We are all alike in that we all share a common kinship that transcends our many differences. We are all part of the one circle of humanity.

In believing that there is one circle of humanity, in believing that the true circle of humanity is a single circle that includes all of humanity, in believing that, therefore, our circle of humanity must be enlarged through continued human progress to include all of humanity, Lecky did not underestimate the persistence of culture as a challenge that must be faced in the making of such progress. On the long, solitary mountain walks he often took when he was not reading and writing in his library, Lecky carried along in his pocket a copy of Edmund Burke’s *Reflections on the Revolution in France*. Like Burke, he was very much aware of the importance of the “little platoons” of local cultures, and of the challenges that the habits, the traditions, the attitudes, and the very diversities of local cultures present to the continued enlargement of the human circle.

Lecky shared Burke’s view that, “To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public

affections.” It was perhaps for this reason that Lecky spent so many years writing a history of Ireland that was notable in particular for its defense of Irish culture. At the same time, Lecky, like Burke, was of the view as well that, as Burke went on to say in the very next sentence of his famous reflections, the “little platoon” of our local affections is “the first link in the series by which we proceed towards a love to our country and to mankind.” There must be other links beyond this first link that will lead us to a broader range of duty and to a similar allegiance to the larger circle of all of humanity.

This is seen clearly in Lecky’s attitude toward the political relationship between Ireland and Britain. Like Burke before him, Lecky was an Irish “Unionist.” He favoured the continued union of Ireland and Britain, and he did so at a time when many Irish patriots who shared many of Lecky’s other views were moving ever closer toward separation, and toward Irish independence. He was, however, no less of an Irishman because of it. After all, it was the Irish, not the British, who raised a statue of him in Dublin.

Lecky hoped that Ireland and Britain would be able to reason together in ways that would sustain their union. He believed, as I do, that a crucial part of our likeness is the capability we share as humans of reasoning together. This is true for seven people. This is true for hundreds, thousands, millions, or billions of people. This is true in trade. This is true also in much else of mutual international concern. Above all, and despite all, we must somehow reason together.

REASONABLENESS WHEN FURTHERING TRADE

Reasonableness must be our approach in all our continuing multilateral efforts to further trade. Multilateral trade negotiation is one of the best opportunities we have for employing reasonableness by reasoning together, and multilateral trade liberalization through such negotiation is one of the best ways we have to help enlarge the circle to include all of humanity. Through the combined power of cooperative reason in the WTO, the nations of the world can continue to help free humanity through trade. Trade is an essential means to the essential end of liberating humanity so that we can all live together in freedom.

The connection between trade and freedom is one that is both critical and often overlooked. Our dignity as individual human beings depends on our ability to choose our own destiny. Thus, freedom is about choosing. Freedom is about having real choices about how to live. The liberty that is freedom is about choosing for ourselves. The French thinker Simone Weil once suggested, in *The Need for Roots*, published in 1949, that, “Liberty, taking the word in its concrete sense, consists in the ability to choose.” Likewise, I would suggest that humanity, taken in its truest and highest sense, consists in believing that other

people have the capacity to choose for themselves – if they are given the choice. Accordingly, by multiplying choices, by increasing the ability to choose, trade serves the end of freedom, and thereby serves as well the goal of establishing the single circle of all of humanity.

Reasonableness must likewise be our approach in all our other multilateral efforts beyond trade. In addition to the means of trade, other multilateral means are also needed to serve the end of freedom. Other means are also needed to help enlarge the circle of human sympathy to include all of humanity. Expanding trade is only one way to expand Lecky’s circle. There are others. There are numerous other global concerns that demand global solutions if we are to have any hope of changing all the numbing statistics of world deprivation, and of having the full measure of both freedom and humanity throughout the world.

Some of these concerns affect trade or otherwise relate to trade. Others do not. The numbing statistics reveal many global needs. The world is a circle of many truly global concerns. These include – but, as we lawyers say, are not limited to – human rights, women’s rights, the environment, health, labor, intellectual property, investment, crime, corruption, and, of course, terrorism, genocide, and all the other dire dilemmas that so urgently demand cooperative acts of collective international security.

Our need for international law to address these and other international concerns is great, and is greatly increasing. But our awareness of our need for international law, and of our need to establish and to abide by the international rule of law, is not increasing. The geographical distance between us seems to be diminishing, but the other distances between us are not. Even as the forces of “globalization” seem to be making our world smaller, other forces are pulling us farther and farther apart.

When lecturing at Harvard Law School some time back, I spoke at length about what I consider to be the significant and positive contribution the WTO is making in demonstrating to a skeptical world that there can be such a thing as the international rule of law. Afterwards, one of the bright students at Harvard asked me a question that I confessed at the time I could not answer.

The question was this. In trade, independent nation-states have a clear and compelling economic incentive to cooperate in finding global, multilateral solutions. In the WTO, mutual cooperation leads to greater mutual prosperity. In WTO dispute settlement, a refusal to comply with rules and rulings can lead to costly economic sanctions. But where is the incentive for compliance with international law in other areas of global concern – in areas where there is not an obvious economic incentive, and where there is not the economic leverage that there is to help secure and ensure compliance in the WTO? It is difficult enough to achieve consensus and compliance in the WTO – where there is such leverage. How can we do it elsewhere?

This is a very good question, to say the least. There are about 30,000 pages of rules in the WTO treaty. There are about 20,000 pages of rulings in WTO dispute settlement. The members of the WTO comply with these rules and with these rulings because they see it as in their self-interest to do so. They want the trade concessions that are secured by compliance. They do not want the trade sanctions that can be the price of non-compliance. But what about the other treaties besides the WTO treaty that have been concluded by the nations of the world? And what about all the additional treaties that the world still needs to negotiate and conclude? What about, say, the international agreement to combat terrorism that the world has long discussed, but has not even come close to concluding? Where is the incentive to comply with other international laws that are not part of the WTO treaty, and where is the leverage to enforce them?

I promised that bright young Harvard law student that I would think about the answer to this question. I have thought long and hard about it ever since. I have concluded that my answer is the same as the answer that was given long ago by William Edward Hartpole Lecky, who said (*Morals*, vol I, at 13):

“He who seeks to improve the moral condition of mankind has two, and only two, ways of accomplishing his end. The first is, to make it more and more the interest of each to conform to that of the others; the second is, to dispel the ignorance which prevents men from seeing their true interest.”

Therefore, as Lecky saw it, there are only two ways to further human progress. One is to find new ways to help us cooperate with one another in our mutual self-interest – such as through the WTO. The other is to find new ways to help us educate and otherwise enlighten one another so that we will be able to see our true self-interest.

The Oxford and Cambridge Club in London has a large library filled with shelves and shelves of old books. On one of the lofty shelves there, I found the two volumes of another old book by Lecky, entitled *History of the Rise and Influence of the Spirit of Rationalism in Europe*, which was published in 1865. Fortunately, unlike “The Bookworm” in Geneva, the library of the Oxford and Cambridge Club has a tall ladder. So I climbed the ladder, pulled down the dusty volumes, and spent the better part of a pleasant afternoon sitting alone in the silence of the library and reading more of what Lecky had to say about the importance of seeing and serving our true self-interest. (Although I was all alone in the library, in keeping with the rules of the club, I wore a coat and a well-knotted tie while I did so.)

Lecky acknowledged in the *History of the Rise and Influence of the Spirit of Rationalism in Europe* that there is a “bond of intellectual sympathy” among some of us that inclines some of us to desire to cooperate in our mutual self-interest. Intellectually, rationally, logically, there are some among us who want to work together in our mutual

interest. The difficulty is in doing so. Lecky’s solution to this difficulty was to urge more of us to learn how to do so by trying to do so. He maintained that:

“human nature is so constituted that it is impossible for bodies of men to work together under the sense of a common interest without a warm feeling of amity arising between them. Common aims and hopes knit them together by a bond of sympathy. Each man becomes accustomed to act with a view to the welfare of others, and a union of affections usually replaces or consecrates the union of interests.”

“BOND OF SYMPATHY”

One example illustrating the essential truth of Lecky’s insight is my own experience on the Appellate Body, where in my eight years I have seen first-hand how “common aims and hopes” can knit individuals together in a “bond of sympathy.” I have seen firsthand how a “union of affections” can create and facilitate a “union of interests.” In our work together for the members of the WTO, we seven see ourselves, not as seven, but as one. We have seen the Appellate Body as one from the very beginning.

My hope is that, long after I have left the Appellate Body, those who serve on it will continue to see themselves as one in their continued mutual efforts to serve the members of the WTO. The members of the Appellate Body can continue to achieve much by working together as one toward the common goal of strengthening and sustaining the WTO dispute settlement system as an international institution that will serve all of the members of the WTO equally and effectively. Much can be achieved by a mutual commitment to the kind of real conversation that has always made the Appellate Body think and act and serve as one.

Yet another example of the validity of Lecky’s insight is the broader experience of first the contracting parties of the GATT, and now of the members of the WTO. Cooperation is based on trust. Trust builds on trust. Trust is generated by interaction. Trust is based on habit, and not merely on rational calculation. The trust that emerges from the habit of working together is an example of what some economists call “social capital” (see “A question of trust”, *The Economist*, 22 February 2003, 22). The social capital within the WTO is evidenced in the humdrum, day-to-day working of the WTO-based world trading system that rarely is referenced in the pages of the world’s press or in the rhetoric of the world’s protests. The disputes that are addressed by the Appellate Body are the rare exceptions in a global trading system in which a mutual trust among the members of the WTO largely prevails, and in which their mutual trust contributes significantly to a considerable mutual compliance with the agreed rules for trade.

By working together, the members of the WTO have established the habit of working together. By establishing the habit of compliance with WTO rules, they have encouraged more compliance with WTO rules. Modern mathematical game theorists call this “tit for tat.” Lecky

would simply have called this human nature. For the 146 members of the WTO, just as for the seven members of the Appellate Body, the shared and sustained experience of working together has created, and sustains, a “bond of sympathy” and a “union of interests.” It does so now for all the current 146 members of the WTO. Ultimately, it can do so for all the world.

All the same, Lecky stressed that none of us, whether individuals or nations, will want to engage in the real conversation that can lead to real mutual trust unless we believe that it is in our interest to do so. Altruism is admirable. Altruism is not a fit or a firm foundation for effective international law. There must be the perception of a real interest to inspire the real conversation and the real trust that, alone, can be the basis for real international law. As Lecky explained in *History of the Rise and Influence of the Spirit of Rationalism in Europe*, vol II, at 338:

“The bond of intellectual sympathy alone is far too weak to restrain the action of colliding passions, and it was reserved for political economy to supply a stronger and permanent principle of unity. This principle is an enlightened self-interest.”

By “political economy,” Lecky, a nineteenth-century man, meant a policy aimed at attaining and maintaining the nineteenth-century goal of freer trade. In his mid-Victorian musings, he was echoing the views of Adam Smith, David Ricardo, Richard Cobden, and their many free-trade followers of his time. But this is also our goal in our time. Lecky was also anticipating some of the assumptions that are between the lines of the WTO treaty, and that are taking the members of the WTO into the twenty-first century.

One of those assumptions is that of a fixed and unchanging human nature that focuses on self-interest, and thus on the need to perceive, and to appeal to, an enlightened self-interest. Lecky observed that:

“Taking human nature with all its defects, the influence of an enlightened self-interest first of all upon the actions and afterwards upon the character of mankind, is shown to be sufficient to construct the whole edifice of civilisation; and if that principle were withdrawn, all would crumble in the dust (History of the Rise and Influence of the Spirit of Rationalism in Europe, vol II, at 350).”

His emphasis on the need for an enlightened self-interest was not in any way an original thought with Lecky. Nor was it in any way an original thought with Smith, Ricardo, Cobden, or others of his time who influenced his Victorian thinking. There were many others who preceded them in perceiving the importance and, indeed, the indispensability, of an enlightened view of self-interest to expanding the circle of human morality and, thus, human sympathy. There have been many others who have concluded, as Lecky did, that, without an enlightened view of self-interest, civilization will “crumble in the dust.”

ENLIGHTENED VIEW OF SELF-INTEREST

An enlightened view of self-interest can, for example, be seen as a key to Aristotle’s *Politics*. Like all classical Greeks, Aristotle could not even conceive of a happy or a virtuous life outside of the context of the mutually cooperative framework of the Greek *polis* – the Greek city-state. Likewise, and contrary to the common misconception of many today, Adam Smith’s “moral sentiments” were much more about cooperation than about competition. He saw trade primarily as a way of cooperating, not of competing. That is why he placed so much emphasis on the necessity of a division of labor in his most famous book, *The Wealth of Nations*. Moreover, the first paragraph of the first page of the other, and often neglected, first book by that great champion of the pursuit of self-interest, *The Theory of Moral Sentiments*, is a ringing assertion of the centrality of the bonds of human sympathy. Similarly, at the very center of the thoughts of Alexis de Tocqueville on the possibilities for human progress through the development of democratic self-government is his belief that, in perceiving and pursuing our self-interest, we must look both far ahead and far afield; we must adhere to what he described as “the principle of interest rightly understood” (see *Democracy in America*, vol II, at 129).

And so on. In Christian ethics, in Muslim ethics, in Jewish ethics, in Hindu ethics, in Buddhist ethics, in both religious and secular thinking of all kinds in all parts of the world and all through the centuries, there has been a pervasive emphasis on perceiving and pursuing an enlightened self-interest. In advocating adherence to an enlightened view of self-interest, Lecky was merely following in many other similar footsteps. Indeed, if there is one common thread that runs through much of theology and philosophy from antiquity to today – and that, I would contend, has universal application for all of humanity today and tomorrow – it is the common thread of the indispensability of an enlightened self-interest to the furthering of human progress and to the progressive unfolding of an ever-expanding human morality and human sympathy.

Thus, the answer to the question I was asked by the student at Harvard about the future of international law is found, not in the nuances of law itself, not in the particulars of law *per se*, but in how we see our true self-interest. And how we see our true self-interest depends on how large we see the *size* of our circle. Do we really see other people as part of our circle? Do we really see other people in other parts of the world as part of our circle? Do we really see their welfare and their well-being as part of our self-interest? Do we wish for others what we wish for ourselves? Are other people, whoever they may be, wherever they may be, our neighbors? Are they our sisters and our brothers? Or are they only our prey?

As Lecky suggested, the range of duty we see ourselves as having to others is likewise the range of what we see as our

self-interest. It is also, as a consequence, the range of what we see as our need for law. The long historical progression from preying on others to trusting in others is a progression away from might, and toward right. It is a progressive expansion of our range of duty, and a progressive enlargement of our circle of human sympathy. It is the progression away from barbarism, and toward law. It is the progression away from the rule of power, and toward the rule of law.

We still have a long road to travel from power to law. In particular, we still have a long way to go, we still have a long way to progress, to reach and realize the international rule of law. We have reached the point where nations feel compelled to claim they are adhering to the international rule of law. We have not yet reached the point where nations necessarily always do so. Rhetorically, our range of duty sometimes seems to include the whole world. But realistically, it does not. And thus, legally, it does not, because all too often what are described as “laws” that are meant to fulfill the full extent of our duty to others elsewhere in the world do not, realistically, have any real meaning.

Why not? Why does power still so often prevail over law? Why does the reality of the international rule of law fall considerably short of our rhetorical commitment to the international rule of law? The answer is in what we are able to see. Like everything else of man’s devising, the law can be considered an invention. The British philosopher Mary Midgley, in *Heart and Mind*, has observed that the notion of an invention is not an abstract notion; it has meaning only “with reference to a given purpose. You can invent the spinning jenny, or a more humane form of divorce, or the notion of representative government, once you know that you want them.”

This is equally so with the invention of law. Just as other inventions occur only “once you know that you want them,” so too does law occur only once you know that you want law. For this reason, international law, like any other law, will occur only once we know that we want it. But we will not want law until we know that we need it. And we will not need it until we see that we need it. And we will not see that we need it while the size of our circle of human sympathy remains smaller than the scope of the international law that we need.

An example of a society that did not see the need for invention was ancient Greece. The classical Greeks lived in a world in which everything seemed to be new. They had no precedents. They had no models. As a great British historian of ancient Greece, the late Moses Finley, wrote, in *The Greeks*, theirs was a situation of “compulsory originality.” The Greeks responded to the challenge of this situation with an originality that perhaps remains unequalled. In virtually every emerging form of human inquiry – including the scientific and mathematic pursuits of astronomy, biology, physics, geometry, meteorology, and

more – the classical Greeks were pioneers of surpassing originality.

Long before Einstein, Democritus advanced an atomic theory of the universe. Long before Darwin, Anaximander anticipated the theory of evolution. Long before Copernicus and Galileo, Aristarchus argued that the earth circles the sun. In these and numerous other ways, the ancient Greeks demonstrated the reach of their originality. And yet, as Finley noted, “[T]he list of Greek inventions is a very short one indeed.”

There were several reasons for this. Because the Greeks had slaves, they had less need for inventions. Because the Greeks had an aristocratic tradition that valued leisure, they had less interest in what we would consider as useful work. Generally, they were content to engage in the originality of their remarkable deductive reasoning; they gave little thought to how the conclusions from their reasoning might be used to improve materially the quality of their daily lives.

The Greeks wanted to know, but for the most part they did not see the need to use their knowledge for invention. Theirs was what economists call a “bounded rationality” (the phrase is that of the economist Timur Kuran. See Joel Mokyr, *The Lever of Riches: Technological Creativity and Economic Progress* (Oxford: Oxford University Press, 1990), 154). For all their considerable capabilities for reasoning, they could not see beyond the bounds of the structure of their own ancient world. In Finley’s judgment, (*The Greeks*, at 125):

“Apparently the society as a whole lacked the mentality and the motivation to strive systematically for greater efficiency and greater productivity . . . What was missing was an intangible factor, a Baconian spirit which regularly and persistently turns speculation into empirical research, empirical research into practical application.”

Thus, as Lecky would remind us, the Greeks, too, had their “hidden bias of imagination.” They did not share his view – or our view – of human progress as involving economic growth through the practical application of innovative ideas in technological inventions. They did not know that they wanted inventions. They did not know that they needed them, because they did not see a need for them. They could not imagine them.

We face the same challenge now. Today with respect to international law, our own capabilities for reasoning – and especially for reasoning together – are bounded by the limits of our imagination. We cannot have the international rule of law if we cannot imagine a world in which there is the international rule of law. We cannot know that we need it if we do not see the need for it. And we cannot see the need for it if we cannot see as far as all of humanity. We cannot see the need for the international rule of law if we cannot see clearly enough to change the hidden bias of our imagination.

Generally, with trade, we see our shared interest in working together. Trade serves and strengthens our shared interest. By its very nature as an act of exchange, trade is an *acknowledgment* of a shared interest. In the multilateral trading system that is served by the WTO, this shared interest is reflected most clearly in the “most-favoured-nation” principle that is at the very heart of the system. A principle that provides that one trade concession made by one WTO member to one other WTO member must also be made to all other WTO members is a principle that, above all else, acknowledges the shared interest of all WTO members in securing the mutual benefits of trade.

Yet, even in trade, often we do not see the interest we share. Thus, even in trade, we do not always serve our shared interest as we should. In particular, even in trade, we do not always see clearly enough our shared interest in establishing and upholding the international rule of law. More so, in areas of international concern other than trade, often we are even less likely than we are in trade to see our shared interest in the international rule of law. Because we cannot see it, we cannot serve it. We cannot advance the international rule of law in those other areas of shared human concern because we cannot see beyond the current limits of our imagination.

The circle of the ancient Greeks was enclosed by the limits of their own thinking. They could not see beyond it. All those who were not Greeks were barbarians. They spoke the “bar-bar” of something other than Greek, and so they were the outsiders. They were the “others.” They were the foreigners who were beyond the limits of the Greek circle. At the dawn of rational thought, the ultimate implications of the profoundly original Greek thinking were universal. Yet the limited size of the Greek circle kept the Greeks from seeing the true extent of those implications.

SEEING THE POTENTIAL OF LAW

So too with the way that many who profess to believe in law see the supposed limits of law today. The way they see the potential of law is limited by the way they see the limits of their self-interest. Thomas Hobbes, a Londoner who was a dedicated student of both the Greeks and self-interest, told us long ago in *Leviathan*, “Covenants, without the sword, are but Words . . .” Short of the sword, the only other way to enforce the covenants we choose to call “international law” is by seeing more than we see now. It is by expanding the circle of our sight. It is by inspiring an ever-expanding circle of enlightened self-interest. The larger the circle, the larger the need we will see for international law that is really “law,” and not merely “words.”

Where international law is concerned, we live, like the ancient Greeks, in a time of “compulsory originality.” And, to be sure, we have no lack of originality among our legal thinkers. We have no lack of legal theories that can have

practical application in a world much in need of international law, and in need even more of the international rule of law. What we lack is a sufficient awareness in the world that real and inventive and practical applications of international law are needed.

Those of us who believe we need “law” – and who believe especially, and increasingly, that we need “international law” – must understand above all what it is that *precedes* “law.” Law is preceded by a perception of a duty. Thus, an awareness of a duty precedes a willingness to abide by a law. Law will exist only to the extent that we see a need for law in fulfilling our “range of duty.” Law will exist only to the extent that we see the need to be bound by law.

In his book, *Ways of Seeing*, the British art critic John Berger told us: “Seeing comes before words. The child looks and recognizes before it can speak. But there is also another sense in which seeing comes before words. It is seeing which establishes our place in the surrounding world. . . .” As with art, so with law. Seeing comes before words, and, thus, seeing comes before the words that comprise the laws that place us all in the surrounding world. For this reason, the foremost frontier in international law is the frontier of what we see. It is the frontier of what we see as our true self-interest. It is the frontier that faces all of us who seek a surrounding world in which there truly *is* international law.

Can we look beyond the grim reiteration of all the numbing statistics of human degradation to see at last the sheer human reality they represent? Can we look beyond the mere numerical fact that there are 826 million people in the developing countries of the world who suffer from malnourishment to see the hunger of a single human being somewhere in Asia? Can we look beyond the mere numerical fact that there are 968 million people in the developing countries of the world with no access to safe drinking water from improved water resources to see the thirst of a single human being somewhere in Africa? Can we feel the sheer urgency of their hunger, their thirst, their poverty, their deprivation, their desperation, if we do not see it? And can we see it if we do not see and, thus, do not acknowledge the basic humanity that each and every one of them shares with us? Can we really treat them as anything other than mere numbers, as anything other than mere statistics, if we do not see each and every one of them as part of our circle?

Article 102 of the Charter of the United Nations provides that every treaty and every other international agreement that is entered into by a Member State of the United Nations shall be registered and published by the United Nations Secretariat. The United Nations Treaty Collection contains more than 40,000 treaties. Many of these treaties are followed and upheld. But many are not. Many are simply ignored in the day-to-day dealings and doings of the nations of the world.

For all of the “international law” we have made as a world, ours remains a world that is largely without international law. We know a lot about how to negotiate and conclude and sign and ratify and even register treaties. We know a lot less about how to give them real meaning as real law in the daily life of the world. We know a lot about how to make international law. We know a lot less about how to make international law work for all of us in the large circle that includes all of those who are much in need of international law all over the wide world.

Why is international law so often invoked but so seldom obeyed? Why do sovereign nation-states so often simply ignore international law and international tribunals? They do so because they can, and they do so because they do not see why they should not. Like the ancient Greeks, their circle is too small. It is enclosed by the limits of their own thinking. To expand their thinking, to expand the domain of international law, the nations of the world must expand the size of their circle. In a world where there truly is international law, the circle of human sympathy will truly be a circle that includes the whole world.

Lecky was much taller than I am. He could reach the top shelf. He was so “very tall” that, on the long walks they often took together, he had to stoop over to hear the soft voice of the aged Thomas Carlyle (see Fred Kaplan, *Thomas Carlyle: a Biography* (Ithaca, New York: Cornell University press, 1983)). Lecky was tall enough to foresee the future. Like many men, he grew more pessimistic as he grew older. The glass that seemed half full in his youth seemed in his later years to be half empty. Like some others of his time – and like some also of our time (see Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (New York: WW Norton & Company, 2003) – Lecky worried about extending the limits of liberal democracy out of fear that doing so would lead to illiberal results. He feared that too much democracy would result in too little freedom. Yet, even in his old age, Lecky retained the optimistic belief in human progress about which he wrote so eloquently in his youth.

Later in life, Lecky wrote a multi-volume history of eighteenth-century England, and also a multi-volume history of eighteenth-century Ireland. These lengthy narrative histories were widely read and widely praised at the time. Even today, they are, on occasion, still read. But it was his youthful book on the history of European morals that was, of all his books, Lecky’s favorite. Perhaps this was because it was in that early book that Lecky voiced the most optimism about the future. It was in that youthful distillation of all the hopes he held as he delved so deeply into all the dusty shelves of all the musty libraries of Europe that he saw most clearly the expanding circle of humanity.

It was also in his youth when Lecky first began to admire and model himself after another nineteenth-century “man of letters” who wrote about circles, Ralph Waldo Emerson.

Like me, Emerson was an American who never tired of London. You can see this in every line of his collection of essays about his visit to London and to England, *English Traits*. Lecky was about 30 years younger than Emerson. To my knowledge, they never met. But, in his youth, Lecky, like me, read Emerson, and the Victorian historian from Ireland was, like me, clearly much influenced by the American sage from Concord.

Lecky’s histories were really extended philosophical essays in a style reminiscent of Emerson’s own timeless essays. Like the writings of Emerson, Lecky’s writings were really lay sermons that sought to inspire a thoughtful emulation. In his writing, and in his thinking, Lecky admittedly emulated Emerson. Like Emerson, “he tried to crystallize political wisdom in a single shining sentence.” And, like Emerson, he saw the world as a world of circles in which the range of what we see shapes the range of what we do.

At some point in his youth, before writing his history of European morals, Lecky must surely have read Emerson’s essay entitled “Circles.” If so, it must have influenced his own thinking, even as it has influenced mine. In that essay, Emerson wrote:


“The life of man is a self-evolving circle which, from a ring imperceptibly small, rushes on all sides outwards to new and larger circles, and that without end ... The eye is the first circle; the horizon which it forms is the second; and throughout nature this primary figure is repeated without end ... Our life is an apprenticeship to the truth, that around every circle another can be drawn ... The one thing which we seek with insatiable desire is ... to draw a new circle ...”

As Emerson taught us, our “invisible thought” makes our visible world. As Lecky taught us, the “hidden bias” of our imagination determines what is visible to us in the world around us. For Emerson, for Lecky, and for me, the question is one of what we can see. The size of our circle depends on our eyes. It depends on our sight. It depends on who and what and how far we can see across the horizon.

Can we see anything beyond our own narrow-minded and short-sighted selfishness? Can we see as far as next door? Can we see as far as the farthest forgotten and forsaken corner of our imperiled planet? Will we turn inward? Will we turn our eyes away from the world? Or will we turn outward toward the world, and to new and larger circles, to circles without end?

From my seat in our small circle called the WTO Appellate Body, from my front row seat on the frontier of international law, I see an urgent need for a new and larger circle. I see our apprenticeship to truth as ending only when we finally discover the truth about our real interest as individuals and as nations. I see our apprenticeship as ending only when we clearly and finally see that our true self-interest includes *all of humanity*.

Together, we must draw a new circle that embraces all the world. Together, we must draw Lecky's circle.

This article is taken from the lecture given by James Bacchus at the Institute of Advanced Legal Studies on 10 April 2003. 

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The Security Council: an impediment to international justice?

by Nigel White

The author doubts whether the Council could survive another crisis of the type witnessed in Kosovo and Iraq without change.

INTRODUCTION

The crisis of 2002–2003, leading up to the application of military force against Iraq on 20 March 2003, raised fundamental questions over the future of the Security Council. From the American and British perspectives the inability of the Council to agree on a process for handling the Iraq crisis called into question the role, if any, to be played by the Security Council in the future. From the French perspective (and also probably from the Russian and Chinese perspectives) the Iraq crisis strengthened the Security Council, by showing that it will not simply agree to the demands of the sole remaining superpower. The principle seemingly being upheld by France, Russia and China, was that using force to resolve long standing problems should only occur once all diplomatic and non-forcible efforts to resolve the matter had been exhausted. It certainly seemed that the process of weapons inspection, restarted after Resolution 1441 of 8 November 2002, was precipitously curtailed by military action.

Nevertheless, to paint the picture of a Council protecting fundamental principles (the principle of the non-use of force) in the Iraq crisis may seem a little rich, given that, as with many other instances of Security

Council action and inaction, the application of principles of law and justice is selective and inconsistent, being dependent on the political configuration of Council membership, particularly the P5 (five permanent members), on any given issue. While the French government can probably claim the moral and legal high ground in the Iraq crisis in March 2003, how can it, along with China, France, and also the UK, explain its pragmatism in the case of voting for a US inspired resolution granting immunity from the International Criminal Court (ICC) to peacekeepers from certain countries serving with the UN in July 2002? Of course, pragmatists would argue that these are completely separate issues, involving different issues of power and law. That is certainly true, and it is to be expected in a political body.

The purpose here though, is not just to criticise the Council for its inconsistency, but to suggest ways in which the Council's discretion in the maintenance of international peace and security, and the discretion of each permanent member in exercising the veto, can be evaluated and perhaps regulated, so that principles of law and justice play a more significant role in decision making within the Council. Furthermore, the problem of inaction