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The Internationalization of Legal Relations

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THE INTERNATIONALIZATION OF LEGAL RELATIONS

*by Roger P. Alford**

What exactly does it mean to say that "legal relations" are becoming "internationalized"? For me, the concept is in large measure a vertical question: the degree to which international law is affecting (some might say encroaching on) traditional domestic law, particularly state law. This is particularly so with treaty law. In the United States at least, internationalization might be thought of as simply another arm of federalism, with Congress stipulating that certain sales of goods will be governed by international law, not the Uniform Commercial Code. Or that a certain category of child adoptions will be governed by federal treaty law rather than state family law. Or that state and local officials in Pima County, Arizona, should inform a German suspected of committing murder of his federal rights under the Vienna Convention on Consular Relations. Such internationalization is not simply *Missouri v. Holland*[1] *redux*, in which Congress is bypassing normal federalist restraints to achieve ends it could not achieve through other means. No, internationalization reflects the concept that the political branches are willing to pass laws or enter into compacts with other states to regulate foreign and interstate commerce, to define and punish offences against the law of nations, to lay and collect duties, and to make other laws that are necessary and proper to execute its powers.

But obviously the internationalization of legal relations is more, much more, than just federal preoccupation with fields that have been within the reserved powers of the state. Internationalization in the United States also means that the political branches are increasingly—some might say *finally*—exercising their enumerated powers to create rights and obligations affecting international relations. It means that the judicial branch is increasingly recognizing and enforcing rights and obligations that have their genesis in international law, recognizing that international law "is part of our law, and must be ascertained and administered" by our courts.[2]

In its essence, internationalization reflects the realities of modern life that relationships—family, business, employment, private-public—are changing in a way that increasingly transcends traditional borders and boundaries. It reflects the reality of metaterritorial and transterritorial relationships, situated beyond and without reference to geographic boundaries. International law is beginning to have import in the larger context; it matters to people where they live. Trade rules actually have teeth. A decision in Geneva will have repercussions not only in the hallways of Brussels and Washington but also for banana farmers in Honduras or apple growers in Washington state.[3] Investment rules have teeth. In the face of a state or federal regulation that adversely impacts business, a Mexican or a Canadian investor in the United States actually might have greater enforceable rights under international law than an American business does under the U.S. Constitution.[4] Human rights law now has teeth. A Mexican doctor accused and

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[1] Missouri v. Holland, 252 U.S. 416 (1920).

[2] The Paquete Habana, 175 U.S. 677 (1900).

[3] WTO Appellate Body Report on EC Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R (Sept. 9, 1997), *available at* <http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#1996>; WTO Appellate Body Report on Japan—Measures Affecting Agricultural Products, WT/DS76/AB/R (Feb. 22, 1998), *available at* <http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#1996>.

[4] *Compare* Metalclad Corp. v. Mexico, Case No. Arb(AF)/97/1, para. 103 (Aug. 30, 2000), *available at* <http://www.state.gov/documents/organization/3998.pdf> ("expropriation under NAFTA includes . . . covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in

acquitted of torturing a DEA agent has a cause of action against the United States in U.S. courts for his alleged illegal abduction in Mexico by federal authorities.[5]

Everything that has been said thus far is anecdotal, and the plural of anecdote is not data. And, to be sure, it is difficult to offer empirical evidence to support or refute the assertion that we are seeing an internationalization of legal relations. I would suggest, however, that courts are viewing legal relations through an international lens today more than ever before. Although by no means open to scientific measurement, there is a notable trend toward court use of international concepts. From Westlaw computer research one can at least draw some conclusions about trends in the internationalization of legal relations. For example, in a five-year period in the early 1980s, courts referenced "international law" in 574 cases; in the most recent five years, courts referenced "international law" in 888 cases, a 55 percent increase in fifteen years.

More specific international law topics saw even greater emphasis in the past twenty years. "Human rights" was referenced by judges in the early 1980s in 2,641 cases, and in the past five years in 7,156 cases—an increase of 271 percent. There was a 250 percent increase in references to treaties (1,348 citation in the early 1980s and 3,396 in the most recent five years). And some topics are clearly de rigueur in the academy despite the relative paucity of case law. Academics referred to the Alien Tort Claims Act (ATCA) 343 times in the last five years, even though courts cited it in only forty-five cases. Similarly, the *Charming Betsy*[6] canon of statutory construction interpreting decisions consistent with international law was cited by courts only twenty-six times in the past five years, but there have been over two hundred references to the doctrine in articles.

At a dinner party one always prefers a passing reference or a furtive glance to being ignored altogether, but only someone truly vain would equate a passing reference or a polite nod in one's direction to being the topic of conversation or the center of attention. So to say that courts are referring to international law today more than ever is not to say that it is a topic of regular discourse at the bench. I would therefore like to conclude with a word of caution, indeed skepticism. Such skepticism is borne out by almost any law student trying to find a job in international law, or any law clerk hoping for a docket of international cases. It is also borne out by simply asking sincerely whether international law, as interesting as it is to this audience, really is that significant to our parents or siblings.

While the numbers quoted may seem superficially impressive, comparing them with traditional domestic concepts suggests that international law is not nearly as pervasive in our courts as this audience of international lawyers might hope or anticipate. Traditional concepts such as "due process," "strict liability," and "unjust enrichment" were each cited by courts in tens of thousands of cases, far exceeding the most popular concepts in international law. Indeed, it is somewhat humbling to find that courts reference very narrow tort concepts such as *res ipsa loquitur* more often than the general concept of "international law." Perhaps it is some small consolation that the academy finds international law far more interesting than *res ipsa.* In the past five years, there were over thirteen thousand journal references to international law compared with less than five hundred that reference *res ipsa loquitur*—a ratio of over 26 to 1. You might say the data *res ipsa loquitur.*

significant part, of the use or reasonably-to-be-expected economic benefit of property. . . ."), *with* Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003, 1015 (1992) (regulatory action is compensable under the Fifth Amendment if it "compel[s] the property owner to suffer a physical 'invasion' of his property" or if the "regulation denies all economically beneficial or productive use of land.").

[5] Alvarez-Machain v. United States, 266 F.3d 1045 (9th Cir. 2001).

[6] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 2 L. Ed. 208 (1804).

In conclusion, perhaps we could say that though international law is important and intriguing to our courts, it is not part of their daily life, and will not be for the foreseeable future. And as for the academy, I suppose we can take pride—perverse pride—in the fact that international law is thought to be very sexy. To borrow a phrase from the novelist David Lodge, "literature is mostly about having sex and not much about having children. Life is the other way around."[7] In a similar vein, international law inspires, but it is anything but ordinary. Perhaps international law inspires *because* it is so extraordinary.

Does such skepticism reflect a denial of the reality of globalization? No. But most of the threats and promises of globalization concern regulation of the private sector through national laws, not through traditional Westphalian international law. The great threats of globalization discussed by Moisés Naím yesterday are addressed largely through national laws, without reference to international obligations. And the great promise of globalization is promoted daily by lawyers—immigration, arbitration, trade, corporate, antitrust—who are experts in national, not international, law. So legal relations are becoming internationalized, yes, but this does not herald a golden age for classical international law, at least not yet. Far better to think of national laws as expanding as never before to address transnational opportunities and concerns.

REMARKS BY JONATHAN D. BLAKE*

I am a communications lawyer. The broader taxonomy is regulatory law. Regulatory law may not be the first topic that comes to mind when one thinks of "internationalization." It is considered primarily a domestic affair—the law of individual countries that, within their own boundaries, orders commerce, manages shared resources, and curbs private-sector excesses. Moreover, if one were simply guided by the headlines, one might think it a fading force. Over the past two decades, the mantra of "deregulation" has prevailed in this country on both sides of the aisle and in other countries. Restrictions on financial services offerings, transportation regulation, media outlet control, federal land use, and utility ownership have fallen under its advancing banner.

However, the language of deregulation has obscured the quieter truth: regulatory law has, in fact, grown. This is because industry, consumer tastes, technology, and social change generate new businesses, new practices, new benefits, new ways of doing things, and inevitably new issues. In turn, these novel developments lead to more regulation. While deregulation may take place in any one field, overall regulation grows as new fields of activity emerge that need public governance, however restrained. This strikes us as normal, healthy, even necessary.

Regulation has also grown more international. New technologies, business practices, and societal developments raise concerns that cannot be addressed effectively within one country's borders. In order for regulatory law to serve its traditional aims of curbing market imbalances, promoting the public good, and harmonizing new activities with existing practices, it too has been forced to venture abroad.

Let me outline three kinds of regulatory internationalization. The first is the most direct and obvious, the one that best fits the topic of this panel. It occurs as new businesses and activities overflow national boundaries and pose problems that *must* be dealt with internationally. The second kind is based on the linkages between activities in different countries that make it economically and socially desirable that their regulation

[7] DAVID LODGE, THE BRITISH MUSEUM IS FALLING DOWN 63 (1965).

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be compatible, even if uniformity is not mandatory. And the third kind is where countries seek to adopt best practices from one another.

Regulation and Technology

Technological innovation has driven communications regulation across borders. In the beginning, the technology of wireline communications—telegraphs and telephones—made regulation a largely domestic endeavor. Wires, like their users, were geographically fixed. They ended where they ended and usually went no farther than a country's borders. In time, however, as technology improved and consumer demand grew, countries sought to connect their wireline networks and needed to regulate the terms of this interconnection. Through a series of negotiations, generally bilateral, countries established regulations governing the sharing of revenues generated by international calls. In this manner, modern international communications regulation grew.

However, it was the introduction of an entirely new technology that more forcefully drove the creation of a truly international communications regulatory scheme. That technology was radio. Unlike wires, radio waves pay no heed to national boundaries and can wreak havoc on each other. Left uncoordinated, U.S. and Canadian television signals would cancel one another out and airplane communications systems would trigger electronic garage door openers. Thus, some sort of international coordination was necessary from the start. Nations responded by creating a treaty-based international organization with the regulatory authority to coordinate international spectrum management. This World Administrative Radio Conference convenes every four years. Where the issues are hemispheric rather than global in scope, countries also engage in treaty negotiations organized within three regions of the world. Bilateral negotiations fill gaps between two countries when that is appropriate.

Necessity based on physics is not the only imperative for internationalizing regulation in the wake of technological advancement. Preventing the destruction or erosion of intellectual property rights has proved as important an impetus as preventing clashes of radio spectra. Copyright was once essentially the domain of individual nations. However, in the nineteenth century, technological advances in printing and transportation combined to greatly reduce the cost of producing and distributing printed material internationally. Nations soon recognized that the very technology that promised to expand the value of copyrighted material through inexpensive mass distribution also threatened to destroy its value through unauthorized reproduction. In response, in 1866 a number of countries created the Berne Convention. The Berne Convention guaranteed a common floor of intellectual property rights between all signatories and helped to safeguard the internationalization of commercial media.[1]

This same process has repeated itself over the last decade in the case of the Internet. The digitalization of content and global reach of the Internet permit the virtually costless and instantaneous global distribution of any digital media. Faced once again with the threat of technology bankrupting intellectual property rights, nations have responded through international regulation. Over the past decade, they entered into a series of major international copyright and intellectual property agreements, including the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), under the auspices of the World Trade Organization (WTO),[2] and the 1996

[1] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1866, 828 UNTS 221.

[2] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IC, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, VOL. 31, 33 ILM 1125, 1197 (1994).

World Intellectual Property Organization (WIPO) Copyright Treaty[3] and WIPO Performances and Phonograms Treaty.[4] Together, these measures provide a common floor of copyright protection for over 140 nations, supported, in many cases, by viable enforcement mechanisms.

These expansions in international regulation have been necessitated by scientific and service developments. A variety of regulatory means have been chosen to meet these technological challenges. However, it is probably safe to say that top-down, binding international regulations are more prevalent in this context than in the others we discuss next.

Regulation and Economic Efficiency

A second kind of internationalized regulation is driven not by technological necessity, but by economic efficiency and consumer welfare. Where commercial activities involve multiple countries, there is often great economic value to firms, consumers, and governments in reducing disparities between regulatory regimes. This intermediary field of regulatory internationalization is characterized by bilateral and multilateral policy coordination and nonbinding international standards designed to harmonize domestic regulation and hence promote economic efficiency.

The failed Sprint-WorldCom merger typifies the problem this form of internationalization seeks to solve. Both the European Union and the United States undertook full competition reviews of the proposed merger. In both countries the critical issue was the extent of the combined entity's control over the Internet backbone—an international communications resource, as it were. Sprint and WorldCom had to respond to separate massive and costly disclosure requests from each authority. Despite some attempt to coordinate their reviews, the European Union and United States often acted independently, imposing substantial legal and administrative costs on Sprint and WorldCom through duplicative requests and conflicting scheduling. Ultimately, the parties withdrew the merger proposal before either the European Union or the United States ruled on it. In the GE-Honeywell merger, disagreements between the European Union and the United States produced an even more problematic result: U.S. approval and EU denial.

The lack of coordination, transparency, and harmonization of substantive principles between the two regulatory bodies imposed significant administrative costs, even greater business costs, and the strong risk of not only inconsistent but also unfair and consumer-unfriendly outcomes. As a result of these episodes, there is now under way an effort to coordinate U.S. and EU antitrust policy and procedure more closely. The result almost certainly will not take the form of a treaty or binding accord but rather will be an informal bilateral agreement to harmonize proceedings and, to the extent possible, substantive principles.

This intermediary internationalization can be multilateral. For example, beginning in the 1980s, the European Union embarked on a "new approach" to technical standards-setting that relied on voluntary harmonization in place of binding specifications. The European Union formed a standards body called the European Telecommunications Standards Institute (ETSI), which represents member states, industry, and technical interests. Any ETSI member may propose a new technical standard. With appropriate

[3] World Intellectual Property Organization Copyright Treaty, *adopted* Dec. 20, 1996, Diplomatic Conference at Geneva, 36 ILM 65 (1997).

[4] World Intellectual Property Organization Performances and Phonograms Treaty, adopted by Diplomatic Conference at Geneva, Dec. 20, 1996, 36 ILM 76 (1997).

development and sufficient member state support, the standard becomes a "European Norm." Any product made according to the standards of a European Norm receives a presumption of conformity in every member state and can be sold immediately. However, use of the norm is wholly voluntary. If a manufacturer wanted to sell a product not based on European Norms, it would be free to do so, but it would first have to demonstrate independent conformity with EU and member state "essential" technical requirements. The European Union has thus managed to create a strong economic incentive to harmonize standards multilaterally without stifling innovation.

Regulatory idiosyncrasies among countries may pose barriers to entry in the form of higher costs for prospective entrants. Thus, when considering new regulations, countries may increasingly ask themselves whether the good sought to be realized through the regulations outweighs the potential foreign investment lost by deviating from international norms. Moreover, this organic harmonization may well accelerate over time through the dynamic of "market tipping"—the more countries that adopt a norm, the greater the economic incentive for the next country to adopt it. Ultimately, this process might produce an informal equivalent of our country's commerce clause. This would reflect a presumption that a common approach to legal issues across country borders is ultimately in the interest of both consumers and businesses in the countries affected.

Anecdotal evidence suggests that this harmonization is occurring in the field of Internet law. Over the past five or six years, our firm has regularly produced an extensive survey of Internet legal development around the world. Although businesses in this field still confront a hodge-podge of disparate regulation and citizens of different countries continue to live under different Internet rules, the situation has changed noticeably since the inauguration of our survey. There is a discernable trend toward more consistency—fewer outliers. The long-term consequence of this organic harmonization may ultimately prove more effective and widespread than any formally coordinated process.

Conscious Parallelism

The third type of international regulatory development is not formal legal internationalization at all. A matter of conscious parallelism, it grows out of the fact that when countries face similar regulatory issues—even if they are largely domestic—they often compare notes on how to cope with them. Of course, differences in history, culture, and politics may lead to different priorities and different regulatory outcomes, but this trend toward trying to learn from the experiences of other countries in solving regulatory problems is powerful and growing.

A good illustration is the regulation of interconnection. If early cell phone customers had not been able to call or receive calls from landline phones, cellular service would have failed. The process by which the cellular network connected to the public phone network was called "interconnection." Interconnection had to be available to cellular operators at reasonable rates. Furthermore, since one of the two cell phone licenses granted for each city was awarded to the public telephone company, new entrants needed to be protected against more subtle forms of discrimination in their access to the local phone switch. Finally, because cellular service was seen as a potential competitor to wireline, even in its infancy, it was necessary that interconnection be offered on conditions that would allow cellular service to compete with wireline service. The task of drafting and implementing regulations to make interconnection a commercial reality fell to our Federal Communications Commission (FCC).

Since every nation must ultimately connect its wireline and wireless networks, the regulatory issues surrounding interconnection are both similar and important in every

country. As a consequence, countries and private companies have sought to examine examples of interconnection regulation in the United States and elsewhere. Indeed, the new EU Electronic Communications Access and Interconnection Directive adopts the U.S. approach to a substantial extent.

This practice of mimicry extends beyond the substance of the regulation to the institutional structure of both the regulated industry and the regulatory authority itself. In the United States, twenty years ago, there was in essence one huge telephone company—Ma Bell. Ma Bell had a monopoly over the local network and was co-owned by its only major service customer, the long distance network. In the break-up of Ma Bell in 1983, our country severed long distance service from local service, leaving one principal long distance operator, AT&T, and seven "Baby Bells," that owned and operated the local networks. At about the same time, cellular came along. Congress, the courts and the FCC were called upon to referee this confusing but quite productive maelstrom. As a result, the United States gained experience with interconnection issues before other countries.

Contrast this with the typical European structure. Throughout the 1980s and early 1990s, the typical national telephone company was operated by a state-owned Ministry of Posts and Telegraphs. It faced no competition and was solely responsible for rolling out new services and new technologies. With no competition, there was no need for an independent regulator. However, EU policymakers, looking westward at the declining long distance prices U.S. customers were enjoying in the wake of the AT&T breakup, concluded that one key to stimulating more competition and innovation was to privatize monopoly telephone service providers. Countries outside Europe hit upon the same solution as well. At the same time, many of these countries also decided to authorize competing cell phone service providers.

Together, these steps raised the question of who would regulate interconnection between the privatized state monopoly on the one hand and cellular service providers and long distance carriers on the other. Countries tried a number of approaches. As communications services expanded and government ownership of the core telephony service shrank, interest in establishing an expert and independent government agency has grown. Countries are examining the United States and its FCC as a possible model. The European Union has toyed with this idea, Israel is actively considering it, and there have been indications of interest from other countries.

Thus, regulatory examples drawn from the experience of other countries can powerfully influence domestic regulatory policy and result in a core commonality of regulatory principles across country boundaries.

A Cautionary Note

This interpretation of regulatory developments over the past twenty years—using communications law as a principal exemplar—can be taken too far. Even in the long term, national differences will lead to important regulatory differences, country by country. What is most promising in the past twenty years is the sharing of ideas and experiences about common regulatory issues. This is a noncoercive way of achieving needed consistency on important issues, where that is called for, while leaving other issues to local choice. This approach also provides for localized experimentation instead of global straightjacketing. What really impresses is how successful the law has been in adapting to change, not only in accommodating and regulating new situations, but also in both the commonality and plasticity of its responses to complicated and dynamic trends, even across country boundaries.

REMARKS BY VAUGHAN LOWE*

Innovative world views, as Isaiah Berlin once remarked, tend to mutate from paradox to platitude.[1] The idea of globalization mutated from paradox to platitude in just this way. It began as a paradox, with the assertions or "explanations" that the world we thought we knew was in truth quite different from our understanding of it. The world that we thought was divided into home and a hundred and eighty or so other states that are "foreign" is in fact one global village. It is now a platitude. Marshal McLuhan's declaration that "the new electronic interdependence recreates the world in the image of the global village," arresting in 1967, is now passé. The internationalization and globalization of international relations is as unremarkable as the fact (partly an effect, and partly a cause of the phenomenon) that we can sit in a standard-format hotel room anywhere in the world and watch CNN report on foreign wars, famines, and revolutions as they take place.

But it is in the nature of paradoxes that, to some degree at least, they fly in the face of common sense and experience. When that happens, it is always worth a circumspect inquiry into the true nature of the Emperor's new clothes.

There are certainly indications that point towards the internationalization of legal relations—phenomena that are consistent with internationalization. One can, I think, distinguish at least seven different types of such phenomena, according to the way in which the "international imperatives" (as the rubric of our panel has it) are brought to bear on those to whom they are addressed.

First, there are instances of single, uniform prescriptions being laid down in such a manner as to apply equally everywhere across the globe. This category itself contains more than one kind of prescription. There are, for example, the uniform rules that apply between states—the nonderogable rules of public international law, the rules of *jus cogens*. We might add also the legal rules and principles that, though not necessarily nonderogable, are in fact accepted (typically in the form of multilateral conventions or solemn UN declarations) by all states. Then there are the uniform rules that states are obliged to apply to those within their jurisdiction. The International Maritime Organization rules on the construction and equipment of ships would be an example, the more interesting because, in common with many of the norms that I will mention, they are translated into the private law realm and applied between parties to shipping contracts and litigation.

A second category is that of rules that are not themselves immediately and directly applicable, but which bind states to achieve a stated result. The classic instance of this is the directive in EU law, binding as to result but leaving it to each state to decide how best to achieve that result. One might regard many human rights instruments as having much the same character.

Third, there are international norms that do not themselves purport to bind anyone but that are accepted as reasonable standards and applied in circumstances where reasonable behavior is demanded. An example would be international standards for phytosanitary inspections and permissible food additives.

Fourth, there are norms that are applied through the mechanisms of conditionality. Institutions such as the World Bank and many national agencies routinely insist on compliance with international environmental and human rights norms as a condition of their assistance for foreign projects.

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[1] Isaiah Berlin, *Does Political Theory Still Exist? in* THE PROPER STUDY OF MANKIND (Henry Hardy & Roger Hausheer eds., 1997).

Fifth, there are measures imposed by powerful states upon weaker states, whether or not the weaker states want them. The recent OECD efforts to impose standards relating to transparency and other matters upon small tax-haven states is one example.

Sixth, there are voluntarily accepted uniform solutions to legal problems. Examples are the work of UNIDROIT and the UNCITRAL instruments on international arbitration.

Finally, there is the category of simple international coordination. An example is international cooperation in dealing with criminal matters, where efforts are made to ensure that disparate national systems are at least capable of interfacing effectively with one another.

There is a good deal of evidence of international imperatives of these kinds—no doubt others could also be discerned—being applied in what were long thought of as domestic spheres. But does this amount to the internationalization of legal relations? I am not sure that it does.

We must begin by being clear what we mean by internationalization—and by the allied concepts of standardization and globalization. There are no accepted definitions, but I understand globalization to mean the situation in which the entire world is treated as if it were a single, borderless unit, and internationalization to mean the situation in which the world is treated as 250 or so different jurisdictions with measures being designed to plug effortlessly into every one of them. The Internet is global; McDonald's is international. Rules of *jus cogens* and International Maritime Organization shipping standards are global; basic human rights norms and EU directives are international. And sitting between globalization, which seeks to eliminate national borders, and internationalization, which acknowledges national borders but seeks to overcome their divisive effects, is standardization. It differs from the other two because standardized measures do not purport to be binding in any way. Their application is a matter of choice—as, for instance, in the case of the UNCITRAL Model Law.

While all three phenomena locate the ultimate source or inspiration of national rules outside the national system, and in that sense all point to an increasing internationalization of domestic law, there are factors at work that might cause us to question the extent and significance of internationalization.

First, there is the obvious point that, alongside internationalization, there are powerful forces working in exactly the opposite direction. United States policies on steel tariffs and on greenhouse gases; European and NATO actions in the Balkans; alliance actions in Iraq and Afghanistan—all use the language of international action for the protection of global community interests, but, no matter how strong the moral or political justification for such actions may be, they are not so much examples of the determination of domestic policies and actions by international norms as of the exact [space] converse. I do not say that this is wrong. It is inevitable, and no doubt sometimes desirable, that developments in international law should on occasion be driven by unilateral actions, but this fact does limit the extent to which internationalization can be seen as the dominant pattern in modern legal relations.

Secondly, there is the closely related fact that even genuinely uniform solutions are differently perceived, and have a different significance, in different places. Internationalization, of whatever kind, is commonly led by a small group of actors—states, individuals, or whatever—and serves their agenda. For some, internationalization is a tool; for others, it is a process that they undergo.

My third point is different. It is that although for many of us in our professional lives internationalization seems an obvious reality, that reality is superficial. Certainly, we

travel more, and faster. We communicate with lawyers in other states, many of them graduates of one of the couple of dozen or so great law schools; we can talk to them, usually in English, because we share a common conceptual framework. Yet in certain respects legal systems remain resolutely local.

For example, there is, as yet, no clear notion of an international public policy of the kind that is taken for granted within national legal systems. This deficiency is apparent in contexts as diverse as the struggles of national courts with the "public policy" ground for the refusal to recognize foreign arbitral awards under the New York Convention; the lack of a coherent conception of international public policy—or even of an international public interest—underlying international criminal law in episodes such as the Milošević and Pinochet trials; and even the uncertainty concerning the scope of *jus cogens* principles under the Vienna Convention on the Law of Treaties.

This, in turn, seems to me to reflect the fact that there is no real, effective sense of international morality, no sense of common responsibility. There are particular signs of this. One is the curious provision in Article 24 of the ILC's Draft Articles on State Responsibility, which precludes the wrongfulness of an otherwise unlawful act "if the author of the act in question has no other way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care."[2] According to the Commentary, this provision is limited to cases "where there exists a special relationship between the State organ or agent [the author of the act] and the persons in danger."[3] No hint there of an acceptance that one state has the right to engage in altruistic actions for the protection of citizens of another.

That is, of course, the reality. Recent World Bank figures estimate that over one thousand million people still live on less than one dollar a day. In many regions the number is increasing: In Eastern Europe and Central Asia, for example, the number of people living on less than a dollar a day is estimated to have increased from 1.1 million in 1987 to twenty-four million in 1998. More than half the world's population lives on less than two dollars a day, many constantly faced by poverty, disease, and death. The wealth and technology exist to help the victims. The moral codes that are the orthodoxy of the rich nations purport to promote equality, minimum entitlements to basic human rights, and the responsibility of the community to support its weakest members if they cannot support themselves. How, then, can the coexistence of great wealth and abject poverty be explained? Surely the truth is that in practice these poor are precisely *not* seen as part of our own community.

Does globalization reflect the state of the world? It is undeniable that there is a part of society that is internationalized, but how typical is that part? Or to put the same question in a different way, how much of the reality of life on this planet is accommodated within the perspective of globalization? Not, I suspect, very much.

Yes, there are moves towards the internationalization of legal relations—though how pervasive they are when compared with, say, the medieval law merchant, I do not know. Yes, lawyers—particularly commercial and government lawyers—work across the globe, in the developing *lingua franca*. Yes, developed states have secured many trade advantages by internationalizing legal standards, concepts, and processes. But a truly internationalized, globalized legal system must, in my view, wait upon the development of a true sense of international morality.

[2] International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), art. 24, *available at* < http://www.un.org/law/ilc/texts/State_responsiblity/responsibilityfra.htm>.

[3] Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), at 193, *available at* <http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm.>.