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## An American Vision for Global Justice: Taking the Rule of (International) Law Seriously

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# AN AMERICAN VISION FOR GLOBAL JUSTICE: TAKING THE RULE OF (INTERNATIONAL) LAW SERIOUSLY

LEILA NADYA SADAT\*

Normally in an election year, the nation's collective attention and energy would be focused primarily on domestic issues. But this year, pollsters are reporting unprecedented interest on the part of American voters regarding questions of foreign policy.<sup>1</sup> One of the reasons, of course, is globalization. Politicians debate the merits of "outsourcing" jobs to countries such as India and China, executives contemplate cross-border mergers, and, as *New York Times* journalist Tom Friedman notes, markets, nation-states and technologies appear locked in an inexorable process of integration, permitting individuals, businesses and governments to reach around the world "farther, faster, deeper and cheaper than ever before."<sup>2</sup> As individuals, many of us have experienced the positive side of globalization: instantaneous email contact with friends and family living abroad, learning a foreign language, or being enriched by exposure to a different culture. As a society, we have benefited from free trade, increased travel, and greater prosperity. But we have also glimpsed globalization's dark underbelly—poverty for those left behind, terrorism, disease, global warming, even war—and have come to understand that our geographic isolation no longer protects us.

America's preoccupation with foreign affairs also derives from its superpower status. While representing only about five percent of the world's population, the U.S. economy dwarfs the economies of other

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\* Henry H. Oberschelp Professor of Law, Washington University in St. Louis. This essay is adapted from an address by the author, given September 7, 2004 on the occasion of her Installation as the Henry H. Oberschelp Professor of Law, Washington University School of Law, St. Louis, Missouri. I am deeply touched by the honor bestowed upon me by the Oberschelp family, by the School of Law, by this great University, and most especially by the gracious introduction and presence of Justice Richard Goldstone, whose entire life and work stand as a testament to the importance of justice and the rule of law, and whose contribution to international criminal justice simply cannot be overstated. My thanks to my teachers, my students, my colleagues, Dean Joel Seligman and Chancellor Mark Wrighton, and to my family.

1. Brian Knowlton, *Foreign Affairs Top Voter Concern, U.S. Poll Shows*, INT'L HER. TRIB., Aug. 19, 2004, at 1. In addition, the journal *Foreign Affairs* recently ran a three-part series on U.S. foreign policy concerns. C. Fred Bergsten, *Foreign Economic Policy for the Next President*, FOREIGN AFF., Mar.–Apr. 2004, at 88; Samuel R. Berger, *Foreign Policy for a Democratic President*, FOREIGN AFF., May–June 2004, at 47; Sen. Chuck Hagel, *A Republican Foreign Policy*, FOREIGN AFF., July–Aug. 2004, at 64.

2. THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 7–8 (1999).

nations, whether measured by GDP, purchasing power, trade, industrial output, or stock market capitalization.<sup>3</sup> The United States is the world's largest consumer of energy,<sup>4</sup> and Americans, by some estimates, consume twenty-five percent of the world's oil resources.<sup>5</sup> This economic dominance has led to military *predominance*, and the emergence of the United States as the world's only superpower. Nearly fifteen years after the end of the Cold War, the other eighteen NATO countries combined spend less than half of what the U.S. spends on military defense.<sup>6</sup> The 9/11 Commission Report notes that the U.S. Defense Department budget is greater than Russia's GDP.<sup>7</sup> The United States military is engaged in operations across the globe, with more than 140,000 soldiers in Iraq<sup>8</sup> and an additional 20,000 in Afghanistan.<sup>9</sup> As a society, we have become more aware than ever of our increased stature in the world and the fact that, whether we like it or not, our upcoming Presidential election is being closely followed by observers all over the planet—becoming, as one British journalist recently remarked, the first “world election,” but one in which only five percent of the world will vote.<sup>10</sup>

At Washington University School of Law, we have taken cognizance of the globalization revolution by expanding our curriculum, admitting foreign students in record numbers, and sending our own students abroad. But our society, in general, has been relatively slow to think about globalization in legal terms. International law and international justice have become neglected elements of the U.S. foreign policy equation, as

3. See generally ECONOMIST, POCKET WORLD IN FIGURES (2004 Edition). In the month of June, for example, 241 billion dollars of goods and services crossed U.S. borders. United States Census Bureau, *Foreign Trade Statistics: U.S. International Trade in Goods and Services Highlights*, at <http://www.census.gov/foreign-trade/Press-Release/2004pr/06/ftdpress.txt> (last visited Nov. 14, 2004) (showing imports in June 2004 equaled \$92.8 billion and exports equaled \$148.6 billion).

4. United States Geological Survey, *United States Energy and World Energy Production and Consumption Statistics*, at [http://energy.cr.usgs.gov/energy/stats\\_ctry/Stat1.html](http://energy.cr.usgs.gov/energy/stats_ctry/Stat1.html) (last visited Nov. 16, 2004).

5. National Resources Defense Council, *Energy and National Security: It's Time to Bring America's Appetite for Oil Under Control*, at <http://www.nrdc.org/air/energy/secure.asp> (last visited Oct. 20, 2004).

6. Vernon Loeb, *As Military Spending Booms, Budget Debate Looms*, WASH. POST, Feb. 16, 2003, at A19, available at 2003 WL 13332542.

7. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 95 (2004) [hereinafter 9/11 COMM. REP'T].

8. Ian Fisher, *Iraq Gives Order to Reopen Paper G.I.'s had Closed*, N.Y. TIMES, July 19, 2004, at A1, available at 2004 WLNR5566988.

9. Laurie Goering, *Karzai: Troops Needed for Election, Drug War*, CHI. TRIB., June 11, 2004, at 1, 24, available at 2004 WL 81466701.

10. Timothy Garton Ash, *The World Election*, GUARDIAN, Sept. 2, 2004, at 25, available at 2004 WL 85598233. See also Patrick E. Tyler, *On Outside Looking In World Talks about Bush*, INT'L HERALD TRIB., Sept. 5, 2004, at 1, available at 2004 WL 90965191.

the focus has shifted away from the exercise of diplomacy to the projection of power. Even the 9/11 Commission Report, which exhorts the United States to adopt a preventive strategy toward terrorism that is as much, or more, political than military in nature,<sup>11</sup> barely mentions the need for international legal consensus-building and enforcement as means of constraining the spread of international terrorism. The United States has increasingly turned its back on the role that international law may play in helping to stabilize an often chaotic and violent world. Paradoxically, this trend appears to be peaking just at the moment when, outside U.S. borders, international law and lawmaking have risen to unprecedented prominence.

I would like to suggest that international law should be elevated from its current status as an occasional tool or convenient rhetorical device of U.S. foreign policy to a chief element both in international relations and United States diplomacy. Put another way, the United States needs to take its commitment to the rule of law to the global stage, thereby playing to American strengths, enhancing American legitimacy and moral authority, and perpetuating the leadership role that the United States has historically exercised in the conduct of international affairs. As *the hegemon* presiding over—and benefiting the most from—the global economy, the United States has both a vital interest in maintaining the stability of that system and a responsibility to ensure that the system is fair. While military force will surely continue to play a central role in the conduct of foreign affairs, coercion without legal authority lacks legitimacy and breeds resentment. As lawyers and as citizens, we understand the deep and abiding importance of law and legal institutions domestically—and it is virtually impossible to conceive of a just, peaceful, and stable international order without seeing a place for the rule of law within that order.

While the United States led the way in establishing the United Nations and promoting the rule of law during and following World War II, it has now either abandoned that perspective or embraces it only sporadically. As a result, the U.S. government has been slow in ratifying important treaties, such as the Genocide Convention of 1948<sup>12</sup> and the International Covenant on Civil and Political Rights,<sup>13</sup> and the government has refused to sign or ratify many others, including: the International Covenant on

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11. 9/11 COMM. REP'T., *supra* note 7, at 363–64.

12. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 11, 1948, 78 U.N.T.S. 277 (signed by the U.S. Dec. 11, 1948; entered into force Jan. 12, 1951; ratified by the U.S. Nov. 25, 1988) [hereinafter Genocide Convention].

13. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (opened for signature in New York Dec. 19, 1966; entered into force Mar. 21, 1976; signed by the U.S. Oct. 5, 1977; ratified by the U.S. June 8, 1992).

Economic, Social and Cultural Rights,<sup>14</sup> the Land Mines Convention,<sup>15</sup> the Convention on the Rights of the Child,<sup>16</sup> the Kyoto Protocol on Global Warming,<sup>17</sup> the International Criminal Court Treaty,<sup>18</sup> the Convention on the Elimination of All Forms of Discrimination Against Women,<sup>19</sup> and the United Nations Convention on the Law of the Sea.<sup>20</sup>

Unpacking current American attitudes about international law and international legal regimes is a daunting task, but a few general patterns can be discerned. I will not discuss in detail two of the most obvious actors shaping the contours of American policy—Congress and the media—but it is well known that U.S. media coverage of foreign affairs is generally *de minimus* and that many members of Congress appear politically opposed to international law and international legal regimes on any terms. Yet other forces are at work as well—forces that affect the lawyer in particular.

In American legal culture, there has been a persistent notion that international law is not “real law.” Legal theorists and lawyers often have expressed misgivings about the very use of the term “international law,” arguing that in the absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions, international law has none of the attributes of municipal law and cannot be equated with it in stature, legitimacy, or binding force.<sup>21</sup> These theoretical musings have given rise to a popular (mis)conception of international legal rules as precatory, and international institutions as wasteful because they do not

14. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (opened for signature Dec. 19, 1966; entered into force Jan. 3, 1976; signed by the U.S. Oct. 5, 1977; not ratified by the U.S.).

15. Convention on the Prohibition of the Use, Stockpiling, Production of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211 (entered into force Mar. 1, 1993; not signed by the U.S.).

16. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990; signed by the U.S. Feb. 16, 1995; not ratified by the U.S.).

17. Kyoto Protocol to the United Nations Framework Convention on Climate Change, U.N. Doc FCCC/CP/1997/7/Add.2, 37 I.L.M. 22 (1998) (entered into force Feb. 16, 2005).

18. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 (signed by the U.S. Dec. 31, 2000; intention not to become a party expressed May 16, 2002; entered into force July 1, 2002) [hereinafter Rome Statute].

19. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981; signed by the U.S. July 17, 1980; not yet ratified by the U.S.).

20. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994; not signed or ratified by U.S.).

21. See, e.g., H.L.A. HART, THE CONCEPT OF LAW 209 (1961) (discussing the “international law critique”). Hart concluded that international law represented a simpler form of society functioning without the kind of basic rule of recognition found in developed legal systems that contain a municipal structure. *Id.* at 231.

produce “binding” results. Indeed, the whole endeavor, particularly in the United States, has been imbued with a sort of second-class status. Many of these objections do not withstand thoughtful analysis, but to the extent that the critiques might have been tenable fifty years ago, they are no longer particularly viable today.<sup>22</sup>

International law and adjudication, particularly with the development of the European Union as a supranational, twenty-five member-state legal system and the end of Cold War politics, have undergone a radical transformation in both form and function. Take, for example, the explosion in the sheer number of international courts and tribunals now producing judgments—there are now approximately ninety such bodies.<sup>23</sup> The International Court of Justice, which initially decided only one or two cases per year, now has over twenty active cases on its docket. It is deciding and rendering advisory opinions on issues ranging from maritime boundary disputes to the interpretation and application of Genocide Convention and the legality of the threat or use of force.<sup>24</sup>

Even more radical than the change in quantity, however, has been the change in the quality of international law-making and practice. Binding dispute settlement between states and even the imposition of sanctions upon individuals are now characteristic of international law and practice. International treaty-making, which formerly occurred behind closed doors and on a consensus-only basis, now takes place in the spotlight of global civil society. NGO representatives not only attend diplomatic conferences,

22. Hart writes,

It is true that, on many important matters, the relations between states are regulated by multilateral treaties, and it is sometimes argued that these may bind states that are not parties. If this were generally recognized, such treaties would in fact be legislative enactments and international law would have distinct criteria of validity for its rules. . . . Perhaps international law is at present in a stage of transition towards acceptance of this [rule of recognition] . . . which would bring it nearer in structure to a municipal system. If, and when, this transition is completed the formal analogies, which at present seem thin and even delusive, would acquire substance, and the [skeptics'] last doubts about the legal “quality” of international law may then be laid to rest.

*Id.* at 231.

23. Project on International Courts & Tribunals, *About PICT*, at <http://www.pict-pcti.org/about/about.html> (last visited Oct. 20, 2004) (stating there are twenty international courts and seventy other judicial or quasi-judicial institutions). These bodies include the International Court of Justice, the European Court of Justice, the International Tribunal for the Law of the Sea, the International Criminal Tribunals for Rwanda and the Former Yugoslavia, the World Trade Organization Dispute Settlement Understanding, the Iran-U.S. Claims Tribunal, the Permanent Court of Arbitration, NAFTA Dispute Settlement Panels, the Special Court for Sierra Leone, and the panels established by the United Nations Transitional Administration in East Timor.

24. See International Court of Justice, *Current Docket*, at <http://www.icj-cij.org/icjwww/idocket.htm> (last visited Oct. 20, 2004) (on file with The Washington University Global Studies Law Review).

but also send daily transcripts home via the internet so that national and local organizations can rally followers to support or protest government actions at the conference. Indeed, when asked what led to the extraordinary success of the campaign to ban land mines, Nobel Prize winner Jody Williams, the organizer, reportedly replied: “e-mail.”<sup>25</sup>

Treaties are now negotiated in long sessions, often spanning years, among vast numbers of states. Rather than face the prospect of having the result of protracted and delicate negotiations scuttled by a handful of recalcitrant states, voting is sometimes employed at diplomatic conferences to adopt final treaty texts all at once.<sup>26</sup> This quasi-legislative practice raises the possibility of “instant customary international law”<sup>27</sup> binding not only on those states ratifying the treaty, but even nonparty states. Moreover, the product of the negotiations may include not only highly specific rules, but may also incorporate the establishment of treaty-based courts or tribunals to adjudicate disputes between the parties, such as the new WTO Dispute Settlement Understanding. The founding treaty of the International Criminal Court (ICC) contains not only an international criminal code, but establishes a judicial organ that may actually bring cases against individuals accused of serious violations of the Rome Statute, provided that the Court’s complex jurisdictional regime is satisfied.<sup>28</sup>

All of this leads me to my final point about why the United States may increasingly avoid the use of international law as a vehicle for achieving its foreign policy objectives: a fear that international law and international legal regimes might not serve U.S. interests. That is, paradoxically, critics of international legal institutions often argue that international law is both too weak and too strong; too ineffectual to bother with, and, at the same time, a dangerous constraint on U.S. power and American democracy.

But is a system based upon the rule of law and international justice necessarily inimical to U.S. interests? The answer, of course, depends upon what the system looks like. The above description of the transformation of the international legal order suggests that the Westphalian system of sovereign equality of states, premised as it is on a principle of decentralized authority, has become strained almost to the

25. FRIEDMAN, *supra* note 2, at 12–13.

26. *See, e.g.*, LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* 3–4 nn.7–9 (2002) (describing the adoption of the Rome Statute for the International Criminal Court).

27. PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 45–46 (7th ed. 1997).

28. Rome Statute, *supra* note 18, arts. 11–20.

breaking point. Akhil Amar once quipped that “[s]overeignty means never having to say you’re sorry.”<sup>29</sup> But a system premised upon the absolute sovereignty of 190 nation states cannot possibly function effectively. Moreover, the notion of absolute sovereignty is a fallacy. As a practical matter, nations are constrained by realities and externalities they cannot control: by the nuclear weapons of other states; by geopolitical considerations; by alliances; by private traders that can demolish a country’s currency by dumping it too quickly on international markets; by diseases that do not respect international boundaries; and, of course, by international terrorists.

The terrorist threat is very real, of course, and increasing. Yet, we must be careful not to turn it into the sole preoccupation of our time. A recent study in *Foreign Affairs* noted that “[i]n 2003, a total of 625 people—including thirty-five Americans—were killed in international terrorist incidents worldwide. Meanwhile, 43,220 died in automobile accidents in the United States alone, and three million died from AIDS around the world.”<sup>30</sup> Recent statistics on the conflict in Sudan suggest that hundreds of individuals are dying there each day from disease, starvation and war.<sup>31</sup> While the West enjoys an extraordinarily high standard of living, millions live in wretched poverty. Climate change experts have started to predict dramatic changes in the earth’s environment, including melting of the heroic snows of Mt. Kilimanjaro,<sup>32</sup> and Death Valley temperatures by the end of the century in inland California cities.<sup>33</sup> Of course, there may be a plus side: *The Economist* recently reported that Canada is now conducting naval exercises in the Arctic, confident that when the arctic snowcap melts, the elusive Northwest shipping passage will become the goldmine for which Canadians always hoped—7000 kilometers shorter than the ocean passage through the Panama Canal—much to the consternation of Panama and the United States.<sup>34</sup>

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29. *All Things Considered: Profile: Supreme Court Rules that States Have a New Immunity from Private Suits* (National Public Radio: June 23, 1999), at <http://www.npr.org/templates/story/story.php?storyId=1051931> (last visited Oct. 25, 2004).

30. Alan B. Krueger & David D. Laitin, “Misunderestimating” Terrorism: *The State Department’s Big Mistake*, FOREIGN AFF., Sept.–Oct. 2004, at 8, 12.

31. Marc Lacey, *Despite Appeals, Chaos Still Stalks the Sudanese*, N.Y. TIMES, July 18, 2004, at A1, available at 2004 WL 5533041.

32. Andrew C. Revkin, *The Climate Debate’s Icon*, INT’L HERALD TRIB., Mar. 25, 2004, at 10, available at 2004 WL 57512517.

33. Miguel Bustillo, *Risk to State Dire in Climate Study*, L.A. TIMES, Aug. 17, 2004, at B1, available at 2004 WL 55931670.

34. *Breaking the Ice—Sovereignty over the Arctic*, ECONOMIST, Aug. 21, 2004, at 32, available at 2004 WL 62019111.



Global problems require global solutions—and the Westphalian system may no longer be able to deliver. Just as Copernicus and Galileo challenged the orthodoxies of their time, it may be time to challenge the orthodoxies of ours. Old structures are disintegrating and new ones are emerging to take their place. What will they look like? The alternative to the decentralization of Westphalia, of course, is some kind of hierarchy or centralization. Heresy? Perhaps, but there is no reason that this change must be either violent or accompanied by fear. It will probably be most strongly resisted, however, by those who believe they have the largest stake in the status quo, as demonstrated by the extraordinarily hostile reaction of the U.S. government to the ICC treaty. Although the United States has often failed to support particular treaties before, the U.S. government's resistance to the International Criminal Court is different in kind. With other treaties, the United States often complies even without ratifying. Take, for example, the nearly forty years it took the U.S. Senate to ratify the Genocide Convention,<sup>35</sup> or America's continued absence from the Convention on the Rights of the Child.<sup>36</sup> Few seriously (or plausibly) argue that the U.S. failure to support those treaties was due to a perverse desire to maintain Americans' freedom to commit the human rights atrocities they prohibit. Instead, as Dean Harold Koh recently observed, the U.S. government likes to comply with treaties without signing on to them in order to preserve a false sense of freedom.<sup>37</sup> This permits the United States to support and follow the rules of the international realm most of the time (and to insist that others do so on issues that matter to us), but to maintain that it is doing so only out of prudence, not legal obligation.<sup>38</sup>

But let us examine the U.S. government's approach to the International Criminal Court. It has sought and, for the most part, obtained, Security Council resolutions immunizing Americans from prosecution; Congress has withdrawn military assistance from countries that ratify the treaty and refuse to enter into immunity agreements with the United States; the President has taken the absolutely unprecedented step of attempting to

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35. Genocide Convention, *supra* note 12; see United Nations Treaty Collection on the Internet, *Multilateral Treaties Deposited with the Secretary General: Convention on the Prevention and Punishment of the Crime of Genocide: Participants*, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty1.asp> (last visited Oct 10, 2004).

36. Convention on the Rights of the Child, *supra* note 16; see United Nations Treaty Collection on the Internet, *Multilateral Treaties Deposited with the Secretary General: Convention on the Rights of the Child; Participants*, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty19.asp> (last visited Oct. 10, 2004).

37. Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1485 (2003).

38. *Id.*

“unsign” the treaty; and the ICC’s detractors have employed a level of rhetorical exaggeration that would be almost comical if the matter were not so serious.<sup>39</sup> After all, this Court is charged with investigating and trying individuals for the commission of genocide, crimes against humanity, and the most serious war crimes of interest to the international community as whole.<sup>40</sup> This is an institution created, not to persecute American citizens, but to offer solace and justice to the victims of mass atrocities.

In the latest salvo, in July of 2004, one congressional leader spoke in favor of an amendment to the Foreign Appropriations bill<sup>41</sup> that would withhold economic assistance to America’s NATO partners, as well as some major non-NATO allies such as Jordan, South Africa and Japan, unless and until those countries sign immunity agreements that exempt U.S. nationals from the jurisdiction of the ICC.<sup>42</sup> The speech contained wildly inaccurate and misleading comments,<sup>43</sup> offering an aggressive example of American unilateralism and double standards—rules that are fine so long as they apply to everyone but us.

The United States is a country of law and of lawyers and this approach to international relations is undignified and beneath it. In any event, it is not in Americans’ self-interest. To return to the example of the ICC, political opponents of the Court have consistently overlooked the fact that the key features of the Court’s legal regime are the same elements that the United States needs enforced in the counter terrorism area:

- the duty of states to prosecute international crimes;
- the duty of states to try or extradite international criminals;

39. See Leila Nadya Sadat, *Summer in Rome, Spring in The Hague, Winter in Washington, U.S. Policy Towards the International Criminal Court*, 21 WIS. INT’L L.J. 557 (2003).

40. See Rome Statute, *supra* note 18, pmbl.

41. H.R. 4818, 108th Cong. § 581 (2004).

42. 150 CONG. REC. H5881-83 (daily ed. July 15, 2004) (statements of Mr. Nethercutt), available at [http://frewebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=H5881&dbname=2004\\_record](http://frewebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=H5881&dbname=2004_record) (last visited Feb. 15, 2005).

43. See, e.g., *id.* at 5882 (statement of Mr. Delay). Mr. Delay, for example, after referring to the ICC as “Kofi Annan’s kangaroo court,” told other members of Congress:

If you want to go home to your constituents and tell them that you think that their tax dollars should go to foreign countries who allow American soldiers to be imprisoned and shipped off to Brussels without their constitutional rights, then, by all means, vote no on the, Nethercutt amendment.

*Id.* Besides being mistaken regarding the location of the ICC—it is in The Hague, not Brussels—it is also fundamentally inaccurate to say that the ICC will not provide “constitutional” rights to those before it. Indeed, the ICC arguably offers *greater* rights, both in terms of process and evidentiary standards, to individuals standing trial before the ICC than would be granted under the U.S. Constitution.

- the obligation of states not to give safe haven to international criminals; and
- the right of the international community to act together, if states are unable or unwilling to fulfill their obligations.<sup>44</sup>

Under international criminal law, the regime applicable to the genocidal killers of Sudan, Rwanda, or the former Yugoslavia also covers bin Laden and his ilk.<sup>45</sup> Yet in its assault on the ICC, the United States has partially eviscerated the international criminal justice regime established over the past century, weakening one of the most powerful tools it could have used against bin Laden. Abandoning law, we have been left with military force and economic sanctions—both of which are extraordinarily clumsy vehicles to rein in a terrorist network. The civilian casualties that result from military action are the best recruiting devices with which the terrorists could possibly be provided, as are economic sanctions that impact mostly the women and children of the target country. Indeed, these factors have helped lead some experts recently to suggest that Al Qaeda is no longer a terrorist network—but has become a global movement.<sup>46</sup>

Yet it need not have been that way. The international community was solidly arrayed in support of the United States following the horrific attacks of 9/11, and that support could have been used to strengthen, rather than weaken, the rule of law. As we did in the 1991 Gulf War against Iraq, the U.S. could have sought the equivalent of an international arrest warrant for bin Laden from the Security Council that *explicitly* authorized the use of force to obtain his capture and eliminate his supporters, bringing U.N. legitimacy and cover to the invasion of Afghanistan. We could also have established an international terrorism court, so that we would not have to take on the burden of being sheriff, judge, jury, and likely executioner for international terrorists around the globe.

Returning to the larger problems of recalibrating the international legal system, as a nation with an extraordinarily rich supply of lawyers, there is no shortage of talent that could be brought to bear on the complexities of creating new rules and even a new constitutional understanding for the international community. Indeed, from 1889 to 1944, every Secretary of

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44. Rome Statute, *supra* note 18, pmb1.

45. See Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135 (2004).

46. Michael Hirsh, *Terror's Next Stop*, NEWSWEEK, Mar. 22, 2004, at 30, 33, available at 2004 WL 62584672.

State save one was a lawyer.<sup>47</sup> There is no necessary correlation between a government's emphasis on legal rules and the professional training of its foreign minister; however, there is no doubt that many of those chosen to serve as the head of our diplomatic and foreign service brought their legal training to bear on world problems. Elihu Root, who served as U.S. Secretary of State in Theodore Roosevelt's cabinet, personified the idea of the lawyer-statesman—although a staunch Republican, Root supported U.S. entry into the League of Nations, helped to bring the first World Court into existence, and in 1912 was awarded the Nobel Peace prize.<sup>48</sup>

Following World War II, Presidents often turned to non-lawyers to serve as Secretary of State, but fifty percent of those chosen still had legal training, from John Foster Dulles, appointed by President Eisenhower, to Warren Christopher, appointed by President Clinton.<sup>49</sup> In fact, with the exception of Ronald Reagan, every president of the twentieth century, Republican and Democrat alike, recruited at least one of their Secretaries of State from the ranks of the bar.<sup>50</sup>

47. See Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y.U. L. REV. 239, 241 (2003) (stating that all U.S. Secretaries of State from 1899 to 1945 were lawyers). This assertion does not appear to be correct as at least one Secretary of State, Robert Bacon, was an investment banker. 1 AMERICAN NATIONAL BIOGRAPHY 852–53 (John A. Gigmaty & Marie C. Carnes eds., 1999). Bacon, it should be noted, however, served only for two months. In any event, this string of lawyer-appointees was broken when Franklin Roosevelt appointed Edward R. Stettinius, Jr., an industrialist, as Secretary of State in 1944.

48. See *Elihu Root—Biography*, at <http://nobelprize.org/peace/laureates/1912/root-bio.html> (last visited Nov. 14, 2004).

49. President Truman appointed two lawyers as Secretaries of State. The first was James F. Brynes. 4 AMERICAN NATIONAL BIOGRAPHY, *supra* note 47, at 139. The second was Dean G. Acheson. 1 *id.* at 53. President Eisenhower appointed John Foster Dulles. 7 *id.* at 44. John F. Kennedy's only appointment was Dean Rusk, who studied international law at the University of California at Berkeley (though he did not complete a law degree), and later taught international law at the University of Georgia. 19 *id.* at 81–82; New Georgia Encyclopedia, *Dean Rusk*, at <http://www.georgiaencyclopedia.org/nge/Article.jsp?path=/GovernmentPolitics/PoliticalFigures&id=h-1024> (last visited Mar. 21, 2005). William P. Rogers, a lawyer, was appointed by President Nixon. CAMBRIDGE DICTIONARY OF AMERICAN BIOGRAPHY 623 (John S. Bowman ed., 1995) [hereinafter AMERICAN BIOGRAPHY]. Cyrus R. Vance served as Secretary of State under President Carter. *Id.* at 757. Only one of the Secretaries of State appointed by President George H. W. Bush was a practicing attorney—James A. Baker III. *Id.* at 34. President Bush's second appointee, Lawrence S. Eagleburger, while a career foreign service officer, is now affiliated with the law firm of Baker, Konelson, Bearman, Caldwell & Berkowitz, P.C. Website of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., *Biographies: Lawrence S. Eagleburger*, at [http://www.bakerdonelson.com/index.cfm?fuseaction=dpattorneysdetail&id=1731&site\\_id=0&cat=4](http://www.bakerdonelson.com/index.cfm?fuseaction=dpattorneysdetail&id=1731&site_id=0&cat=4) (last visited Mar. 21, 2005). President Clinton continued the "tradition" of appointing a lawyer as Secretary of State, appointing Warren M. Christopher. AMERICAN BIOGRAPHY, *supra*, at 132.

This roll call indicates that nine of the eighteen Secretaries of State serving after World War II studied law or had legal experience.

50. President Cleveland appointed two lawyers: Walter Q. Gresham (9 AMERICAN NATIONAL BIOGRAPHY, *supra* note 47, at 572) and Richard Olney (16 *id.* at 703). President Harrison also tapped two lawyers: James G. Blaine (AMERICAN BIOGRAPHY, *supra* note 49, at 68–69) and John W. Foster

U.S. lawyers, with their commitment to and understanding of federalism, have extraordinary gifts to share in the crafting of a world order that permits the solution of global problems without unnecessary or undue interference in local affairs. A world order that will respect principles of democracy and separation of powers and that will operate “in the sunshine” and be accessible to the people. That can bring about the enhancement of human dignity, address global environmental problems, take on the continuing and potentially devastating threat from nuclear weapons, and alleviate world poverty and disease. For globalization is not just Americans’ profit—globalization is, above all, about people.

If we embrace the peoples of the world as brothers and sisters, as members of the human family, globalization may bring peace and understanding. If we reduce them to elements of production, understanding is unlikely to follow. Legal rules create a framework for solving problems and avoiding misunderstandings. Legal institutions, as Eleanor Roosevelt once said of the United Nations itself, provide a “bridge upon which we can meet and talk.”<sup>51</sup> Even where we feel no empathy for individuals located in far corners of the globe, we must develop methods of interaction that will prove productive and stabilizing in the long term.

It would be disingenuous to claim that international legal rules will impose no constraints on the sovereignty of the United States, for they will. For the rules to acquire legitimacy, they must apply to large and small states alike. But that will not necessarily deprive the United States of a special place in the international legal order. Just as the EU’s system of weighted voting accords large states more votes than small while permitting small states a blocking minority,<sup>52</sup> any recalibration of the one

(8 AMERICAN NATIONAL BIOGRAPHY, *supra* note 47, at 298). Three lawyers served as Secretary of State under President McKinley: John Sherman (19 *id.* at 813), William R. Day (6 *id.* 276), and John M. Hay (10 *id.* at 367). Teddy Roosevelt’s first Secretary of State, Elihu Root, was an attorney (18 *id.* at 838); however, his second, Robert Bacon, was an investment banker by trade. 1 *id.* at 852–53. Philander C. Knox, an attorney, was appointed Secretary by President Taft (12 *id.* at 838), while Woodrow Wilson appointed three attorneys successively. They were William J. Bryan (3 *id.* 812), Robert Lansing (13 *id.* 181), and Bainbridge Colby (5 *id.* at 192). President Harding appointed attorney Charles Evans Hughes (11 *id.* at 416), and President Coolidge chose Frank B. Kellogg (12 *id.* at 497). Finally, Herbert Hoover chose attorney Henry L. Stimson as Secretary of State. 20 *id.* at 787–88. Gerald Ford may also be considered an exception, as Henry Kissinger remained in office following Nixon’s resignation and Ford’s assumption of the office of President.

For a list of attorneys serving as Secretary of State during the remainder of the twentieth century, see *supra* note 49 and accompanying text.

51. MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS xix (2001), quoting Eleanor Roosevelt, *The U.N. and the Welfare of the World*, 47 NAT’L PARENT-TEACHER 14, 16 (1953).

52. GEORGE A. BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 36–39 (2d ed. 2002).

vote per state paradigm will need to comport with political and economic reality. Of course, the United States is likely to find the rules more to its liking if it has a part in shaping them, which it can only do if it embraces this challenge as an influential insider, rather than remaining a belligerent and hostile outsider.<sup>53</sup>

One final point is worth considering. The same strain that the international legal system is experiencing as a result of globalization is being felt domestically. Foreign relations law has remained a somewhat obscure sub-specialty of constitutional law until now. Yet, ten of last term's eighty-five Supreme Court cases involved important questions of international law and policy.<sup>54</sup> Indeed, some of our Supreme Court justices clearly appear to be contemplating their role in a global world, addressing meetings of the American Society of International Law,<sup>55</sup> traveling and teaching abroad; and engaging in what scholars see as a transjudicial dialogue with their counterparts on Supreme Courts around the world.<sup>56</sup> Apparently provoked by this, sixty members of Congress recently introduced a resolution entitled the "Reaffirmation of American Independence Resolution," intended to prohibit federal courts from relying upon foreign, and presumably international, law in their judgments.<sup>57</sup>

53. As Senator Chuck Hagel from Nebraska recently opined in his essay, *A Republican Foreign Policy*,

U.S. foreign policy should promote good governance, the rule of law, investment in people, private property rights, and economic freedom. The United States can continue to set an example, not arrogantly, but cooperatively, through strong leadership and partnership. . . . The United States must therefore help strengthen global institutions and alliances, beginning with the United Nations and NATO.

Hagel, *supra* note 1, at 67–68.

54. The author's review of the Supreme Court docket for the 2003 term revealed the following ten cases raising significant questions of international law: *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (2004); *F. Hoffman-La Roche Ltd. v. Empagaran S.A.*, 124 S. Ct. 2359 (2004); *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 124 S. Ct. 2204 (2004); *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240 (2004); *U.S. v. Flores-Montano*, 124 U.S. 730, 124 S. Ct. 1582 (2004); *Olympic Airways v. Husain*, 540 U.S. 644, 124 S. Ct. 1221 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); and *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

55. See, e.g., *2004 ASIL Meeting Draws Record Crowds*, ASIL NEWSLETTER (Am. Soc'y of Int'l., Washington, D.C.), May–July 2004, at 1, 11, available at <http://www.asil.org/pdfs/news.pdf> (last visited Nov. 16, 2004).

56. Not all of them, of course—Justice Scalia has been highly critical of most of the Court's references to foreign or international law, although he himself referred to other Supreme Court cases that have considered foreign law to support his dissent in a recent case regarding the Warsaw Convention on airline operations. *Olympic Airways*, 540 U.S. at 644, 124 S. Ct. at 1230 (Scalia, J., dissenting).

57. H.R. Res. 568, 108th Cong. (2004) (expressing the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or

While both the predicate and the text of the resolution are legally problematic, the resolution raises an interesting question: Is our 200-year-old Constitution capable of adapting to the global age?<sup>58</sup>

Incorporating international law into U.S. law is sometimes challenging. In 1900, the U.S. Supreme Court affirmed, in *The Paquete Habana* case, that customary international law is federal law.<sup>59</sup> After all, international law became part of “our law” with the independence of the United States in 1776, either through its reception as part of the law of England, or as an incident of American sovereignty.<sup>60</sup> Treaties, pursuant to article VI of the Constitution, are clearly the Supreme Law of the land.<sup>61</sup> Recently, however, conservative scholars have argued that because *Erie v. Tompkins* eliminated federal common law, customary international law—the law of nations, and particularly international human rights law—cannot be directly applied by the federal courts.<sup>62</sup> Last June, a six-member majority of the Supreme Court rejected this view in *Sosa v. Alvarez-Machain*.<sup>63</sup> But the debate, both on and off the Court, suggests that just as our legislators and our President must struggle with the establishment of a new and functional international legal order in the United States and abroad, our courts are on the front lines as well. NAFTA was entered into as a Congressional Executive agreement, circumventing what would have been an impossible two-thirds majority to attain in the Senate.<sup>64</sup> Was that constitutional? Professor Bruce Ackerman of the Yale Law School says yes;<sup>65</sup> Professor Lawrence Tribe of Harvard disagrees.<sup>66</sup> The EU member states each amended their respective constitutions when they joined the European Union, and many of them had to amend their constitutions to

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pronouncements inform an understanding of the original meaning of the laws of the United States). See also Reps. Feeney, Goodlatte Introduce Legislation Saying Judicial Decisions Shouldn't be Based on Foreign Precedents, States News Service, Mar. 17, 2004, at WL 73621760.

58. See Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

59. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

60. See *Ware v. Hylton*, 3 U.S. 199, 281 (1796) (Wilson, J., stating, “[w]hen the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”).

61. U.S. CONST. art. VI, cl. 2.

62. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997). But see Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

63. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2764–65 (2004).

64. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?* 108 HARV. L. REV. 799, 802 n.6 (1995).

65. See *id.*

66. See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

join the ICC as well.<sup>67</sup> Will the United States need to do the same, and could it do so in the current political climate? Or would the Supreme Court, generally inclined to support the Executive Branch in foreign affairs,<sup>68</sup> bless new treaty regimes in order to avoid a Constitutional crisis?

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Bringing the rule of law back into American thinking about foreign policy will take time, but it is inevitable. Without rules, human civilization cannot survive; without rules, there is no true freedom. Law is, of course, only one element of foreign policy, but it is a powerful one. By appealing to principle, we can better persuade. By acquiring legitimacy, our actions take on a new authority. By delivering justice, we win hearts and minds. From Thomas Jefferson to Warren Christopher, the tradition of the lawyer statesman persists. The challenge ahead is formidable—it is hard to live in a global age.<sup>69</sup> But we can take comfort in the words of Jean Monnet, one of the most passionate advocates of a United States of Europe and one of the chief architects of the European Community—although I should, in all fairness, disclose that he was a cognac merchant, not a lawyer! Monnet was never discouraged in his efforts to create the European Economic Community, and he later wrote in his memoirs, “Resistance is proportional to the scale of the change one seeks to bring about. It is even the surest sign that change is on the way. [T]o abandon a project because it meets too many obstacles is often a grave mistake: the obstacles themselves provide the friction to make movement possible.”<sup>70</sup>

I look forward to many more years of resistance and obstacles, as well as, I hope, just a little progress in the establishment of an international legal system committed to delivering justice. I hope especially that it will be supported, even led, by the United States of America I grew up to believe in, and the founding principles of which I became a lawyer to help defend.

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67. For a description of amendments made by particular EU members to their respective constitutions to comply with the requirements of the Rome Statute establishing the ICC, see Coalition for the International Criminal Court, *Country Info: Europe/CIS*, at <http://www.iccnw.org/countryinfo/europecis.html> (last visited Oct. 11, 2004).

68. See *Sosa*, 124 S. Ct. at 2744.

69. If foreign policy analysts are correct, however, that the United States is likely to be reduced to a major power in a multipolar world, as opposed to the world's only superpower, this might not only prompt the U.S. to take a more multilateralist approach out of self-interest, but probably, in Samuel Huntington's words, would make life “less demanding, less contentious, and more rewarding than it was as the world's only superpower.” Samuel P. Huntington, *The Lonely Superpower*, FOREIGN AFF., Mar.–Apr. 1999, at 35, 49.

70. JEAN MONNET, MEMOIRS 61–62 (Richard Mayne trans., 1978).



