

2006

Rebuilding International Law after the September 11th Attack: Contrasting Agendas of High Priests and Legal Realists

Bryant G. Garth
Southwestern Law School

Follow this and additional works at: <http://lawcommons.luc.edu/lucilr>



Part of the [International Law Commons](#)

Recommended Citation

Bryant G. Garth *Rebuilding International Law after the September 11th Attack: Contrasting Agendas of High Priests and Legal Realists*, 4 *Loy. U. Chi. Int'l L. Rev.* 3 (2006).
Available at: <http://lawcommons.luc.edu/lucilr/vol4/iss1/3>

This Remark is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago International Law Review by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

REBUILDING INTERNATIONAL LAW AFTER THE SEPTEMBER 11TH ATTACK: CONTRASTING AGENDAS OF HIGH PRIESTS AND LEGAL REALISTS

Bryant G. Garth[†]

The title of these remarks, “Rebuilding International Law after the September 11th Attack,” sounds more pretentious than I would like. It evokes the lofty pronouncements of “high priests” of international law—reminding us of the importance of noble principles designed to civilize the world of nations. This evocation may be appropriate given the occasion for my remarks—the dedication of the Wing-Tat Lee Chair of International Law and the appointment of Gregory Shaffer to hold the chair. In fact, however, I want to suggest the approach that our high priests have developed to date in order to foster the reconstruction of international law is not sufficient. The dreams of the high priests will have a better chance of success if the insights of “new legal realists” inform their initiatives. The insights of the new legal realists make sense in two respects. One is that they can situate any revival of international law in the context of general global politics and global hierarchical processes—power relationships that are often masked by what may appear to be a global consensus around norms or rights. Second, realist insights recognize that there is competition to be a relevant voice in international relations, and the role of lawyers and their expertise has ebbed and flowed in U.S. history. The insights of the new legal realism can help law and lawyers find a way to get back into the game of international relations. Rebuilding international law, in short, is also about reclaiming a role for lawyers and the expertise that they cultivate.

The day of these remarks, September 11th, is the day of the incredible airplane violence in New York City and Washington, D.C., and also the day of the *coup d'état* against Salvador Allende in Chile in 1973. Both events make September 11th a timely occasion to address the current feeling of crisis in international law. The occasion of a new chair also raises the question of what the appropriate task of a holder of a new chair in international law should be in the present circumstances.

President Bush and his team issued the challenge initially. They said that everything changed after September 11, 2001. International law needed to be put in the service of the War on Terror or ignored. Academic theories produced not by international lawyers but by others helped justify a new order where concepts like “empire” were considered useful means to keep international peace and sta-

[†] Bryant G. Garth is Dean of Southwestern Law School in Los Angeles and Director Emeritus of the American Bar Foundation. His degrees are from Yale (B.A. 1972), Stanford Law School (J.D. 1975), and the European University Institute in Florence (PhD 1979).

Rebuilding International Law

bility.¹ The United States was supposed to use its power for good and against evil in the world.

The Bush administration has translated its reading of the events of September 11th into a famous series of anti-international law decisions. The most notorious rejections of international law include Guantanamo, renditions to secret prisons and torture, the rejection of the International Criminal Court, and the abandonment of the Kyoto Accords in global warming. The post-September 11th administration rejected any constraints that international law might impose—even, shockingly, against the use of nuclear bombs.

Major figures of international law in the United States and abroad—our “high priests” of international law—have reacted in strong terms. Dean Harold Koh of Yale, for example, called the United States a “member of the axis of non-obedience,” demonstrating a “loss of rectitude” that is leading to “at least a loss of its soft power,” essential for long-term success post-September 11th.² From the British side, a leading barrister and human rights champion, Philippe Sands, has recently written a book called *Lawless World: America and the Making and Breaking of Global Rules*.³ The book excoriates the United States for betraying the legal norms that offered so much promise for a better and more peaceful world.

The setting and timing of this occasion suggest a nice opportunity to back the elite group promoting a revival of international law in favor of international cooperation in trade, human rights, environmental protection, and democracy promotion. The statements by the scholars I have just quoted are very powerful and compelling. Indeed, a revival of international law is partly a matter of professional survival. There was considerable criticism of lawyers who wrote memos justifying, in legalistic terms, the turn away from international law, but the real problem in my opinion was that they lacked the clout to write anything but an apology. It was not a matter of poor legal reasoning or low technical skill. They were simply going through the motions since the technical law did not matter at all. Legal arguments were not part of the actual decision-making process. In the context of the administration at that time, international law did not carry any weight as such.

A program of rebuilding international law (and international lawyers) should take a look at where we were pre-September 11th. The sense of the statements by the high priests of international law was that the Bush administration derailed a movement that was going in the right direction and succeeding. Harold Koh’s remarks at the annual meeting of the American Law Institute make this perspective quite clear: “we should go back to the future, to an international vision

¹ See NIALL FERGUSON, *COLOSSUS: THE RISE AND FALL OF THE AMERICAN EMPIRE* (2005); Michael Ignatieff, *American Empire: The Burden*, N.Y. TIMES, Jan. 5, 2003, at 1.

² Harold Koh, *Why Obey International Law? The Value of Process*, 11 INT’L LEGAL THEORY 27 34–35 (2005).

³ Philippe Sands, *LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES* (2005).

Rebuilding International Law

based on the four original premises that guided us before September 11th.”⁴ He called in particular for diplomacy backed by force, human rights universalism, democracy building by supporting people’s aspirations everywhere, and more use of multilateralism.

An emerging consensus of freedom is a key feature also of the work of Anne-Marie Slaughter, Dean of the Woodrow Wilson School of Princeton and another one of the leading international lawyers today. Courts, she suggests, in an article on “a global community of courts,” work out common approaches and norms as they come “to recognize each other as participants in a common judicial enterprise.”⁵ Like Dean Koh, her emphasis is on an emerging international consensus that also comes to dominate the production of domestic norms.

It is tempting to repeat or embrace this high-mindedness built in the period prior to the shock of September 11th, especially on an occasion like the dedication of a new chair. These leading scholars saw an emerging consensus that was leading toward greater global interconnectedness, freedom, trade, and stability. The high priests—supported by a number of enlightened business people, such as George Soros—saw great progress toward a legitimate system of global rules.

I want to suggest that the top-down perspective of the high priests missed some problems with the emerging consensus. I make the observations in part because the holder of the new chair, Professor Shaffer, would not, in my opinion, settle for that perspective. He cut his scholarly teeth as an academic at Wisconsin, the law school capital of empirical research—including research from a bottom-up perspective.⁶ He uses cutting edge interdisciplinary tools, in addition, that get beneath the pronouncements of high-minded scholars. My own research, largely with Yves Dezalay, participates in the same enterprise, so I want to put a few more issues on the table. Let us look at what was emerging in terms of the “rules of the game” internationally prior to September 11th.

I will provide provocative, if over-simplified, accounts of three areas of law based largely on our research in the fields of international commercial arbitration, international human rights, and trade. Our book on international commercial arbitration, *Dealing in Virtue*, showed that international commercial arbitration in the 1970s and 1980s became the norm for international business transactions—an elite private justice presided over by leading figures of the legal profession.⁷ We found through our research that it began with a small group of senior European grand professors who saw commercial arbitration as a hobby and passion, and they helped make it acceptable for transnational disputes more generally. International commercial arbitration then began to boom as a field in the 1980s, and it was simultaneously “Americanized” by an alliance of a younger generation of Europeans (with degrees and ties to the United States) and U.S. litigators. The

⁴ Harold Koh, American Law Institute, Remarks and Addresses at the 83d Annual Meeting (May 15–17, 2006).

⁵ Anne-Marie Slaughter, *A Global Community of Courts*, 4 HARV. INT’L L.J. 191, 193 (2003).

⁶ Bryant Garth and Joyce Sterling, *From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State*, 32 L. & SOC’Y REV. 409–72 (1998).

⁷ YVES DEZALAY & BRYANT GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996).

Rebuilding International Law

alliance turned it from an informal practice of gentlemen into “off-shore” litigation—U.S. style.

U.S. legal technologies—intensive document gathering, cross-examination, heightened adversarialism—became accepted parts of the process. This account of the evolution of the field represents a remarkable success story from one perspective. From the view at the top, the story of success appears natural and inevitable—the response to a simple “demand” by transnational businesses for the service of international commercial arbitration. This kind of arbitration is very expensive, raising some problems of access, but there are more general issues as well that are less likely to be discussed at the many conferences devoted to the topic of international commercial arbitration.

The alliance of people from highly developed countries—mainly the United States and Europe—who came together and produced this field naturally formed a kind of club of people with similar interests and approaches. This configuration meant that it was very difficult for anyone outside—from a developing country, for example—to join the “club of arbitrators.” The club that produced this transnational justice thus operated with a set of biases, a tilt in favor of particular norms and approaches. Outsiders who claimed a bias in the system or in the way that the proceedings were conducted—or simply wanted to join—had to find a way to gain credibility in the centers of power of this group. It is not surprising that those who become arbitrators overwhelmingly have come from Europe and the developed world. Indeed, one needs insiders to the club as lawyers and arbitrators to succeed in the process even at the level of individual cases. The system works well, but the point is that its legitimacy from the vantage point of outsiders is different than from the perspective of those who participate naturally on the inside. More generally, by revealing how the field was constructed and the conflicts that pervade it (generations, the United States v. Europe, developed v. developing), we see that we cannot take the success of international commercial arbitration for granted or assume that it will maintain its legitimacy as more actors move onto the international scene. It is not just that there was a demand for international commercial arbitration constructed around these people at this particular moment. The perception of legitimacy is there, but the system must find ways to maintain legitimacy when outsiders question how it operates.

The field of international human rights provides the second example. Here, too, interviews as reported in our book on *The Internationalization of Palace Wars* show an evolution of the field toward one that tilts to the United States and to a lesser extent Western Europe.⁸ The recent period of evolution of the field began after World War II—linked quickly to the Cold War. Human rights rhetoric was used in the 1950s mainly as a weapon in the war on communism. That role in the Cold War was found especially in the early work of the International Commission of Jurists (“ICJ”), located in Geneva but funded initially by the CIA. The partisanship of the ICJ (and its opponents) helped lead to Amnesty International, which built on the ICJ in the 1960s but pushed strict neutrality to make it

⁸ YVES DEZALAY & BRYANT GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (2002).

Rebuilding International Law

more legitimate. Amnesty grew and thrived through a particular alliance that related to Cold War politics in the Nixon administration, and the field developed substantially to resist “anti-Communist” military dictatorships in Chile, Argentina, and elsewhere. Human Rights Watch then was created in the early 1980s to take on the foreign policy of the Reagan administration—succeeding and leading a transformation of the international field that had developed in the 1970s and 1980s. The field of international human rights, and the global norms it produced, then gained substantial autonomy.

As with respect to international commercial arbitration, developments in the United States—in this case associated especially with Human Rights Watch and its imitators—“Americanized” a field that was initially defined by European scholars. The new generation of U.S.-based NGOs was internationally oriented, but specifically focused on influencing U.S. foreign policy through U.S. media attention. The evolution of the field then shifted toward what could get on the agenda in the United States—keeping “social rights” off the agenda throughout, for example. The initial expansion of the field was associated with rights against torture, disappearances, and apartheid, issues that played well in the United States even while civil rights issues declined in the domestic U.S. scene. The international agenda then moved to such topics as violence against women and trafficking in prostitution, topics that fit the U.S. media and U.S. political coalitions.

To put it provocatively, the trafficking of women into prostitution, even according to activists in the field, may not be as important as the issue of poverty and opportunity fueling the sex trade, but it is the issue that can unite women’s groups, progressive foundations, and the religious right.⁹ Therefore, it has become central to the global agenda in recent years.

More generally, interviews around the globe suggest that the issues that get on the international human rights agenda are likely to be those that can gain the attention of the media in the United States, U.S. academics, the Ford Foundation, and other domestic players, and that will not be too controversial politically. Rather than the consensus one sees from the top around norms to spread freedom and democracy around the globe, we see through bottom-up research that there is hierarchy, conflict, and again a tilt in the transnational legal field.

Turning now to one of the fields that has Professor Shaffer’s research footprint all over it, we can do a similar analysis of international trade. The story of the legalization of international trade, led by U.S. academics and corporate lawyers, is again the story of a shift toward U.S. practices and agendas. The more diplomatically-oriented European approach toward trade issues became legalized and embedded finally in the World Trade Organization after the Uruguay Round, evolving also to a very expensive, document-intensive, private-public litigation.¹⁰

⁹ See generally Nandita Sharma, *Anti-Trafficking Rhetoric and the Making of a Global Apartheid*, 17 NAT’L WOMEN’S STUD. ASSOC. J. 88 (2005).

¹⁰ See Gregory Shaffer, *Power, Governance, and the WTO: A Comparative Institutional Approach*, in, POWER AND GLOBAL GOVERNANCE (Michael Barnett & Bud Duvall eds., 2005); see generally R. H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT’L ORG. 339 (2002).

Rebuilding International Law

Both the rules and the processes tilt toward a U.S. agenda, and as with respect to the other transnational fields, even the recipes for reform depend on the same media and activist alliance as the one that sets the human rights agenda.¹¹

We could tell the very same story about the development of a “consensus” in intellectual property, and even about evolving norms of corporate governance. What looks top-down, like a consensus, is revealed by research to show hierarchy, conflict, and norms that reflect a structural tilt.¹²

A natural response to these examples is, so what? The norms that have evolved are good ones, or can be made better, and in any event, why spend energy undermining any global legal consensus—the basis upon which we can move forward to rebuild the rule of international law? Again, we experience the temptation to get on with the appealing project of the high priests of international law.

The problem is that these imbalances and issues were already out there prior to September 11th. There were questions about the legitimacy of the international rules of the game. The war in Kosovo, for example, was promoted strongly by the U.S. human rights community, but it made many outside the United States nervous to say the least. The quick loss of faith in the United States since 2001 is not only because we have turned against international law, but also because there were questions about the orientation of the U.S. globalized legal order. Indeed, the image we projected suggested that we in the United States, because of our faith in this international law, had the prior claim to the moral high ground, when in fact others saw some of our morality as linked very closely to our dominant political power and global business interests. Tony Smith suggested this point about U.S. foreign relations already at the time of the conquest of the Philippines: “The irony is that while many Americans ridiculed the Spanish for justifying their 333-year rule over the [Philippines] by bringing them Christianity (and suspected this was only a mask for power), so in a like manner, democracy would be the moving faith of the forty-eight years of American control.”¹³

If we do want to build an international legal order with a better claim to legitimacy, we need to do more than follow the high priests of international law. They require a faith in a consensus at the top that many of those looking up do not fully share or trust. There is also a danger that all the good missionary work inspired by the priests—reforming the World Trade Organization, promoting human rights, taking U.S. public interest law approaches and pushing them everywhere else—will be counterproductive even in the narrow sense of undermining, not building, the legitimacy of international norms and international law.

We need international law scholarship, therefore, that explores the construction of so-called consensus. The scholarship must reveal the conflicts in-

¹¹ Gregory Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environmental Matters*, 25 HARV. ENVTL. L. REV. 1, 1–93 (2001).

¹² See generally PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* (2005).

¹³ TONY SMITH, *AMERICA'S MISSION* (1994).

Rebuilding International Law

volved, make sense of the hierarchies, and above all explain the processes that make and legitimize law in the global context. The scholarship needs to track the flow of ideas, institutions, and approaches. It is not enough, of course, to denounce unequal and hierarchical processes, because the processes continue just the same (and indeed some denunciations count more than others). It is about documenting how things work if they are unexamined and unquestioned.

Fortunately, there is a generation of scholars able to speak the language of the high priests and also do the research on the processes and structures. The hope for the reconstruction of international laws to be found with those groups, and Loyola is fortunate with this chair. Professor Shaffer is at the top of a group doing this kind of research—now labeled increasingly as a new legal realism. He has explored how the rules of governance are produced and change—especially the competition between United States and European approaches—and how globalization transforms both sides. After seeing how Europe came to master the legalized World Trade Organization machinery, he revealed that the anti-WTO globalization reforms have recipes (transplanted U.S. legal idealism) that did not offer much to developing countries. Following these insights, he is now seeing how developing countries might use the World Trade Organization effectively, despite its structural biases and expense, focusing especially on Brazil, but also on India. Furthermore, taking seriously globalization processes, he is showing how Brazil's effort to play the WTO better has an impact on legal education, legal practice, and even the organization of state power in Brazil—building a certain kind of internal rule of law. He is thus linking the global and the local as settings for the production and use of rules, with specific impacts in the different settings. In this one area of Professor Shaffer's research (and I can point to others) his findings reveal the workings of legal globalization and help develop an agenda—or better, tools for all kinds of actors wanting to promote different agendas—to make international law more legitimate and more effective.

I have just a few conclusions. An article by Thomas Franck calls for a refocus on the “power of legitimacy” after the events of September 11. He referred in his article to compliance with the mandates of international law. To that observation I would add that it is not just about compliance and respect for “the law,”¹⁴ but also a sense of what makes the law, how there are built-in biases and inequalities, how these appear to those who tend not to participate as players, and what might be done to make it more legitimate. Building legitimacy, of course, protects the system overall, but it also allows new processes to develop and new coalitions to form. Rebuilding needs a deeper and more sensitive, empirically-based foundation than the one we had prior to September 11th.

After World War II, before the Cold War gained a higher pitch, the high priests of international law thought the United Nations would be a great place to make international law matter. The Universal Declaration on Human Rights was a key triumph of that spirit. As the Cold War developed, however, neither international law nor international lawyers, as lawyers, had much impact at all on

¹⁴ See Thomas Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT'L L. 88 (2006).

Rebuilding International Law

foreign policy. The irrelevance of law, except as a weapon in partisan struggles, is a possibility again.

If there is that kind of a loss of faith in the high priests and their teaching, even the idealists preaching and practicing legal idealism through human rights or other areas will be out of place, and out of date. I want to argue, in short, for an explicit awareness of the imperial and hegemonic processes that exist (and are sometimes used to argue against international law). The most successful empires invested in law and legitimacy after all. I am pleased that this chair at Loyola will be occupied by someone not afraid to reveal imperial processes, and who also will use this transparency to develop a more lasting and credible set of international norms and processes. The next generation of high priests will indeed be those who find the way to a new and more cosmopolitan international law.