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## Sovereignty in a Globalizing, Fragmenting World

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## INTRODUCTION

# SOVEREIGNTY IN A GLOBALIZING, FRAGMENTING WORLD

CHARLES J. REID JR.\*

It was already clear in the summer and fall of 2019, when planning for this symposium commenced, that the world order was facing strains not seen since perhaps some of the darker moments of the Cold War. It was also apparent that the fault lines along which these strains moved fit beneath three rubrics: sovereignty, globalizing (or globalization), and fragmenting (or fragmentation). The events of the succeeding twelve months have only brought ever greater pressure to bear and greater urgency to come to terms with the shape of things to come.<sup>1</sup>

So, we might begin by reflecting on the three main words that compose the title of this symposium—sovereignty, globalization, and fragmentation. These three words represent the theme of this symposium. And while they might be explained and understood abstractly, abstract definitions are always sterile and lifeless. Law is a social reality, and to understand legal terms—how they are used and misused, applied and manipulated—one must attend to social realities.

### I. SOVEREIGNTY

Sovereignty—we shall start with sovereignty. It is commonly said that sovereignty in its modern articulations takes its origins in the writings of the French theorist Jean Bodin (1530–1596) and the English political writer Thomas Hobbes (1588–1679). For Bodin, sovereignty was a matter of logic. There were states; Bodin neither questioned their existence nor

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1. The allusion to H.G. Wells is deliberate. H.G. WELLS, *THE SHAPE OF THINGS TO COME* (1933).

probed very deeply into the notion of statehood. And states required governance.<sup>2</sup>

It was logical, therefore, that the responsibility of governance should finally culminate at governance's apex. Sovereignty was, it is not too much of a stretch to say, the singularity—unitary and indivisible—and the absolute monarch, freed of all constitutional restraint and the source of all law and right, was its visible manifestation.<sup>3</sup>

For Hobbes, sovereign power was consequent upon the human desire to flee life in the state of nature, which in classic formulation was “solitary, poor, nasty, brutish, and short.”<sup>4</sup> To avoid this calamitous condition, individuals transferred their natural rights of self-governance—which were indefensible at any rate in a “war of all against all”<sup>5</sup>—to an all-powerful ruler who promised protection.<sup>6</sup> That ruler then secured the safety of the populace, and the coercive tools the ruler employed became the visible manifestation of the ruler's sovereign power.

In saying all of this, of course, we must avoid the temptation to see Bodin and Hobbes as precursors to the modern totalistic state. Bodin believed in the right of private property,<sup>7</sup> and Hobbes did not mean to unsettle the traditional English regard for individual rights and liberties.<sup>8</sup> Indeed, Hobbes believed that the people's own desire to live peaceably under a beneficent monarch obviated any need for “draconian” government.<sup>9</sup> What matters is merely that Bodin and Hobbes laid the groundwork for the legalist and positivist theories of sovereignty that eighteenth- and nineteenth-century theorists like John Austin and Jeremy Bentham advanced.

For Austin, legal analysis began and ended with the commands of the sovereign. There were three elements to the law, as Austin explained it. First, the sovereign issued a “command.” The sovereign then backed up that command with the threat of punishment—what Austin called “sanction.” Third, the law, thus articulated and thus supported, imposed a “duty” or

2. HOWELL A. LLOYD, JEAN BODIN, ‘THIS PRE-EMINENT MAN OF FRANCE’: AN INTELLECTUAL BIOGRAPHY 142–46 (2017).

3. Daniel Engster, *Jean Bodin, Scepticism, and Absolute Sovereignty*, 17 HIST. POL. THOUGHT 469, 471–72 (1996); Stephen Holmes, *Jean Bodin: The Paradox of Sovereignty and the Privatization of Religion*, 30 NOMOS 5, 8–9 (1988).

4. THOMAS HOBBS, *LEVIATHAN* 65 (J. M. Dent & Sons Ltd. 1914) (1651).

5. Gregory S. Kavka, *Hobbes's War of All Against All*, 93 ETHICS 291 (1983).

6. JEAN HAMPTON, *HOBBS AND THE SOCIAL CONTRACT TRADITION* 190–97 (1987).

7. JOHN LOCKE ET AL., *PROPERTY: MAINSTREAM AND CRITICAL POSITIONS* 10 (C.B. MacPherson ed., 1978).

8. CHARLES COVELL, *HOBBS, REALISM AND THE TRADITION OF INTERNATIONAL LAW* 52 (2004).

9. Paul-Aarons Ngomo, *Russell Hardin's Hobbes, in MORALITY, GOVERNANCE, AND SOCIAL INSTITUTIONS: REFLECTIONS ON RUSSELL HARDIN* 111, 126 (Thomas Christiano et al. eds., 2018).

“obligation” of obedience on those subject to it, a breach of which duty triggered the imposition of sanctions.<sup>10</sup>

For Bentham, the sovereign is the ultimate law-making authority in the state. And the sovereign, at least in theory, exercised total control over all that went on among those subject to its command. “Not a cook is bid to dress a dinner,” Bentham wrote, revealing his class prejudice and privilege, “a nurse to feed a child, an usher to whip a schoolboy, an executioner to hang a thief, but it is by [the sovereign’s] order.”<sup>11</sup>

This, then, is sovereignty in what is known as its “internal” aspect: it is recognition that the lawgiver is the final authority within the state.<sup>12</sup> Theorists, however, also identify a phenomenon labeled “external sovereignty”—the independence, security, and autonomy states should rightfully enjoy within the community of nations.<sup>13</sup> The doctrine of external sovereignty viewed states as analogous to persons and held that states, so conceived, belonged to a community. In the same way human persons owed each other respect and deference in their dealings with one another, the states that formed the community of nations were expected to do the same.

External sovereignty, it is often said,<sup>14</sup> had its start with the Peace of Westphalia—the series of treaties that brought the Thirty Years’ War to a conclusion in 1648.<sup>15</sup> And while the close relationship between Westphalia and external sovereignty has been persuasively questioned in recent years,<sup>16</sup> it is nevertheless safe to say that external sovereignty’s origins lie in the later seventeenth and eighteenth centuries.<sup>17</sup>

The idea of external sovereignty quickly captured the imagination of international lawyers. Indeed, it is safe to say that the concept probably

10. Neil Duxbury, *English Jurisprudence Between Austin and Hart*, 91 VA. L. REV. 1, 22 (2005); Samuel E. Stumpf, *Austin’s Theory of the Separation of Law and Morals*, 14 VAND. L. REV. 117, 119–21 (1960).

11. Quoted in ANNE BRUNON-ERNST, *UTILITARIAN BIOPOLITICS: BENTHAM, FOUCAULT, AND MODERN POWER* 59 (2016).

12. Steven Lee, *A Puzzle of Sovereignty*, 27 CAL. W. INT’L L.J. 241, 247 (1997).

13. ERSUN N. KURTULUS, *STATE SOVEREIGNTY: CONCEPT, PHENOMENON, AND RAMIFICATIONS* 63 (2005); Daniel Philpott, *Ideas and the Evolution of Sovereignty*, in *STATE SOVEREIGNTY: CHANGE AND PERSISTENCE IN INTERNATIONAL RELATIONS* 15, 20 (Sohail H. Hashmi ed., 1997); Kjell Goldmann, *TRANSFORMING THE EUROPEAN NATION-STATE: DYNAMICS OF INTERNATIONALIZATION* 63 (2001).

14. LUIS CABRERA, *POLITICAL THEORY OF GLOBAL JUSTICE: A COSMOPOLITAN CASE FOR THE WORLD STATE* 72 (2004).

15. Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT’L L. 20 (1948).

16. Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT’L ORG. 251 (2001); Pärtel Piirimäe, *The Westphalian Myth and the Idea of Sovereignty*, in *SOVEREIGNTY IN FRAGMENTS: THE PAST, PRESENT AND FUTURE OF A CONTESTED CONCEPT* 64, 64–80 (Hent Kalmo & Quentin Skinner eds., 2010).

17. See Stéphane Beaulac, *The Lotus Case in Context: Sovereignty, Westphalia, Vattel, and Positivism*, in *THE OXFORD HANDBOOK OF JURISDICTION IN INTERNATIONAL LAW* 40, 46–47 (Stephen Allen et al. eds., 2019) (making the case that Emmerich Vattel (1714–1767) was a decisive figure in this development).

reached its highest stage of legal development in the nineteenth century.<sup>18</sup> One of its classic formulations can thus be found in the works of Lord Palmerston, British foreign secretary, prime minister, and political theorist; the very cynical, very subtle Lord Palmerston wrote: “[E]very nation has a right to manage its own internal affairs as it pleases, so long as it injures not its neighbours.” And again: “[O]ne nation has no right to control, by force of arms, the will of another nation in its government or ruler.”<sup>19</sup>

It is this body of ideas and doctrines that the lawyers of the latter nineteenth century and the pre–World War I years relied upon to develop their theories of international law. International law came about through consent. States, like persons, were perfectly free to enter into—or to refrain from entering into—contracts with their neighbors. These “contracts” became the treaties and the other agreements that formed the foundation of international law. It is because states enjoyed such sovereignty, these theorists explained, that international law was possible.<sup>20</sup> Treaties were the basis of international law—treaties that might bind states indefinitely—but that was possible only because states freely and autonomously entered into them.<sup>21</sup> But where state action was not circumscribed by treaty obligations, states were free to act as they wished. In a sense, the state was personified and, thus personified, was superimposed upon a contract model of the law.<sup>22</sup>

This model of international jurisprudence was unsettled by World War I, in two different ways. First, there were those who denounced the old system as a failure,<sup>23</sup> and who argued that states must come together into an ever tighter, more all-enveloping world community—the League of Nations, which so captured the imagination of the 1920s.<sup>24</sup> Second, there were those who looked at sovereignty and essentially deconstructed the concept—deconstruction long before the term was even coined. Sovereignty, they claimed, should be seen as a matter of power relations—rulers over their peoples, states competing among each other in the international

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18. See, e.g., Arnulf B. Lorca, *Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation*, 51 HARV. INT’L L.J. 475 (2010).

19. HENRY J. TEMPLE, OPINIONS AND POLICY OF THE RIGHT HONOURABLE VISCOUNT PALMERSTON 113 (George H. Francis ed., 1852).

20. ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 47 (2005).

21. Jochen von Bernstorff, *Georg Jellinek and the Origins of Liberal Constitutionalism in International Law*, 4 GOETTINGEN J. INT’L L. 659, 667–74 (2012).

22. JOSÉ E. ALVAREZ, THE IMPACT OF INTERNATIONAL ORGANIZATIONS ON INTERNATIONAL LAW 9 (2016).

23. Hersch Lauterpacht, *Westlake and Present Day International Law*, 15 ECONOMICA 307, 309–12 (1925).

24. Thus, the theorist Hans Kelsen argued for the creation of a *civitas maxima*—a “world state”—that might keep international order. Danilo Zolo, *Hans Kelsen: International Peace Through International Law*, 9 EUR. J. INT’L L. 306, 309–10 (1998). Robert Lansing, formerly the secretary of state under Woodrow Wilson, argued for the creation of international organizations that would effectuate the “sovereign will of mankind.” Robert Lansing, *Notes on World Sovereignty*, 15 AM. J. INT’L L. 13, 26 (1921).

arena.<sup>25</sup> At best, sovereignty should be seen not in conceptualist terms but as an ongoing process, a series of negotiations, express or implicit, between the governors and those who are governed. Harold Laski and Léon Duguit were important representatives of this movement.<sup>26</sup>

The aftermath of World War II further unsettled traditional ideas of sovereignty and its relationship to the international order, at least for a while. The enormity of the slaughter, the viciousness and comprehensive-ness of the genocides, caused the post–World War II world to recoil in horror. “Never again,” world leaders agreed, at least for a time. War-crimes tribunals were established to try the leadership of both Nazi Germany and Imperial Japan under the rubric of crimes against humanity.<sup>27</sup> The United Nations was created in the hope that it might succeed where the League of Nations failed—as a supervising body intended to secure collective action against threats to the peace of the global community.<sup>28</sup>

In the final analysis, however, the loftiest visions and hopes of the immediate postwar period foundered on the hard realities of the Cold War. Blocs of nations competed against each other: the United States, Great Britain, and other members of the Western Alliance of World War II faced off against their former partner, now turned adversary, the Soviet Union, which found support not only among the occupied nations of Eastern Europe but also among many nations in the developing world. In this climate of fierce global competition, the United Nations quickly became a stalemated body on all important issues, and older ideas of state sovereignty and state autonomy reemerged. And so too did age-old ideas about power politics and competition among states. The grim Hans Morgenthau captured the climate of the age when he wrote that “[t]he tendency to dominate, in particular, is an element of all human associations” and should be acknowledged as such by the international order.<sup>29</sup>

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25. CÉCILE LABORDE, *PLURALIST THOUGHT AND THE STATE IN BRITAIN AND FRANCE, 1900–25* 103 (2000).

26. Laski viewed sovereignty not as an abstraction but as a constantly shifting balance of power among the various constituent elements of society. See HAROLD J. LASKI, *AUTHORITY IN THE MODERN STATE* 19 (1919). For Duguit, sovereignty depended less on force than on “the belief of its subjects that their rulers perform[ed] their functions.” LÉON DUGUIT, *LAW IN THE MODERN STATE* 43 (Frida and Harold Laski trans., 1919).

27. Hersch Lauterpacht and Raphael Lemkin were among the most important international lawyers making this case. See Ana F. Vrdoljak, *Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law*, 20 *EUR. J. INT’L L.* 1163 (2009). More generally, the community of international lawyers borrowed from the ideals articulated in the seemingly quixotic Kellogg-Briand Pacts to outlaw war, signed in 1928. See OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017).

28. Hans Kelsen, *Collective Security and Collective Self-Defense Under the Charter of the United Nations*, 42 *AM. J. INT’L L.* 783 (1948).

29. HANS MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 35 (5th ed. 1972).

The Cold War, however, endured for only four decades, even if it felt like a permanent reality at the time. Between the years 1989 and 1991, the whole edifice erected by the Soviet Union first tottered and then collapsed. Indeed, the Soviet Union itself ceased to exist altogether at the end of the year 1991.

## II. GLOBALIZATION

The conclusion of the Cold War, then, ushered in the second part of this story: the rise of a movement known as “globalization.” In a sense, a globalized world has always been with us. In the ancient world, trade routes connected the Roman Empire both with China<sup>30</sup> and with Scandinavia.<sup>31</sup> Globalization as a term of art, however, acquired specialized significance beginning in the 1980s and 1990s.<sup>32</sup>

There were two elements to globalization as it was conceived in those early days of the project. One set of concerns centered on what might be broadly labeled “human rights.” Two events in the early 1990s crystallized the demand for a globalized response to human-rights violations. These were the civil wars in the former Yugoslavia and Rwanda, respectively. Beginning in 1991, war broke out in the former Yugoslavia, which, over a period of years, fragmented into seven smaller states—Slovenia, Croatia, Bosnia and Herzegovina, Macedonia, Montenegro, Kosovo, and Serbia. In the course of the war, Serbian forces, in particular, committed acts of mass murder, most especially against the Bosnians.<sup>33</sup> Similarly, in 1994, Rwanda broke into open civil conflict, as one ethnic group—the Hutus—rose up and slaughtered members of a rival group—the Tutsis.<sup>34</sup>

Both of these conflicts led to the empaneling of tribunals charged with investigating and punishing war crimes and genocide. These judicial proceedings brought about the development of what can only be called a transnational body of law governing these offenses.<sup>35</sup> What stands out is the independence enjoyed by the tribunals. The composition of the judges was deliberately international, and the body of norms they produced did not re-

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30. Marco Galli, *Beyond Frontiers: Ancient Rome and the Eurasian Trade Networks*, 8 J. EURASIAN STUD. 3 (2017); Michael P. Fitzpatrick, *Provincializing Rome: The Indian Ocean Trade Network and Roman Imperialism*, 22 J. WORLD HIST. 27 (2011).

31. Jennifer Billock, *Follow the Ancient Amber Road*, SMITHSONIAN MAG. (Aug. 28, 2019), <https://www.smithsonianmag.com/travel/follow-ancient-amber-road>.

32. The term may well have been coined by Theodore Levitt. See Theodore Levitt, *The Globalization of Markets*, HARV. BUS. REV., May–June 1983, at 92–102.

33. See PAUL MOJZES, *BALKAN GENOCIDES: HOLOCAUST AND ETHNIC CLEANSING IN THE TWENTIETH CENTURY* (2011).

34. See, e.g., Paul Magnarella, *The Background and Causes of the Genocide in Rwanda*, 3 J. INT’L CRIM. JUST. 801 (2005).

35. On the Balkans, see, for example, Vojin Dimitrijević & Marko Milanović, *The Strange Story of the Bosnian Genocide Case*, 21 LEIDEN J. INT’L L. 65 (2008). On Rwanda, see Amanda Alexander, *New Histories and New Laws: Crimes Against Humanity at the International Criminal Tribunal for Rwanda*, 32 LEIDEN J. INT’L L. 801 (2019).

ceive state ratification in any traditional sense, although the tribunals did depend on state governments to implement the punishments they imposed.<sup>36</sup>

The prosecution of the perpetrators of genocide and war crimes has continued, even expanded in recent years. Thus in 2012, the Liberian political leader Charles Taylor was convicted of war crimes and crimes against humanity.<sup>37</sup> Similarly, the International Criminal Court in The Hague has conducted ongoing investigations for fifteen years into the genocide committed in the Darfur region of Sudan, and in February 2020, the Sudanese government agreed to transfer Sudanese leader Omar al-Bashir, the leader most responsible for these offenses, into the custody of the ICC.<sup>38</sup>

This recent experience with vigorous prosecution of genocide and war crimes teaches at least three lessons. First, robust norm formation can take place outside the context of the nation-state. Second, the law itself may be moving in a direction away from unrestrained intrastate violence and toward the recognition of transnational norms of decency and good conduct. Third, we must, however, not get our hopes too high. Politics and strategic positioning remain important forces. There is little doubt that Saudi leaders would face the same fate as Slobodan Milosevic for their actions in Yemen were they ever to be brought to justice, but the likelihood of that happening is remote, thanks to their important superpower protectors and their control of the strategically important petroleum market.<sup>39</sup>

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36. On this process of norm-making, see, for example, M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63 (1996); Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, FORDHAM INT'L L.J. 286 (1999).

37. Kai Ambos & Ousman Njikam, *Charles Taylor's Criminal Responsibility*, 11 J. INT'L CRIM. JUST. 789 (2013); Marlies Glasius, "It Sends a Message": *Liberian Opinion Leaders' Response to the Trial of Charles Taylor*, 13 J. INT'L CRIM. JUST. 419 (2015).

38. *Omar al-Bashir: Sudan Agrees Ex-President Must Face ICC*, BBC (Feb. 11, 2020), <https://www.bbc.com/news/world-africa-51462613>.

39. Daniel Larison, *Dozens of Civilians Killed in Another Saudi Massacre*, AM. CONSERVATIVE (July 17, 2020, 2:06 PM), <https://www.theamericanconservative.com/state-of-the-union/dozens-of-civilians-killed-in-another-saudi-massacre/>; Mohamad Bazzi, *America Is Likely Complicit in War Crimes in Yemen: It's Time to Hold the US to Account*, GUARDIAN (Oct. 3, 2019, 8:19 AM), <https://www.theguardian.com/commentisfree/2019/oct/03/yemen-airstrikes-saudi-arabia-mbs-us/>; Charles Pierson, *Yemen Continues Its Decent into Hell*, COUNTERPUNCH (Sept. 12, 2019), <https://www.counterpunch.org/2019/09/12/yemen-continues-its-descent-into-hell/>; Sudarsan Raghavan, *U.N. Report Says U.S., Britain, France May Be Complicit in Potential War Crimes in Yemen*, WASH. POST (Sept. 3, 2019, 12:25 PM), [https://www.washingtonpost.com/world/un-report-says-us-britain-france-complicit-in-potential-war-crimes-in-yemen/2019/09/03/ad278cf6-ce48-11e9-9031-519885a08a86\\_story.html](https://www.washingtonpost.com/world/un-report-says-us-britain-france-complicit-in-potential-war-crimes-in-yemen/2019/09/03/ad278cf6-ce48-11e9-9031-519885a08a86_story.html); Richard Hall, *New Report Alleges Saudi Arabia Covered Up War Crimes in Yemen*, INDEPENDENT (Aug. 15, 2019, 4:57 PM), <https://www.independent.co.uk/news/world/middle-east/saudi-arabia-yemen-airstrikes-war-crimes-covered-a9061061.html>; Cesar Chelala, *The War in Yemen Is Not a War, It Is a Massacre*, DEF. DEMOCRACY PRESS (Nov. 27, 2018), <http://www.defenddemocracy.press/the-war-in-yemen-is-not-a-war-it-is-a-massacre/>; Fred Hiatt, *Opinion, Will You Work for a Murderer? That's the Question a Host of Ex-generals, Diplomats and Spies May Soon Face*, WASH. POST (Oct. 12, 2018, 5:16 PM), <https://www.washingtonpost.com/opinions/global-opinions/are-we-willing-to-sacrifice-our-moral->



Even outside the genocide and war-crimes context, claims of human-rights violations have been made with increasing force and effectiveness. Such claims played a prominent role in the unrest that led to the toppling of the Vladimir Putin–sponsored president of Ukraine, Viktor Yanukovich, in early 2014.<sup>40</sup> Allegations of human-rights abuses were similarly used to justify the forcible removal of Muammar al-Gaddafi from power in Libya, although the Libyan situation was not made better by his departure.<sup>41</sup>

Thus, sovereign authorities who once could suppress civil conflict or abuse their subjects without fear of retribution must now at least pause to reflect that the world community might muster the resources needed to hold them to account. They might be violently removed from power and die at the hands of their enemies, like Gaddafi.<sup>42</sup> Or, like Slobodan Milosevic, the belligerent Serbian leader responsible for so many atrocities, they might even die in prison.<sup>43</sup>

The second main element of the globalization of the last thirty years might be called economic liberalization. Like its human-rights counterpart, economic liberalization has also had an impact on traditional ideas of sovereignty. Consider foreign exchange. There was a time—in the years before World War II—when the value of currency was seen as a matter of solemn state responsibility.<sup>44</sup> The first quarter century or so of the post–World War II era witnessed a continuation of these policies under the so-called Bretton

standing-for-this/2018/10/12/baf7bff6-ce42-11e8-a3e6-44daa3d35ede\_story.html; Robert Fisk, *Is Yemen Too Much for the World to Take?*, COUNTERPUNCH (Oct. 27, 2016), <https://www.counterpunch.org/2016/10/27/is-yemen-too-much-for-the-world-to-take>; Robert Fisk, *Saudi Arabia “Deliberately Targeting Impoverished Yemen’s Farms and Agricultural Industry”*, INDEPENDENT (Oct. 23, 2016, 7:02 PM), <https://www.independent.co.uk/news/world/middle-east/saudi-arabia-s-bombing-yemeni-farmland-disgraceful-breach-geneva-conventions-a7376576.html>.

40. See, e.g., Taras Kuzio, *Vigilantes, Organized Crime, and Russian and Eurasian Nationalisms: The Case of Ukraine*, in UKRAINE’S EUROMAIDAN: ANALYSES OF A CIVIL REVOLUTION 57, 57–60 (David R. Marples & Frederick V. Mills eds., 2015); Timothy Snyder, *Ukraine: The New Dictatorship*, N.Y. REV. (Jan. 18, 2014), <https://www.nybooks.com/daily/2014/01/18/ukraine-new-dictatorship>; Michael P. Mayko, *Local Ukrainian Churches Pray for Kiev: Recent Immigrants Are Worried About Their Families Back Home*, STAMFORD ADVOC. (Feb. 22, 2014, 1:01 AM), <https://www.stamfordadvocate.com/news/article/Local-Ukrainian-churches-pray-for-Kiev-5257499.php>.

41. Indeed, Eric Posner cites the failure to contemplate the aftermath of Gaddafi’s removal from office as a reason for caution in deciding whether to remove a regime for its human-rights violations. ERIC POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* 132 (2014).

42. Which, it has been alleged, might in itself qualify as a human-rights violation. Nathan Kensey, *Scapegoating the Guilty: Girard and International Law*, in VIOLENCE, DESIRE, AND THE SACRED VOLUME 2: RENÉ GIRARD AND SACRIFICE IN LIFE, LOVE AND LITERATURE 67, 77 n.18 (Scott Cowdell et al. eds., 2012).

43. Peter Beaumont, *Slobodan Milosevic Dies Alone with History Still Demanding Justice*, GUARDIAN (Mar. 11, 2006, 7:13 PM), <https://www.theguardian.com/world/2006/mar/12/war-crimes.milosevictrial>.

44. See generally Barry Eichengreen, *The Comparative Performance of Fixed and Flexible Exchange Rate Regimes: Interwar Evidence*, in BUSINESS CYCLES: THEORIES, EVIDENCE AND ANALYSIS 229 (Niels Thygesen et al. eds., 1991) (reviewing the diversity of currency practices in the 1920s and 1930s).

Woods system. The product of an agreement forged in 1944 among the leading western allied powers—Canada, the United States, the United Kingdom, and even the Soviet Union participated in the negotiations<sup>45</sup>—Bretton Woods was meant to govern international currency markets after the war.<sup>46</sup> (The Soviet Union did not, in fact, sign the final documents.)<sup>47</sup>

Two pillars sustained the world that Bretton Woods created—the US dollar and a commitment to a fixed dollar value for gold. Prices and exchange rates remained relatively stable, at least for a while, but the edifice became unsustainable by the 1960s, when it became apparent that the connection between the dollar and gold could no longer be maintained.<sup>48</sup> No surprise, then, that in 1971 the system was left in tatters when President Richard Nixon withdrew from the agreement and allowed the value of gold and the dollar to float, thereby ushering in a period of floating exchange rates and relative currency valuations.<sup>49</sup>

Floating exchange rates and the free mobility of capital have now come to dominate the period since 1989. Even a supporter of this system—the German economist Horst Siebert—conceded that “[i]nternational capital mobility limits national governments’ freedom of action and changes the opportunity costs of economic policy decisions.”<sup>50</sup> Even so, Siebert lauded the effect capital mobility would have on state behavior—everything from providing security for property rights to creating a friendly tax environment.<sup>51</sup>

Similarly, tariffs were once seen as an important instrument of industrial policy.<sup>52</sup> That certainly was the case historically in the United States. Alexander Hamilton recommended the adoption of a tariff in his Report on Manufactures (1791) to shield embryonic American industry from a United Kingdom eager to regain through trade what it had lost in the American

45. BENN STEIL, *THE BATTLE OF BRETTON WOODS: JOHN MAYNARD KEYNES, HARRY DEXTER WHITE, AND THE MAKING OF A NEW WORLD ORDER* 9–15 (2013).

46. David M. Andrews, *Bretton Woods: System and Order*, in *ORDERLY CHANGE: INTERNATIONAL MONETARY RELATIONS SINCE BRETTON WOODS* 6, 6–7 (David M. Andrews ed., 2008).

47. G. John Ikenberry, *The Political Origins of Bretton Woods*, in *A RETROSPECTIVE ON THE BRETTON WOODS SYSTEM: LESSONS FOR INTERNATIONAL MONETARY REFORM* 155, 197–98 (Michael D. Bordo & Barry Eichengreen eds., 1993) (comments of Edward M. Bernstein).

48. Barry Eichengreen, *The Monetary Role of Gold as the Original Sin of Bretton Woods*, in *BRETTON WOODS AGREEMENTS: TOGETHER WITH SCHOLARLY COMMENTARIES AND ESSENTIAL HISTORICAL DOCUMENTS* 38, 39–40 (Naomi Lamoreaux & Ian Shapiro eds., 2019).

49. *Id.* at 52.

50. Horst Siebert, *What Does Globalization Mean for the World Trading System?*, in *FROM GATT to the WTO: THE MULTILATERAL TRADING SYSTEM IN THE NEW MILLENNIUM* 137, 148 (The WTO Secretariat ed., 2000); cf. COLLEEN LUNDY, *SOCIAL WORK, SOCIAL JUSTICE, AND HUMAN RIGHTS: A STRUCTURAL APPROACH TO PRACTICE* 4 (2d ed. 2011) (“Within the context of increased mobility of capital, power has shifted even further from nation-states to transnational corporations . . .”).

51. Siebert, *supra* note 50, at 149.

52. MARK A. MARTINEZ, *THE MYTH OF THE FREE MARKET: THE ROLE OF THE STATE IN A CAPITALIST ECONOMY* 127–28 (2009).

War of Independence.<sup>53</sup> While Hamilton's proposals were fairly moderate in scope, generations of American political leaders, from Henry Clay<sup>54</sup> to William McKinley,<sup>55</sup> looked to protective tariffs as a far more aggressive tool of industrial policy.

In the aftermath of the Great Depression and World War II, however, protective tariffs fell into disrepute. They were seen as part of the "beggar thy neighbor" policies that in the 1930s led to a downward spiral of employment and production.<sup>56</sup> Accordingly, the immediate postwar period witnessed two efforts to come to an international agreement on tariffs and trade. The International Trade Organization (ITO) was the first (failed) attempt to reach an accord.<sup>57</sup> When the ITO foundered in the United States Senate, negotiators crafted a second, successful agreement, known as the General Agreement on Tariffs and Trade (GATT).<sup>58</sup>

Intended as a temporary expedient, GATT actually provided the legal framework for a series of tariff reductions until it was superseded in 1994 by the more comprehensive World Trade Organization (WTO).<sup>59</sup> GATT—and the WTO—have depended on several key premises. First, export subsidies should be discouraged if not wholly eliminated.<sup>60</sup> By subsidies, it is meant governmental support for domestic industries competing in international markets.<sup>61</sup> Such subsidies might enjoy real domestic popularity. Politicians justify their use by claiming that they maximize the well-being of a particular political community by artificially lowering the price of a domestically produced good, either by directly financing production of the good, or by devices like tariffs meant to raise the price of foreign goods.<sup>62</sup> Since local constituencies are often benefited by such practices, WTO oversight of such matters does not always meet with political approval.

53. Douglas A. Irwin, *The Aftermath of Hamilton's "Report on Manufactures,"* 64 J. ECON. HIST. 800 (2004).

54. WILLIAM R. NESTER, *A SHORT HISTORY OF AMERICAN INDUSTRIAL POLICIES* (1998); WILLIAM E. BENSON, *A POLITICAL HISTORY OF THE TARIFF, 1789–1861*, 73–85 (2010); Charles K. McFarland & Nevin E. Neal, *The Nascence of Protectionism: American Tariff Policies, 1816–1824*, 45 LAND ECON. 22 (1969).

55. QUENTIN R. SKRABEC, *WILLIAM MCKINLEY, APOSTLE OF PROTECTIONISM* 90 (2008).

56. CHARLES P. KINDLEBERGER, *KEYNESIAN VS. MONETARISM: AND OTHER ESSAYS IN FINANCIAL HISTORY* 287–88 (1985) (providing a careful contextualization of America's tariff policy in the 1930s).

57. Richard Toye, *Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization, 1947–1948*, 25 INT'L HIST. REV. 282 (2003); George Bronz, *The International Trade Organization Charter*, 62 HARV. L. REV. 1089 (1948).

58. Francine McKenzie, *GATT and the Cold War: Accession Debates, Institutional Development, and the Western Alliance, 1947–1959*, 10 J. COLD WAR STUD. 78 (2008).

59. *Id.*

60. PETROS C. MAVROIDIS, *TRADE IN GOODS* 179–81 (2007).

61. James Rude, *Direct and Indirect Export Subsidies*, in *HANDBOOK ON INTERNATIONAL TRADE POLICY* 282, 282–91 (William A. Kerr & James D. Gaisford eds., 2007).

62. Arvind Panagariya, *Evaluating the Case for Export Subsidies*, WORLD BANK POLICY RESEARCH WORKING PAPER NO. 2276 (2000).

Another key premise is antidiscrimination. In principle, foreign trade should involve fair competition over price and quality of goods.<sup>63</sup> Discrimination—favoring the goods of one nation over those of another for political or other reasons—violates this basic principle.<sup>64</sup> Again, however, as with export subsidies, there is a substantial domestic constituency for such discrimination, as Buy American efforts attest to.<sup>65</sup>

Third, the system depends on the idea of comparative advantage. Some states might, for instance, be better at the production of agricultural products, others at the extraction of raw materials, yet others at the production of finished manufacturing goods. Each of these three premises, finally, are manifestations of a kind of *Grundnorm* (“foundational norm”), and that is the belief that economic efficiency is the greatest and highest good and that all other subsidiary goods must yield before it.<sup>66</sup> These principles were foundational to the operation of the GATT, and they have proved every bit as central to the WTO.

If the post–Cold War period has witnessed the renewed growth of human-rights law and the law of international trade, it has also seen the proliferation of international tribunals designed to administer these bodies of norms and procedures. There is now an Inter-American Court of Human Rights,<sup>67</sup> an African Court of Justice and Human Rights,<sup>68</sup> and a European Court of Human Rights.<sup>69</sup> In the background are yet other, older, well-established tribunals, such as the International Criminal Court<sup>70</sup> and the International Court of Justice (often known alternatively as the “World Court”) (these latter two courts have jurisdiction that ranges far outside the scope of human rights—the Criminal Court’s competency including both violations of the person’s rights in time of war but also the legitimacy of other acts of war, such as cross-border attacks and blockades;<sup>71</sup> and the Court of Jus-

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63. Simon Lester, *The Role of the International Trade Regime in Global Governance*, 16 UCLA J. INT’L L. FOREIGN AFFS. 209, 223–26 (2011).

64. Nicolas F. Diebold, *Standards of Non-Discrimination in International Economic Law*, 60 INT’L & COMPAR. L.Q. 831 (2011).

65. See, e.g., Exec. Order No. 13881, 84 Fed. Reg. 34257 (July 15, 2019).

66. “Competition policy and trade policy pursue the common objective of promoting an efficient functioning of markets.” Ernst-Ulrich Petersmann, *Trade Policy as a Constitutional Problem: On the ‘Domestic Policy Functions’ of International Trade Rules*, in THE WORLD TRADING SYSTEM: HISTORICAL AND CONCEPTUAL FOUNDATIONS 121, 121 (Robert Howse & Petrus von Bork eds., 1998).

67. See generally Jo M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS (2d ed. 2013).

68. See generally THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES’ RIGHTS: DEVELOPMENT AND CHALLENGES (Charles C. Jalloh et al. eds., 2019).

69. See, e.g., SHAPING RIGHTS IN THE ECHR: THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN DETERMINING THE SCOPE OF HUMAN RIGHTS (Eva Brems & Janneke Gerards eds., 2013).

70. See generally THE INTERNATIONAL CRIMINAL COURT: GLOBAL POLITICS AND THE QUEST FOR JUSTICE (William Driscoll et al. eds., 2004).

71. See generally STATE SOVEREIGNTY AND INTERNATIONAL CRIMINAL LAW (Morten Bergsmo & Ling Yan eds., 2012); Theodor Meron, *Defining Aggression for the International Criminal*

tice's authority embracing such matters as boundary disputes and access to natural resources).

The WTO also contemplated the use of judicial proceedings to advance its goal of trade free not only of tariff barriers but also of all sorts of nontariff barriers. These nontariff barriers are many in number and might include, to cite one nonexhaustive list, "trade regulations, standards, sanitary and phytosanitary measures, customs formalities, and government procurement practices," and many other concerns besides.<sup>72</sup> Efforts to subject such barriers to international norms might meet with significant local opposition, but nevertheless enjoyed real progress. So much so, that in 2016 Robert Howse surveyed the evolution of the WTO's dispute-resolution mechanisms and wrote confidently of "global government by judiciary," as the WTO's "judicial branch" "entertain[ed] hundreds of claims and produc[ed] a vast jurisprudential *acquis*."<sup>73</sup>

Of course, a mere four years later, we know that this process of standardizing not only international trading rules but also domestic practices has met with a fierce reaction on the part of sovereign states. Indeed, the entire WTO judicial system has been thrown into doubt as the American president, Donald Trump, refuses to cooperate in appointing new members to the WTO Appellate Body, causing the judicial process essentially to freeze.<sup>74</sup>

In light of this deepening chill, it may be difficult to remember that just a few short years ago, scholars wrote seriously about the ways in which human-rights norms and the rules and practices of international trade were merging into a kind of "global constitutionalism."<sup>75</sup> The concept and terminology of global constitutionalism have been around for some decades. As long ago as the period between the 1930s and the 1950s, Alfred Verdross, a former student of Hans Kelsen and a distinguished Austrian law professor in his own right, developed the body of ideas that became "global constitutionalism."<sup>76</sup>

But this concept truly flowered in the two decades that followed the Cold War's demise. Writing in 2009, Karolina Milewicz proposed the exist-

*Court*, 25 SUFFOLK TRANSNAT'L L. REV. 1 (2001); Benjamin Ferencz, *Enabling the International Criminal Court to Punish Aggression*, 6 WASH. U. GLOB. STUD. L. REV. 551 (2007); Matthew D. Campbell, *Bombs over Baghdad: Addressing Criminal Liability of a U.S. President for Acts of War*, 5 WASH. U. GLOB. STUD. L. REV. 235 (2006).

72. PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES, AND MATERIALS* 741 (3d ed. 2005).

73. Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L. 9, 10 (2016).

74. Keith Johnson, *How Trump May Finally Kill the WTO*, FOREIGN POL'Y (Dec. 9, 2019, 9:58 AM), <https://foreignpolicy.com/2019/12/09/trump-may-kill-wto-finally-appellate-body-world-trade-organization>.

75. See generally Aoife O'Donoghue, *Alfred Verdross and the Contemporary Constitutionalization Debate*, 32 OXFORD J. LEGAL STUD. 799 (2012).

76. *Id.*

tence of a global constitutional order characterized by three “elements:” “a continuous and lasting process;” “a formal dimension that denotes some procedural and institutional norms, . . . that is, the rule of law;” and “a substantive dimension associated with the guarantee of fairness and security.”<sup>77</sup> Four years earlier, in 2005, Deborah Cass argued that the free-trade system structured and shaped by the WTO was developing constitutional characteristics as international lawyers and judges used both free-trade principles and noneconomic concerns like the environment and democratic legitimacy to build a transnational legal order.<sup>78</sup> In 2009, Jan Klebbbers and coauthors made similar claims for the entire international system.<sup>79</sup>

### III. FRAGMENTATION

That was then. In the decade since these authors waxed rhapsodic, the world has shifted on its axis, dramatically so. And this brings us to the fragmenting/fragmentation aspect of this symposium. The world has been globalizing, but it has also been coming apart at the seams. The dimensions of the crisis are actually quite enormous. Any effort to describe the range of seemingly insoluble problems now confronting the world may seem arbitrary and incomplete. Still, we shall assume that risk and propose four converging crises that collectively are shaking the foundations of the post-Cold War world order.

These are respectively: a pervading crisis of political and constitutional legitimacy in the United States of America, a crisis of separatism in the United Kingdom and the European Union brought on by Brexit, a crisis in the international judicial order, and the crisis of a new destabilizing and highly dangerous arms race among the superpowers.

#### A. *The American Crisis*

The United States that emerged from the Cold War’s conclusion seemed like a colossus. It was described as a “global hegemon,” the world’s unquestioned final authority.<sup>80</sup> The period itself was said to be a “unipolar moment.”<sup>81</sup> The world, on this account, did not have competing poles of power, but only one—the United States.

To be sure, on paper, the United States still enjoys great power. Its military retains unquestioned supremacy, and the dollar remains the global

77. Karolina Milewicz, *Emerging Patterns of Global Constitutionalism: Toward a Conceptual Framework*, 16 *IND. J. GLOB. LEGAL STUD.* 413, 416 (2009).

78. DEBORAH Z. CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY, AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM* (2005).

79. JAN KLABBERS ET AL., *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* (2009).

80. *See, e.g.*, Bruce E. Moon, *The United States and Globalization: Struggles with Hegemony*, in *POLITICAL ECONOMY AND THE CHANGING GLOBAL ORDER* 342, 342–52 (Richard Stubbs & Geoffrey R.D. Underhill eds., 2000).

81. Charles Krauthammer, *The Unipolar Moment*, 70 *FOREIGN AFFS.* 23 (1990).

reserve currency. Thanks to American chokeholds on the international banking system, when the United States seeks to impose economic sanctions on another nation, those sanctions have real bite.<sup>82</sup>

But a close inspection suggests a Potemkin-like quality to the structure. It looks like a charade, a moldering facade standing atop an eroded foundation. Thus David Klion, writing in *Foreign Policy* in April 2019, compared the United States to the doddering last days of the pre-World War I Ottoman Empire. “The American Empire is the Sick Man of the Twenty-First Century,” Klion wrote. Policy is bought and sold, and the dismantling of campaign finance restrictions has led to the “legalization of corruption . . . on a scale unheard of in other developed countries.”<sup>83</sup>

Indeed, Klion understates the matter. It is a simple fact that the United States has failed at the most elementary task of a modern democratic state—ensuring that the person who receives the most votes actually wins office. Twice in sixteen years—thanks to the inexcusable survival of an eighteenth-century anachronism, the Electoral College—the United States has actually installed as president the candidate who received fewer votes than his nearest competitor.<sup>84</sup> (And as this issue goes to print, we have witnessed an assault on the United States Congress instigated by a president whose objections to a “rigged vote” have been made entirely in bad faith.)<sup>85</sup>

The constitutional crisis is bad enough, but it is only one factor in a far more pervasive set of social pathologies that have infected American life. The United States is experiencing declining life expectancies<sup>86</sup>—a phenomenon last experienced by a modern state in the turmoil of Russia in the 1990s, in the wake of the Soviet Union’s collapse. A crisis of inequality—of race, wealth, and class—is coming to a boil in the summer of 2020, as

82. GERALD A. EPSTEIN, *THE POLITICAL ECONOMY OF INTERNATIONAL FINANCE IN AN AGE OF INEQUALITY: SOFT CURRENCIES, HARD LANDINGS* 190 n.1 (2018).

83. David Klion, *The American Empire Is the Sick Man of the 21st Century*, *FOREIGN POL’Y* (Apr. 2, 2019, 8:00 AM), <https://foreignpolicy.com/2019/04/02/the-american-empire-is-the-sick-man-of-the-21st-century>; cf. *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (relaxing standards of public corruption); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (striking down restrictions on campaign fundraising).

84. In 2000, Vice President Al Gore received approximately 530,000 more votes than George W. Bush. In 2016, former Secretary of State Hillary Clinton received nearly 3,000,000 more votes than Donald Trump. Bush and Trump were declared the winners by the Electoral College.

85. *Donald Trump Suggests Delay to US Presidential Election*, BBC (July 30, 2020), <https://www.bbc.com/news/world-us-canada-53597975>; cf. Steven Calabresi, *Trump Might Try to Postpone Election. That’s Unconstitutional*, *N.Y. TIMES* (July 30, 2020), <https://www.nytimes.com/2020/07/30/opinion/trump-delay-election-coronavirus.html?auth=login-google> (authored by the cofounder of the Federalist Society, the article calls for Trump’s re-impeachment).

86. Over the last three years for which comprehensive data are available—2014 through 2017—life expectancy in the United States has declined from 78.9 to 78.6 years. The impact falls disproportionately on the poor and those unable to access health care. See Aylin Woodward, *Life Expectancy Keeps Going Down: A New Study Says America’s Worsening Inequality Could Be to Blame*, *BUS. INSIDER* (Nov. 30, 2019, 7:12 AM), <https://www.businessinsider.com/us-life-expectancy-declined-for-third-year-in-a-row-2019-11>; ANNE CASE & ANGUS DEATON, *DEATHS OF DESPAIR AND THE FUTURE OF CAPITALISM* 1–15 (2020).

the United States confronts its legacy of white racism and police misconduct. The disparate impact of the COVID-19 pandemic—falling disproportionately on racial minorities and poorly compensated, cruelly exploited “essential workers”<sup>87</sup>—is yet another manifestation of America’s inequality crisis. Indeed, it is not far-fetched to say that the present situation is taking on the trappings of a real crisis of legitimacy.<sup>88</sup> If in the eyes of many, the American state stands for the preservation of privilege, for the exploitation or degradation of the weak and vulnerable, for the denial of human rights and dignity, then it makes the summer-long effort to tear down statues—the bronze and concrete reminders of state power—more explicable.

Given all of this, can the United States maintain its position as global hegemon and guarantor of world order? The question is made all the more acute by America’s spectacular failure to address the COVID-19 pandemic.<sup>89</sup>

### B. *Brexit and the Crisis of Separatism*

Brexit might have its deep causes in rising British discontent with the United Kingdom’s increasingly close connections with the European Union in the post–Cold War period.<sup>90</sup> It was felt in many quarters of the United

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87. Nick Vachon, *OSHA Complaints Show the Morbid Dangers Healthcare Workers Face During Covid*, IN THESE TIMES (July 16, 2020), <https://inthesetimes.com/article/osha-healthcare-covid-19-pandemic-nurses-danger>; Richard A. Opiel Jr. et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>; Don Bombino Geno Tai et al., *The Disproportionate Impact of COVID-19 on Racial and Ethnic Minorities in the United States*, 72 CLINICAL INFECTIOUS DISEASES 703 (2020); Cedric Hugrée et al., *Workers Are on the Frontline of a Second Wave of COVID-19*, JACOBIN (June 13, 2020), <https://www.jacobinmag.com/2020/06/jobs-pandemic-working-class-inequality>; Anthony Pahnke, *Appreciated or Exploited? Key Workers in a Coronavirus World*, AL JAZEERA (Mar. 26, 2020), <https://www.aljazeera.com/opinions/2020/3/26/appreciated-or-exploited-key-workers-in-a-coronavirus-world>.

88. Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>; Lonnae O’Neal, *Black Lives Matter Has Moved from the Political Outskirts to the Center of America’s Conversation About Itself*, UNDEFEATED (June 16, 2020), <https://theundefeated.com/features/black-lives-matter-has-moved-from-the-political-outskirts-to-the-center-of-americas-conversation-about-itself>.

89. Pankaj Mishra, *Flailing States*, LONDON REV. BOOKS (July 16, 2020), <https://www.lrb.co.uk/the-paper/v42/n14/pankaj-mishra/flailing-states>; Aris Roussinos, *Covid Has Exposed America as a Failed State*, UNHERD (June 1, 2020), <https://unherd.com/2020/06/covid-has-exposed-america-as-a-failed-state>.

90. Pompeo Della Posta & Scheherazade S. Rehman, *Brexit: Origins and Future Perspectives*, in AFTER BREXIT: CONSEQUENCES FOR THE EUROPEAN UNION 11, 11–34 (Nazaré da Costa Cabral et al. eds., 2017); Bruce Stokes, *Brexit Vote Highlighted U.K.’s Discontent with EU, but Other European Countries Are Grumbling Too*, PEW RSCH. CTR. (June 24, 2016), <https://www.pewresearch.org/fact-tank/2016/06/24/brexit-vote-highlighted-uks-discontent-with-eu-but-other-european-countries-are-grumbling-too>.



Kingdom that parliamentary supremacy was being eroded in favor of ever more expansive European powers to regulate human rights and trade.<sup>91</sup>

The more proximate cause of Brexit, on the other hand, was the decision by then British prime minister David Cameron to call for a referendum on the subject in response to political pressure to do so.<sup>92</sup> Cameron's confidence that the British public would support his professed desire to remain within the European Union, however, was dashed when in June 2016, the "Leave" option won a narrow victory.<sup>93</sup>

What matters for our purposes are not the details of the campaign or subsequent negotiations of a deal to depart the European Union, but the rising chorus in favor of sovereignty, as opposed to a tighter relationship with Europe, which, yes, did require the surrender of aspects of Britain's internal and external sovereignty.

In the months leading up to the referendum, the vote came down to a choice: deeper integration with world nations (in the form of the European Union) or a return to an autonomous, sovereign Britain freed from what were seen as intolerable constraints. The editors of the *Economist* saw this clearly three months before the vote occurred: "[T]he argument that Britain has lost sovereignty, and even its democracy, by being in the European Union is at the heart of the case for Brexit."<sup>94</sup> Writing a few months after the referendum, Ambrose Evans-Pritchard concurred: "The elemental purpose of Brexit is and has always been to restore the supremacy of Parliament—and to return legal authority to British courts."<sup>95</sup> In January 2020, when Boris Johnson finally secured parliamentary support to depart the European Union,<sup>96</sup> the prime minister spoke enthusiastically of Britain's "recaptured sovereignty."<sup>97</sup>

When Ambrose Evans-Pritchard or Boris Johnson speaks of sovereignty, of course, one is entitled to ask what this means. It means at least this: a strategically important part of the British public saw Brexit as a means of attaining a greater measure of independence, of self-rule, of local,

91. Stefania Baroncelli and Monica Rosini, *Brexit, Sovereignty, and Devolution: The View of Constitutional Law*, in *THE POLITICS AND ECONOMICS OF BREXIT* 56, 60–61 (Annette Bongardt et al. eds., 2020).

92. RUDOLF G. ADAM, *BREXIT: CAUSES AND CONSEQUENCES* 60–61 (2020).

93. Tim Ross, *The Long War: How Vote Leave and the Eurosceptics Won*, *TELEGRAPH* (June 25, 2016), <https://www.telegraph.co.uk/news/2016/06/25/the-long-war-how-vote-leave-and-the-eurosceptics-won>.

94. *Dreaming of Sovereignty*, *ECONOMIST* (Mar. 19, 2016), <https://www.economist.com/britain/2016/03/19/dreaming-of-sovereignty>.

95. Ambrose Evans-Pritchard, *Supremacy of Parliament Is the Whole Point of Brexit*, *TELEGRAPH* (Nov. 3, 2016, 8:00 PM), <https://www.telegraph.co.uk/business/2016/11/03/supremacy-of-parliament-is-the-whole-point-of-brexit>.

96. Eleni Courea, *UK Leaves the European Union*, *POLITICO* (Jan. 31, 2020, 12:00 AM), <https://www.politico.eu/article/uk-leaves-the-european-union>.

97. Eleni Courea, *Boris Johnson Heralds "Recaptured Sovereignty" After Brexit*, *POLITICO* (Jan. 31, 2020, 11:05 PM), <https://www.politico.eu/article/boris-johnson-heralds-recaptured-sovereignty-after-brexit>.

dare we say it, democratic accountability. But one must not lose sight of Brexit's dark side. There is also the xenophobia, the anti-immigrant fever, the desire to grab at some dimly remembered, grainy image of national greatness.<sup>98</sup>

No one yet knows where this is going, nor is it our business to try and discern Britain's future path. What matters is that in this tug-of-war between the forces of globalism and of deeper integration, it was the countervailing force of sovereignty that prevailed. Fuzzy, ill-thought-out, romantic, nostalgic, undoable, undesirable, one can call it what one wishes, but one must still account for this centrifugal force, pushing things and events to an edge where blowups become foreseeable. Nor is Britain alone. Within post-Brexit Britain there is still a substantial Scottish independence movement.<sup>99</sup> And on the European continent, one must acknowledge the Catalan independence movement, seeking to free the province of Catalonia from control by the central Spanish government.<sup>100</sup> Again, what one sees is not globalization but its opposite, fragmentation, yet another example of the breakup of the post-Cold War order of convergence through trade and respect for human rights.

### C. *The Diminishment and Disregard of Transnational Tribunals*

At the heart of the movement for globalization was belief that it would be led by an enlightened judiciary. Human rights, trade, the coming global constitution, all were predicated on increasing deference to and respect for a world judiciary. This principle, however, is at the moment badly battered.

One might consider two examples. The first is the case of the Appellate Body of the WTO. The Appellate Body was—and remains at least in theory—an indispensable part of the WTO. Its membership consists of seven judges.<sup>101</sup> Its responsibilities include determining the appropriate standard of review; arriving at an understanding of the relevant legal princi-

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98. Josh Gabbatiss, *Brexit Strongly Linked to Xenophobia, Scientists Conclude*, INDEPENDENT (Nov. 27, 2017, 5:52 PM), <https://www.independent.co.uk/news/science/brexit-prejudice-scientists-link-foreigners-immigrants-racism-xenophobia-leave-eu-a8078586.html>; Ian Johnston, *Brexit: Anti-Immigrant Prejudice Major Factor in Deciding Vote, Study Finds*, INDEPENDENT (June 22, 2017, 10:38 AM), <https://www.independent.co.uk/news/uk/politics/brexit-racism-immigrant-prejudice-major-factor-leave-vote-win-study-a7801676.html>; Joseph Breaun, *Brexit's Driving Force: Middle England's Desire to Return to an Almost Mythical Past*, NAT'L POST (June 24, 2016), <https://nationalpost.com/news/world/brexit-driving-force-middle-englands-desire-to-return-to-an-almost-mythical-past>.

99. See, e.g., Robin McKie & Toby Helm, *Plaudits for Nicola Sturgeon Fuel Talk of Scottish Independence Drive*, GUARDIAN (July 19, 2020, 2:13 PM), <https://www.theguardian.com/politics/2020/jul/19/plaudits-for-nicola-sturgeon-fuel-talk-of-scottish-independence-drive>.

100. See generally RAPHAEL MINDER, *THE STRUGGLE FOR CATALONIA: REBEL POLITICS IN SPAIN* (2017).

101. Victoria Donaldson & Alan Yanovich, *The Appellate Body's Working Procedures for Appellate Review*, in *THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE RESOLUTION SYSTEM* 386, 387–91 (Giorgio Sacerdoti et al. eds., 2006).

ples; reviewing the findings and decisions of subordinate tribunals; and finally passing judgment on them, usually in the form of written opinions.<sup>102</sup> The decisions of the Appellate Body still require another layer of approval—by the WTO’s Dispute Settlement Body.<sup>103</sup> But once that is done, the Appellate Body’s rulings are final. Its authority was described in 2016 as simultaneously “extensive” but “fragile.” It had acquired real expertise and international status and respect, but this earned reputation for competency was simultaneously imperiled by shifting political winds.<sup>104</sup>

Those winds have now shifted. The Trump administration arrived in Washington, DC, determined to rewrite the rules of international trade and essentially took the WTO Appellate Body hostage, metaphorically speaking.<sup>105</sup> Since appointments to the Appellate Body require American approval, Trump resolved to approve no new appointments.<sup>106</sup> In December 2019, the membership of the Appellate Body dropped to a single judge, meaning that the body now lacks a quorum to resolve disputes. The Appellate Body, in other words, has ceased to function and is likely to remain nonfunctional for the foreseeable future.<sup>107</sup>

The shutting down, if not the outright destruction, of the WTO Appellate Body’s adjudicative powers thus represents one line of assault on the world’s judicial bodies. A second major assault was launched by China in response to the Permanent Court of Arbitration’s decision in the South China Sea Arbitration case, also known as *The Republic of the Philippines v. the People’s Republic of China*.<sup>108</sup> The dispute arose because of China’s claim of sovereignty over a large part of the South China Sea—a claim that

102. See generally Claus-Dieter Ehlermann & Nicolas Lockhart, *Standard of Review in WTO Law*, 7 J. INT’L ECON. L. 491 (2004).

103. Zhu Yanle, *The Effects of the WTO Dispute Settlement Panel and Appellate Body Reports: Is the Dispute Settlement Body Resolving Disputes Only, or Making Precedent at the Same Time?*, 17 TEMP. INT’L & COMPAR. L.J. 221, 222 (2003).

104. Gregory Shaffer, Manfred Elsig, & Sergio Puig, *The Extensive (but Fragile) Authority of the WTO Appellate Body*, 79 LAW & CONTEMP. PROBS. 237 (2016).

105. As *WTO Members Meet in Argentina, the Organisation Is in Trouble*, ECONOMIST (Dec. 9, 2017), <https://www.economist.com/finance-and-economics/2017/12/07/as-wto-members-meet-in-argentina-the-organisation-is-in-trouble>; Adam S. Posen, *The Post-American World Economy: Globalization in the Trump Era*, 97 FOREIGN AFFS. 28 (2018).

106. See *The WTO Warns of the Risk of ‘Paralysis’ of the Institution by the United States*, NOTICIAS FINANCIERAS, Feb. 20, 2018.

107. Johnson, *supra* note 74; BRANDON L. MURRILL, CONG. RSCH. SERV., *THE WTO APPELLATE BODY LOSES ITS QUORUM: IS THIS THE BEGINNING OF THE END FOR THE “RULES-BASED TRADING SYSTEM”?* (2019); cf. Chad P. Brown, *There Is Little Dignity in Trump’s Trade Policy: Workers Were Never at the Heart of the President’s Plans*, FOREIGN AFFS. (July 9, 2020), <https://www.foreignaffairs.com/articles/united-states/2020-07-09/there-little-dignity-trumps-trade-policy> (explaining that Trump is likely to fail even at his stated goal of improving the condition of American workers). There is reason to believe that the Biden administration will reverse course. See, e.g., Doug Palmer, *Biden Administration Joins Call for ‘Swift Appointment’ of New WTO Head*, POLITICO (Jan. 29, 2021), <https://www.politico.com/news/2021/01/29/biden-world-trade-or-organization-463820>.

108. Republic of the Phil. v. Republic of China, Case No. 2013-19, Award (Perm. Ct. Arb. 2016), <https://docs.pca-cpa.org/2016/07/PH-CN-20160712-Award.pdf>.

often goes by the shorthand expression “Nine Dash Line,” so-called after a line drawn on a 1948 map China published asserting its claim.<sup>109</sup>

The proximate cause of the dispute between the Philippines and China concerned possession of the Spratly Islands, a collection of tiny, uninhabited islands and reefs, perhaps as many as six hundred altogether, most no more than bits of rock and coral, that straddle important sea lanes but are also a potentially rich source of natural resources.<sup>110</sup> Possession of the islands had been an unresolved question following the conclusion of World War II.<sup>111</sup> The Philippines based its claim of sovereign right on the proximity of the Spratlys to the Philippine coast; China pointed to the fact that the islands lay within the Nine Dash Line as asserted by China in 1948.<sup>112</sup>

In 2013, the Philippines chose to adjudicate its claim before the Permanent Court of Arbitration. China objected to the court’s jurisdiction, alleging that by treaty the matter should be subject to bilateral negotiation.<sup>113</sup> The Permanent Court rejected China’s position and proceeded to a final verdict even though China never submitted to be bound by the result.<sup>114</sup> In the event, the Philippines prevailed on its claim, with the decision being issued in 2016.<sup>115</sup>

China, however, has remained recalcitrant. Indeed, it rejected the court’s decision just as it had the court’s jurisdiction,<sup>116</sup> and it has now begun to actively occupy portions of the Spratlys. It has built up some reefs into artificial islands and has used other islands as stopping points for the Chinese Navy.<sup>117</sup> China, in other words, has behaved as if the Permanent Court of Arbitration—and, more generally, international law—did not ex-

109. S. Jayakumar et al., *The South China Sea Arbitration: Laying the Groundwork*, in *THE SOUTH CHINA SEA ARBITRATION: THE LEGAL DIMENSION* 1, 8 (S. Jayakumar et al. eds., 2018).

110. Charles S. Hutchinson & V.R. Vijayan, *What Are the Spratly Islands?*, 39 *J. ASIAN EARTH SCIS.* 371 (2010).

111. China had used the islands as fishing grounds for centuries prior to World War II. The French lay claim to the islands in the 1930s. The Japanese Navy occupied the islands during the war. It was agreed following the war that the islands should be returned to their rightful owner, but it remained unclear whether that was the People’s Republic of China, Taiwan, Vietnam, or the Philippines. Ross Marlay, *China, the Philippines, and the Spratly Islands*, 23 *ASIAN AFFS.: AN AM. REV.* 195, 200–03 (1997).

112. Brian K. Murphy, *Dangerous Ground: The Spratly Islands and International Law*, 1 *OCEAN & COASTAL L.J.* 187 (1995); Marlay, *supra* note 111.

113. Wim Muller, *China’s Missed Opportunity in South China Sea Arbitration*, CHATHAM HOUSE (Mar. 19, 2015) (no longer available online).

114. Ankit Panda, *Philippines v. China: Court Rules Favorably on Jurisdiction, Case Will Proceed*, DIPLOMAT (Oct. 30, 2015), <https://thediplomat.com/2015/10/philippines-v-china-court-rules-favorably-on-jurisdiction-case-will-proceed>.

115. *Id.*

116. Isaac B. Kardon, *China Can Say “No”*: Analyzing China’s Rejection of the South China Sea Arbitration, 13 *U. PA. ASIAN L. REV.* 1 (2008).

117. Frances Mangosing, *New Photos Show China Is Nearly Done with Its Militarization of the South China Sea*, INQUIRER.NET (Feb. 5, 2018, 6:00 AM), <https://www.inquirer.net/specials/exclusive-china-militarization-south-china-sea> (“[R]eefs . . . transformed into artificial islands in the final stages of development into air and naval bases.”).

ist. As with the American decision to suffocate the WTO's Appellate Body, we see here also a choice made by the world's emergent superpower to ignore the processes of law in favor of self-help.

The hope that the world's few superpowers would agree to be governed by a global rule of law is thus imperiled equally by American belligerence over trade and Chinese assertiveness over foreign territory.

#### D. *A New and Uncontrolled Arms Race*

If we traveled backward in time to the 1990s, we would find, of course, the United States standing tall as the global hegemon. But we would also find the two nations that have become America's rivals in today's competitive environment showing real signs of weakness. The Soviet Union broke up in 1991, fracturing into fifteen nations, from Armenia to Uzbekistan, with the Russian state emerging as the largest of the states.<sup>118</sup> The Russian people were demoralized.<sup>119</sup> Alcoholism and premature deaths of despair skyrocketed.<sup>120</sup> A regional civil war involving the Russian republic of Chechnya broke out in 1994 (the so-called First Chechen War).<sup>121</sup> The United States, for its part, mishandled the situation. The economic "shock therapy" prescribed by western free-market economists might (or might not have) accomplished some good, but the lives of ordinary Russians were not improved, and the public mood soured toward the West.<sup>122</sup>

It was out of this milieu that Vladimir Putin emerged at the end of 1999 as Russia's leader. And while his precise constitutional office has shifted several times during his rulership of the Russian state,<sup>123</sup> it is fair to say that he has been, for most of his time on the public stage, the unquestioned strong man of Russia.<sup>124</sup> While much could be said about Putin's ambitions for Russia, this much suffices: he views the breakup of the Soviet

118. Sabrina P. Ramet, *Introduction to CENTRAL AND SOUTHEAST EUROPEAN POLITICS SINCE 1989*, at 3–4 (Sabrina P. Ramet ed., 2010).

119. Masha Gessen, *The Dying Russians*, N.Y. REV. (Sept. 2, 2014), <https://www.nybooks.com/daily/2014/09/02/dying-russians>.

120. See, e.g., Vladimir Shkolnikov et al., *Changes in Life Expectancy in Russia in the Mid-1990s*, 357 LANCET 917, 917–21 (2001); A.V. Nemtsov, *Alcohol-Related Human Losses in Russia in the 1980s and 1990s*, 97 ADDICTION 1413, 1413–25 (2002); Peder Walberg et al., *Economic Change, Crime, and Mortality Crisis in Russia: Regional Analysis*, 317 BMJ 312, 312–18 (1998).

121. Gail W. Lapidus, *Contested Sovereignty: The Tragedy of Chechnya*, 23 INT'L SEC. 5 (1998).

122. LYNN D. NELSON & IRINA KUZES, *RADICAL REFORM IN YELTSIN'S RUSSIA: POLITICAL, ECONOMIC, AND SOCIAL DIMENSIONS* 178 (1995); NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* 310–31 (2007).

123. He has variously been prime minister, president, prime minister a second time, and now president, potentially until the year 2036. Ann M. Simmons & Georgi Kantchev, *Russians Vote for Overhaul That Could Keep Putin in Power Until 2036*, WALL ST. J. (July 1, 2020, 3:43 PM), <https://www.wsj.com/articles/russians-set-to-approve-radical-overhaul-that-could-keep-putin-in-power-until-2036-11593593621>.

124. Anastasia Edel, *Putin's Constitutional Tsarism*, N.Y. REV. (July 9, 2020), <https://www.nybooks.com/daily/2020/07/09/putins-constitutional-tsarism>.

Union and the 1990s as a period of national humiliation;<sup>125</sup> he sees Russia as a great nation with a distinctive culture centered on a militant, conservative interpretation of Russian Orthodoxy;<sup>126</sup> and he wishes to restore Russia to the international preeminence it once enjoyed.<sup>127</sup>

China, similarly, in 1991 had recently experienced political upheaval. Protests in Tiananmen Square in the spring of 1989 gradually transformed into a crisis of the regime,<sup>128</sup> which led finally to violent suppression on June 3–4, 1989.<sup>129</sup> Still, this disruption proved but a temporary impediment to China's rise as an economic power throughout the 1990s and early 2000s.<sup>130</sup>

In 2013, Xi Jinping assumed the leadership of the Chinese state with a vision of transformational change.<sup>131</sup> Most significantly, China's constitutional ordering underwent significant modification. In 2018, term limits were removed from the office of the presidency, essentially making Xi

125. As long ago as 2005, Putin called the breakup of the Soviet Union the “catastrophe of the [twentieth] century.” See Andrew Osborn, *Putin: Collapse of the Soviet Union Was “Catastrophe of the Century,”* INDEPENDENT (Oct. 6, 2011, 5:43 AM), <https://www.independent.co.uk/news/world/europe/putin-collapse-soviet-union-was-catastrophe-century-521064.html>. He continues to reiterate these views today. See, e.g., *Putin, Before Vote, Says He'd Reverse Soviet Collapse If He Could: Agencies*, REUTERS (Mar. 2, 2018, 2:21 PM), <https://www.reuters.com/article/us-russia-election-putin/putin-before-vote-says-hed-reverse-soviet-collapse-if-he-could-agencies-idUSKCN1GE2TF>. Indeed, he has taken steps to rehabilitate Joseph Stalin. Irina Sherbakova, *Vladimir Putin's Russia Is Rehabilitating Stalin: We Must Not Let It Happen*, GUARDIAN (July 10, 2019, 1:00 AM), <https://www.theguardian.com/commentisfree/2019/jul/10/vladimir-putin-russia-rehabilitating-stalin-soviet-past>.

126. Aris Roussinos, *Putin's Cathedral of War Embodies His Civilisation State*, UNHERD (June 18, 2020), <https://unherd.com/thepost/putins-cathedral-of-war-embodies-his-civilisation-state>; Mark Armstrong, *Russian Orthodox Church Consecrates Huge Cathedral Dedicated to Military*, EURONEWS (June 14, 2020), <https://www.euronews.com/2020/06/14/russian-orthodox-church-consecrates-huge-cathedral-dedicated-to-military>; Chrissy Stoop, *Putin Wants God (or At Least the Church) on His Side*, FOREIGN POL'Y (Sept. 10, 2018, 9:33 AM), <https://foreignpolicy.com/2018/09/10/putin-wants-god-or-at-least-the-church-on-his-side>; David Horsey, *Putin's Anti-Gay Laws Set the Stage for an International Battle*, L.A. TIMES (Aug. 15, 2013, 5:00 AM), <https://www.latimes.com/opinion/topoftheticket/la-na-tt-putins-antigay-laws-20130814-story.html>; John P. Burgess, *The Unexpected Relationship Between U.S. Evangelicals and Russian Orthodox*, CHRISTIAN CENTURY (Aug. 2, 2018), <https://www.christiancentury.org/article/features/unexpected-relationship-between-us-evangelicals-and-russian-orthodox>.

127. Fiona Hill & Clifford G. Gaddy, *Vladimir Putin as Statist: Restoring the Greatness of Russia*, BROOKINGS (Feb. 1, 2013), <https://www.brookings.edu/blog/up-front/2013/02/01/vladimir-putin-as-statist-restoring-the-greatness-of-russia>.

128. ANDREW J. NATHAN, CHINA'S CRISIS: DILEMMAS OF REFORM AND PROSPECTS FOR DEMOCRACY 15 (1990).

129. JEANNE BODEN, THE WALL BEHIND CHINA'S OPEN DOOR: TOWARDS EFFICIENT INTERCULTURAL MANAGEMENT IN CHINA 70 (2008).

130. See, e.g., ELISABETH CROLL, CHINA'S NEW CONSUMERS: SOCIAL DEVELOPMENT AND DOMESTIC DEMAND 31–52 (2006); Linda Yueh, *China's Growth: A Brief History*, HARV. BUS. REV. (Dec. 9, 2015), <https://hbr.org/2015/12/chinas-growth-a-brief-history>; Fatima-Zohra Er-Rafia, *How Did China Become the World's Second Economic Power?*, RISING POWERS IN GLOB. GOVERNANCE (Sept. 17, 2018), <https://risingpowersproject.com/how-did-china-become-the-worlds-second-economic-power>.

131. ELIZABETH ECONOMY, THIRD REVOLUTION: XI JINPING AND THE NEW CHINESE STATE 3–5 (2018).

Jinping president if not for life, then for an indefinitely long time.<sup>132</sup> Xi Jinping Thought, furthermore, was enshrined as a constitutional principle, alongside the Thought of Chairman Mao Zedong and the Thought of Deng Xiaoping.<sup>133</sup> Under Xi's leadership, finally, China is now attempting to change the strategic balance of power that has prevailed since the 1990s, at least within its perceived sphere of influence in East Asia.

Both Russia, in its quest to return to a dominant position on the world stage, and China, with its desire to alter the regional landscape, have found it necessary to challenge American military supremacy.<sup>134</sup> They both perceive that American military power represents probably the single biggest supporting pillar for the geopolitical status quo. And they understand that to change that status they must pursue modern, sophisticated weapons systems for which the Americans have no apparent ready answer.<sup>135</sup>

Thus Russia has not only developed and now deployed hypersonic missiles that travel at Mach 27, a speed that negates American missile defenses.<sup>136</sup> Russia is also developing a nuclear-powered cruise missile that, if perfected, would possess unlimited range and stealth capabilities, permitting it to strike essentially without warning anywhere in the world.<sup>137</sup> Indeed, Vladimir Putin has boasted, “[n]ow we have a situation that is unique in modern history when they are trying to catch up to us.”<sup>138</sup> The Chinese have also developed hypersonic weapons with a particular eye on American

132. Frank Ching, *China and Xi: More Powerful by the Day*, EURASIA REV. (Mar. 16, 2018), <https://www.eurasiareview.com/16032018-china-and-xi-more-powerful-by-the-day-analysis>.

133. *Id.*

134. AMY F. WOOLF, CONG. RSCH. SERV., R45861, *RUSSIA'S NUCLEAR WEAPONS: DOCTRINE, FORCES, AND MODERNIZATION* (2020), <https://fas.org/sgp/crs/nuke/R45861.pdf>; Cynthia Roberts, *Revelations About Russia's Nuclear Deterrence Policy*, WAR ON THE ROCKS (June 19, 2020), <https://warontherocks.com/2020/06/revelations-about-russias-nuclear-deterrence-policy>; *Full Text: China's National Defense in the New Era*, XINHUANET (July 24, 2019), [http://www.xinhuanet.com/english/2019-07/24/c\\_138253389.htm](http://www.xinhuanet.com/english/2019-07/24/c_138253389.htm).

135. Dietmar Pieper, *The Nuclear Risk Is "Higher Than It Has Been Since the Darkest Days of the Cold War*, DER SPIEGEL (Aug. 6, 2020), <https://www.spiegel.de/international/world/un-official-the-nuclear-risk-is-higher-than-in-the-darkest-days-of-the-cold-war-a-ab05df08-f79e-4f68-a86a-a74688c4cb90>.

136. Kyle Mizokami, *Russia's New Hypersonic Weapon Flies at Mach 27*, POPULAR MECHS. (Dec. 30, 2019), <https://www.popularmechanics.com/military/weapons/a30346798/russia-new-hypersonic-weapon-mach-27>; Franz-Stefan Gady, *Russia's Avangard Hypersonic Warhead Officially Enters Service*, DIPLOMAT (Dec. 27, 2019), <https://thedi diplomat.com/2019/12/russias-avangard-hypersonic-warhead-officially-enters-service>.

137. David Axe, *Why Russia's Nuclear Powered "Skyfall" Missile Is Bad News*, NAT'L INT. (Oct. 22, 2019), <https://nationalinterest.org/blog/buzz/why-russias-nuclear-powered-skyfall-missile-bad-news-90116>.

138. *Vladimir Putin: Russia Has Edge in New Weapons*, POLITICO (Dec. 24, 2019, 8:13 PM), <https://www.politico.com/news/2019/12/24/vladimir-putin-russia-weapons-089713>; Joseph Trevithick, *Here's the Six Super Weapons Putin Unveiled During Fiery Address*, DRIVE (Mar. 1, 2018), <https://www.thedrive.com/the-war-zone/18906/heres-the-six-super-weapons-putin-unveiled-during-fiery-address>.

aircraft carrier battle groups stationed in the eastern Pacific.<sup>139</sup> Russia and China—as well as the United States—are also building up cyber capabilities for use in a possible hybrid war.<sup>140</sup>

Prescinding from the political question whether continued American global military dominance is either desirable or possible, the conclusion is certainly unavoidable that the status quo is being disrupted in ways that could end catastrophically, whether by choice or by inadvertence. Again, what we encounter—whether we talk about the fragile health of the global hegemon, or the shattering of long-standing relationships like that of the United Kingdom and the EU, or the rising disregard for international tribunals, or heightened military instability—is the emergence of a more fragmented world, a world that no longer looks like the inviting, converging global condominium theorists and politicians alike imagined it to be a mere three decades ago.

#### IV. THE CONTRIBUTORS

##### A. Raj Bhala

And this brings us to the articles that make up this symposium. Each of the authors has sought to address some aspect of the tripartite theme that was set for them: sovereignty, globalism, and fragmentation. Raj Bhala is among the most prolific of international law scholars in the United States. He is a member of the Council on Foreign Relations and has written extensively in the area of international trade.<sup>141</sup> A convert to Catholicism and a member of the Fellowship of Catholic Scholars, he has also written on Is-

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139. Bill Powell, *China's Hypersonic Missiles, aka "Carrier Killers," Are a "Holy S\*\*t Moment" for US Military*, NEWSWEEK (Oct. 3, 2019, 8:33 AM), <https://www.newsweek.com/chinas-hypersonic-missiles-aka-carrier-killers-are-holy-st-moment-us-military-1462794>.

140. Sue Halpern, *How Cyber Weapons Are Changing the Landscape of Modern Warfare*, NEW YORKER (July 18, 2019), <https://www.newyorker.com/tech/annals-of-technology/how-cyber-weapons-are-changing-the-landscape-of-modern-warfare>; Cynthia Brumfield, *Russia's Sandworm Hacking Group Heralds New Era of Cyber Warfare*, CSO (Nov. 22, 2019, 8:07 AM), <https://www.csoonline.com/article/3455172/russias-sandworm-hacking-group-heralds-new-era-of-cyber-warfare.html>; Michael J. Mazarr et al., *The Emerging Risk of Virtual Society Warfare*, RAND CORP. (Oct. 9, 2019), [https://www.rand.org/pubs/research\\_reports/RR2714.html](https://www.rand.org/pubs/research_reports/RR2714.html); David E. Sanger & Nicole Perloth, *U.S. Escalates Attacks on Russia's Power Grid*, N.Y. TIMES (June 15, 2019), <https://www.nytimes.com/2019/06/15/us/politics/trump-cyber-russia-grid.html>; Maria Ellers, *How America's Cyber Strategy Could Create an International Incident*, NAT'L INT. (Oct. 23, 2019), <https://nationalinterest.org/blog/skeptics/how-americas-cyber-strategy-could-create-international-crisis-90526>; Lyu Jinghua, *What Are China's Cyber Capabilities and Intentions?*, CARNEGIE ENDOWMENT FOR WORLD PEACE (Apr. 1, 2019), <https://carnegieendowment.org/2019/04/01/what-are-china-s-cyber-capabilities-and-intentions-pub-78734>.

141. RAJ BHALA, INTERNATIONAL TRADE LAW: A COMPREHENSIVE TEXTBOOK (5th ed. 2019).



lamic law<sup>142</sup> and maintains a steady commentary on legal developments in India.<sup>143</sup>

At one level, Bhala's article is concerned with curricular reform.<sup>144</sup> If we teach international law, or work within the field, we should want the next generation of scholars and practitioners to be the best possible. And that means that we must use tools that address the major problems confronting the field today.

For Bhala, there is no greater threat confronting the world order than the rise of nationalism.<sup>145</sup> Nationalism poses a threat not only to international law but also to world order. Indeed, if we look around, we can see its poisoned fruit in many places. Victor Orban's appeals to nationalist impulses are notorious. Under his rule, Hungarians have grown intolerant of Muslims, Jews, and Roma.<sup>146</sup> Narendra Modi, the Indian prime minister, is another example of toxic nationalism. Modi has both exploited and aroused Hindu nationalism and directed it against the Muslim Indian minority in some despicable ways.<sup>147</sup>

Nationalism, Bhala asserts, is the product of "ignorance" and "prejudice."<sup>148</sup> One might add that it grows in a climate of parochialism and provincialism and that it leads to narrow-mindedness: without knowing why, the provincial person rejects the foreign, the strange, the other. On the other hand, Bhala distinguishes nationalism from patriotism.<sup>149</sup> Patriots love their country, but they are not uncritical of it. They are self-aware, they are alert to their prejudices and blind spots, and they work to remedy them.

How then do we educate to safeguard against the threat of nationalism? How do we inculcate authentic patriotism? Bhala begins his response by looking to religious faith, specifically his own deeply felt Catholic

142. RAJ BHALA, *UNDERSTANDING ISLAMIC LAW (SHARI'A)* (2011).

143. See, e.g., Raj Bhala, *Reserve Bank of India*, in *RESEARCH HANDBOOK ON CENTRAL BANKING* 68, 68–93 (Peter Conti-Brown & Rosa Maria Lastra eds., 2018); Raj Bhala, *India at 71: Can India Fill a China Trade Gap?*, *BLOOMBERG QUINT* (Aug. 13, 2018, 3:58 PM), <https://www.bloomberquint.com/opinion/india-at-71-can-india-fill-a-china-trade-gap>.

144. Raj Bhala, *Combating Nationalism by Applying Catholic Teaching and Studying Iran's Constitution*, 17 *U. ST. THOMAS L.J.* 521–610 (2020).

145. *Id.* at 526–31.

146. Dorothy Manevich, *Hungarians Share Europeans' Embrace of Democratic Principles but Are Less Tolerant of Refugees, Minorities*, *PEW RSCH. CTR.* (Sept. 30, 2016), <https://www.pewresearch.org/fact-tank/2016/09/30/hungarians-share-europes-embrace-of-democratic-principles-but-are-less-tolerant-of-refugees-minorities>; William Echikson, *Victor Orbán's Anti-Semitism Problem*, *POLITICO* (May 13, 2019, 4:00 PM), <https://www.politico.eu/article/viktor-orban-anti-semitism-problem-hungary-jews>.

147. See THOMAS A. HOWARD, *Hindu Nationalism Against Religious Pluralism: Or, the Sacralization of Religious Identity and Its Discontents in Present-Day India*, in *FAITH IN A PLURALIST AGE* 62, 62–78 (Kaye V. Cook ed., 2018); Azeem Ibrahim, *Modi's Slide Toward Autocracy*, *FOREIGN POL'Y* (July 13, 2020, 12:11 PM), <https://foreignpolicy.com/2020/07/13/modi-india-hindutva-hindu-nationalism-autocracy>.

148. Bhala, *supra* note 144, at 524.

149. *Id.* at 524–25.

faith.<sup>150</sup> Patriotism, Bhala continues, is consistent with the revealed truth of religion, although nationalism is not. Thus, he reflected on the story of the Three Wise Men—in fact, the Gospel of Matthew is silent as to their number—as a story of transcendence of boundaries.<sup>151</sup> In tradition, the Three Wise Men were representatives of far-flung nations and cultures who joined together to give homage to a Jewish baby born in poverty and obscurity. Cooperation, synthesis, difference subsisting within a larger architectonic whole—this is how Bhala reads the passage.<sup>152</sup>

And Bhala's reading of the Three Wise Men becomes a key for appreciating the whole of his contribution. He uses it to answer the question of how we transcend the narrowness of our horizons.<sup>153</sup> After all, even the most well-traveled human being has only just glimpsed the smallest part of the world's richness and variety. Like the Wise Men, we must be prepared to leave behind the familiar and respond imaginatively and sympathetically to the larger world around us. The Wise Men, after all, according to tradition, hailed from different corners of the world—from Persia, from Arabia, and from Turkestan—but they journeyed together, cooperatively seeking a larger synthetic vision of God and humankind.

Still relying on Catholic social thought, Bhala makes plain that the patriot is the one who seeks to achieve this synthesis in her own life. She knows that she must reach beyond narrow boundaries to rescue and welcome refugees, to love the immigrants and the new arrivals, always knowing that every person is worthy of respect because every person is “a unique, unrepeatable, and priceless creature created in the image and likeness of God.”<sup>154</sup>

If this is how Catholic social thought teaches us to act, Bhala stresses, it also informs us on what must be avoided. Nationalism—with its partiality, its line drawing, its hatred of those outside the tribe, its suspicion of strange folkways and distant customs—is (not to put too fine a point on it) sinful. It is the repudiation of the authentically religious experience reflected in the universal vision of the Wise Men.<sup>155</sup>

Returning to the topic of curricular reform, Bhala makes the point that Catholic social thought should be, for the professor if not necessarily for the student, a wellspring of empathy. It gives the professor the tools to imaginatively place herself in another person's context and to feel and think with that individual.<sup>156</sup>

150. *Id.* at 526–31.

151. *Matthew* 2:1–12.

152. Bhala, *supra* note 144, at 526–27.

153. *Id.* at 527.

154. Bhala, *supra* note 144, at 530.

155. *Id.* at 530.

156. *Id.* at 531.

Much of the remainder of Bhala's article is taken up with an exercise in empathy. Indeed, he proposes an empathetic reading of the Iranian constitution. He acknowledges at the outset that Iran represents a threat to global peace. He knows better than to apologize for the Iranian political order. He will not excuse Iranian misdeeds. But he wants to investigate the Iranian constitution for what it can tell us about a social and political order that is very different from ours: How are rights and duties allocated? How is the government structured? He acknowledges the temptation to read the Iranian constitution cynically, as justification for expansionist policies in the Middle East and beyond, but he counsels that we should move beyond well-known hostilities and look at it like genuinely curious external observers. What he wants to do, in other words, is to "see America through official Iranian eyes."<sup>157</sup>

Bhala's review of the Iranian constitution and the value system it reflects and embodies is deep and thorough. Thus, following a clear-eyed analysis of the Constitution's preamble, Bhala suggests points that might be developed in a proposed curricular reform. One might emphasize and distinguish the place of Shari'a law in the Constitution with the enlightenment values embodied in our own constitutional tradition. One might inspect the document for the ways Islam and Islamic values pervade the text. One might look at Iranian governing structures—the Guardian Council, the place and position of Islamic jurists—for evidence of the way a concern for doctrinal consistency informs the government's official words and deeds. Bhala's analysis is a masterpiece—in its detail, in its command of the subject, and in the way it demonstrates to the law professor ways in which a very different worldview might be incorporated within classroom presentation. "Empathy," Bhala concludes, "is vital in this pedagogical process."<sup>158</sup> And Bhala's own empathetic presentation of his subject matter is a master class in how it might be achieved.

### B. *Jeremy Rabkin*

Jeremy Rabkin is a professor of law at the Scalia Law School at George Mason University. Prior to his appointment at George Mason, he taught for many years at Cornell University in the Politics Department. He came eminently well qualified for our symposium. He has thought deeply on questions of sovereignty and international relations for more than two decades. In *Why Sovereignty Matters*,<sup>159</sup> he states the case for viewing the Constitution as an important safeguard against the imposition of extra-constitutional international standards on the United States. To be sure, Rabkin is no Henry Cabot Lodge. He is a committed internationalist. But America's

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157. *Id.* at 537.

158. *Id.* at 609.

159. JEREMY RABKIN, *WHY SOVEREIGNTY MATTERS* (1998).

international commitments, Rabkin insists, must always conform to constitutional principle.<sup>160</sup>

These are themes that Rabkin further develops in two subsequent books. In *The Case for Sovereignty*,<sup>161</sup> Rabkin explains that sovereignty is not about the exercise of unlimited or capricious power. Rather “[i]t [is] precisely about the control of force.”<sup>162</sup> In other words, sovereignty functions as a necessary attribute for the rule of law and constitutional order. And in *Law without Nations*,<sup>163</sup> Rabkin synthesizes his earlier work to argue that ideals like democratic governance and self-rule can be realized only within sovereign states and to assert further that under the theories of global governance then in vogue it is difficult to identify where precisely responsibility rested for any particular administrative decision.<sup>164</sup>

Rabkin’s contribution to this symposium adapts his insights to explore the relationship of sovereignty and nationalism.<sup>165</sup> These two ideas are often conflated, but Rabkin insists that they be kept separate and distinct. Sovereignty is essentially a legal concept. Its origins are traceable to the late sixteenth and seventeenth centuries, as the indeterminate political structures of the middle ages yielded to the more sharply defined principalities and states that followed the Lutheran Reformation and the challenge that represented to European unity. Sovereignty, as a legal concept, has been the subject of theorizing by generations of scholars—Jean Bodin and Thomas Hobbes, of course, but also the great international jurists, like Hugo Grotius and Samuel Pufendorf.<sup>166</sup>

Nationalism, on the other hand, is a nineteenth-century movement. Where sovereignty, as Rabkin describes it, was a product of keen legal theorizing, nationalism was an emotion, a passion, something that arose from the heart.<sup>167</sup> Rabkin points out that while many scholars of the past wrote on sovereignty, there were very few who defended nationalism as a concept.<sup>168</sup> Indeed, Rabkin might have added that nationalism received its highest expression not in scholarship but in music. The great nationalists of the nineteenth century were the composers. One thinks of Bedrich Smetana (1824–1884) and *Má Vlast*; Giuseppe Verdi (1813–1901) and *Nabucco*; and

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160. *Id.* at 12–14; *cf.* *Reid v. Covert*, 354 U.S. 1 (1957) (a case whose language Rabkin borrows from to state his case for strong constitutional safeguards).

161. JEREMY RABKIN, *THE CASE FOR SOVEREIGNTY: WHY THE WORLD SHOULD WELCOME AMERICAN INDEPENDENCE* (2004).

162. *Id.* at 14.

163. JEREMY RABKIN, *LAW WITHOUT NATIONS?: WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* (2007).

164. *Id.* at 18–44.

165. Jeremy Rabkin, *Sovereignty as a Brake on Nationalism*, 17 U. ST. THOMAS L.J. 611–624 (2020).

166. *Id.* at 612.

167. *Id.* at 616.

168. *Id.* at 616–17.

Ignacz Paderewski (1860–1941) and his Symphony in B Minor (the *Polonia*).

In the modern world, however, since World War II, Rabkin asserts, sovereignty and nationalism unavoidably intersect. And in that intersection, the hope is that sovereignty plays “an inherently moderating force.”<sup>169</sup> Indeed, a well-constructed sovereign power might be able to transcend tribal passions pulsing within the political community and ensure that even states with multiple and different partisan groups or ethnic minorities might work not to the advantage of one or another group but to the common good of all concerned.

### C. David Sloss

David Sloss is the John A. and Elizabeth H. Sutro Professor of Law at Santa Clara University. He is the author and editor of several important works of international law. In the *Role of Domestic Courts in Treaty Enforcement*, Sloss assembled a team of scholars to engage in a comparative study of the role courts play in protecting the rights of citizens under treaties to which their home nations are parties.<sup>170</sup> Twelve nations, representing a broad cross section of international development and experience, were surveyed, among them states like Canada, Germany, South Africa, India, and Israel. Sloss and his collaborators determined that among the nations surveyed, the United States stands out as the only nation whose courts have declined to follow international trends in favor of more robust treaty enforcement.<sup>171</sup>

In *International Law in the U.S. Supreme Court*, Sloss and his coeditors produced a remarkably strong and thorough collection of studies examining the question of the court and international law—public and private, treaty-based and customary—from the Founding to the present.<sup>172</sup> In *The Death of Treaty Supremacy*, Sloss looks at a major, but little noticed, shift in Supreme Court practice, that is, its refusal in the years after World War II to require states to enforce treaty obligations solemnly undertaken by the United States. He traces this refusal to the reluctance, on the part of a virtually all-white federal judiciary, to use the Charter of the United Nations and other broad commitments to human rights as a device for overturning racially discriminatory state laws.<sup>173</sup>

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169. *Id.* at 622.

170. *THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY* (David L. Sloss et al. eds., 2009).

171. *Id.*

172. *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* (David L. Sloss et al. eds., 2011).

173. DAVID L. SLOSS, *THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE* (2016).

David Sloss's contribution to the symposium is tightly reasoned and compact, but it nevertheless contains much valuable insight. He begins with a jurisprudential insight. There are those who view law—its interpretation and application—as a self-contained process.<sup>174</sup> Thus, one finds a lawgiver who promulgates the law and courts that interpret and construe those texts in a self-referential process. What are the words of the text? What are their meanings? How do they fit the case at hand? Self-contained. Narrow and precise. Faithful to the rule of law.<sup>175</sup>

This is the logic of a school of thought Sloss labels “sovereigntist.”<sup>176</sup> A paradigm sovereigntist opinion is Antonin Scalia's dissent in *Atkins v. Virginia*.<sup>177</sup> On Scalia's model, the law of the nation-state is whole and self-contained. To introduce norms drawn from external sources is more than wrong, it is an offense against sovereignty and democratic order since the American people have never consented to be governed by foreign law.

Sloss proposes that the sovereigntist model is flawed because it does not fit what courts actually do. In his words, it is “descriptively inaccurate.”<sup>178</sup> Sloss challenges the sovereigntist position in three different ways. First, he looks to the practice of other nations. What he finds are states that are continually revisiting and revising their written constitutions. And in so doing, they do not act in isolation from the world. Rather, there exists a body of experts who work with nongovernmental organizations, political parties, and government agencies, who stand ready to give guidance. “Transnational norm entrepreneurs,” Sloss calls them at one point.<sup>179</sup> What we see at the level of international constitutional development, in other words, is an ongoing process of borrowing, adapting, and cross-fertilization.

Second, American courts have resisted this practice, especially since the Second World War.<sup>180</sup> The judiciary—following public opinion—feared that by opening the door to international norms, documents like the United Nations Charter might supplant American law. This fear was especially acute—Sloss summarizes the argument he makes at greater length in *The Death of Treaty Supremacy*—on the subject of racial discrimination and segregation.<sup>181</sup> A virtually all-white judiciary was not prepared to use the law of the United Nations to overturn Jim Crow and the many racist principles embedded within American law.<sup>182</sup>

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174. David L. Sloss, *Sovereignty and National Constitutions*, 17 U. ST. THOMAS L.J. 625–40 (2020).

175. *Id.* at 625.

176. *Id.*

177. *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting).

178. Sloss, *supra* note 174, at 625.

179. *Id.* at 626.

180. *Id.* at 636.

181. *Id.* at 636–37.

182. *Id.* at 637.

Third, even though the American courts eschewed overt reliance on foreign constitutional principles, transnational ideals have nevertheless influenced the course of legal development. We “should not confuse lack of citation for lack of influence,” Sloss writes.<sup>183</sup> Between 1948 and 1976, the Supreme Court “federalized human rights through a process of silent incorporation.”<sup>184</sup> Transnational norms have thus prevailed in many ways, Sloss concludes, even if the court made sure to leave no fingerprints.<sup>185</sup>

*D. Michael O’Sullivan*

Michael O’Sullivan is a native of Ireland who has been trained in both political theory and international finance. He has kept a foot in both worlds, serving variously as a professor at Princeton University and as an advisor and strategist at UBS and at Credit Suisse. His book *The Levelling: What’s Next after Globalization* represents a masterful synthesis of these disciplines, as O’Sullivan seeks to discern the future.<sup>186</sup> Globalization is dead, he boldly announces, and the world that comes after will be multipolar, featuring competing approaches to governance. Some nations, he suggests, will retain, or develop, democratic institutions, but these nations will face stiff competition from less-open alternatives, with top-down administrative structures.<sup>187</sup>

In his contribution to this journal, O’Sullivan expands on the thesis he has articulated in *The Levelling*. Globalization is over. If 1991 marked its hopeful beginning—that was the year the Soviet Union dissolved and markets opened worldwide—then the COVID summer of 2020 marks its death.<sup>188</sup>

To be sure, O’Sullivan knows better than to say that COVID actually killed globalization. Rather, his point might be explained by an analogy. It is now commonplace among economic historians to assert that the stock market Crash of late October 1929 was not the cause of the Great Depression. The economy had been stalling for months, the debts of the 1920s had come due, and the Crash was more symptom, or correlation, than cause. To be sure, however, the Crash was an accelerant. It made matters inestimably worse.

And that is O’Sullivan’s point about COVID. COVID is likely to “hasten our path down the road toward a multipolar world.”<sup>189</sup> For sure, O’Sullivan is not utopian in his thinking, but neither is he dystopian. The

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183. *Id.* at 638.

184. Sloss, *supra* note 174, at 640.

185. *Id.* at 640.

186. MICHAEL O’SULLIVAN, *THE LEVELLING: WHAT’S NEXT AFTER GLOBALIZATION* (2019).

187. *Id.*

188. Michael O’Sullivan, *Globalization Dies and Gives Way to a Multipolar World Order*, 17 U. ST. THOMAS L.J. 641–48 (2020).

189. O’Sullivan, *supra* note 186, at 645.

road ahead, he acknowledges, is likely to offer a bumpy ride. Not only COVID but also climate change and a host of intractable problems await on the other side. A multipolar world may not be a stable place. Instead of broadly tolerant liberal states we may see—indeed we are already witnessing—the emergence of so-called civilizational states, such as China, Russia, and India, that look to history, tradition, language, and all the shared markers of a common cultural identity as the glue that binds society together.<sup>190</sup> Little room exists there for outsiders. Just ask the Uighurs of Xinjiang province.<sup>191</sup> But O’Sullivan nevertheless comes across as an optimist. Yes, COVID is “an appalling humanitarian crisis,” but humankind has seen worse and emerged stronger for it.<sup>192</sup>

### E. Paul B. Stephan

Paul B. Stephan is the John C. Jeffries Distinguished Professor of Law at the University of Virginia. Over the course of four decades, he has written widely on many legal topics. There were his early works on the law of taxation<sup>193</sup> and his contributions first to an understanding of Soviet law and now more recently on Russian law.<sup>194</sup> And then there is the body of work he has produced in international law. Thus, he is the reporter for the *Restatement (Fourth) of the Foreign Relations Law of the United States*.<sup>195</sup> Finally, he is the editor and author of numerous books on the law of international trade.<sup>196</sup>

Paul Stephan’s contribution to this symposium is divided into three sections, the first of which is entitled “Rethinking Sovereignty.”<sup>197</sup> That

190. Amitav Acharya, *The Myth of the “Civilization State”: Rising Powers and the Cultural Challenge to World Order*, 34 ETHICS & INTERNAT’L AFFS. 139–56 (2020); Aris Roussinos, *The Irresistible Rise of the Civilisation-State*, UNHERD (Aug. 6, 2020), <https://unherd.com/2020/08/the-irresistible-rise-of-the-civilisation-state>; Adrian Papst, *China, Russia, and the Return of the Civilizational State*, NEW STATESMAN (May 8, 2019), <https://www.newstatesman.com/2019/05/china-russia-and-return-civilisational-state>.

191. Lindsay Maizland, *China’s Repression of Uighurs in Xinjiang*, COUNCIL ON FOREIGN RELS. (June 30, 2020), <https://www.cfr.org/background/chinas-repression-uighurs-xinjiang>; Christian Shepherd, *Fear and Oppression in Xinjiang: China’s War on Uighur Culture*, FIN. TIMES (Sept. 11, 2019), <https://www.ft.com/content/48508182-d426-11e9-8367-807ebd53ab77>.

192. O’Sullivan, *supra* note 188, at 648.

193. See, e.g., Paul B. Stephan III, *Nontaxpayer Litigation of Income Tax Disputes*, 3 YALE L. & POL’Y REV. 73 (1984); Paul B. Stephan III, *Bob Jones University v. United States: Public Policy in Search of Tax Policy*, 1983 SUP. CT. REV. 33 (1983).

194. See, e.g., Paul B. Stephan III, *The Restructuring of Soviet Commercial Law and Its Impact on International Business Transactions*, 24 GEO. WASH. J. INT’L L. & ECON. 89 (1990); Paul B. Stephan III, *Labor Law in Russia—The Hopes and Fears of Post-Soviet Workers*, 32 VA. J. INT’L L. 789 (1992).

195. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW (2018).

196. See, e.g., PAUL B. STEPHAN, INTERNATIONAL TRADE AND INVESTMENT (2011); PAUL B. STEPHAN & ROBERT E. SCOTT, THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW (2006).

197. Paul B. Stephan, *Sovereignty and the World Economy*, 17 U. St. Thomas L.J. 651–54 (2020).



section is further divisible into three core insights. First, Stephan asserts that sovereignty must not be seen as some mystical, indivisible singularity as Bodin and his followers conceived of it. On the contrary, sovereignty must be seen as a relationship. Sovereignty might rely on force, but it must also have recourse to persuasion. It must, after all, be accepted by the governed, and that means the sovereign must work hard to earn and keep the people's loyalty.<sup>198</sup> (It should be added that there are affinities between Stephan's conception of sovereignty and that of the post-World War I jurist Léon Duguit, who emphasized that sovereignty depends for its efficacy on social interdependence and public service. The state that fails to render service to its constituents is the state that will soon lose its legitimacy.)<sup>199</sup>

Second, since sovereignty is relational, it does not require for its existence a modern conception of the nation-state.<sup>200</sup> Indeed, many forms of premodern social organizations exercised sovereign power in ways that do not correspond to the modern nation-state but that we would nevertheless agree are real. And, since this is the case—Stephan is led to his third insight—there are nonstate entities today that similarly enjoy sovereign authority.<sup>201</sup> For an example, Stephan points in particular to a concept he labels “international sovereignty.”<sup>202</sup> International sovereignty consists of established norms and ways of doing business (for example, the doctrine of *jus cogens*) and formal structures and institutions (for example, the United Nations or the WTO).<sup>203</sup>

In his article's second section, Stephan shifts tack to address the knowledge economy and the political economy of the world.<sup>204</sup> Here, again, there are three core insights. Stephan begins with the “knowledge worker.”<sup>205</sup> His paradigm of the knowledge worker is the highly compensated technology engineer (think, for example, a search-engine designer for Google) or the well-situated transactional lawyer (think a member of a major New York or London firm, tasked with developing ever more effective forms of financial assets).<sup>206</sup>

These knowledge workers tend to reside in close proximity to one another in one or another of those emerging world cities—San Francisco, say, or New York, or London, or Singapore. And to meet their daily needs, they increasingly depend on poorly compensated pools of workers who fill roles from nannies, to cooks, to Uber or Lyft drivers. As shorthand, Stephan la-

198. *Id.* at 651–52.

199. See DUGUIT, *supra* note 26; Martin Loughlin, *The Functionalist Style in Public Law*, 55 U. TORONTO L.J. 361 (2005).

200. Stephan, *supra* note 197, at 654.

201. *Id.* at 654.

202. *Id.* at 662–63.

203. *Id.* at 665–69.

204. *Id.* at 654.

205. *Id.* at 657.

206. Stephan, *supra* note 197, at 658.

bels these two groups *über* and *unter*. The new urban proletariat, furthermore, is often distinguishable by being recent immigrants.<sup>207</sup>

But there is a third group of workers that Stephan also takes account of, which he labels “the dispossessed.”<sup>208</sup> The dispossessed might be former industrial workers or their children. They live in the forgotten parts of the nation—America’s so-called Rust Belt, for instance, or those parts of the United Kingdom that voted heavily for Brexit. They lack the resources to make the move to one of the world cities. They earn a living that is less than their ancestors’ and lead lives that are disrespected by the elites. They have, furthermore, come to resent their diminished place in the American (or British, or French) economic order.<sup>209</sup>

In his third section, entitled “Different Sovereignties in the World: Cooperation and Conflict,” Stephan ties together the seemingly disparate arguments he made in the first two sections of his article.<sup>210</sup> There is probably no more visible, tangible expression of “international sovereignty” in today’s world than international trade. Consisting of trade agreements among nations, contracts among multinational corporations, and a thousand different arrangements among elite power brokers, international trade is what has attracted the anger of the dispossessed.<sup>211</sup>

Stephan is at his most perceptive in discussing the economic plight of the dispossessed.<sup>212</sup> For cultural reasons, as well as for reasons of racial grievance and its exploitation by powerful political players, the dispossessed of the heartland have been unable to make common cause with the urban proletariat. But the dispossessed have been able at least to acquire sufficient political power to checkmate and stymie movement in the direction of greater trade liberalization. Donald Trump was attempting to satisfy precisely this constituency when he brought the Appellate Body of the WTO to a full stop. Stephan himself is uncertain how all of this ends and presents a range of possibilities, ranging from “doomsday,” to “utopia,” to “muddling through.”<sup>213</sup> My own guess—we muddle.

#### F. Itai Apter

There is a natural transition between Paul Stephan and Itai Apter. Apter is an Israeli scholar, affiliated with the University of Haifa and the Israeli Ministry of Justice, and he has chosen to write on the relationship of international trade and social mobility. If there is a rising urban proletariat and a deeply alienated class of the “dispossessed,” as Stephan convincingly

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207. *Id.* at 658.

208. *Id.* at 659.

209. *Id.* at 660.

210. *Id.* at 661–72.

211. *Id.* at 664.

212. Stephan, *supra* note 197, at 659.

213. *Id.* at 672.

demonstrates, then, Apter asks, what can international law, in particular international trade law, do to remedy this crisis?<sup>214</sup>

Apter begins with the assumption—justifiable empirically—that the lack of social mobility has become a crisis not only within the United States but in many other nations.<sup>215</sup> As the world has become less equal, it has also become more stratified, as those with resources crowd out those who lack the means of social ascent.<sup>216</sup>

Apter proposes to remedy this precise problem. When he speaks of social mobility, he does not have in mind equality of results. Rather, he states the case for a robust, meaningful equality of opportunity. Housing, health care, education, the chance to meet and mingle among those who have the connections to help one advance in the world—these are among the key elements that constitute Apter’s understanding of equality of opportunity.<sup>217</sup>

Apter’s argument is divisible into three main themes. First, he means to state a philosophical and jurisprudential case for social mobility as a value that should be the concern of international law.<sup>218</sup> Particularly important to his case is the work of Ayelet Shachar of the University of Toronto School of Law. There is something, Shachar asserts, arbitrary and capricious about the relationship of the accident of birth and the opportunities (or lack of opportunities) that that primordial accident presents for the whole of one’s life. As Shachar writes: “Access to affluent polities in our unequal world is still reserved primarily to those born in a particular territory or to a particular ancestry while at the same time shutting out everyone else born on the wrong side of the border of security and prosperity.”<sup>219</sup>

Apter bolsters his philosophical case for enhancing social mobility with a number of supporting arguments. Indeed, the philosophical tradition provides Apter with a whole arsenal of justifications. Ancient Aristotelian principles of distributive justice can be invoked to support a global program aimed at improving social mobility, as could principles of corrective justice. One might also consult Jeremy Bentham and the utilitarian tradition for further support. It seems obvious that it is in the interest of the greatest number to see all the members of society thriving, attaining their potential, and contributing to the flourishing of the community.

Apter then turns to the means by which social mobility might be inscribed into law. One method he proposes is a conscious commitment on

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214. Itai Apter, *Utilizing International Law to Move the Jeffersons On Up to the East Side—Exploring the Potential of International Law to Support Domestic Social Mobility*, 17 U. St. Thomas L.J. 679–706 (2020).

215. *Id.* at 679.

216. *Id.*

217. *Id.* at 683.

218. *Id.* at 681.

219. AYELET SHACHAR, *Preface to THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY*, at 000 (2009).

the part of states, when entering or renewing free trade agreements, to oblige themselves to improve social mobility. Indeed, Apter suggests that where great disparities exist among states, subsidies (which he calls “incentive mechanisms”) might be made available to ensure that the “losers” of the birthright lottery might still attain the promise of a better life.<sup>220</sup>

In addition to the “hard” commitments of free trade agreements, Apter also proposes recourse to “soft law”—that indeterminate body of principles to which “good” states ascribe.<sup>221</sup> States, Apter suggests, might commit to tracking social mobility within their territories. Global monitoring organizations—what Apter calls “international, intergovernmental organizations”—might collate the data.<sup>222</sup> And in a process of naming and shaming, states that fail in their commitments might be identified and so suffer reputational harm.<sup>223</sup>

Third, Apter turns to the body of international human-rights law as a final buttress for his case. Human-rights law has long been committed to the ideal of “equality.” But the term “equality” always prompts the question “equal as to what?” Apter hopes to answer that question by reading into the law of human rights a guarantee that all persons should have at least approximately similar chances at social advancement.<sup>224</sup>

One possibility Apter explores is the Sustainable Development Goals to which the United Nations’ General Assembly committed itself in 2015. Apter knows that General Assembly resolutions do not carry the force of binding international law. Still, such a proposal falls beneath the rubric of “soft law” and could constitute grounds for the eventual development of customary international law.<sup>225</sup>

In conclusion, Apter notes that states have an interest in promoting social mobility. He acknowledges—in common with Stephan—that there are large and growing bodies of citizens within states who feel isolated and alienated from the affluent parts of their own political communities and who have accordingly turned to nationalist or populist political alternatives that have as their common denominator opposition to international trade and greater engagement with the world.<sup>226</sup>

There is the widespread perception, Apter concedes, that international trade is “anathema to social mobility.”<sup>227</sup> He is certainly correct on this point. As we have noted above, “efficiency” remains a kind of foundational norm for international trade. And while international tribunals have occa-

220. Apter, *supra* note 214, at 694.

221. *Id.* at 695. For a working definition of “soft law,” see Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 174–75 (2010).

222. Apter, *supra* note 214, at 696.

223. *Id.*

224. *Id.* at 700.

225. *Id.* at 701.

226. *Id.* at 702.

227. *Id.* at 704.

sionally read into the law of international trade principles drawn from other areas of law—consider, for example, the importance of environmental law in the *Shrimp/Turtle* case—economic interests, narrowly construed, still dominate the field.<sup>228</sup> With this in mind, we must applaud Apter. He is making a set of truly breathtaking claims. There is a radical edge to Apter's work, which he wisely camouflages, but which is nevertheless visible. And that is that the law of international trade should be put to the task of achieving affirmative, substantive goals for the betterment of humankind.<sup>229</sup> It is, furthermore, vital that the world community take his arguments seriously. Inequalities of wealth, race, and class are perhaps the most stubborn obstacles standing in the way of social development. Itai Apter has provocatively proposed ways of mitigating and even, perhaps, reversing this lamentable, dangerous, destabilizing fact of life.

### G. *Henry Carey and Stacey Mitchell*

Henry Carey and Stacey Mitchell, finally, have written an important retrospective on the work of the Princeton University international lawyer Richard A. Falk. A few words first about Falk and then about our contributors. I became acquainted with Richard Falk's work for the first time in 1974, when I was an undergraduate student at the University of Wisconsin–Milwaukee. Falk had been called to give expert testimony at the sentencing of Karl Armstrong, who had been found guilty of bombing the Army Mathematics Research Center on the University of Wisconsin–Madison campus.

Falk testified that the sentencing judge should take into account Armstrong's claim to have been acting under the Nuremberg principles. In 1970, the year the bombing occurred, the Vietnam War had metastasized into a great evil, consuming hundreds of thousands of (mostly Vietnamese) lives in an unworthy cause. Armstrong's claim was that resistance in the face of evil, even violent resistance, was justified.

By the time Falk testified, Armstrong had already accepted a plea bargain. He served about seven years in prison. At the sentencing hearing, Falk supported Armstrong's contention. "To stop the commission of great crimes," Falk testified, "one may have to commit lesser crimes. What is illegal or criminal has to be understood in the context of the larger notion of

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228. Appellate Body Report, *US—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998); cf. Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for Trade and Environmental Debate*, 27 COLUM. J. ENV'T L. 489, 505–08 (2002); Darren Hudson et al., *Environmental Regulation Through Trade: The Case of Shrimp*, 68 J. ENV'T MGMT. 231, 232 (2003).

229. Apter, *supra* note 214, at 706.

the illegality and criminality of war.”<sup>230</sup> At our historical distance, it is difficult to know what effect Falk’s testimony had on the sentencing judge.<sup>231</sup>

But Falk’s testimony had a profound effect on me. I remember thinking that, yes, Armstrong was certainly guilty. Falk had admitted as much. And certainly, Armstrong deserved punishment. But I also remember thinking that even the guilty—especially the guilty—deserve zealous representation and that Falk had nobly fulfilled that obligation. He was a lawyer who put his own reputation on the line in defending an unpopular defendant while raising an unpopular but necessary defense. As a twenty-year-old undergraduate, I was impressed with this example of courageous lawyering, and I remain moved by it today.

Indeed, Richard Falk is one of the giants in the field of international law. At ninety years old, his career spans more than sixty years. He remains active today. A professor at Princeton University (and more recently at the University of California–Santa Barbara), he counts among his former students a wide array of America’s foreign policy elite. Robert Mueller, the former FBI director and special prosecutor, was a student of Falk’s.<sup>232</sup> So also was General David Petraeus.<sup>233</sup> Falk, plainly, is broadly ecumenical in the students he accepts and tutors.

Reviewing Falk’s contributions to international law are Henry Carey and Stacey Mitchell. Professor Carey has written widely on themes such as the role of nongovernmental organizations in “peace-building,”<sup>234</sup> the transnational prevalence and reform of torture as an instrument of interrogation and terror,<sup>235</sup> the plight of the island nation of Haiti,<sup>236</sup> and the condition of the eastern European state of Romania.<sup>237</sup> Professor Mitchell, for her part, is an assistant professor at the Perimeter College campus of Georgia State

230. *The Struggle Against Army Math*, 6 SCI. FOR PEOPLE 24, 26 (1974).

231. For a history of these events, see RONALD CHRISTENSON, *POLITICAL TRIALS: GORDIAN KNOTS IN THE LAW* 149–63 (2nd ed. 1999); STEFAN ANDERSSON, *REVISITING THE VIETNAM WAR AND INTERNATIONAL LAW: VIEWS AND INTERPRETATIONS OF RICHARD FALK* 287–99 (Richard Falk ed., 2018).

232. Richard Falk, *I Was Robert Mueller’s Undergraduate Thesis Adviser—and What He Wrote Gives Some Hints About What He’ll Do as Special Counsel*, NATION (July 13, 2018), <https://www.thenation.com/article/archive/robert-muellers-undergraduate-thesis-adviser-wrote-gives-hints-hell-special-counsel>.

233. Patrick Lawrence, *A Conversation with Richard Falk, Part 2*, NATION (Jan. 31, 2018), <https://www.thenation.com/article/archive/a-conversation-with-richard-falk-part-2>.

234. HENRY F. CAREY, *PRIVATIZING THE DEMOCRATIC PEACE: POLICY DILEMMAS OF NGO PEACEBUILDING* (2012).

235. HENRY F. CAREY, *REAPING WHAT YOU SOW: A COMPARATIVE EXAMINATION OF TORTURE REFORM IN THE UNITED STATES, FRANCE, ARGENTINA, AND ISRAEL* (2012).

236. See, e.g., Henry F. Carey, *The Third U.S. Intervention and Haiti’s Paramilitary Predicament*, 11 J. HAITIAN STUD. 88 (2005).

237. See, e.g., Henry F. Carey, *Legal Reform in Romania*, 61 NEW ENG. J. HIST. 41 (2004).

University, where she has written on genocide, particularly with respect to the nation of Rwanda.<sup>238</sup>

Regarding the organization they adopt for their article, Carey and Mitchell state that the work of “Richard Falk, the public intellectual, can be divided into five major themes.”<sup>239</sup> The first of these is “Vietnam, International Law, and the World Peace through Law Movement.” In this section, Carey and Mitchell discuss Falk’s contributions to the debate over the Vietnam War, but their analysis ranges beyond this starting point to explore Falk’s reasons for believing that the Iraq and Afghanistan interventions would fail. Like the resistance of the Vietnamese to foreign subjugation, it could have been predicted that American pacification in Iraq and Afghanistan would face steady popular opposition.

Under the title “The Nuclear Order,” Carey and Mitchell examine Falk’s long-standing commitment to denuclearization. Nuclear weapons are both a symbol and a potent source of power sustaining the state-based Westphalian order, and Falk fears that nuclear arms have become so deeply enmeshed with what it means to be a state, or at least a superpower, that a course correction is possible only through catastrophe—say, an exchange of nuclear arms.<sup>240</sup>

Beneath the rubric of “Complementarity,” Carey and Mitchell discuss Falk’s belief that the world order must be “inclusive, not exclusive.”<sup>241</sup> Whatever shape the emerging world order assumes, Falk urges that it not be Western. That would be to privilege one civilization over other civilizations and so violate the principles of inclusivity and complementarity.<sup>242</sup> Western “economistic secularism” is the basis of the present world order, and it has failed—indeed, it has exacerbated “problems of poverty, inequality, [and] conflict.”<sup>243</sup> Carey and Mitchell read Falk as insisting that we must do better.<sup>244</sup>

The section entitled “Environmental Concerns” traces Falk’s long-term dedication to environmental issues.<sup>245</sup> This was a focus of Falk’s work as far back as the 1970s,<sup>246</sup> and it remains a concern today.<sup>247</sup> It is an issue

238. See, e.g., STACEY M. MITCHELL, INSTITUTIONAL LEGACIES, DECISION FRAMES, AND POLITICAL VIOLENCE IN RWANDA AND BURUNDI (2018).

239. Henry F. Carey & Stacey M. Mitchell, *Richard Falk’s Cosmopolitan View of Sovereignty: The Ambition of Necessity to Pursue World Order Through Law*, 17 U. St. Thomas L.J. 711 (2020).

240. *Id.* at 717.

241. *Id.* at 724.

242. *Id.*

243. *Id.* at 726.

244. *Id.*

245. Carey & Mitchell, *supra* note 239, at 727.

246. See, e.g., RICHARD FALK, THIS ENDANGERED PLANET: PROSPECTS AND PROPOSALS FOR HUMAN SURVIVAL (1971).

247. See, e.g., Richard A. Falk, *A Radical World Order Challenge: Addressing Global Climate Change and the Threat of Nuclear Weapons*, 7 GLOBALIZATIONS 137 (2010); Richard A.

that in Falk's eyes challenges the contemporary state-based system of international law. States now act in pursuit of their short-term interests. They jockey for advantage in a competitive world. They seek to maximize their positions vis-à-vis other world actors. Climate change, however, challenges the premises behind these established ways of business as it requires not short-term thinking but far-sighted cooperation.<sup>248</sup>

Finally, Carey and Mitchell address the question of the Palestinian occupation. Richard Falk has been a consistent critic of "the international community[']s" "double standard" on "the Israeli-Palestinian conflict."<sup>249</sup> Falk finds unacceptable a world order that sees Israeli treatment of Palestinians as justified on national "security" grounds, while it condemns Palestinian resistance as "terrorism."<sup>250</sup> If one wanted to, one could draw a line connecting the Richard Falk who defended Karl Armstrong and the Falk who has assertively taken up the Palestinian cause. Falk has never stopped being that lawyer who defends the unpopular cause in the face of entrenched opposition.

One must, however, add three further observations to Carey and Mitchell's article, for it seems to me that it contains three meta-themes that cut across the topics that the authors analyze. First, there is Richard Falk's commitment to a noncoercive international order. He views the present state-based system, grounded on a seventeenth-century compromise, the Peace of Westphalia, as hopelessly out of date. The Westphalian system is predicated on state interests, state power, state authority, and national sovereignty. It submerges—i.e., it makes invisible—the human beings who are the subjects of this system.<sup>251</sup>

Second, Falk would have us build a renewed world order grounded on justice. This is a vision of justice, furthermore, that is not state-centric but rather human-centric. It places the human person at the heart of the international order and dares to imagine the construction of new collaborative, cooperative institutions in place of the failed old order.<sup>252</sup>

Third, Falk is unrelentingly optimistic. He is a believer in humanity and has faith that we can build a better world. And in truth, if one asked him, he might say that we really have no choice. The crises that confront us today—from COVID, to climate change, to a crumbling old order—are so

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Falk, *Apollo's Curse and Climate Change*, GUERNICA (Oct. 4, 2012), <https://www.guernicamag.com/richard-falk-apollos-curse-and-climate-change>; Richard A. Falk, *Climate Change, Policy Knowledge, and the Temporal Imagination*, in REIMAGINING CLIMATE CHANGE 49 (Paul Wapner & Hilal Elver eds., 1st ed. 2016).

248. Carey & Mitchell, *supra* note 239, at 728.

249. *Id.* at 729.

250. *Id.*

251. *Id.* at 733.

252. *Id.*



profound that we must, we simply must, begin building, and we must do so at once.<sup>253</sup>

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253. *Id.*