

COMMENTS

GLOBALIZATION AND INTERNATIONAL LAW*

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It is indeed an honor to be with you this evening for the annual banquet. It's always a pleasure for me to come home to Athens and the University of Georgia. As a former student of both Dean Rusk and Dean Gabriel Wilner, and being a former member of the *Georgia Journal of International and Comparative Law*, it is humbling to be standing before you. I come as someone who left Athens twenty-eight years ago and return to report from the front lines of international law. I would like to pay my respects to Professor Alan Watson. Unfortunately, I did not have the opportunity to be your student. But the recent Journal issue which focused on your contributions to the law is a significant tribute to you, and the law school is extraordinarily fortunate to have you as a faculty member.

Let me also take the liberty before starting to unashamedly make a plug for the two-day conference which starts tomorrow, titled "The Trans-Atlantic Relationship—Aviation Policy: Clearing the Way to a More Open Market." It will bring together leading international aviation practitioners and academics to discuss how to move from the aviation industry's current crisis to creating a truly global system for the twenty-first century. I am co-chair of the conference, and it is a topic near to my heart as a former U.S. Assistant Secretary of Transportation for Aviation and International Affairs. In terms of international law, I can think of no better place for students such as yourselves to see firsthand the beauty and difficulties of applying international law. And I hope that I will see you all at the conference.

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For the last several years I have believed that international law was in trouble in this country. We have many in our Executive Branch and in Congress who do not understand the source or the importance of our international undertakings. We have even more in the media and the public. We have large gaps in the knowledge of our Judiciary, and our law schools are not giving it the attention it deserves.

This indifference continues despite the fact that industries of all kinds continue to move towards more open and vigorous global competition as consumers demand increasing access to new services and products. And “globalization” is not just an economic phenomenon. The same technologies that are breaking down barriers to trade and communication are generating the start of a global politics. People in all parts of the world are collaborating to catch terrorists, protect the environment, or hunt down a microbe. A common law is gradually giving expression to shared beliefs in rights and wrongs. And nation-states are no longer the unchallenged instruments of transnational action.

The current system of international law must operate in the face of new threats to world order—threats that are more pervasive, since they do not necessarily attribute themselves to a nation-state. The information age and cyberspace have most definitely broken down many territorial borders and created certain problems, which in turn calls for a redefinition and an expansion, and perhaps a reconceptualization, of the term “international law.” I believe the practice of international law must bring forth new rules, new ideas, new law. We need to take a step back and look at how well the current system addresses these new threats and look at ways of adapting the current system to handle the changes in world affairs. And the events of the past two years make that all the more difficult from within the United States. At a time when many of us want to turn inward, we need to remain firmly part of the global community. We can, and must, participate, not retreat; help lead the discussion, not follow; and help set the standards in the face of globalization.

Dean Rusk, in his autobiography, written with his son Richard, stated that early in his career he “believed that international law would of necessity play a greater role in world affairs. Nations needed standards of law and justice in dealing with each other. Purely political considerations were inadequate in resolving disputes between nations, because they left out what was most essential—morality.” Tom Schoenbaum, former Director of the Dean Rusk Center, once wrote that Rusk’s early “study and teaching of international relations led him to search for a standard of justice in dealings between nations; he found it in international law.”

Dean Rusk believed strongly in international law and had great respect for the utility of international organizations in resolving conflict. He felt that international law should determine the behavior of nation-states and set the criteria for making judgments about international conflict. An exchange between Dean Acheson and Dean Rusk revealed the strength of Rusk's commitment. Once, while Professor Rusk was expressing his views on international law, Acheson, in exasperation, exclaimed, "Dammit, Dean, the survival of nations is not a matter of law." Rusk replied, "On the contrary, in a nuclear age, the survival of nations may depend upon international law." Those words continue to ring true today. In light of the new and unconventional threats facing the world, the nations of the world must work together in responding to these threats and adapt international law so it can rise to meet these new challenges. The United States should help lead the way in promoting the rule of law and not retreat from the international community.

Few subjects, however, are as polarizing as globalization. Some see it as the way toward a better, more prosperous future for the world. Others see globalization as having disastrous potential, from the destruction of native cultures to increasing poverty and misery in the poorest nations. Domestically, critics argue that globalization is a new movement advancing radical ideas which will subvert the nation-state system and subject the United States to powers and influences beyond our borders whose interests are not ours. But it's not a new process. It has occurred at various points throughout history. However, it has accelerated recently due to economic integration, the rise of telecommunications, and transportation advances. In reality, globalization is the natural state of the world. It acknowledges that we are interconnected and related; that we are all in this together.

Let's trace our beginnings as human beings. How did our species arise and spread around the globe to become the most dominant creature on the planet? After decades of scientific research, we now know that we are all intricately linked in this world, as recent genetic research has shown that all humans alive today can claim a common ancestor. I have learned that as part of every cell in the human body, tiny cellular structures called mitochondria produce energy needed by all living creatures and, remarkably, possess their own DNA that is completely independent of the principal cellular DNA residing in the nucleus. Known as mitochondrial DNA, this genetic material has a property that makes it a unique tool for studying human origins. This mitochondrial DNA is passed on only from mothers and goes back for countless generations. Using this genetic road map, scientists have linked all present-day humans to a single population of ancient humans who lived in East Africa over 150,000 years ago.

You might ask how do I, a liberal arts major, know this? One of the disadvantages of being an international law practitioner is that you spend a lot of time in hotel rooms. The good news for me is that I found the Discovery Channel, and they have run a feature titled, "The Real Eve."

Current research confirms that the world's entire population can be traced back to a family tree that has its roots in Africa and a single branch leading out of the continent and into the rest of the world. While there were other human migrations out of Africa before this time, these other populations died off without leaving their genetic imprint on present-day humans. But, the mitochondrial DNA from ancient humans from East Africa has survived.

These humans migrated out of Africa, according to Stephen Oppenheimer, a leading researcher from Oxford University. The migration began some 80,000 years ago, during a climatic weather shift which turned what was once desert into the lush growth of the so-called "Fertile Crescent" stretching from the Arabian Gulf to Turkey. Our ancient ancestors traveled east across the Red Sea into what is now Yemen, and then through India and all the way to the far reaches of Asia and Australia, before beginning the push into what is now modern-day Europe. The final stage in the human odyssey was again triggered by climate change. Approximately 20,000 years ago, when the seas retreated, humans crossed over a bridge of land that connected what is now Siberia and Alaska. These ancient humans spread then throughout all of the Americas, and "the peopling of the planet was complete."

Thus, according to Oppenheimer, "despite the migration and branching of the human family tree over the past 7,000 generations since Eve, perhaps the most startling result of the new picture of human evolution is how very closely related all humans are This really brings home that we are just one big, very close family." So, despite the vastness of our modern world, despite our different cultures and languages, we all came from the same small group of ancient humans. We are all one.

In moving towards globalization, we are attempting to build a system that is relevant to very basic things. Feeding people, moving people, employing people. Creating an integrated, diverse, and free world. Globalization is more than just economics—rich nations vs. poor nations, technology-based countries vs. agrarian-focused countries. It encompasses a wide range of political, social, and cultural elements as well. But, having said that, let me be honest and state that economics is at the heart of the debate between critics and proponents of globalization. Discussions on international trade, international capital, multinational corporations, and non-governmental organizations drive the current debate.

But, and this is key, the globalization process does not demand any one trade or governmental system, nor does it impose on governments any requirement that market forces and economic interests must trump other values. Mark Gordon, an Associate Professor in the Practice of Public Affairs at Columbia University's School of International and Public Affairs, has argued that "too frequently, discussions about globalization have avoided the necessary debate about how global markets *should* operate to focus instead on how they *currently* operate.

Thus, too often we have accepted the current form of global capitalism as the only possible one, when there is no 'one' correct system." Globalization does not mean, as the protestors would have you believe, that there will necessarily be a Starbucks and McDonalds on every street corner, and that the world will be "Americanized." There can be triggers and brakes built into the system; there can be provisions to provide developing countries a more level playing field; and individuality and diverse cultures will not necessarily crumble. But there is one inevitable outcome. The trade and openness that it brings will increase pressure on international relations and the need for a more integrated world in all of its facets, not just from an economic standpoint.

Thus, the importance of international law will become all the more evident in our move towards a more open and global society. And we as lawyers should be leaders in these efforts. As Dean Rusk once stated: "The governments of the world already practice international law; it is a living, if unheralded, force in world affairs. And yet we must speed the process, as mankind is in a desperate race to find ways of settling its disputes peacefully."

The World Trade Organization (WTO) is at the epicenter of the broader globalization trend impacting nation-states and increasing the breadth of international law. The WTO, still in its infancy, is re-defining how nations conduct their trade. It reveals the shift in the balance of power resulting from globalization. From two tiers of governmental power, federal and state from the United States perspective, we must now add a third tier, governing powers at the international level. Yet I continue to insist that this concept is not new. As I just quoted Professor Rusk, "the governments of the world already practice international law." It's just reaching down beyond the nation state and in more formally structured ways than in the past.

Let me provide an example. Currently, I am involved in an international trade dispute involving wheat. The matter of wheat trade between Canada and the United States has been an extremely contentious issue ever since the signing in 1989 of the Canada-United States Free Trade Agreement. Canadian

wheat which United States farmers, my clients, consider unfairly priced, has poured into the United States market.

To make matters worse, Canada—despite its free trade commitments under the 1989 agreement and now NAFTA—has retained a series of non-tariff trade barriers which essentially eliminates the possibility of U.S. wheat exports into Canada. Not satisfied with its increasing United States market share, the Canadians have been targeting certain third-country markets where, again, we contend with unfair prices, as they under-price United States wheat bids in order to capture the market. As a result, United States wheat farmers are reeling.

The United States government has attempted on numerous occasions over the past decade to resolve this matter, but the Canadians are insistent that they have every right to maintain a single desk procurement and selling monopoly by way of a state trading enterprise known as the Canadian Wheat Board. Over the past several years, my approach has been two-fold: to protect our wheat farmers under existing United States trade laws and to work with the United States Trade Representative to address the problems of the Canadian Wheat Board via international law through the WTO.

Thus, on the domestic front, we have filed countervailing duty and dumping cases against Canada before the Department of Commerce and the International Trade Commission; and, on the international front the United States has filed a WTO complaint and is demanding that the Doha Round of WTO negotiations make certain amendments to the Agriculture Agreement to insure that entities such as the Canadian Wheat Board function in a transparent and commercial manner.

The rule of international law in this dispute will be extremely important. We are going after the Canadians under our domestic trade laws, which must be WTO-consistent; however, the result when we win—while beneficial in the short-term to United States farmers by imposing duties on Canadian wheat entering the United States—will not address the root cause of the problem, which is the existence in a free-trade area of a monopsony/monopoly power that is the largest wheat exporter in the world.

Thus, the United States Trade Representative's efforts at the WTO will be extremely critical. The dispute settlement panel established to hear this dispute will determine whether Canada, in allowing the operation of the Canadian Wheat Board, is in violation of its commitments under the WTO Agreement. Once we are victorious before the WTO, Canada will have to reform or dismantle the Wheat Board and the unfair methods by which it

engages in wheat trade. So, ultimately, international law will be the means by which United States wheat farmers have their rights protected.

While I have expressed some concern over the status of international law and the United States' current commitment to it, I do remain hopeful, because as diverse as this world is, we are all one people and we must rise as one to meet the new challenges and threats that face us in this new century.

To give us courage to meet this challenge, I want to lift up a characteristic that I think is distinctive for us "Bulldogs for international law."¹ And that is optimism. I think back to Professor Sigmund Cohn, who preceded Professor Rusk, and his commitment and belief that international law could be strengthened to prevent the horrors of his generation. Professor Rusk, if he were here tonight, would be reminding us that it's been more than fifty-eight years since atomic weapons were fired in anger. Louis Sohn, in spite of being one of the current world statesmen in international law, is almost impish in his enthusiasm and optimism.

Down to the present day Dean Wilner and the other faculty here, who may have different perspectives on aspects of international law, all believe it can make our world a better place. Through the Dean Rusk Center, through the *Journal*, and through the Society, we can work to assure that international law continues to make the world a better place.

Professor Rusk was so committed to international law that after a lifetime of service to his country he returned here to Athens to teach it. And in closing, I think it appropriate to quote him one more time. He concluded his autobiography by writing a "Message to the Young."

He wrote:

Can we live together, different races of people, their different religions and cultures, to share this planet peacefully and overcome the terrible differences between "we" and "they" which has crowded the human story with so much senseless tragedy? Will nations restrain their extravagant notions of sovereignty and join hands to find answers which no one nation can find alone?

He went on to explain that he was optimistic about the future and, in his words,

confident that each of you, in your own way, will take a piece of the action and make it yours. In doing so, you will share with

¹ The mascot for the University of Georgia is the "Bulldogs."

each other a great adventure. I am not afraid about how the story comes out. I regret to say that I cannot accompany you on that journey. But I can assure you all, that you carry with you the blessing and best wishes of an old man.

Professor Rusk would be extraordinarily proud of you who are gathered here this evening.

Thank you for allowing me to be with you.