



# Washington University in St. Louis

## SCHOOL OF LAW

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**Address by Leila Nadya Sadat  
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on the occasion of her Installation as the  
Henry H. Oberschelp Professor of Law**

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

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I am deeply touched by the honor bestowed upon me by the Oberschelp family, by the School of Law, by this great University, and most especially by the gracious introduction and presence of Justice Richard Goldstone, whose entire life and work stand as a testament to the importance of justice and the rule of law, and whose contribution to international criminal justice simply cannot be overstated. My thanks to the many students who have studied with me, to my colleagues who have made teaching at this law school such a joy, and to my family who has loved and supported me.

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Normally in an election year, the nation's collective attention and energy would be focused primarily on domestic issues. But this year, pollsters are reporting unprecedented interest on the part of American voters regarding questions of foreign policy. One of the reasons, of course, is globalization. Politicians debate the merits of "outsourcing" jobs to

countries such as India and China, executives contemplate cross-border mergers, and as Tom Friedman notes in *The Lexus and the Olive Tree*, markets, nation-states and technologies appear locked in an inexorable process of integration permitting individuals, businesses and governments to reach around the world “farther, faster, deeper and cheaper than ever before.” As individuals, many of us have experienced the positive side of globalization: instantaneous email contact with friends and family living abroad, learning a foreign language, or being enriched by exposure to a different culture. As a society we have benefitted from free trade, increased travel and greater prosperity. But we have also glimpsed globalization’s dark underbelly – poverty for those left behind, terrorism, disease, global warming, even war – and understand that our geographic isolation no longer protects us.

The second major factor contributing to the importance of foreign affairs is America’s superpower status. While representing only 4-1/2 % of the world’s population, the U.S. economy dwarfs the economies of other nations, whether measured by GDP, purchasing power, trade, industrial output, or stock market capitalization. The U. S. is the world’s largest consumer of energy, and Americans, by some estimates, consumes more than 25% of the world’s resources. This economic dominance has led to military *predominance*, and the emergence of the United States as the world’s only superpower. Nearly fifteen years after the end of the Cold War, the U.S. now spends more on defense than the next sixteen countries combined. The 9/11 Commission Report notes that the U.S. Defense Department budget is greater than Russia’s GDP. The U.S. military is engaged in operations across the globe, with more than 140,000 soldiers in Iraq and an additional 20,000 in Afghanistan alone. As a society, we have become more aware than ever of our increased stature in the world and the fact that,

whether we like it or not, our upcoming Presidential election is being closely followed by observers all over the planet – becoming, as one British journalist recently remarked, the first “world election,” but one in which only 5% of the world will vote.

At our law school, we have taken cognizance of the globalization revolution by expanding our curriculum, admitting foreign students in record numbers and sending our own students abroad. But our society has been relatively slow to think about globalization in legal terms. International law and international justice have become neglected elements of the U.S. foreign policy equation, as the focus has shifted away from the exercise of diplomacy to the projection of power. Even the 9/11 Commission Report, which exhorts the U.S. to adopt a preventive strategy towards terrorism that is as much, or more, political than military in nature, barely mentions the need for international legal consensus-building and enforcement as means to constrain the spread of international terrorism. The U.S. has increasingly turned its back on the role that international law may play in helping to stabilize an often chaotic and violent world. Paradoxically, this trend appears to be peaking just at the moment when, outside U.S. borders, international law and lawmaking have risen to unprecedented prominence.

Today I would like to suggest that international law should be elevated from its current status as an “occasional tool” or “convenient rhetorical device” of U.S. foreign policy to a chief element both in international relations and U.S. diplomacy. Put another way, the U.S. needs to take its commitment to the rule of law to the global stage, thereby playing to American strengths, enhancing American legitimacy and moral authority, and perpetuating the leadership role that the United States has historically exercised in the conduct of international affairs. *As the*

*hegemon* presiding over, and benefitting the most from, the global economy, the U.S. has a vital interest in maintaining the stability of that system and a responsibility to ensure that the system is fair. While military force will surely continue to play a central role in the conduct of foreign affairs, coercion without legal authority lacks legitimacy and breeds resentment. As lawyers and as citizens, we understand the deep and abiding importance of law and legal institutions domestically – and it is virtually impossible to conceive of a just, peaceful and stable international order without seeing in that order a place for the rule of law. While the U.S. led the way in establishing the United Nations and promoting the rule of law during and following World War II, it has now either abandoned that perspective or embraces it only sporadically, causing the U.S. government to be slow in ratifying important treaties such as the Genocide Convention of 1948 and the International Covenant on Civil and Political Rights, and refusing to sign onto many others: the International Covenant on Economic, Social and Cultural Rights, the Ottawa Land Mines Convention, the Convention on the Rights of the Child, the Kyoto Protocol on Global Warming, the International Criminal Court Treaty, the Convention on the Elimination of All Forms of Discrimination Against Women and, most recently, the United Nations Convention on the Law of the Sea.

Unpacking current American attitudes about international law and international legal regimes is a daunting task, but a few general patterns can be discerned. I will not discuss in detail two of the most obvious actors shaping the contours of American policy, Congress and the media, but it is well-known that U.S. media coverage of foreign affairs is generally *de minimus*, and that many members of Congress appear politically opposed to international law and

international legal regimes on any terms. Yet, there are other forces at work as well--forces that affect the lawyer in particular.

In American legal culture, there has been a persistent notion that international law isn't "real law." Legal theorists and lawyers have often expressed misgivings about the very use of the term "international *law*," arguing that in the absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions, international law has none of the attributes of municipal law and cannot be equated with it in stature, legitimacy, or binding force. These theoretical musings have given rise to a popular (mis)conception of international legal rules as precatory, international institutions as wasteful (because they do not produce "binding" results), and the whole endeavor, particularly in the U.S., has been imbued with a sort of second-class status. Many of these objections do not withstand thoughtful analysis, but to the extent that the critiques might have been tenable fifty years ago, they are no longer particularly viable today.

International law and adjudication, particularly with the development of the European Union as a supranational twenty-five member state legal system and the end of Cold War politics have undergone a radical transformation in both form and function. Take, for example, the explosion in the sheer number of international courts and tribunals now producing judgments – there are approximately fifty-two such bodies, including the International Court of Justice, the European Court of Justice, the International Tribunal for the Law of the Sea, the international criminal tribunals for the Former Yugoslavia and Rwanda, the World Trade Organization Dispute Settlement Understanding, the Iran-U.S. Claims Tribunal, the Permanent Court of Arbitration, NAFTA Dispute Settlement Panels, the Special Court for Sierra Leone and the

panels established by the United Nations Transitional Administration in East Timor. The International Court of Justice, which initially decided only one or two cases per year, now has twenty active cases on its docket, and is deciding and rendering advisory opinions on issues ranging from maritime boundary disputes and the scope of consular rights for foreigners arrested abroad, to the legality of the threat or use of nuclear weapons.

Even more radical than the change in quantity, however, has been the change in the quality of international law making and practice. Binding dispute settlement between states and even the imposition of sanctions upon individuals have become characteristics of international law and practice. International treaty-making, which formerly occurred behind closed doors and on a consensus-only basis, now takes place in the spotlight of global civil society. NGO representatives not only attend diplomatic conferences, but send daily transcripts home via the internet, so that national and local organizations can rally followers either to support or protest government actions at the conference. Indeed, when asked what led to the extraordinary success of the campaign to ban land mines, Nobel Prize winner Jody Williams, the organizer, reportedly replied: “e-mail.”

Treaties are now negotiated in long sessions, often spanning years, among vast numbers of states. Rather than face the prospect of having the result of protracted and delicate negotiations scuttled by a handful of recalcitrant states, voting is sometimes employed at Diplomatic Conferences to adopt final treaty texts all at once. This quasi-legislative practice raises the possibility of “instant customary international law,” binding not only on those states

ratifying the treaty, but even nonparty states. Moreover, the product of the negotiations may include not only highly specific rules, but may incorporate the establishment of treaty-based courts or tribunals to adjudicate disputes between the parties, such as the new WTO Dispute Settlement Understanding. In the case of the International Criminal Court treaty, the treaty contains not only an international criminal code, but establishes a judicial organ that may actually bring cases against individuals accused of serious violations of the Statute, so long as the Court's complex jurisdictional regime is satisfied.

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

But is a system based upon the rule of law and international justice necessarily inimical to U.S. interests? The answer, of course, depends upon what the system looks like. The above description of the transformation of the international legal order suggests that the Westphalian system of sovereign equality of states, premised as it is on a principle of decentralized authority, has become strained almost to the breaking point. Akhil Amar once quipped that "sovereignty means never having to say you're sorry." But a system premised upon the absolute sovereignty of 190 nation states cannot possibly function effectively. Moreover, the notion of absolute

sovereignty is a fallacy – as a practical matter, nations are constrained by realities and externalities they cannot control: by the nuclear weapons of other states; by geopolitical considerations; by alliances; by private traders that can demolish a country's currency by dumping it too quickly on international markets; by diseases that do not respect international boundaries. And of course, by international terrorists.

The terrorist threat is very real, of course, and increasing. Yet, we must be careful not to turn it into the sole preoccupation of our time. A recent study in *Foreign Affairs* noted that in 2003, a total of 625 people, including thirty-five Americans, were killed in international terrorist incidents worldwide. Meanwhile, 43,220 died in automobile accidents in the United States alone, and three million died from AIDS around the world. Recent statistics on the conflict in Sudan suggest that hundreds of individuals are dying there each day from disease, starvation and war. While the west enjoys an extraordinarily high standard of living, millions live in wretched poverty. Climate change experts have started to predict dramatic changes in the earth's environment – snows melting on Mt. Kilimanjaro – death valley temperatures by the end of the Century in Los Angeles. Of course, on the plus side, *The Economist* recently reported that Canada is now conducting naval exercises in the Arctic, confident that when the arctic snowcap melts, the elusive Northwest shipping passage will become the goldmine Canadians always hoped for – 7000 miles shorter than the ocean passage through the Panama Canal – much to the consternation of Panama and the United States.

Global problems require global solutions – and the Westphalian system may no longer be able to deliver. Just as Copernicus and Galileo challenged the orthodoxies of their time, we must challenge the orthodoxies of ours. Old structures are disintegrating and new ones are emerging to take their place. What will they look like? The alternative to the decentralization of Westphalia, of course, is some kind of hierarchy or centralization. Heresy? Perhaps, but there is no reason that this change needs to be either violent or accompanied by fear. It will probably be most strongly resisted, however, by those who believe they have the largest stake in the status quo, as demonstrated by the extraordinarily hostile reaction of the U.S. government to the International Criminal Court treaty. Although the U.S. has often failed to support particular treaties before, the U.S. government's resistance to the International Criminal Court is different in kind. With other treaties, the U.S. often complies even without ratifying. Take, for example, the 40 years it took the U.S. Senate to ratify the Genocide Convention, or America's continued absence from the Convention on the Rights of the Child. Few seriously (or plausibly) argue that our failure to support those treaties was due to a perverse desire to maintain the freedom to commit the human rights atrocities they prohibit. Instead, as Dean Harold Koh recently observed, the U.S. government likes to comply with treaties without signing on to them in order to preserve a false sense of freedom. This permits the U.S. to support and follow the rules of the international realm most of the time (and to insist that others do so on issues that matter to us) but to maintain that it is doing so only out of prudence, not legal obligation.

But let us examine the U.S. government's approach to the International Criminal Court. It has sought (and obtained for the most part) Security Council resolutions immunizing

Americans from prosecution; Congress has withdrawn military assistance from countries ratifying the treaty and refusing to enter into immunity agreements with the United States; the President has taken the absolutely unprecedented step of attempting to “unsign” the treaty; and the ICC’s detractors have employed a level of rhetorical exaggeration that would be almost comical if the matter were not so serious. After all, this is a Court charged with investigating and trying individuals for the commission of genocide, crimes against humanity and the most serious war crimes of interest to the international community as whole. This is an institution created, not to persecute American citizens, but to offer solace and justice to the victims of mass atrocities. In the latest salvo, just last week, one congressional leader spoke in favor of an amendment to the Foreign Appropriations bill that would withhold economic assistance to America’s NATO partners, as well as some major non-NATO allies such as Jordan, South Africa and Japan, unless and until those countries sign immunity agreements that exempt U.S. nationals from the jurisdiction of the ICC. The speech contained wildly inaccurate and misleading comments, offering an aggressive example of American unilateralism and double standards – rules that are fine so long as they apply to everyone but us.

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

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

- the obligation of States not to give safe haven to international criminals; and
- the right of the international community to act together, if States are unable or unwilling to fulfill their obligations.

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

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

the burden of being sheriff, judge, jury and likely executioner for international terrorists around the globe.

Returning to the larger problems of recalibrating the international legal system, as a nation with an extraordinarily rich supply of lawyers, there is no shortage of talent that could be brought to bear on the complexities of creating new rules and even a new constitutional understanding for the international community. Indeed, from 1889 to 1944 every Secretary of State was a lawyer. There is no necessary correlation between a government's emphasis on legal rules and the professional training of its foreign minister, however, there is no doubt that many of those chosen to serve as the head of our diplomatic and foreign service brought their legal training to bear on world problems. Elihu Root, who served as U.S. Secretary of State in Theodore Roosevelt's cabinet, personified the idea of the lawyer-statesman – although a staunch Republican, Root supported U.S. entry into the League of Nations, helped to bring the first World Court into existence, and in 1912 was awarded the Nobel Peace prize in recognition for his efforts.

Following World War II, Presidents often turned to non-lawyers to serve as Secretary of State, but 50% of those chosen still had legal training, from John Foster Dulles, appointed by President Eisenhower, to Warren Christopher, appointed by President Clinton. In fact, with the exception of Ronald Reagan, every President of the Twentieth Century, Republican and Democrat alike, recruited at least one of their Secretaries of State from the ranks of the bar. U.S. lawyers, with their commitment to and understanding of federalism, have extraordinary gifts to share in the crafting of a world order that permits the solution of global problems, without

unnecessary or undue interference in local affairs. A world order that will respect principles of democracy and separation of powers, and that will operate “in the sunshine” and be accessible to the people. That can bring about the enhancement of human dignity, address global environmental problems, take on the continuing and potentially devastating threat from nuclear weapons, and alleviate world poverty and disease. For globalization is not just about profit – globalization is, above all, about people.

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

It would be disingenuous to claim that international legal rules will impose no constraints on the sovereignty of the United States, for they will. For the rules to acquire legitimacy, they must apply to large and small states alike. But that will not necessarily deprive the U.S. of a special place in the international legal order. Just as the EU has a system of weighted voting that accords large states more votes than small in a complex voting formula that also permits small states a blocking minority, any recalibration of the one vote/state paradigm will need to comport with political and economic reality. Of course, the U.S. is likely to find the rules more to its liking if it has a part in shaping them, which it can only do if it embraces this challenge as an influential insider, rather than remaining a belligerent and hostile outsider.

One final point worth considering. The same strain that the international legal system is experiencing as a result of globalization is being felt at home. U.S. foreign relations law has remained a somewhat obscure sub-specialty of constitutional law until now. Yet, ten of last term's eighty-five Supreme Court cases involved important questions of international law and policy. Indeed, some of our Supreme Court justices clearly appear to be contemplating their role in a global world, addressing meetings of the American Society of International Law, traveling and teaching abroad, and engaging in what scholars see as a transjudicial dialogue with their counterparts on Supreme Courts around the world. Apparently provoked by this, sixty members of Congress recently introduced a resolution entitled the "Reaffirmation of American Independence Resolution" intended to prohibit federal courts from relying upon foreign, and presumably international, law in their judgments. While both the predicate and the text of the Resolution are legally problematic, the Resolution raises an interesting question: Is our 200 year old Constitution capable of adapting to the global age?

Incorporating international law into U.S. law is sometimes challenging. In 1900 the United States Supreme Court affirmed, in *The Paquete Habana*, that customary international law is federal law. After all, international law became part of "our law" with the independence of the United States in 1776, either through its reception as part of the law of England, or as an incident of American sovereignty. Treaties, pursuant to article VI of the Constitution, are clearly the Supreme Law of the land. Recently, however, conservative scholars have argued that because *Erie v. Tompkins* eliminated federal common law, customary international law – the law of nations, and particularly international human rights law – cannot be directly applied by the federal courts. Last June, a six-member majority of the Supreme Court rejected this view in

*Sosa v. Alvarez Machain*. But the debate, both on the Court and off, suggests that just as our legislators and our President must struggle with the establishment of a new and functional international legal order, both in the U.S. and abroad, our courts are in the front lines as well. The NAFTA was entered into as a Congressional Executive agreement, circumventing what would have been an impossible two-thirds majority to attain in the Senate. Was that constitutional? Professor Bruce Ackerman of the Yale Law School says yes – Professor Larry Tribe of Harvard disagrees. The European Union’s member states each amended their constitution when they joined the EU, and many of them had to amend their constitutions to join the International Criminal Court as well. Will the United States need to do the same, and could it do so in the current political climate? Or would the Supreme Court, generally inclined to support the Executive Branch in foreign affairs, bless new treaty regimes in order to avoid a constitutional crisis?

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Bringing the rule of law back into American thinking about foreign policy will take time. But it is inevitable. Without rules, human civilization cannot survive; without rules, there is no true freedom. Law is, of course, only one element of foreign policy, but it is a powerful one. By appealing to principle, we can better persuade. By acquiring legitimacy, our actions take on a new authority. By delivering justice, we win hearts and minds. From Thomas Jefferson to Warren Christopher, the tradition of the lawyer statesman persists. The challenge ahead is formidable – it is hard to live in a global age. But we can take comfort in the words of Jean Monnet, one of the most passionate advocates of a United States of Europe after the war, and

one of the chief architects of the European Community – although I should, in all fairness, disclose that he was a cognac merchant, not a lawyer! Monnet was never discouraged in his efforts to create the European Economic Community, and he later wrote in his memoirs, “Resistance is proportional to the scale of the change one seeks to bring about. It is even the surest sign that change is on the way. . . To abandon a project because it meets too many obstacles is often a grave mistake: the obstacles themselves provide the friction to make movement possible.”

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