

International Law and Institutions: A Post-Westphalian Landscape

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As globalization has changed the relations between states, international organizations, and other nonstate actors, international law has played an important role in shaping those relationships. If the defining issue of the 21st century is the struggle between democracy and chaos, law will be a key part of that struggle. It remains to be seen whether international law and international organizations can help handle these developments in ways that promote conflict resolution, lessening of dangers, stability, and progress. In response to this situation, both law and organizations are undergoing a revolution in this important arena. For good or ill, the old rules and standards—dating back to the Peace of Westphalia in 1648—that have helped regulate international conduct for the past 350 years are giving way to new approaches.

This chapter examines how this post-Westphalian revolution is unfolding and where it seems headed. Its main thesis is that this revolution can be harnessed, or at least channeled, in a constructive direction for U.S. interests and broader healthy causes if it is guided by a policy of active engagement and shaping. The risk is that this revolution might not unfold wisely if it is allowed to proceed on its own dynamics, which would be driven by many different forces, not all of them healthy. A far better outcome is possible if the United States and its allies work together to shape its future. The task of dealing with a globalizing world will be easier if new laws and better functioning organizations can be molded to make a strong, sound contribution. Guiding this revolution will be one of the most important challenges facing U.S. foreign policy in the coming years. It merits considerable attention—perhaps more than it is getting now.

Setting the Stage

The definition of globalization provided by Andrew Linklater is particularly useful when it comes to international law and international organizations: “the compression of time and space and the universalization of economic and social relations.”¹ International law, which assists in regularizing economic and social relations, has

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struggled to keep up with the changing international landscape. As Eugene Rostow put it, “There has been an explosion of international law in response to the exponential growth of international trade, travel, and finance.”²

Developments in law over the last decade mirror trends seen in other disciplines: an increase in connectivity across borders, more cooperative efforts between states and citizens of different states, and the emergence of new international standards and norms. Both law and international organizations are facilitators for globalization. The change in the global environment has challenged long-standing legal tenets, such as the principle of noninterference in sovereign state matters. Much as the information and transportation revolutions have been facilitators for globalization, a “legal revolution” of sorts is facilitating global transactions and international cooperation. As stated in the December 1999 National Security Strategy, “We must sustain our efforts to press for adherence to democratic principles, and respect for basic human rights and *the rule of law* (emphasis added) worldwide, including in countries that continue to defy democratic advances.”³ In fact, this document cites “the rule of law” as an important U.S. objective no less than 10 times.

At the same time, a countertrend against global standards can be seen in every area, from copyright laws to labor standards. Samuel Huntington in *The Clash of Civilizations and the Remaking of World Order*,⁴ and Benjamin Barber in *Jihad vs. McWorld: How Globalism and Tribalism Are Reshaping the World*,⁵ vividly describe the counter-globalism phenomenon, albeit from different viewpoints. The forces of fragmentation work against the globalization of law. Some observers, such as Henry Kissinger, anticipate a growing “political backlash” from developing states against globalization.⁶ Others equate global culture with American culture and warn, as does United Nations (UN) Secretary General Kofi Anan, of a potential global backlash against American values.⁷ The conflict between those advocating the adoption of global standards and those states and nonstate actors fighting to preserve local identities set the stage for examining the future of international law and organizations.

Key Phenomena, Dynamics, and Trends

The Peace of Westphalia of 1648 is credited with establishment of a system recognizing the sovereign equality of states, with the state as the center of authority, originator of law, and provider of security. Today, however, traditional notions of sovereignty are being challenged by trends toward extraterritoriality, regionalization, and universality of laws. Changes in these three areas are having a substantial impact on how states will be acting, interacting, and influenced by external sources in the coming years. A fourth area of evolving law, the growing regulation of warfare, is also noteworthy, as discussed below.

Growth of Extraterritorial Application of National Law

Increasingly, states attempt to apply their laws to persons and events outside their borders. As the United States grapples with transnational crime, prosecutors attempt to apply its laws to foreign terrorists, drug traffickers, and other malfasants based on

“effects” on, or results for, the United States and its citizens. The exponential growth in transnational commerce has spurred a similar trend in the areas of antitrust, finance, and trade law.

Criminal Law. Through the legal device of extradition, the United States and other states attempt to apply national criminal laws to foreign events—for example, terrorism, drug trafficking—based on their effects in the United States. Traditional bases of jurisdiction apply to criminal activities occurring within the United States (territoriality) or to activities of U.S. citizens, regardless of the location (nationality). The growth of transnational crime has increased the drive to apply U.S. laws to foreign nationals based on effects or results in American territory, such as from drug trafficking (Carlos Lehder Rivas) or terrorism (Osama bin Laden), even if the planning or acts themselves occurred overseas.⁸ The United States is not alone in attempting to apply criminal laws beyond its borders in this way.

Additional bases of extraterritorial jurisdiction include the passive nationality principle, protective principle, and universality principle. The principle of passive nationality recognizes the right of the state to protect its nationals overseas and thus gives jurisdiction over foreigners who cause harm to its citizens. The protective principle goes further, giving the state jurisdiction over individuals in events that threaten the state’s existence or proper functioning. Finally, certain crimes (piracy, hijacking, slave trade, genocide, war crimes, torture) have been so widely condemned that international law accepts jurisdiction by any state under the universality principle. Although there is wide acceptance of the passive personality and universality principles, the protective principle is viewed by many as overly broad.

Extradition is not universally favored. Israel as a matter of national policy refuses to extradite citizens, liberally accepting citizenship for Samuel Scheinbein, who was charged with murder in Maryland, while previously denying citizenship to mobster Meyer Lansky. Prior to a Reagan-Thatcher era bilateral extradition agreement, some American courts were notoriously uncooperative in extraditing accused Irish Republican Army terrorists.⁹ Still complicating matters of extradition is the existence of the so-called political offense exception, which recognizes the right of states to refuse to extradite for crimes that are primarily political in nature. Although there is wide acceptance of this doctrine, there are disagreements with definitions of political offenses. Nevertheless, most extradition agreements exclude common crimes. The trend is toward narrow interpretations of the political offense exception, as is the case with the extradition agreement between the United States and United Kingdom.

In some areas, extraditions are often viewed as an affront to national sovereignty. Unsuccessful right-wing Chilean presidential candidate Joaquin Lavín was critical of the British decision to detain Augusto Pinochet in response to a Spanish court’s extradition request to answer charges under the International Torture Convention. “I never expected anything from international justice, because I believe that it represents large countries against small countries,” Lavín said. His views resonate beyond the right-wing elements in Chile to nationalist sentiments across the political spectrum. There was reportedly much relief in Chile when the British court declared Pinochet medically unfit to stand trial, thereby returning the issue to his home state.

The United States has concluded more than 90 extradition treaties since the Jay Treaty of 1794 required the return of deserters from the British navy. Extradition has never been particularly popular, as evidenced by riots in response to the extradition of one alleged deserter under the Jay Treaty. The United States has used the Congressionally mandated drug war certification process to pressure Colombia and other countries to extradite narcotics traffickers. Colombia recently extradited its first prisoner in almost 10 years, at a time when the United States has significantly stepped up aid.¹⁰ Colombia had banned extradition in 1991, when Pablo Escobar and the Medellin cartel launched a series of bombings and assassinations.

Regional agreements, such as the Inter-American Convention on Extradition, have attempted to provide some standardization in procedures and understandings. Some legal scholars have argued for a Universal Extradition Treaty, though it will not likely be seen anytime soon. But interest in this idea may foretell a long-term direction of law in this area.

Antitrust, Trade, and Finance Law. The trend toward extraterritorial application of law can be seen in antitrust, trade, and finance law. Traditionally, American courts have been reluctant to apply American laws extraterritorially. The traditional approach has begun to erode in recent decades. In 1984, a judge held that American antitrust laws applied to foreign air carriers in the case of *Laker Airways v. Sabena, Belgian World Airlines, et alia*. British-owned Laker Airlines sued British Airways, Sabena, Pan Am, and several other airlines in a Federal district court, alleging predatory pricing for transatlantic routes. Although a later holding denied jurisdiction based on a judgment that the anticompetitive activities (for example, price setting) took place solely in the United Kingdom,¹¹ the Laker lawsuit opened the door for further extraterritorial application of other laws.

More recently, the 9th Circuit Court of Appeals upheld the extraterritorial application of American bankruptcy laws to a bank in Hong Kong, *Hong Kong and Shanghai Banking v. Simon*, 1999 (*In re Simon* 153 Fed 3rd 991, 9th Cir 1998). The Bahamas-based borrower was allowed to file for bankruptcy in an American court because U.S.-based subsidiaries carried out principal transactions of the loan. Recent legislation proposed by the Treasury Department would give American courts “long-arm” jurisdiction over foreign banks that violate money-laundering laws when doing business in the United States.

Similar to American antitrust laws, European Union (EU) laws prohibit agreements that prevent, restrict, or distort competition.¹² The European Court of Justice (ECJ) has ruled that EU law applies even to agreements to interfere with competition made outside the territory of member states if the agreement is implemented within the European Union (for example, the “Wood Pulp” case decision of 1988). Recently, the European Union began an investigation of whether Microsoft’s Windows 2000 program breaks EU competition law by allowing dominance over servers.¹³ This comes on the heels of the Department of Justice antitrust lawsuit against Microsoft. The international market remains critical to Microsoft. Nearly one-quarter of Microsoft’s second-quarter revenue of \$6.1 billion came from sales in Europe. The EU commission on competition law has gone on to review proposed mergers between such companies as MCI-WorldCom and Sprint, Time-Warner and America Online,

and Exxon and Mobil. EU disapproval of the proposed MCI-WorldCom-Sprint merger appears to have been a fatal impediment. Clearly, corporate mergers are becoming less viewed as single-nation issues.

Summary of Extraterritorial Trends. The emergence of extraterritoriality may not technically constitute *globalization* of the law per se but rather “transgovernmentalism,” as law professor Anne-Marie Slaughter of Harvard defines it.¹⁴ Transgovernmentalism is distinguished from global law or world government by focusing on networks of formal and informal ties between states fostering cooperation rather than on supranational laws and organizations. In this context, transgovernmentalism clings to the traditional realist notion that states will remain the primary actors in the international environment while acknowledging the growing need for interstate cooperation in light of global trends.

The growing extraterritorial application of state laws reflects globalization because it is a measure of how states are now interacting more often and in new ways. As organized crime grows, pressures arise not only to test the adequacy of existing criminal law but also to write new laws. As international business grows, the same applies to antitrust, trade, and financial laws. The process of redefining old laws and creating new laws is partly a legal exercise, but it also is partly political because it is affected by the interests and pressures of many different countries, some of which do not always agree on the proper nature of law. For example, countries that are victims of organized crime can have a different stake than those that are profiting from it. The same applies to laws regulating international business: depending upon how laws are defined and interpreted, some countries may benefit while others may be harmed. If such laws are well crafted, their application can help dampen international strife and promote cooperative relations. If not, they can have the opposite effect. The process of defining and interpreting them thus bears close watching by the U.S. Government.

Regionalism and the Erosion of Traditional Notions of Sovereignty

Partly as a counterbalance to the growth of global norms and the erosion of traditional notions of state sovereignty, regional institutions have proliferated. The latter are a reflection of the former where states seek either commercial or security benefit by joining with like-minded states for common purposes. The growth of free trade zones around the world demonstrates the growing attraction of common markets. Erosion of sovereignty also means that states may be more likely to intervene in disputes hitherto viewed as purely internal matters, such as in Kosovo, where human rights are threatened.

Humanitarian Interventions. The Peace of Westphalia, which settled Europe’s bloody 30 Years’ War in 1648, is often credited with establishing the principle of sovereign equality of states. Implicit in this understanding was the notion of a derivative principle of noninterference in matters of another sovereign state. While there have been many examples of violations of this principle, it has nonetheless been widely accepted as a norm of international behavior and as part of customary international law. Humanitarian interventions stand in contravention of this norm.

In the 19th century, humanitarian interventions were frequently actions of Christians versus Muslims in North Africa, the Balkans, and the Levant. In the 20th cen-

tury, it sometimes has been hard to distinguish humanitarian interventions from aggression. Hitler's invasion of Czechoslovakia under the pretext of protecting ethnic German minorities in the Sudetenland is one example. Other cases have been more justifiable but were nevertheless actions of opportunistic states guided by other than purely altruistic motivations: the Vietnamese intervention against the Khmer Rouge regime in Cambodia in 1978, the Tanzanian intervention against Idi Amin in Uganda in 1979, French intervention against the Bokassa regime in the Central Africa Republic in 1979, and Indian intervention in East Pakistan (Bangladesh) in 1971. In all these cases, security politics were at work alongside claims of humanitarian values. A key point is that sometimes intervention for "humanitarian" purposes is justified, but cloaks other motives that may or may not be justified.

The UN Charter attempted to regulate the use of force, distinguishing between aggression and enforcement action. There has been widespread support for humanitarian intervention when approved and sanctioned through the UN process. In the 1980s, the UN Security Council imposed economic sanctions on South Africa's regime of apartheid. In the 1990s, military intervention rose to the vogue beginning with the creation of a protective zone for Kurds in northern Iraq, followed by operations in Somalia, Haiti, and Bosnia—all with the support of the United Nations. The humanitarian interventions in Kosovo occurred with belated concurrence by the United Nations, but only after Slobodan Milosevic had capitulated to demands to end ethnic cleansing and to withdraw forces from the province. The intervention in East Timor similarly occurred with UN approval after Indonesian leadership acceded to international pressure. Where the United Nations has authorized interventions, it has done so because individual states voted in favor of such actions based on their own national interests. Indeed, the UN Security Council and the General Assembly are political bodies.

Has the Kosovo intervention set forth new rules for humanitarian intervention, as Prime Minister Tony Blair suggests? Has it revoked the principles of sovereign independence of states? May any state or group of states intervene in another state merely because they claim their intervention is humanitarian in character? As in other areas, there is a perception by some that such new rules pit the "West versus the rest" in the area of humanitarian intervention. Robert Ellsworth has observed that "Military intervention to promote democracy in other countries may appear to the rest of mankind to be a form of salvation without representation."¹⁵ Nonetheless, it is equally true that in Kosovo, Milosevic was accused of committing genocide, and his values were accused of being a grave threat to the stability of Europe, a continent once victimized by Nazism.

There is no global legal consensus (*opinio juris communis*) as to the legitimacy of humanitarian intervention without UN sanction. Nevertheless, many states around the world remain concerned about nebulous unwritten rules for behavior and the further erosion of their sovereignty. Over time a *peremptory norm* in support of intervention may emerge, but it may be expected to be a right limited to exceptional circumstances. These "exceptional circumstances" must be defined with great care in order to permit intervention when it is justified while blocking it when not justified.

Growth of Regional Organizations. There has been a proliferation of regional organizations, particularly those promoting free trade. These organizations may be viewed as both supporting and counteracting globalization trends. For example, when they promote free trade, these organizations enhance globalization; when they block trade, they work against globalization. In fact, many organizations alternately support either objective, depending on the commodity involved and the nature of competition from outside the region. In either event, these regional organizations involve the ceding (or sharing) of some sovereignty by states.

European Union. The European Union remains the pre-eminent regional economic and political institution in both breadth and depth. This organization, which started as the European Coal and Steel Community in the 1950s, no longer focuses only on economic policy. It is developing into a political union with a common European security and defense policy. This is an area that is not without contention, as members with a history of neutrality (Sweden, Finland, Ireland, and Austria) express concerns about moving the European Union in this direction. Additionally, even the widely hailed European Economic and Monetary Union, which introduced the Euro currency, has faced pockets of dissent. The initial Danish vote against the Maastricht Treaty and the British decision not to participate in the new currency stand out as examples. Former British Prime Minister Margaret Thatcher criticized the European Union for its “democratic deficit.” Considerable opposition to the organization persists in the United Kingdom, despite current Prime Minister Tony Blair’s support for it. Part of the objection centers on the move over time from unanimous decisionmaking to qualified majority voting in the Council of Ministers, except for actions affecting a state’s “vital interests.”¹⁶ The other part of the objection centers on the power of the European Commission, which consists of unelected commissioners who are appointed by states. The Commission has considerable power vis-à-vis the European Parliament, which has limited powers even for basic activities such as initiating legislation.

EU community law is binding on member nations, and national laws have been invalidated when they are contrary.¹⁷ The European Court of Justice (ECJ) has been particularly effective in enforcing national obligations with regard to the free movement of goods, capital, persons, and services.¹⁸ The court has also ruled to further EU principles of freedom of competition, environmental protection, human rights, and equal pay for men and women. Only the future will determine how the European Union evolves. If it moves beyond the current status to become a superstate or some other entity, it will clearly reshape European politics and laws.

North American Free Trade Agreement. Although the North American Free Trade Agreement (NAFTA) has eliminated most tariffs and barriers to trade between Mexico, Canada, and the United States, it comes nowhere close to the depth of the European Union. Unlike the European Union, NAFTA does not provide for the elimination of border controls, free movement of labor across borders, or establishment of a common currency. There is a movement to expand NAFTA to a larger region, the Free Trade Area of the Americas (FTAA). On November 4, 1998, 34 countries agreed on preliminary measures at a meeting in Toronto. Cuba was the only Latin American nation not represented. The goal is to establish a hemispheric free trade zone by 2005. Nevertheless, there are some major obstacles to the realization of

this goal. Argentina, Brazil, and Paraguay want to boost efficiency of their manufacturing centers before subjecting them to full competition from the United States and Canada. Other regional organizations in the Western Hemisphere, such as the Caribbean Community (CARICOM), *Mercado Común del Sur* (MERCOSUR)—the Common Market of the South, the Central American Common Market (CACM), and the Andean Group, have faced problems with local opposition and unwillingness among legislatures to remove trade barriers.

MERCOSUR is the third-largest customs union in the world, after the European Union and NAFTA. This economic group, which includes Argentina, Brazil, Uruguay, and Paraguay, remarkably survived the devaluation of the Brazilian *Real* in 1999. Argentinians feared that a cheaper *Real* would flood their market with Brazilian imports, but this never materialized because Brazil's exports of manufactured goods (dependent on foreign material) remained expensive.¹⁹ Despite contention between Argentina and Brazil, the pact has led to the elimination of numerous export subsidies and the creation of a Macroeconomic Coordination Committee. There is movement to establish a fiscal responsibility program similar to that of the EU Treaty of Maastricht. MERCOSUR has reduced suspicions between Brazil and the Spanish-speaking members, encouraging the lowering of defense budgets. It has also proved to be an effective negotiation body, securing U.S. agreement to eliminate subsidies for agricultural exports within the zone of the Free Trade Areas of the Americas (FTAA). Despite the economic slumps of 1998–1999, the general trend since 1991 has been an average of 25 percent annual growth rates in intra-MERCOSUR trade.²⁰

Asia-Pacific Economic Cooperation Group. Like the General Agreement on Tariffs and Trade (GATT), the Asia-Pacific Economic Cooperation (APEC) group is a forum for meetings rather than a true international organization for implementing policy.²¹ Its 21 member states have committed to aligning with international standards for machinery, electronics, rubber products, and food labeling by 2005 and to achieve free trade and investment by 2010 for developed economies and by 2020 for developing economies. The failure of the World Trade Organization (WTO) ministerial conference in Seattle in December 1999 was a setback, though not a fatal one, to trade liberalization efforts in Asia. The emergence of organizations such as the APEC Monitoring Group, which counter APEC free trade agenda on labor and environmental grounds, at first blush appears to be evidence of counter globalization; however, a closer look reveals a union of indigenous peoples and interests that supersede borders. In other words, the groups emerging are arguably countermarket but not counterregional or counter global. At stake is merely a difference in regional or global objectives.

Emergence of Universality. Another trend is the increased promulgation of “universal” principles and standards via treaties and conventions. This can be described as an attempt to bring uniformity and standardization to specified areas of the law, through changing the law itself, creating new institutions, or both. A good example is the proposed new International Criminal Court (ICC), which was accompanied by new standards for judging aggression and war crimes. Within the last 11 years, new conventions for subjects, including drug trafficking, money laundering, terrorism, torture, corruption, and bribery, have emerged. This trend can also be seen in the area of human rights and humanitarian law. Nongovernmental organizations

(NGOs), operating beyond the traditional bounds of states, have acted as lobbyists on behalf of individual causes, generating international support for new conventions. Where extraterritorial reach of states is inadequate to deal with commercial issues, universal rules and institutions such as the World Trade Organization have emerged out of necessity. Similar universalization efforts can be seen in the Law of the Sea Treaty, the Child Labor Convention, and the Kyoto Protocol on climate change.

Particularly problematic are attempts to address global problems through “universally binding normative regulations” such as treaties and conventions that purport to bind all states, regardless of lack of specific consent.²² This is one of the major objections held by the United States against the Rome Statute of the ICC. The concept in the Law of the Sea Treaty of the Common Heritage of Mankind is another example. Nevertheless, prevailing legal authorities do not accept the proposition that these treaties can bind nonsignatories.²³ Absent *opinio juris communis* (a recognition by the greater community of states that a given practice is a legal requirement), a purported norm will not constitute customary international law and be universally binding on states.

A “democratic deficit” of a sort exists in the manner in which global norms are legislated. One concern is that international elites composed of influential NGOs and key government officials attempt to legislate international norms, thereby imposing their view of the world on others without effective representation in the law-making process. This process has many undemocratic features and is essentially countermajoritarian in its process and end result. The elite tends to consist of those from the highly industrialized countries, primarily European nations. This elite manifests a different dimension of the dichotomy described by Samuel Huntington and Benjamin Barber. Huntington’s paradigm pits the “West versus the rest.” The obvious risk is that laws increasingly ramrodded through an international pseudo-legislative process will become meaningless to the rest of the world, if not the object of derision as part of some new social/ideological/cultural imperialism. In the wake of the failure of the Seattle WTO talks, for example, India’s Commerce and Industry Minister, Murasoli Maran, denounced President Clinton’s attempt to link trade accords to labor standards as a pretext for protectionism.²⁴ Some delegates even accused the President of secretly orchestrating the demonstrators behind the scenes to support national interests.²⁵ Yet, just as American and European motives can be questioned, so can those of other countries, especially those that resist the application of the rule of law.

Universalization of law can be seen to varying degrees in the following institutions and areas of the law:

International Court of Justice. The tempo of cases argued before the International Court of Justice (ICJ) is increasing. Between 1946 and 1996, the court heard just 74 cases. Since 1996, the court has heard over 22 cases, a rate six times the earlier number of cases. The United States was party to 15 cases (3 since 1996). In one significant 1996 case, the court was asked by the UN General Assembly to issue an advisory opinion on the legality of the threat or use of nuclear weapons. To the surprise of many observers, the court actually supported the legality of the use of nuclear weapons in self-defense, albeit in the most dire circumstances.²⁶ To a certain extent, the growing body of court rulings and judgments add to an emerging “global” body of law that may have borrowed from states’ juridical rulings by analogy, yet are in-

dependent by virtue of the authority of the Statute of the court and the UN Charter. Increasingly, substantive law reflects a global orientation, as described below.

Criminal Law. In the area of criminal law, Peruvian author Mario Vargas Llosa spoke of the “globalization of justice” in the context of General Augusto Pinochet’s pending extradition to Spain by the United Kingdom. The Torture Convention, with universal jurisdiction, provided Spain with legal jurisdiction to request extradition and to try Pinochet. Looming behind the Pinochet case is the effort to create an International Criminal Court. On July 17, 1998, 120 states voted to adopt the Rome Statute of the court after a decade-long effort by governments and nongovernmental organizations. The Statute of Rome represents an attempt to set up the first permanent international criminal court, going beyond the ad hoc nature of tribunals set up for Germany, Japan, the Balkans, and Rwanda. Seven states opposed: China, Israel, Iraq, Qatar, Sri Lanka, Sudan, and the United States. As of September 2000, 113 states have signed the statute and 21 have ratified it. Ratification by 60 states is required before it becomes effective.

The International Criminal Court is not merely a permanent version of previous ad hoc tribunals; it moves further in defining crimes and setting out trial procedure. The court would have jurisdiction over only the most serious of international crimes, such as genocide, violations of the laws of armed conflict, crimes against humanity, and aggression. An innovative list of crimes includes incitement of genocide, forced disappearance, forcible transfer and deportation, extermination, enslavement, forced prostitution and rape, apartheid, and other inhumane acts. The court would be particularly useful for the prosecution of individuals such as Sierra Leone rebel leader Foday Sankoh, whose government has requested outside help in trying him.

The Rome Statute is viewed by opponents as an example of elite international law making, to the extent that a clique of states and NGO representatives are formulating policies that purport to have global reach. As a U.S. representative stated before the UN Committee on the International Criminal Court, “The Rome Treaty risks becoming only a rhetorical milestone in international relations unless it confronts the reality of how the international system must function if peace, security, and human rights are to have a lasting chance.”²⁷ Particularly vexing to U.S. officials is the claim that the Rome Statute will bind even nonsignatory states. This claim goes against long-standing norms of international law under which states are bound only by treaties that they have signed and ratified or by principles of customary international law, which are understood to have universal applicability. It appears to go against Grotius’ well-known aphorism: *nullum crimen sine lege* and *nulla poena sine lege* (“no crime without law” and “no punishment without law”). Although advocates for the treaty can get around the signatory issue by securing recognition by states that the Rome Statute is customary law, they have a long way to go before such recognition will be obtained. Most scholars would agree that a mere declaration by the treaty itself is insufficient to give it the status of customary international law.

Some scholars remain concerned about the potential disparity between international law and the reality of international relations. As Professor Al Rubin stated regarding the process of forming the International Criminal Court, “The notion that lawyers or judges form an elite to which we can refer the most complex social dilem-

mas is deeply inconsistent with fundamental rules of democratic governance.”²⁸ Indeed, judiciaries are often countermajoritarian by design. On the positive side, countermajoritarianism means that the rights of minorities and unpopular rights (for example, the right to express an unpopular viewpoint) are protected against the desires of the majority, an essential part of a functioning democratic society. On the negative side, unfettered discretion in the formulation and application of international rules of behavior may lead to an arrogation of authority and subversion to political motivations.

Laws covering specific areas of transnational crime have grown in response to the problem. For example, one particular area of concern is drug trafficking, as evidenced by the 1988 UN Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Related is the area of money laundering, as seen in the 1990 Council of Europe Strasbourg Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, as well as those from corruption. The Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Public Officials in International Business Transactions was signed on December 17, 1997, and went into effect on February 15, 1999. This convention attempts to level the playing field for American businesses subject to the Foreign Corrupt Practices Act (FCPA) by setting up international standards. In the past, states such as Germany and France even allowed tax deductions for bribes to foreign officials. The United States enacted the International Anti-Bribery and Fair Competition Act of 1998 to amend FCPA and improve the competitiveness of American business overseas. It also implements the international bribery convention. The Organization of American States (OAS) has followed OECD in adopting the Inter-American Convention on Bribery.

Recently, the UN Convention Against Torture and other forms of Cruel, Inhuman, or Degrading Treatment or Punishment has received much media attention. The Torture Convention entered into force in 1987, with the United States becoming a party in 1994. In 1999, the convention was called into play when a Spanish judge submitted an extradition request for Augusto Pinochet, former Chilean head of state and Senator-for-life, to the United Kingdom. Judge Garzón in Spain claimed “universal jurisdiction” by virtue of the Torture Convention, similar to jurisdiction recognized for genocide and piracy. Was this a violation of Chile’s sovereignty, as Pinochet’s lawyer, Clive Nicholls, claimed? The ultimate denial of the extradition request on health grounds did not end the quest for universal jurisdiction. On the heels of the Pinochet case, a Senegalese court indicted Hissène Habré, former dictator of Chad, on charges under the Torture Convention. He is being held under house arrest in Dakar. Despite grandiose proclamations, it remains to be seen whether universal jurisdiction will become an effective force in countering safe havens for ex-dictators such as Idi Amin, Alfredo Stroessner, and Jean-Claude (Baby Doc) Duvalier. In any event, the tide has turned against the traditional application of immunity to current and former heads of state.

In the wake of terrorist bombings of the American embassies in Nairobi and Dar es Salaam, there has been an effort to further international cooperation to fight terrorism. International conventions in this area are not new, with the 1963 Tokyo Convention (Aviation: Offenses and Certain Other Acts Committed on Board Aircraft) and

the 1971 Montreal Convention (Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation). More recently, the UN General Assembly promulgated the International Convention for the Suppression of Terrorist Bombing in 1999. Though states will undoubtedly remain the primary players in the prosecution of terrorists, the increased efforts to reach across state boundaries reveal the weakness of states to combat terrorism alone, enhancing the need for international law and institutions to deal with terrorism.

Human Rights and Humanitarian Law. Under traditional Westphalian doctrine, the “boundaries of justice were thought to be coextensive with the legal-territorial jurisdiction and economic reach of the sovereign policy.”²⁹ Thus, human rights were once the exclusive province of a state’s internal affairs. Beginning with outlawing piracy in the 18th century and slave trade in the 19th century, certain activities were subjected to widespread condemnation. The effort to establish universal human rights standards began in earnest after World War II with the Genocide Convention in 1948 and the Universal Declaration of Human Rights in 1949.

Nevertheless, the growth of human rights laws has led to charges of Western elitism from many in the developing world.³⁰ Some have charged that human rights are “a cover for Western interventionism in the affairs of the developing world, and . . . an instrument of Western political neocolonialism.”³¹ To be correct, many developing countries (India, China, Chile, Cuba, Lebanon, and Panama) played key roles in the drafting of the Universal Declaration of 1949 and in the drafting of the International Covenant on Civil and Political Rights of 1966 (Ghana and Nigeria). It is also important to note that regional organizations, such as the Inter-American Court of Human Rights (IACHR) and the European Court of Human Rights (ECHR), have played a role in adapting and enforcing standards. IACHR is part of OAS and is based in Costa Rica. It was created in 1978 to interpret and apply the American Convention on Human Rights.

Nongovernmental organizations play increasingly substantial roles as watchdogs and enforcers of human rights and humanitarian law. Amnesty International, Human Rights Watch, the International Committee of the Red Cross, Doctors without Borders, and others have had major impact on international legal conventions on topics such as child soldiers, antipersonnel land mines, and the International Criminal Court. Using global media and networks, NGOs have been able to build public pressure and forge an international consensus on issues when governments have not always been successful. In many cases, their agenda is at variance with governmental policies, such as the land mines convention and the International Criminal Court. To a large extent, globalization of the Internet and other media has enhanced the power and influence of nongovernmental organizations.

Some argue that globalization (particularly in the economic sense), instead of promoting the protection of human rights, democracy, and the rule of law, actually creates conditions for disorder, authoritarian rule, disintegration of the state entity, and violations of human rights.³² While there is strong evidence demonstrating a positive correlation between economic development, democratization, and protection of human rights, the course toward democracy is seldom linear and is often rife with anomalies. One example is an International Monetary Fund-mandated “structural ad-

justment” that forced Zimbabwe to end free education for all. The erosion of national control over economies may lead to reactive nationalism and tribalism (for example, the Zapatista revolt in Mexico’s Chiapas province). Further, uneven economic development may foster destabilizing rivalries, competition for resources, and direct conflict. Where international institutions are incapable of enforcing human rights, the state remains the primary entity of enforcement.

Trade and Labor Law. The World Trade Organization is the pre-eminent institution promoting free trade and rules of fair competition, building on the work of the GATT. Among other things, it adjudicates trade disputes involving such matters as antitrust law, unfair trade practices, copyrights, and commodity dumping. Its purported goal of promoting free trade and order for the marketplace sometimes runs counter to the interests of developing nations, who feel that the rules of competition are stacked against them.

The conflict of interests of developing nations, labor, and environmental groups became apparent unrest during the Seattle meeting of the World Trade Organization. In few areas has the impact of elite decisionmaking become more divisive than that of trade and labor law.³³ In the view of some, global markets and free trade are products of state power, rather than natural phenomena.³⁴ As trade has gone global, unions have been forced to extend their reach to maximize their collective bargaining power. As Jay Mazur stated recently in an article in *Foreign Affairs*, “Picket lines of major strikes now almost routinely radiate internationally.”³⁵ One example is the United Parcel Service (UPS) “World Action Day” strike in 1997, when the Teamsters Union, together with the International Transport Workers Federation, formed a world council of UPS unions and coordinated more than 150 protests worldwide, shortly resulting in a settlement with management.

These new tactics make it more difficult for companies to pit American workers against laborers overseas. They also portend efforts by labor to improve wages and work standards in developing countries so as to fight the tendency to move to off-shore “sweatshops.” As Mazur points out, the rights to organize and bargain collectively are essential to the building of modern democratic states. Perhaps the larger trend emerging is that labor can no longer employ traditional protectionist policies, but rather must go global to protect its interests. Labor’s influence, together with human rights advocates, played no small role in denying the Clinton administration’s requests for fast-track trade authority and demands that labor rights be a part of future trade negotiations. Labor can be expected to seek and gain more of a voice in globalization.

Indeed, globalization aids labor’s efforts in more direct ways. International labor can look to the Child Labor Convention, which the International Labor Organization unanimously adopted in June 1999 and the Senate ratified on November 6, 1999. The convention attempts to protect children from jobs that expose them to danger or exploitation. It outlaws forced conscription of children for the military, but voluntary service by 17-year-olds is permitted under a compromise agreement struck by the United States and the United Kingdom. It also outlaws all forms of slavery or compulsory labor, child prostitution, the use of children to produce or transport illicit drugs, and other activities that harm the health, safety, or morals of children.

International Finance, Monetary Policy, and Aid. The economic order fashioned at Bretton Woods is facing new challenges as a result of globalization. The disparities between the have and have-not states have become more apparent in the area of finance and monetary policies. In the backdrop of the recent struggle between the United States and Germany over the selection of the successor to Michel Camdessus as head of the International Monetary Fund (IMF) was an attempt by the developing world to assert more influence in by the developing states in Africa, the Mideast, and Latin America. The struggle over control of institutions such as the International Monetary Fund, World Bank, and OECD has significant impact on much of the world. There are 4 billion people living in states with a per-capita gross domestic product of less than \$1,500 a year.³⁶ As income disparities have grown between low- and high-skilled labor, many developing states depend upon loans to adapt their labor force and industries to rapid technological change in the world marketplace. As conditions of loans become broader, IMF and other lenders reduce the recipient government's ability to control its own fiscal and monetary policy. Although fiscal restraint, improved protection of human rights, and democratization are positive steps, they belie the trend away from total self-government and bear the risk of formulaic, one size fits all prescriptions that may not always be appropriate for emerging economies.

Law of the Sea. The U.S. Government, including the Department of the Navy, was a supporter of the initial concept of a Convention on the Law of the Sea to protect freedom of navigation for both civil and military vessels. Provisions were added declaring the seabed the common heritage of mankind, causing U.S. disapproval when the final version of the convention was produced in 1982. Those provisions called for the United States and other nations possessing advanced seabed excavation capabilities to share the produce (or profits) with developing nations through a mechanism known as the International Seabed Authority. This portion of the treaty remained moribund after 1982 because of the lack of U.S. agreement, forcing a reconsideration of the offending provisions. After years of dissent, the Clinton administration supported ratification of the treaty, following relaxation of provisions of the International Seabed Authority. Nonetheless, the treaty currently languishes in the Senate Foreign Relations Committee, where Chairman Jesse Helms has expressed disinterest in moving the agreement forward to ratification.

Environmental Law. This area offers one of the most potent challenges to the voluntarist tradition of international law. For example, the Montreal Protocol on Substances that Deplete the Ozone Layer of 1987 allows for qualified majority voting on some of its regulations. U.S. critics fear that the 1997 Kyoto Protocol would require a surrender of U.S. sovereignty to an unelected international authority. Sometimes, international environmental regimes will accommodate nonconsenting members. For example, in 1982, the International Whaling Commission (IWC) imposed a moratorium on commercial whaling. Norway and Iceland formally objected. Under IWC rules, the moratorium did not bind them.

Other environmental regimes are less accommodating. The Antarctic Treaty System was designed to protect the continent from national exploitation and proprietary division. The treaty requires that states engage in substantial activities in the Antarctic in order to become full participants in the treaty regime. The legitimacy of this

regime has been challenged by Malaysia and other developing countries.³⁷ Ultimately, treaty power will depend largely on the influence of parties with substantial interests and the ability to pursue those interests.

A looser arrangement was fashioned for the Arctic region. In 1998, an Arctic Council was established by the states with territory in that region: Canada, Denmark, Finland, Norway, Russia, Sweden, and the United States. This group aspires to protect the region's environment and to control the exploitation of natural resources. Like OSCE and APEC, this organization is a forum without legal personality and therefore technically not an international organization.³⁸

Summary of Universality Trends. Recent events suggest that tension will increase as lawmaking elites attempt to legislate internationally. The democratic deficit issue persists as a problem affecting the legitimacy of international law and associated regimes.³⁹ Legality and state consent are bases for the legitimacy of most regimes, but a trend is emerging that attempts to sidestep state consent. Traditional political science regime theory focused on relevance, rather than legitimacy, of regimes. It seems the world is moving well beyond Stephen Krasner's query of 1982: "Do regimes matter?"⁴⁰ The question now is "Can regimes create universal norms?" The question underscores the difficulty described by Robert Ellsworth, who has said, "The assumption that our values are universal is false because it is demonstrably untrue; immoral because of what would be necessary to make non-Western peoples adopt Western institutions and culture; and dangerous because it could lead to war."⁴¹

Growing Regulation of Warfare

A final trend that is relevant to future military operations is the growing regulation of warfare. Though attempts to regulate warfare date back to St. Augustine's "just war" doctrine in the latter days of the Roman Empire, the pace of lawmaking has increased dramatically since the late 19th century. The past 150 years have witnessed the Lieber Instructions of 1863 for the Union forces during the American Civil War, the Geneva Convention of 1864, the St. Petersburg Declaration of 1868, the Hague Declaration of 1899, the Hague Conventions of 1907, the Hague Rules of Aerial Warfare of 1923, the Geneva Convention on Chemical/Biological Warfare of 1925, the Geneva Convention on the treatment of prisoners of war of 1929, and the Geneva Convention of 1949 (and the 1977 Protocols). Both the recent Anti-Personnel Land Mines Treaty and the pending International Criminal Court are consequences of the universalization of the law as regards the conduct of armed conflict. The biological and chemical weapons conventions further this trend. What is particularly significant is both the specificity and breadth of the new conventions, which reach further into the domain of military operations than have earlier agreements.

Several conventions already exist regarding the conduct of naval operations: the Hague Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines (1907), the Hague Convention (VI) Relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities (1908), the Hague Convention (VII) Relative to the Conversion of Merchant Ships into War Ships (1908), the Hague Convention (XI) on Restrictions with Regard to the Right of Capture in Naval War (1907), the Rights and

Duties of Neutral Powers in Naval War (1907), the Inter-American Maritime Neutrality Convention (1928), the *Procès-Verbal* Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Odon Naval Treaty of 1930, and the Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949). As previously mentioned, the Law of the Sea Convention provides for, among other things, freedom of navigation and rights of passage for vessels. Despite the frenzied pace of attempted regulation early in the 20th century, the momentum to further regulate naval warfare has apparently been lost to land warfare (especially land mines and weapons of mass destruction), air warfare (especially bombardment), and space warfare (the Outer Space Treaty of 1967). Of course, the land (and possibly air) elements are of concern to future littoral strategies.

The Anti-Personnel Land Mines Treaty, signed by 133 nations in Ottawa in 1997, came into force in 1999. This was a case where the United States supported the general concept of the treaty but “lost control” of the negotiating process before objections from the Department of Defense became well known. The Joint Chiefs of Staff regard it as a force protection issue, though acknowledging the official policy to phase land mines out of the U.S. inventory in a few years. A number of friends and allies (Turkey, South Korea, and Finland) depend on land mines to counterbalance numerical advantages of potential adversaries. Russia and China also refused to sign the treaty. The land mine issue became another irritant in transatlantic relations when implications of the treaty (that is, application of the treaty to certain antitank mines and pre-positioned storage) became understood. The 1997 award of the Nobel Peace Prize to the International Campaign to Ban Land Mines demonstrates the growing power of NGOs. President Clinton set 2006 as a target date for joining the accord.

The Chemical Weapons Convention of 1993 is another example of a treaty creating an implementing organization for monitoring and providing for an intrusive verification system. Since the United States made a commitment to end the use and stockpiling of chemical weapons as far back as the 1970s, this convention poses little challenge to existing U.S. policy and operations.

U.S. opposition to the Child Soldier Convention ended with a compromise provision allowing the United States to enlist soldiers at age 17. The treaty was obviously aimed at states that have actively recruited or coerced teenagers and children into military service. This convention stands as an example where constructive U.S. involvement in treaty formation can have a beneficial result in upholding the intent and purpose of the treaty.

Perhaps the greatest potential impact on the future of warfare is the pending Statute of Rome for the International Criminal Court. Notwithstanding U.S. objections to the current incarnation of the court, there is still general American support for action against war criminals. Furthermore, there is apparently enough support for the court to come into existence even without U.S. backing. Fear remains of politically motivated prosecutions of U.S. military forces (or even civilian leaders) when transiting signatory states, risking extradition. This causes tensions between contradictory elements of U.S. policy, which remains largely supportive of the apprehension and punishment of war criminals. For example, on November 4, 1999, the Senate passed a bill entitled Denying Safe Havens to International and War Criminals Act of 1999,

which would amend the Immigration and Nationality Act and expand grounds for inadmissibility and deportation of aliens involved in acts of torture abroad. It widens the jurisdiction of the Justice Department's Office of Special Investigation. There are an estimated 7,000 to 10,000 human rights violators from Haiti, Yugoslavia, Rwanda, and elsewhere living in the United States.

Implications for U.S. Interests, Strategies, Policies, and Goals

As evinced by its national security strategy, the United States has a strong interest in shaping how these international laws and organizations will evolve in the coming years. On balance, the track record in recent years has been positive. Laws emerging in extraterritorial, regional, or universal modes have attempted to establish better codes of conduct for interaction between states and other actors in a globalizing world. In parallel ways, the emergence of stronger regional organizations has had a similar effect. Because the United States and its close allies are law-abiding countries, they have a stake in helping promote the rule of law in the international arena. Good laws can help promote cooperation, dampen conflicts, and provide standards for judging when international power should be applied against lawbreakers. Good laws have been created in the past, and in the future, additional laws likely will be needed to deal with organized crime, inhumane conduct, weapons proliferation, and other menaces to peaceful progress. Globalization enhances the importance of creating and applying such laws because it is drawing the far corners of the earth closer together.

The art of creating good laws should not be taken for granted. In many respects, the process is inherently political. It requires the building of a consensus among many countries that bring their own interests to the table. Sometimes, key countries will seek to prevent important laws from being adopted and enforced in order to maintain freedom for their own improper conduct. On other occasions, coalitions will emerge in favor of laws that advance their interests at the expense of legitimate U.S. and allied interests. The United States thus needs to remain active in the arena of lawmaking in order to ensure that its legitimate interests are respected, that the common good is advanced in a globalizing world, and that new laws are shaped to deal with emerging problems. The creation of good laws itself does not guarantee peace or progress: the nation-state system will continue to be influenced by the distribution and use of power. Nevertheless, good laws help tilt the balance toward greater peace and progress, while helping govern the use of power in wise and legitimate ways.

Impact on the U.S. Role

The recent struggle over who would succeed Michel Camdessus as managing director of the International Monetary Fund may be indicative of limited U.S. ability to control international events. By tradition, the nominee for this position has been a European, but a lackluster reception for the initial German nominee, combined with pressure from Arab and African states and U.S. objections, led this nominee to withdraw his candidacy. By reciprocal tradition, the president of the World Bank has been an American. The Europeans rallied around Germany's second nominee, despite U.S.

concerns. The brief but notable squabble damaged U.S.-German relations; at the same time, transatlantic divisions have furthered Asian, Latin American, and African challenges to the traditional geographic alignment of IMF posts.⁴²

As Jim Hoagland of *The Washington Post* stated, “The power the United States and Western Europe have arrogated to themselves to direct the world’s leading financial institutions will increasingly be challenged as undemocratic—which it certainly is—and ineffective which it may become if (German Prime Minister) Schröder’s tactics (of unilateral insistence on naming the IMF director) become the standard.”⁴³ This comes at a time when the International Monetary Fund has been criticized for its handling of past financial crises in Russia, Asia, and Latin America. IMF events indicate that the United States wields considerable influence in the selection of officials for key international posts; however, the U.S. challenge to traditional transatlantic bargains has invited challenges to the status quo from the greater international community.

In addition to the challenge by developing states, an embryonic “global public sphere” is emerging. As Richard Devetak and Richard Higgott describe it, this sphere views an “evolving arena where social movements, nonstate actors and ‘global citizens’ join with states and international organizations in a dialogue over the exercise of power and authority across the globe.”⁴⁴ The role of multinational corporations must be included as well. The world’s 100 largest economies include 51 corporations and 49 states.⁴⁵

There was a shudder in U.S. policy circles when Carla Del Ponte, the highly regarded lead prosecutor for the International Criminal Tribunal for the Former Yugoslavia (ICTY), agreed to look into allegations that NATO forces had violated the laws of armed conflict during its 78-day air campaign against the Federal Republic of Yugoslavia. Though Del Ponte eventually backed down, the fear of an international tribunal standing in judgment of U.S. soldiers, sailors, airmen, or marines resonates against U.S. support for a global criminal justice system. This underscores significant potential impacts of international law on U.S. interests.

Impact on Security Regimes

International law has been a centerpiece for major international regimes, such as the Peace of Westphalia (1648), the Congress of Vienna (1815), the Peace of Paris (1919), and the San Francisco Charter (UN) (1945). Every one of these major regimes followed a major war and attempted to set up a new international order to foster peace, security, and orderly relations among nations. The end of the Cold War has both strengthened the UN system by reinvigorating the Security Council’s role in matters relating to countries such as Iraq, Somalia, Haiti, Bosnia, and Kosovo (after the air war) and weakened the UN system where unilateral or multilateral force has been applied without Security Council sanction (for example, in the Kosovo air war or the Chechen suppression).

Historically, the demise of security regimes has led sequentially to a period of conflict followed by a new security regime. In this context, the weakening of the UN system is not a welcome event, at least until a new regime is formed to replace it. A consensus on a new global regime is not likely soon, but revised or new regional regimes may be feasible in the interim. NATO is a security regime organized by the

North Atlantic Charter's admission under Article 51 (Collective Self-Defense) of the UN Charter. The new Strategic Concept for NATO moves beyond the collective self-defense role to humanitarian operations, peacekeeping operations, and more proactive operations such as the Kosovo air campaign. This does not mean that NATO will follow the course of the Delian League of Thucydides' time, but it does present a challenge to the post-Cold War system. Whether comparable steps will be taken by other regional organizations is to be seen.

Even before the Pax Romana, major powers depended on laws. But much as major powers depend on law (or can be complemented by it), law depends upon the support of major powers. Eugene Rostow warned that, "What we must guard against is the illusion that law can prevail without force, either within societies or in the society of nations."⁴⁶

Growing Democratic Deficit

A threat is emerging that elitist international lawmaking will act counter to U.S. interests and policies. In recent years, foreign governmental officials, NGOs, and other elites have been effective in developing transnational consensus for their agendas. They favor a strongly positivist approach that seeks to forge a consensus in new areas. Many believe in the concept of instant customary law and norm creation through treaties and conventions. Oftentimes the United States has been a major proponent of lawmaking this way, particularly in conventions against terrorism and drug trafficking; however, the United States does not control this lawmaking.

The United States cannot adopt the neorealist approach of ignoring the law or regarding it as irrelevant, for this stance would risk that further treaties and conventions would be promulgated without U.S. influence or direction. Neither does the neoliberal institutionalist viewpoint provide a profitable path, for it can ignore the role of power in lawmaking.

At the same time, democracy is preserved in regimes that maintain decentralized power. The United States has tended to favor informal cooperative structures such as OSCE, APEC, and the Arctic Council, when appropriate, for limited purposes.⁴⁷ These informal organizations tend to make decisions based on a consensus.

What remains clear is that lack of U.S. involvement in lawmaking will court disaster. The United States is still largely influential in such activities, particularly at the early stages. The experiences of the International Criminal Court and the land mines convention stand as reminders. An activist engagement policy in shaping international law is necessary.

Conclusions and Key Recommendations

Laws are merely means, not ends, in handling a globalizing world. They are instrumentalities through which states and nonstate actors seek reliability and predictability in transactions and relations. Nevertheless, some may use law as a tool for imposing values and rules, potentially leading to or contributing to future conflicts between groups, regions, or states.

As Kenneth Waltz points out, “Many globalizers underestimate the extent to which the new looks like the old.”⁴⁸ States still remain key actors. States still compete with each other. Waltz is correct in questioning the proposition that economic goals determine a nation’s policies.⁴⁹

To the extent that states remain key players, major powers will continue to wield considerable influence. This is not to say that a neorealist approach that ignores the significant moral consensus of other nations is a wise policy, but rather to note that the United States can and must use its influence to shape the moral consensus.

As Waltz observes, “In a system without central governance, the influence of the units of greater capability is disproportionately large because there are no effective laws and institutions to direct and constrain them.”⁵⁰ Waltz and other neorealists agree with the globalists that the international economy needs a set of rules and institutions in order to operate; however, they argue that these rules and institutions are made and sustained by the major power, such as Britain prior to World War I and the United States more recently.⁵¹ Transgovernmentalists such as Anne-Marie Slaughter seem to agree with this point, that states will remain key actors in instituting rules of international order and commerce, though acknowledging the growing importance of nonstate actors.⁵²

Nevertheless, the push for treaties and conventions with “global” coverage continues to grow in both subjects and depth. From the law of the sea and world trade to land mines and international crime, there is an increasing demand for global rules to deal with problems that elude the capabilities of traditional state-based systems.

As Hegel described the evolutionary nature of historic events, forces of action for change tend to generate and fuel the fires of forces of reaction. There are several dimensions to this global dialectic, well captured by James Rosenau’s term *framgregation*.⁵³ Lawmaking in particular may aid the powerful states versus the poor states or, more accurately, the elites of influential states versus the masses and disenfranchised. It may be as much North versus South as East versus West. It may also be the law-abiding versus the non-law-abiding states.

The distinction between law-abiding and non-law-abiding states is not always clear. As Louis Henkin points out, the law is “sometimes hypocritically invoked by the violators.”⁵⁴ He reminds us, however, that violations of the law do not of themselves invalidate law. Instead, Henkin notes that a higher national interest remains in preserving the rule of law: “The issue of observance, I would suggest, is never a clear choice between legal obligation and national interest; a nation that observes law, even when it ‘hurts,’ is not sacrificing national interest to law; it is choosing between competing national interests; when it commits a violation it is also sacrificing one national interest to another.”⁵⁵

As the international landscape changes, law itself is undergoing a major transformation. Law is an important instrument to provide stability in the midst of change. As William G. Paul, president of the American Bar Association, has stated, a “stable and predictable legal system is essential” to advance the cause of rights and liberties under law and to foster world commerce.⁵⁶

Most important, what makes sense is the advice of Rostow, who believed that law and power are not antithetical: “The most fundamental security interest of the

United States is to achieve and maintain a pluralist system of world public order, based on a balance of power, and *regulated by law*" (emphasis added).⁵⁷ 🌐

Notes

¹ Andrew Linklater, "The Evolving Spheres of International Justice," *International Affairs* 75, no. 3 (1999), 473.

² Eugene V. Rostow, *A Breakfast for Bonaparte: U.S. National Security Interests from the Heights of Abraham to the Nuclear Age* (Washington, DC: National Defense University Press, 1992), 48. Also published by Yale University Press under the title *Toward Managed Peace: The National Security Interests of the United States, 1759 to the Present*.

³ The White House, *A National Security Strategy for a New Century* (Washington, DC: Government Printing Office, December 1999), 26.

⁴ Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon and Schuster, 1996).

⁵ Benjamin Barber, *Jihad vs. McWorld: How Globalism and Tribalism Are Reshaping the World* (New York: Ballantine Books, 1996).

⁶ Henry A. Kissinger, "Making a Go of Globalization," *The Washington Post*, December 20, 1999, A33.

⁷ Robert F. Ellsworth and Dimitri K. Simes, "Imposing Our 'Values' by Force," *The Washington Post*, December 29, 1999, 27.

⁸ The *objective territorial principle* covers prosecution where the offense takes effect or produces effects. The *subjective territorial principle* covers prosecution of crimes commenced within the state but completed or consummated abroad.

⁹ Supplementary Extradition Treaty, ratified July 17, 1986.

¹⁰ Jaime Orlando Lara was extradited on drug-related charges on November 21, 1999. "Colombia Suspect Pleads Not Guilty," *The New York Times*, November 23, 1999, A2.

¹¹ *Laker Airways v. Pan Am World Airlines, et al.* (1985).

¹² Article 85, European Economic Community (EEC) Treaty.

¹³ Scott Hills, "Microsoft Faces New Battle with EU Probe," *The New York Times*, February 10, 2000.

¹⁴ Anne-Marie Slaughter, "The Real New World Order," *Foreign Affairs* 76, no. 5 (September/October 1997), 184.

¹⁵ Ellsworth and Simes, "Imposing Our 'Values' by Force," 27.

¹⁶ This procedure is known as the Luxembourg Compromise.

¹⁷ See the ECJ decisions of *van Gend en Loos* (1963), *Costa v. ENEL* (1964), and *Simmenthal* (1978).

¹⁸ See the ECJ decisions of *Cassis de Dijon* (1979), *Bordessa* (1995), *Bosman* (1995), and *Cowan* (1989).

¹⁹ Thomas Andrew O'Keefe, "Why the January 1999 Devaluation of the Brazilian Real Did Not Cause Mercosur's Demise," *International Law News* 29, no. 1 (Winter 2000), 22.

²⁰ O'Keefe, "Devaluation of the Brazilian Real," 22.

²¹ Jim Delahunty, "APEC at Auckland," *Monthly Review* (December 1999).

²² G.M. Danilenko, *Law-Making in the International Community* (Boston: Martinus Nijhoff Publishers, 1993), 64.

²³ *Ibid.*, 67–68.

²⁴ Celia W. Dugger, "Why India and Others See U.S. as Villain on Trade," *The New York Times*, December 17, 1999.

²⁵ *Ibid.*

²⁶ Laurence Boisson de Chazournes and Philippe Sands, *International Law, the International Court of Justice, and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999), 462.

²⁷ U.S. Statement before the UN General Assembly Sixth Committee on the Rome Treaty of the International Criminal Court, October 21, 1999, 1.

²⁸ Alfred Rubin, "A Critical View of the Proposed International Criminal Court," *The Fletcher Forum of World Affairs* 23, no. 2 (Fall 1999), 139–140.

²⁹ Richard Devetak and Richard Higgott, "Justice Unbound? Globalization, States and the Transformation of the Social Bond," *International Affairs* 75, no. 3 (1999), 483, 487.

³⁰ Shashi Tharoor, "Are Human Rights Universal?" *World Policy Journal* (Winter 1999/2000), 2.

³¹ *Ibid.*, 2.

³² Robert McCorquodale and Richard Fairbrother, "Globalization and Human Rights," *Human Rights Quarterly* 21 (1999), 735, 758.

³³ Jay Mazur, "Labor's New Internationalism," *Foreign Affairs* 79, no. 1 (January/February 2000), 79.

³⁴ *Ibid.*, 80.

³⁵ *Ibid.*, 88.

³⁶ Peter D. Sutherland and John W. Sewell, "The Challenges of Globalization," *Earth Island Journal* 13, no. 4 (Fall 1998), 47.

³⁷ Daniel Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law," *American Journal of International Law* 93, no. 3 (July 1999), 605.

³⁸ Virginia Morris and M. Christiane Bourloyannis-Vrailis, "Current Developments: Establishment of the Arctic Council," *American Journal of International Law* 93, no. 3 (July 1999), 712, 721.

³⁹ Daniel Bodansky, "The Legitimacy of International Governance," 596.

⁴⁰ Stephen D. Krasner, *International Regimes* (Ithaca, NY: Cornell University Press, 1983), 5.

⁴¹ Ellsworth and Simes, "Imposing Our 'Values' By Force," 27.

⁴² "EU Closes Ranks behind New German IMF Candidate."

⁴³ Hoagland, "Germany's Costly Win," A27.

⁴⁴ Devetak and Higgott, "Justice Unbound?" 491.

⁴⁵ McCorquodale and Fairbrother, "Globalization and Human Rights," 738.

⁴⁶ Rostow, *Law, Power, and the Pursuit of Peace*, 125.

⁴⁷ Morris and Bourloyannis-Vrailis, "Current Developments," 721.

⁴⁸ Kenneth N. Waltz, "Globalization and Governance," *Political Science and Politics* 32, no. 4 (December 1999), 693–695. Presented at the 1999 James Madison Lecture before the American Political Science Association.

⁴⁹ *Ibid.*, 696.

⁵⁰ *Ibid.*, 698.

⁵¹ *Ibid.*

⁵² Slaughter, "The Real New World Order," 196.

⁵³ James N. Rosenau, *Along the Domestic-Foreign Frontier* (Cambridge, England: Cambridge University Press, 1997).

⁵⁴ Louis Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Columbia University Press, 1979), 338.

⁵⁵ *Ibid.*, 331.

⁵⁶ William G. Paul, "President's Message: International Opportunities," *ABA Journal* (February 2000), 6.

⁵⁷ Rostow, *Law, Power, and the Pursuit of Peace*, 6.