Essay

THE YALE SCHOOL OF INTERNATIONAL LAW

Harold Hongju Koh*

I am honored to celebrate the extraordinary Michael Reisman on the occasion of his retirement. For nearly forty of Michael's fifty-eight years on the Yale Law School faculty, I have been lucky enough to teach alongside, and at times, with him. Michael has been my treasured friend, senior colleague, and role model.

It is most fitting to honor his achievements in these pages. Fifty years ago, Michael and his students helped found the *Yale Journal of International Law*.[1] During the *Journal*'s half-century, he has mentored thousands of students of many nationalities on their journey to become international lawyers and scholars. No teacher has given more to his students, or personally guided and inspired a more influential global cohort of international law scholars, teachers, and practitioners. When guest lecturing in Michael's courses, I have felt viscerally the reverence and affection that his students feel for him.

As a practitioner, arbitrator, and commissioner, Michael has illuminated the face of twenty-first century international law. The myriad themes that he has explored continue to shape the field. It often feels like he has written more than many other scholars have read. Trying to read his massive opus inevitably makes one feel inadequate. But whenever I encounter a new topic in international law,

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1. *See* W. Michael Reisman, *The Vision and Mission of the* Yale Journal of International Law, 25 YALE J. INT'L L. 263 (2000) (describing how Michael's committed students founded the *Journal* to study contemporary challenges to world public order).

I look first to see what Michael has written on the subject.[2] His interventions always provide an original, elegant, powerful, and clarifying lens.

Most of all, Michael, his brilliant wife and partner Dr. Mahnoush Arsanjani, and their remarkable daughter Diana—all hugely accomplished international lawyers—have been the warmest of friends. Over the years, they have shown my family and me such graciousness, hosting memorable meals for the leading international law figures of the day at their lovely home overlooking Connecticut's wooded hills.

Michael has shown me more acts of personal kindness than I can count. To give just one example: at one of those meals, Michael mentioned in passing that he was heading to Doha. I joked that I had once flown Qatar Airways and coveted the very comfortable pajamas they give out in business class. A week later, I arrived at my office to find a package, which I opened to find a pouch containing my very own Qatar Airways pajamas! So thanks to Michael, I not only know more and think better, but also sleep better: all gifts that keep on giving.

I. THE NEW HAVEN SCHOOL

From my first days at Yale, Michael enrolled me as a "special student" in the New Haven School of International Law. In his brilliant lifetime of work as "Dean" of the New Haven School, Michael brought the School he inherited from Myres McDougal and Harold Lasswell into the twenty-first century by giving it new focus and insight.[3] Under Michael's leadership, the New Haven School insistently asked two seminal questions, one descriptive and the other normative. First, what role *do* international law, rules, and process play in global affairs? Second, what *should* the goal of international law be? These remain the core questions facing international lawyers today.

The New Haven School began as a critical school, a legal realist response to the cynical political realism that had pervaded international relations discourse during the Cold War.[4] Political realism rejected the notion that rules and norms

2. For just a few illustrative examples, see, for example, W. Michael Reisman, *The Quest for World Order and Human Dignity in the Twenty-First Century Constitutive Process and Individual Commitment*, 351 RECUEIL DES COURS 9, 12 (2010); W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS (1971); W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101, 107, 113 (1981); and W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575 (2007).

3. *See generally* Harold Hongju Koh, *Michael Reisman: Dean of the New Haven School of International Law*, 34 YALE J. INT'L L. 501 (2009).

4. *See* Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599, 2618, 2622-23 (1997) [hereinafter Koh, *Why Nations Obey*]; Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301, 305 (2007) ("[T]he New Haven School offered a kind of socio-legal realism to combat the power-based realism that had dominated the early Cold War period."). As used in this Essay, a "school of thought" represents an intellectual or cultural movement that unites scholars and practitioners who share common philosophy, learning, beliefs, opinions, or worldview. Members of a School share a core set of ideas and attitudes, but crucially, they need not live in the same place; nor need every practitioner in that place belong to that School. Raphael's famous Vatican masterpiece, *The School of Athens*, vividly illustrates two such schools of thought in action: the School of Athenian Philosophy, led by its two centrally depicted figures, Plato and Aristotle, and also the Renaissance School of Painting, to which Raphael belonged, along with Michelangelo (who is also depicted in the painting).

can help shape and guide international relations, claiming that only power and interest matter.[5] Because Yale Law School, along with Columbia, was one of the original intellectual homes of the American school of legal realism, the New Haven School became the American legal realists' school of international law. As one New Haven School member noted, McDougal and Lasswell converted the core insight of legal realism, "its critical focus on the interplay between rules and social process in the enunciation of law in authoritative form . . . into a comprehensive framework of inquiry."[6] Rejecting both legal formalism and legal positivism, the New Haven School instead offered "a functional critique of international law in terms of social ends . . . that shall conceive of the legal order *as a process* and not as a condition."[7] McDougal and Lasswell, soon joined by Reisman, answered the first, descriptive question by arguing that political realism "underestimates the role of rules, and of legal processes in general, and overemphasizes the importance of naked power" in international affairs.[8] The New Haven School of International Law insisted that, even in international affairs, law, institutions, rules, and process do matter, in ways that many policymakers, academics, and laypeople do not fully appreciate.

The New Haven School answered the second, normative question by arguing that the goal of international law should not be simply to stop wars, but to make peace. Under this view, international law should pursue not just order (i.e., traditional peace and security), but human dignity: not just the *absence* of conflict and violence, but the construction of international legal architectures designed affirmatively to foster human flourishing. Reisman updated the McDougal and Lasswell framework to insist that "the end of law and the criterion for appraisal of particular decisions [is] their degree of contribution to the achievement of *a public order of human dignity*."[9] To use his School's own terminology, Reisman insisted that international law be differently understood: not as a static set of rules, but as a world-constitutive process of authoritative decision-making, dedicated to building regimes of effective control designed to promote a world public order of human dignity.

II. THE "NEW" NEW HAVEN SCHOOL

During the post-Cold War era, the New Haven School's work spawned a new generation of American international lawyers who formed what has been

5. *See, e.g.*, GEORGE F. KENNAN, AMERICAN DIPLOMACY 1900-1950, at 95 (1984) (a realist tract attacking the "legalistic-moralistic approach to international problems" as an unrealistic "belief that it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some system of legal rules and restraints").

6. Richard A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 YALE L.J. 1991, 1991 (1995).

7. Roscoe Pound, *Philosophical Theory and International Law*, 1 BIBLIOTHECA VISSERIANA 71, 89 (1932) (emphasis added), *quoted in* Myres S. McDougal, *Introduction: The Tasks of a Policy-Oriented Jurisprudence (Philosophy-Science of Law) in Our Time*, 82 RECUEIL DES COURS 137, 137 (1953).

8. McDougal, *supra* note 7, at 137.

9. *See* W. Michael Reisman, *Theory About Law: Jurisprudence for a Free Society*, 108 YALE L.J. 935, 939 (1999) (emphasis added).

called the "'New' New Haven School of International Law."[10] If the New Haven School began as a critical reaction to the Cold War, the "New" New Haven School emerged as an analogous response to the revelations of a post-Cold War world.

After World War II, international law made a dramatic shift. It sought to move beyond the existing loose web of largely customary, do-no-harm, state-centric rules toward an ambitious positive law framework built around institutions and constitutions seeking to organize proactive assaults on a vast array of global problems. The Cold War stunted the growth of that system. But after the Berlin Wall fell, international law acted as a "panda's thumb"—an *ad hoc* improvisational evolutionary device serving functional systemic needs—to promote the global rule of law by combining public and private players, and horizontal and domestic methods of enforcement.[11]

At the dawn of the twenty-first century, following brief euphoria about globalization, transnational terrorists destroyed the Twin Towers and introduced international law to a new era. The pervasive theme was global threat: not a world of two blocs led by competing national superpowers locked in a debate over ideology, but an increasingly "flat" world populated by myriad transnational actors—both constructive and destructive—decisionmakers, and rogue disruptors. The United States and its allies responded to the threats posed by terrorism by embracing a theory of American exceptionalism that too often squandered America's legitimacy by promoting double standards through such false solutions as Guantánamo, torture in CIA "black sites," and the invasion of Iraq.[12]

The "New" New Haven School emerged as a reaction to these political times, and the intellectual movements that accompanied them. In the last decades of the twentieth century, legal academia writ large turned away from the notion of law as an autonomous discipline.[13] Instead, legal scholarship embraced interdisciplinary studies, calling for an international legal curriculum that would blend theory and practice, public and private, and focus on *transnational law* as the prime vehicle by which law affects global affairs and vice versa.

By the dawn of the twenty-first century, students building on New Haven School foundations had developed new approaches to adapt the core commitments of the original School to the needs of the modern era. As I have

10. *See* Harold Hongju Koh, *Is There a "New" New Haven School of International Law?*, 32 YALE J. INT'L L. 559 (2007) [Koh, *"New" New Haven School*]. As I have traced elsewhere, the "New" New Haven School drew inspiration not just from the original New Haven School, but also from Harvard's School of International Legal Process. *See id.* at 560 & n.4; Koh, *Why Nations Obey*, *supra* note 4, at 2619-22.

11. *See generally* STEPHEN JAY GOULD, THE PANDA'S THUMB: MORE REFLECTIONS IN NATURAL HISTORY (1980) (explaining how, without the luxury of architectural intelligent design, evolutionary processes sometimes simply adapt existing institutional features to solve pressing functional needs as they arise).

12. *See generally* Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003).

13. *See, e.g.*, Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

elaborated elsewhere,[14] the "New" New Haven School made core commitments to: (1) building international law theory through *interdisciplinary* studies; (2) studying modern international law through the lens of *transnationalism*; (3) exploring "*transnational legal process*," the transsubstantive process whereby states and other transnational private actors combine domestic and international legal process to internalize international legal norms into domestic law;[15] (4) *normativity* (i.e. applying positive theory to promote normative ends); and (5) using law to influence *public policy* through clinical practice, public service, and international legal commentary. Paradoxically, the "New" New Haven School simultaneously made international law both more theoretical and more practical. The School combined theory with practice and high-level theorizing with street-level clinical activities and eye-level blogging. By so doing, adherents of the School helped craft a new set of tools to pursue normative commitments to upholding human rights and the rule of law.[16]

III. THE YALE SCHOOL OF INTERNATIONAL LAW

One quarter of the way through the twenty-first century, it no longer makes sense to treat the "old" and "new" New Haven Schools as separate entities, as opposed to successive stages in the intellectual evolution of a single driving philosophy. After fifty years operating under the same roof and espousing similar values, these New Haven schools—both dedicated to the pursuit of order and dignity through creative use of transnational legal process—should now be understood to comprise a single inter-generational *Yale School of International Law.*

The Yale School rejects, as a construct that no longer fits modern realities, formalistic approaches such as the traditional 2x2 matrix that claims dichotomies between domestic and international law, and public and private law.[17] The Yale School argues, both positively and normatively, that rules of transnational legal process and substance do and must ensure that international law still matters. Unlike formal, rules-based approaches, the Yale School insists that what makes transnational law effective is the interplay between rules and process within the context of policy and politics.

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14. Koh, *"New" New Haven School*, supra note 10, at 565-71.

15. *See generally* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1994); Koh, *Why Nations Obey*, *supra* note 4; Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998) [hereinafter Koh, *Bringing International Law Home*]; OONA A. HATHAWAY & HAROLD HONGJU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS 173-204 (2005).

16. *See* Koh, *"New" New Haven School*, supra note 10, at 571 (noting the rise of blogs such as the international law blogs *Opinio Juris*, *EJILTalk!*, *AJIL Unbound*, and *ASIL Insights*, as well as the national security blogs *Just Security* and *Lawfare*). In contrast to *Lawfare*, the *Just Security* blog has generally taken more sympathetic Yale School-like position positions toward litigation against the U.S. government. *See* Ryan Goodman & Steve Vladeck, *Lawfare, Just Security, and the Preservation of Nuance in National Security Law & Policy*, JUST SEC. (Mar. 15, 2017), https://www.justsecurity.org/38826/lawfare-security-preservation-nuance-national-security-law-policy [https://perma.cc/33GM-UGNY] ("Lawfare has typically supported a strong executive on national security and intelligence matters . . . . Now that Donald Trump is president, its authors are beginning to see the real perils of that position." (quoting David Cole)).

17. Koh, *"New" New Haven School*, *supra* note 10, at 566-67.

In the twenty-first century, the Yale School continues its five ongoing investigations into: interdisciplinary theory, transnationalism, transnational legal process, normativity, and policy reform through legal activism and commentary. These five investigations share the core insight that international law cannot and should not be studied in isolation. Rather, how international law matters must be studied by applying the insights of other scholarly fields.[18]

As one scholar put it, "[s]ince the 1990s, the dominant theory of international law has been transnational legal theory, or 'transnationalism.'"[19] This means that international law should not be studied independently from domestic law, but rather, as a merged inquiry into transnational legal process and substance. The Yale School recognizes that in a diverse range of legal fields, through a common transnational legal process, global standards have become fully recognized, integrated, and internalized into domestic law. In those areas, nations do not simply *comply* with international law; they *obey* it as internalized domestic law.[20]

The Yale School's ethos is its focus on normativity: a belief that what international law is should not be studied and analyzed isolated from ethical questions about what international law should be. Just as a doctor's goal is not simply to diagnose, but to heal, the international lawyer's quest should not be just to theorize, but to push the international system toward promoting human dignity. This means operationalizing international law theory through sustained practice, public service, and reasoned debate.

Pursuit of this normative mission envisions distinct but interrelated roles for those outside and inside of governments. Strengthening the international law system calls for those outside governments—nonstate actors such as nongovernmental organizations, private interest groups, legal clinics, media organizations, and networks of concerned activists—to act as "agents of internalization," to promote legal change. Government outsiders do so by pursuing strategies of "interact-interpret-internalize," typified by transnational public law litigation,[21] to press for interpretations of applicable global norms that can be internalized into, and subsequently obeyed by, states' domestic legal systems. Outsiders provoke interactions with government policy (e.g. lawsuits) that trigger a legal interpretation by a domestic court that requires the

18. *See id.* at 565-66 (citing international law scholars who draw insights from international relations and political science, anthropology, sociology, culture, economics and rational choice, political philosophy, geography, empirical legal studies, and history).

19. Itamar Mann, *Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993-2013*, 54 HARV. INT'L L.J. 315, 315 (2013) (emphasis omitted).

20. Koh, *"New" New Haven School*, *supra* note 10, at 566-67. Because nearly every transaction, whether conceived as "public" or "private," can involve cross-border elements, domestic internalization has become a core process dimension of such diverse subjects as human rights and humanitarian law, immigration and refugee law, foreign relations and national security law, international criminal law, international business and commercial law, international environmental law, and conflict of laws. To be sure, there are still largely domestic subjects that focus almost exclusively on domestic transactions governed by domestic law, such as pension law, securities regulation, and state law variants of property and criminal law, but even such traditionally domestic topics as family law and taxation now include significant transnational elements. *See* Koh, *Why Nations Obey*, *supra* note 4, at 2645-51.

21. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE. L.J. 2347 (1991) [hereinafter Koh, *Transnational Public Law Litigation*].

government actor to obey the international norm as internalized into domestic law.[22]

Neosovereigntists in the American legal academy pejoratively branded this kind of litigation "lawfare," a term "used most commonly as a label to criticize those who use international law and legal proceedings to make claims against the state, especially in areas related to national security."[23] Yale School adherents instead see human rights nongovernmental actors as pursuing a strategy of "LawFAIR": namely (1) crystalizing *law* through claims and precedent, (2) before receptive *fora*, aided by (3) coalitions that muster *assets and allies*, (4) to seek and exploit *issue linkages* between the human rights claim and other issues that motivate the adversary,[24] all in search of (5) achievable and meaningful *remedies and relief*.[25] In a range of issue areas, U.S. human rights clinics and law firms have demonstrated that through well-conceived LawFAIR strategies, human rights advocates can use the lessons of "repeat play" to harness politics and promote global policies based on better human rights principles.[26]

For those who serve inside governments or intergovernmental institutions, the complementary strategy has been "engage-translate-leverage," or deploying "international law as smart power."[27] When in doubt, this "insider strategy" urges government actors to pursue engagement rather than isolationism. In situations where international rules have not yet crystallized—for example, cyberconflict or use of artificial intelligence (AI) in warfare—the strategy is not to deny the existence of legal restraints altogether, but to translate from the spirit of existing legal norms to generate new rules to govern newly emerging situations.[28] The goal of this approach is not total policy flexibility, but rather, developing a clear, transparent, and regulated playing field. This strategy then urges government insiders to leverage their legal arguments with such tools as diplomacy, development, technology, markets, international institutions, and

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22. Key agents in promoting this process of internalization include government outsiders or "transnational norm entrepreneurs," government insiders or "governmental norm sponsors," transnational issue networks, and interpretive communities. *See generally* Koh, *Bringing International Law Home*, *supra* note 15.

23. Michael Scharf & Elizabeth Andersen, *Is Lawfare Worth Defining? Reports of the Cleveland Experts Meeting*, 43 CASE W. RES. J. INT'L L. 11, 12 (2011). On neosovereigntists, see *infra* note 42.

24. Such issue linkages include, for example, formally linking a country's international law compliance to its bid to seek admission to international organizations and regimes whose membership requires compliance with international law, or leveraging a target state's fear of "outcasting" to improve its behavior on threat of exclusion from such institutions. *See generally* Oona Hathaway & Scott Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252 (2011).

25. A notable challenge that human rights clinics face (e.g., in conducting environmental litigation that affects indigenous communities) is how best to align client-centered work that requires direction from the impacted clients with broader theoretical articulation of human rights claims that can best anticipate the direction of jurisprudence in future cases.

26. Harold Hongju Koh, *YLS Sale Symposium: Sale's Legacies*, OPINIO JURIS (Mar. 17, 2014), http://opiniojuris.org/2014/03/17/yls-sale-symposium-sales-legacies [https://perma.cc/LZU6-MHJK]; Deena M. Hurwitz, *Lawyering for Justice and the Inevitability of Human Rights Clinics*, 28 YALE J. INT'L L. 505 (2003).

27. *See, e.g.*, Stanford Law School, *Discussion | International Law as Smart Power with Harold Hongju Koh*, YOUTUBE (Jan. 24, 2014), https://www.youtube.com/watch?v=QK4fmHHpVhk [https://perma.cc/235B-GLML].

28. *See* Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23 (2002).

even limited applications of force to achieve sustainable and durable foreign policy outcomes that are more likely to succeed with the legitimacy that international law bestows.[29]

These insider and outsider strategies often complement one another. Both government insiders and outsiders can function as agents of internalization. While often formally adversaries, they also frequently collaborate, consciously or unconsciously, to find policy solutions that can achieve greater national compliance with international law. The interactions among government outsiders, also called "transnational norm entrepreneurs," and governmental officials, also called "governmental norm sponsors," create transnational networks and law-declaring fora, which create new rules of international law that are construed by interpretive communities, then trickle down from the international level and become domesticated into national law.[30]

Simply put, adherents of the Yale School care not only about how nations behave—the central international law inquiry of the late twentieth century[31]—but more fundamentally about the compliance question that has fascinated international law and relations scholars in the twenty-first century: *why nations and other transnational actors do or do not obey legal rules.*[32] The Yale School's inquiry aims to be not just analytical, but transformative and constructive. The Yale School believes that a better understanding of how nations behave will promote greater obedience to international law, narrowing of double standards, and development of new frameworks of international law for such emerging fields as climate change, global health, cyberconflict, and AI.

Like the Constructivist School of International Relations theory, the ultimate goal of the Yale School is constitutive: "not simply to change behavior, but to change minds."[33] Yale School adherents believe that prudent application of transnational legal process can both generate better norms of substantive transnational public law and help construct national interests to place greater priority on human dignity. Unlike interest theorists, who tend to treat state interests as exogenously given, constructivists argue that states and their interests are socially constructed by "commonly held philosophic principles, identities, norms of behavior, or shared terms of discourse."[34] Their ultimate aim is to push states, international law doctrines, and institutions to give greater weight to human dignity within a well-ordered system governed by respect for the international rule of law.

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29. *See* HAROLD HONGJU KOH, THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW 8-13 (2019).

30. *See generally* Koh, *Bringing International Law Home*, *supra* note 15.

31. *See generally* LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY (2d. rev. ed. 1979).

32. *See generally* Koh, *Why Nations Obey*, *supra* note 4.

33. Melissa A. Waters, *Normativity in the "New" Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts*, 32 YALE J. INT'L L. 455, 463 (2007); *see also* HATHAWAY & KOH, *supra* note 15, at 112-32 (describing the Constructivist School in international relations, whose leaders have included Friedrich Kratochwil, John Ruggie, Martha Finnemore, Kathryn Sikkink, Nicholas Onuf, Hayward Alker, Richard Ashley, Ernst B. Haas, and Alexander Wendt).

34. MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 15 (1996).

When one includes all the School's alumni, adherents, and fellow travelers, the Yale School now plainly ranks among the most influential schools of thought in international law scholarship and practice.[35] Many different schools of international law thought prevail outside the United States[36]: a formal European school; an English Grotian school;[37] a Russian school; a Chinese school; and a gradually evolving critical or "developing world" school. Many of these schools borrow from one another, often based on patterns of colonial history and migration. The Latin American schools, for example, originally tended to borrow from Spanish and European schools, but in recent decades have increasingly looked to the United States, particularly in the area of constitutional adjudication and legal education.[38] Commonwealth schools generally inherit doctrines from the British tradition. The Japanese and Korean schools borrowed from German's civil tradition before both started their more recent turn toward American-style legal education and scholarship. And many of the African schools, which initially borrowed from the French, British, and Belgian jurisprudence of their colonial ancestry, are increasingly looking to the critical approaches popular in the Global South.[39]

Given these divergent perspectives, some international law scholars have asked "Is international law really international?"[40] Others have argued that there are competing national conceptions of international law that should be studied from a comparative perspective, merging the fields of "comparative" and

35. As *supra* note 4 observes, not all "members" of a School need to live in or have graduated from the same place; nor need every international lawyer in that place belong to that School. For a fascinating "cross-journal symposium" examining trends in international legal scholarship worldwide, see, for example, the work of the Consortium for the Study and Analysis of International Legal Scholarship (SAILS), discussed in Kathleen Claussen, *Foreword*, 49 YALE J. INT'L L. 93 (2024); Kathleen Claussen, *The World of International & Comparative Law Journals*, 55 GEO. J. INT'L L. 61 (2024); and Oona A. Hathaway & John D. Bowers, *International Legal Scholarship: An Empirical Study*, 49 YALE J. INT'L L. 101 (2024).

36. For a current survey of these variegated schools, see Harold Hongju Koh, *Transnational Legal Process and the "New" New Haven School of International Law*, *in* INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS 101 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2023).

37. *See* Koh, *Why Nations Obey?*, *supra* note 4, at 2617 (describing the Grotian notion of "international society" invoked by Martin Wight, Hedley Bull, Alastair Buchan, Andrew Hurrell, and Barry Buzan).

38. *See* Jorge Contesse, *International Law Scholarship in Latin America*, 64 VA. J. INT'L L 373 (2024); JORGE L. ESQUIROL, RULING THE LAW: LEGITIMACY AND FAILURE IN LATIN AMERICAN LEGAL SYSTEMS 95 ("[T]he charge of legal formalism led efforts to transform the whole [Latin American] legal culture . . . [and] reform of legal education in the region.").

39. *See, e.g.*, ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (2005); ACHILLE MBEMBE, ON THE POSTCOLONY (2001); Vasuki Nesiah, *The Ambitions and Traumas of Transitional Governance: Expelling Colonialism, Replicating Colonialism*, *in* INTERNATIONAL LAW AND TRANSITIONAL GOVERNANCE: CRITICAL PERSPECTIVES 139 (Emmanuel H. D. De Groof & Micha Wiebusch eds., 2020); Namira Negm, *Diverse Perspectives on the Impact of Colonialism in International Law: The Case of the Chagos Archipelago*, 113 ASIL PROC. 68 (2019); SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY (2011); MICHA WIEBUSCH, A THEORY ON AFRICANIZING INTERNATIONAL LAW 15 (2024).

40. *See, e.g.*, ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? (2017). This inquiry began in the early 1980s. *See, e.g.*, Charles Rousseau, "Les conceptions nationales du droit des gens", *Le droit international: unité et diversité. Mélanges offerts à Paul Reuter* (1981).

"international" law into a hybrid they call "comparative international law."[41]

Multiple schools of international legal thought have arisen even *within* the U.S. legal academy. But significantly, apart from the Yale School, most of these schools have a strikingly thin view of international law itself. At present, at least four other identifiable schools of U.S. international law currently exist. First, a "Chicago School", a neorealist-sovereigntist group that emphasizes rational choice and the primacy of national sovereignty, as illustrated by Chicago professor Eric Posner, who along with former Chicago colleague Jack Goldsmith (now at Harvard) co-authored the realist tract *The Limits of International Law*.[42] On examination, adherents of this neorealist school do not believe that international law should be obeyed, but rather, that nation-states should and do follow international law only when it is in their "rational self-interest" to do so. Second, a "Princeton School" of international relations theory led by former Princeton School of Public and International Affairs Dean Anne-Marie Slaughter and political scientist Robert O. Keohane is dedicated primarily to explanations about international relations founded in political science, not international law.[43] Third, and related, is the "New York University (NYU) School" of Global Administrative Law (GAL), which also has adherents in the European University Institute in Florence, the Paris Institute of Political Studies, and the Institute for Research on Public Administration in Rome.[44] Fourth, a vocal cluster of critical international legal studies schools has emerged: the "New Stream" of international legal scholarship, led by Harvard's David Kennedy and Finnish

41. *See, e.g.*, COMPARATIVE INTERNATIONAL LAW (Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier & Mila Versteeg eds., 2018). A growing subset of this field is comparative international human rights law, a project preoccupied with one of the Yale School's fundamental concerns: the protection of human dignity. *See, e.g.*, THE OXFORD HANDBOOK OF COMPARATIVE HUMAN RIGHTS LAW (Neha Jain & Mila Versteeg eds., 2024).

42. *See, e.g.*, JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005). These scholars are sometimes joined as co-author by current Chicago professor Curtis Bradley. One scholar has dubbed this group the "New Sovereigntists." *See* Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, 79 FOREIGN AFFS. (Nov. 1, 2000), https://www.foreignaffairs.com/articles/united-states/2000-11-01/new-sovereigntists-american-exceptionalism-and-its-false-prophets [https://perma.cc/K8BS-MB8A]. Some Chicago School adherents have combined a neosovereigntist mindset with a Chicago School economics "rational choice" methodology. *See* Seyla Benhabib, *The New Sovereigntism and Transnational Law: Legal Utopianism, Democratic Scepticism and Statist Realism*, 5 GLOB. CONSTITUTIONALISM 109 (2016). Neosovereigntists "see international law . . . as threatening to push the balance of lawmaking authority toward those they believe are least deserving of it and are least able to handle it—to international bodies and federal courts—at the expense of the states, Congress, and the President." Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1414 (2006) (reviewing GOLDSMITH & POSNER, *supra*). *See, e.g.*, JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 60 (2019) ("In the past quarter century, various nations, NGOs, academics, international organizations, and others in the 'international community' have been busily weaving a web of international laws and judicial institutions that today threatens [U.S. government] interests . . . . Unless we tackle the problem head-on, it will continue to grow."). Similar reasoning gave rise to the U.S. blog *Lawfare*, which began in 2010 to discuss "hard choices in national security." Emily Bazelon, *How a Wonky National-Security Blog Hit the Big Time*, N.Y. TIMES MAG., Mar. 14, 2017.

43. *See, e.g.*, Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 717 (1995); Kenneth Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 53 INT'L ORG. 401 (2000); Symposium, *Legalization and World Politics*, 54 INT'L ORG. 385 (2000).

44. *See generally* Lorenzo Casini, *Global Administrative Law*, *in* INTERNATIONAL LEGAL THEORY, *supra* note 36, at 199.

scholar Martti Koskenniemi, which has gained particularly strong influence among Australian international lawyers in Melbourne, Australian National University, and the University of New South Wales;[45] a critical feminist school inspired by the pioneering work of Hillary Charlesworth and Christine Chinkin;[46] and a critical approach based on race, empire, and development that criticizes the dominant views of the Global North, which calls itself "Third World Approaches to International Law" (TWAIL).[47] This critical wing now embraces schools of Critical Race Theory, Latinx and Middle Eastern Critical Legal Theory, and such intersectional schools as Critical Race Feminism.[48]

These four schools have attracted attention and produced significant scholarship, but they remain at the periphery, not the center of the American study and practice of international law. Nor is it clear how any of these other American schools of international law answer the "is" or "ought" questions of international law that occupy the Yale School. Instead, these other schools tend to ask, "what's law got to do with it?" Each school focuses less on how international law influences national behavior, and more on how other causal factors shape the rules of international law: economics and game theory in case of the neorealist school; politics in the case of the Princeton School; administrative bureaucracy in the case of global administrative law; and ideology and power in the case of the critical schools.

Within the United States, the Yale School remains the dominant school of international law thought. The Yale School regularly produces a disproportionately high percentage of the international law scholars entering the U.S. teaching market.[49] But its influence also extends within the legal academy

45. *See, e.g.*, David W. Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L.J. 1 (1988); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2006); Fleur Johns, *Critical International Legal Theory*, *in* INTERNATIONAL LEGAL THEORY, *supra* note 36, at 133. This School now has numerous adherents at the European University Institute in Florence, and its work continues today, *inter alia*, through Harvard Law School's Institute for Global Law & Policy (IGLP).

46. *See* Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991); Karen Engle, Dianne Otto & Vasuki Nesiah, *Feminist Approaches to International Law*, *in* INTERNATIONAL LEGAL THEORY, *supra* note 36, at 174.

47. Symposium, *Third World Approaches to International Law (TWAIL) & Economic Sanctions*, YALE J. INT'L L. ONLINE (June 20, 2023), https://www.yjil.yale.edu/symposium-third-world-approaches-to-international-law-economic-sanctions [https://perma.cc/R6GU-C8NU]; ANGHIE, *supra* note 39; James Gathii, The *Agenda of Third World Approaches to International Law (TWAIL)*, *in* INTERNATIONAL LEGAL THEORY, *supra* note 36, at 153; Makau Mutua, *What Is TWAIL?*, 94 ASIL PROC. 35 (2000) (noting that the term "third world" does not denote under- or less developed, but rather "the oppositional dialectic between the Europeans and the non-Europeans and identifies the plunder of the latter by the former").

48. Aslı Bâli, Ntina Tzouvala & Chisato Kimura, *Third World Approaches to International Law & Economic Sanctions*, YALE J. INT'L L. ONLINE (June 7, 2024), https://www.yjil.yale.edu/third-world-approaches-to-international-law-economic-sanctions [https://perma.cc/7UH8-PB4B]; BANDUNG, GLOBAL HISTORY AND INTERNATIONAL LAW: CRITICAL PAST AND PENDING FUTURES (Luis Eslava, Michael Fakhri & Vasuki Nesia eds., 2017); Usha Natarajan, John Reynolds, Amar Bhatia & Sujith Xavier, *Introduction: TWAIL—on Praxis and the Intellectual*, 37 THIRD WORLD Q. 1946 (2016); B. S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L CMTY. L. REV. 3 (2006).

49. Despite its relatively small number of graduates, Yale Law School has traditionally produced a disproportionate number of the entry-level law teaching hires in the United States each year. In 2024, for example, twenty-three of 117 reported professorial hires in the United States came from Yale

to many scholars who teach or have studied in other schools who share its basic orientation. Transnational Legal Process theory has gained adherents not just in the United States, and not just among Yale's alumni, but also among scholars, human rights, and international law practitioners who share its ethos in such places as Australia, Canada, Israel, Korea, the Philippines, South Africa, South Asia, and the United Kingdom.[50]

The Yale School has demonstrated its ability to influence and explain international lawmaking processes that take place outside the boundaries of U.S. law, policy, or legal scholarship. In Europe,[51] Latin America, and Africa,[52] legal systems are already applying a Yale School approach to transnational lawmaking processes to internalize international law rules into domestic law under the "supremacy" and "direct effect" doctrines that merge EU law and national law or the similar Latin American human rights practice that routinely internalizes Inter-American Court of Human Rights jurisprudence into Latin American domestic law by way of the "conventionality control" doctrine.[53]

And the Yale School's influence extends well beyond the legal academy to policymakers and the judiciary. The Yale School seeks to embed an internalized commitment to the rule of international law within national decisionmakers that can help construct state interests and crystallize compliance with international law as a national value.[54] Many of the leading international law practitioners currently populating the U.S. government who exhibit that internalized commitment are alumni of the Yale School who share this approach to

Law School, ten more than the next law school, and between 2011 and 2024, thirty of the 122 reported entry-level hires in international law at American law schools came from Yale Law School. Sarah Lawsky, *Lawsky Entry Level Hiring Report 2024*, PRAWFSBLAWG (May 14, 2024), https://prawfsblawg.blogs.com/prawfsblawg/entry-level-hiring-report [https://perma.cc/84PP-YFZ2]; Email from Kathleen Claussen to Harold Hongju Koh (June 9, 2024, 4:26 PM EDT) (on file with the Yale J. Int'l L.).

50. This far-flung group includes such scholars as Dapo Akande, Eyal Benvenisti, Jutta Brunnée, Diane Desierto, Guy Goodwin-Gill, Regina Jefferies, Itamar Mann, Galit Sarfaty, Yuval Shany, Micha Wiebusch, and Philippa Webb. *See generally* Regina Jefferies, *Transnational Legal Process: An Evolving Theory and Methodology*, 46 BROOK. J. INT'L L. 311 (2021) (reviewing recent transnational legal process scholarship).

51. *See, e.g.*, Jorge Contesse, *The International Authority of the Inter-American Court of Human Rights: A Critique of the Conventionality Control Doctrine*, 22 INT'L J. HUM. RTS. 1168, 1175 (2018) (describing how "[i]n the early 1960s, the ECJ created the twin doctrines of 'direct effect' and 'supremacy', which together established the European Community's prevailing normative power in regional law").

52. *See generally* WIEBUSCH, *supra* note 39.

53. *See, e.g.*, Contesse, *supra* note 51; Jorge Contesse, *Human Rights as Transnational Law*, 116 AJIL UNBOUND 313 (2022).

54. One scholar of immigration and refugee law has illustrated how this internalized commitment may improve the performance of U.S. Customs and Border Protection officials in processing asylum seekers, and more generally, how transnational legal process methodology can help connect individual behavior to the development of law and norms in jurisgenerative fora. *See* Regina Jefferies, *Transnational Legal Process, Cognition, and Context*, *in* INTERNATIONAL LEGAL THEORY AND THE COGNITIVE TURN (Anne van Aaken & Moshe Hirsch eds., forthcoming 2024) (on file with author) (noting that "cognitive sciences contain a multitude of approaches for disentangling the complex relationships between individuals within or outside a State and the social, political, and legal forms of internalization that influence observance and development of legal norms and international law").

international law and process.[55] The same can be said of the U.S. Congress,[56] U.S. federal courts, [57] international and foreign courts, [58] and leading nongovernmental organizations.[59]

IV. THE YALE SCHOOL IN THE TWENTY-FIRST CENTURY

What should be the focus of the Yale School of International Law in the next phase of the twenty-first century? As America and the world together face such twenty-first century global challenges as climate change, pandemics, migration, authoritarianism, cyberconflict, and AI, the Yale School should recall America's historical connection to international law and remain both constructivist and Kantian. In seeking to ensure that America honors its founding credo—to pay "decent respect to the opinions of mankind," as embodied in international law—the School could even be called "originalist," in the sense of recalling the American study of international law to its founding transnationalist roots.[60] The Yale School should remain "constructivist at its core, in that it focuses on how norms are internalized in the global arena in the course of social

55. This group includes such present and recent U.S. government officials as Secretary of Commerce Gina Raimondo, Deputy Secretary of the Treasury Waly Adeyamo, National Security Advisor Jake Sullivan, Principal Deputy National Security Advisor Jon Finer, Assistant Secretary of State for Europe and Eurasian Affairs James C. O'Brien, Ambassador-at-Large for Global Criminal Justice Beth van Schaack, Defense Department General Counsel Caroline Krass, CIA General Counsel Kate Heinzelman, Trade Representative General Counsel Greta Peisch, State Department Legal Adviser Margaret Taylor, National Security Council Legal Advisors Jonathan Cedarbaum and Josh Geltzer, National Security Council Deputy Advisor for International Economic Affairs Mike Pyle, and Deputy National Security Council Legal Advisors Kimberly Gahan and Katie Rivkin Visser, and others.

56. Leading Yale School legislators include Senators Michael Bennet (D. Colo.), Richard Blumenthal (D. Conn.), Cory Booker (D. N.J.), and Chris Coons (D. Del.), and Congressmen Ro Khanna (D. Cal.) and Jamie Raskin (D. Md.).

57. The group includes former Supreme Court Justice Stephen Breyer, who helped found the now-quarter century old Global Constitutionalism Seminar at Yale Law School, *see, e.g.*, STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES (2016), and such past attendees as Justices Sonia Sotomayor and Elena Kagan and past and present lower federal judges who are currently advisors to the *Restatement (Fourth) of the Foreign Relations Law of the United States*, such as Judges Jeb Boasberg, Nancy Gertner, Steven Higginson, Margaret McKeown, Randolph Moss, Jon Newman, Jeffrey Meyer, and Diane Wood.

58. This group has included such international judges as Sarah Cleveland and Stephen Schwebel of the International Court of Justice; Kimberly Prost of the International Criminal Court; Helen Keller and Ivana Jelic of the European Court of Human Rights; Tamara Perisin of the Court of Justice of the European Union; Theodor Meron and Patricia Wald of the International Criminal Tribunal for the former Yugoslavia; and Margaret DeGuzman of the Residual Mechanism. Other constitutional court judges who have attended Yale Law School's Global Constitutional Seminar, and share Yale School orientations include: Aharon Barak and Daphne Barak-Erez of Israel; Rosalie Silberman Abella and Frank Iacobucci of Canada; Brenda Hale, Robert Reed, and David Lloyd Jones of the United Kingdom; Helen Winkelmann and Sian Elias of New Zealand; Dieter Grimm and Susanne Baer of Germany; Stephen Gageler and Michael Kirby of Australia; Luis Roberto Barroso of Brazil; Daniela Salazar Marin of Ecuador; Natalia Angel-Cabo of Colombia; and Mansoor Ali Shah of Pakistan.

59. For example, Kenneth Roth, long-time head of Human Rights Watch, is a graduate of Yale Law School, as are any number of his division heads, as well as all four legal directors of the National American Civil Liberties Union: Legal Director David Cole, and Deputy Legal Directors Yasmin Cader, Louise Melling, and Cecellia Wang.

60. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). The history of the early American republic's openness to the reception of international law is reviewed in Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004); and Koh, *Transnational Public Law Litigation*, *supra* note 21, at 2351-58.

interaction."[61] The Yale School should remain Kantian in supporting the broader political philosophy of international cooperation that philosopher Immanuel Kant supported in *To Perpetual Peace*.[62] Kant presciently advocated not for world government, but for a "United Nations" in which "The Law of Nations Shall be Founded on a Federation of Free States."[63] In Kant's vision, law-abiding sovereign nations should live in a law-governed international society, collectively explicating shared moral commitments to democracy, the rule of law, individual freedom, and the mutual advantages derived from peaceful intercourse. These free states—a community of democracies, if you will—engage in mutual discourse to achieve shared outcomes, based on a common respect for domestic and international rule of law. Otherwise put, they engage, translate, and leverage.[64]

Since World War II, Kantian global governance has provided the philosophical foundation for the international system that the United States worked to create and sustain, across administrations of both political parties. After the two great wars, this governance approach formed the basis not just for the United Nations, the global system to end war and promote human rights, but also for the system to end global depression and poverty, which laid the foundations for today's international economic law: the Bretton Woods system to govern international monetary flows, trade, and development through the International Monetary Fund, the WTO, and the World Bank.[65] More recently, this shared commitment to Kantian global governance enabled the United States to lead a group of like-minded nations to organize an ambitious multilateral effort to address all manner of global problems, including climate change, denuclearization, intellectual property, and global health.

For more than seventy years, the United States acted as both the driver and the balance wheel of this Kantian governance system. But today, that system faces its greatest challenge: globalization. In an era of resurgent nationalism, the term "globalization" has taken on pejorative overtones as an ominous threat to national sovereignty. But as Nobel Prize winner Joseph Stiglitz has explained,

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61. Roda Mushkat, *Non-Democratic State Learning of Universal Human Rights: Reconfiguring Chinese Patterns*, 27 TEMPLE INT'L & COMP. L.J. 63, 78 (2013). The Yale School's constructivist identity also ensures that its practitioners understand that "[r]ules and norms constitute the international game by determining who the actors are, [and] what rules they must follow if they wish to ensure that particular consequences follow from specific acts." Ngaire Woods, *The Uses of Theory in the Study of International Relations*, *in* EXPLAINING INTERNATIONAL RELATIONS SINCE 1945, at 9, 26 (Ngaire Woods ed., 1996) (emphasis omitted).

62. IMMANUEL KANT, TO PERPETUAL PEACE: A PHILOSOPHICAL SKETCH (1795).

63. *Id.* art. 2.

64. See, for example, the Community of Democracies, founded by the United States, Poland, Chile, and Republic of Korea in 2000, as a global intergovernmental coalition to support adherence to common democratic values and international law standards. COMMUNITY OF DEMOCRACIES, https://community-democracies.org [https://perma.cc/PF6J-PFCW].

65. Today's American international economic law scholars who operate with a Yale School worldview include, for example, in the area of international trade, Kathleen Claussen, Gary Horlick, Timothy Meyer, Gregory Shaffer, and Mark Wu, and in the field of international business transactions, William Dodge, Hannah Buxbaum, and John Coyle. *See, e.g.*, Gregory Shaffer, *Transnational Legal Process and State Change*, 37 LAW & SOC. INQUIRY 229 (2011); WILLIAM DODGE, HANNAH BUXBAUM & HAROLD HONGJU KOH, TRANSNATIONAL BUSINESS PROBLEMS (7th ed. 2024).

standing alone, "[g]lobalization itself is neither good nor bad."[66] Globalization describes not a conspiracy, but an unfolding reality. In its simplest form, "globalization" just means that certain phenomena have become worldwide in application: global culture, global migration, global communications, global rights discourse, and globalization of markets. The growing threat comes not from the inevitable global process, but from the varying and nationalistic parochial responses to it. Globalization is thus not an inherent evil, but a rapidly evolving process that could go awry unless it is collectively well-managed through innovative mechanisms of global governance.

In that global process of collective management, international law and institutions must play critical roles. In particular, the twenty-first century age of globalization requires international lawyers to understand and to implement three propositions about law and globalization that are best captured in three prepositions: law *as* globalization; law *of* globalization; and law *in* globalization.

First, treating law *as* globalization means tracing the paradigmatic ways in which the global spread of law reveals the broader phenomenon of globalization in action. As all human relations have gone global, so too have laws. Global migration, public health, climate change, and communications have each led to the development of new legal frameworks to address these global challenges. To both learn and contribute to interdisciplinary understanding of the globalization process writ large, the Yale School should ask another process question: "How does the global spread of the rule of law mirror and emulate the globalization of other social and economic phenomena?"

Second, the Yale School should introduce the law *of* globalization into law school curricula. Today, almost all traditional legal subjects have gone global: for example, transnational torts,[67] transnational criminal law,[68] transnational procedure,[69] and global constitutional law.[70] This mixing of domestic-international transnational legal subjects has engendered a distinctive, emerging law of globalization, including such varied topics as human rights, immigration and refugee law, climate law, global public health, and international business transactions. Just as after World War II, American law schools shifted away from the study of local law to the study of national law, the same schools must now increasingly shift away from the teaching of purely "domestic law" to the teaching of various aspects of law as courses in transnational legal process and substance.[71]

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66. JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 20 (2002).

67. See, for example, global industrial accidents like the 1994 Bhopal gas disaster, transborder pollution, and U.S. human rights litigation under the Alien Tort Claims Act, 28 U.S.C. § 1350. *See generally* Koh, *Transnational Public Law Litigation*, *supra* note 21.

68. *See generally* Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340 (2019).

69. *See generally* HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS (2008) [hereinafter KOH, TRANSNATIONAL LITIGATION].

70. *See, e.g.*, VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW (3d ed. 2014).

71. To give just one example, over four decades, my first-term course in Procedure at Yale Law

Third, and most urgent: what role should law play *in* globalization?[72] As globalization unfolds, how can Yale School lawyers help make globalization more just and equitable? The process of globalization is so consequential that we should not just let it happen. Instead, that process must be wisely and creatively managed—by high-level stakeholders acting in conjunction with impacted communities—so that the emerging law can play a positive role in advancing human values. But if globalization demands management, this means using and coordinating transnational law and institutions to help organize the activities and relations of myriad transnational players—both nation-states and individuals and communities adversely affected by globalization. The goal should be not just reflecting parochial state interests, but advancing an enlightened global system dedicated to the promotion of human dignity. International lawyers must ask insistently how international law can help generate a more humane process of globalization that is both sensitive to and responsive to real human concerns.

Simply put, the Yale School of International Law must promote "global governance with a human face." Going forward, fleshing out these three "prepositional propositions" should be both an analytic challenge and a normative commitment for the Yale School. As the COVID-19 global pandemic graphically revealed, the most important issues confronting international law and the Yale School will be fundamentally global in nature: public health, global economy, climate change, global migration, and perpetual conflict. Let me use two prominent challenges—AI and global authoritarianism—to illustrate how this might be done.

First, the rise of AI poses a unique challenge for twenty-first century international law.[73] It is now conventional wisdom that historically, the three transformative developments in warfare have been gunpowder, nuclear weapons, and AI. As technology evolves, policymakers can too easily treat a state of perpetual "forever war" as the best way to deal with future threats. We can already envision a world replete with "video game wars," where countries clash primarily through cyber-assisted AI weapons, with much if not most of the kinetic work being done by expendable mercenaries. By reducing the financial and physical risks that aggressor states face in launching attacks, low-cost AI-driven conflict would likely increase their incentives to use force via AI, and encourage more frequent resorts to force that would increasingly visit grievous harm upon innocent civilians.

To counter this trend, a Yale School response should seek to generate world public order on this issue in a way that promotes human dignity by protecting

School has evolved from a course focused mainly on U.S. federal versus state jurisdictional and procedural rules into one where such transnational law topics as the Alien Tort Claims Act, immigration, foreign sovereign immunity, diplomatic and official immunities, transnational *forum non conveniens*, and transnational public law litigation are regularly discussed. See the various topics covered in KOH, TRANSNATIONAL LITIGATION, *supra* note 69. This evolution has occurred naturally, as each year, the course has focused on a prominent Procedure case on the U.S. Supreme Court's current docket, which has more and more often been a case with significant transnational procedural dimensions.

72. As Stiglitz has noted, globalization "has the *power* to do enormous good, . . . [but f]or many, it seems closer to an unmitigated disaster." STIGLITZ, *supra* note 66, at 20.

73. For a survey of challenges, see generally HENRY A. KISSINGER, ERIC SCHMIDT & DANIEL HUTTENLOCHER, THE AGE OF AI AND OUR HUMAN FUTURE (2021).

innocent lives. To begin, emerging technology in the form of more advanced drones and increasingly autonomous weapons systems must be strictly regulated.[74] Doing so requires significantly strengthening the laws of LAWS (Legally Autonomous Weapons Systems) at both the international and the domestic levels. Second, domestic and international laws concerning cyber conflict must be clarified, closing loopholes where they exist. Finally, private security contractors and mercenaries must be subjected to proper government oversight, supervised by all applicable laws governing the initiation and conduct of armed conflict.[75]

A global consensus seems to be emerging that relevant governmental personnel must require appropriate levels of human judgment in the development, deployment, and use of AI for military purposes.[76] The core problem is not so much the existence of technology, which will always be pervasive in our lives, but the *exclusion of human beings* from algorithmic decisions to engage in offensive selection of targets that are then attacked with lethal force. The primary danger here is that advanced weapon systems, once activated, can—independently of human interference or supervision—acquire and engage targets, and adapt to a changing environment. The laws of war do not yet explicitly prohibit use of such weapons even as they are being widely developed.[77] Fully autonomous robots that do not have a human operator "in the

74. For elaboration of these points, see Harold Hongju Koh, *Finally Ending America's Forever War, Part II: Prescription*, JUST SEC. (Sept. 12, 2023), https://www.justsecurity.org/88164/finally-ending-americas-forever-war-part-ii-prescription [https://perma.cc/UQ33-ACQ2].

75. With respect to private security contractors, public-private arrangements like the Montreux Document—a non-binding statement of principles and practices approved by 59 states participating, including the United States, the EU, NATO, and the OSCE—have produced an International Code of Conduct (ICoC) to govern the private security practices of more than 150 global corporations. A Yale School approach would suggest that this code of conduct be internalized into private behavior through contracts that govern the conduct of private security contractors, as well as domestic criminal and contract law. *See The International Code of Conduct for Private Security Service Providers*, INT'L CODE OF CONDUCT ASS'N, http://www.icoca.ch/en/the_icoc [https://perma.cc/U9QF-MHJA]; *see also* U.N. General Assembly Security Council, Annex to the letter dated Oct. 2, 2008 from the Permanent Representative of Switzerland to the Secretary-General: Montreux Document on Pertinent International Legal Obligations and Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, U.N. Doc. A/63/467-S/2008/636 (2008). The President could issue an executive order, directing purchase-contract terms and updating policies, contracts, and regulations to ensure producer liability for legal violations. As these standards crystallize and mature, they can be further embedded into statutes and nongovernmental and intergovernmental legal agreements.

76. As an autonomous institution within the U.N. system notes, the U.N. Conference on Conventional Weapons in Geneva has stated general principles for maintaining meaningful human control in compliance with international humanitarian law and establishing a responsible chain of command with humans "in the loop." The Weaponization of Increasingly Autonomous Technologies: Artificial Intelligence, UNIDIR (2018), https://unidir.org/files/publication/pdfs/the-weaponization-of-increasingly-autonomous-technologies-artificial-intelligence-en-700.pdf [https://perma.cc/6KG7-YJ79]. Its main points track the State Department's recent declaration on the subject. Bureau of Arms Control, Deterrence, and Stability, *Political Declaration on Responsible Military Use of Artificial Intelligence and Autonomy*, U.S. DEP'T OF STATE, https://www.state.gov/political-declaration-on-responsible-military-use-of-artificial-intelligence-and-autonomy [https://perma.cc/WD6S-FGEP].

77. *See* Robert F. Trager & Laura M. Luca, *Killer Robots Are Here—and We Need to Regulate Them*, FOREIGN POL'Y (May 11, 2022), https://foreignpolicy.com/2022/05/11/killer-robots-lethal-autonomous-weapons-systems-ukraine-libya-regulation [https://perma.cc/BT7N-4M8S] ("So far, at least Israel, Russia, South Korea, and Turkey have reportedly deployed weapons with autonomous capabilities—though whether this mode was active is disputed—and Australia, Britain, China, and the

loop" when they select, acquire, and engage targets should be outlawed as *per se* illegal weapons of war. Even with full human control, however, special care still must be taken to ensure the underlying algorithms are unbiased and that AI power is used in transparent, just, and equitable ways.

In short, emerging law must ensure that *algorithms are made accountable*. If they are not, the accountability revolution that began at Nuremberg will be jeopardized. As I have described elsewhere, Nuremberg dramatically changed the valence of personal accountability for gross violations of human rights.[78] Before the Nuremberg trials of the late 1940s, lax rules of responsibility had created conditions under which gross atrocities could be committed, yet nobody would be held responsible. Street-level officials who had committed genocide could claim that they were "just following orders." Yet at the same time, their commanders could claim that they were so high in the chain of command that they did not know what was going on, and therefore should not bear command responsibility for illegal acts committed by their subordinates. After Nuremberg, the law recognized both that commanders had a responsibility to know what atrocities their subordinates were committing in their name, and that street-level officials could not escape accountability by claiming they were "just following orders."[79]

Left unregulated, the inexorable rise of lethal AI-assisted weaponry threatens to undo this imperative of personal responsibility mandated by Nuremberg. If machines can be programmed to make and execute autonomous lethal targeting decisions, it can become impossible to disentangle whether and how much responsibility lies with those machines' various hardware and software designers, programmers, builders, military commanders, and remote and onsite operators. Anyone who has ever had to override the "autocorrect" function or the Global Positioning System (GPS) directions on their cellphone understands that because AI remains fallible, it must necessarily remain subject to human control. To ensure accountability, that human intervention and control must be made explicitly identifiable, explainable, traceable, reliable, and interoperable when conducted by military allies. To that end, a Yale School approach would demand a focus on protecting human dignity: *evolving rules of international law must be designed to demand and ensure human supervision and control at the definitive moment to execute, or the last clear chance to avoid, irreversible lethal action.*

Even if all of this were done, however, political leaders would not be spared hard moral choices. As the recent Afghanistan withdrawal painfully illustrated, withdrawing from a theater of war can create significant risks of egregious

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United States are investing heavily in developing LAWS [(Lethal Autonomous Weapons Systems)] with an ever-expanding range of sizes and capabilities.").

78. *See generally* Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641 (2005).

79. In In re *Yamashita*, 327 U.S. 1 (1946), the U.S. Supreme Court recognized the doctrine of command responsibility, under which commanding officers are liable if they exercised effective control over subordinates who engaged in torture and other mistreatment of detainees in violation of the law of nations or knew or had reason to know of their subordinates' unlawful conduct, but failed to take reasonable measures to prevent their subordinates' misconduct.

human rights violations, the resurgence of terrorism, and the betrayal of loyal allies and local actors. As the book-become-movie *Oppenheimer* reminded us, leaders decide almost every day that one group of lives is more important to them than another: for Harry Truman, for example, valued American lives over the lives of Japanese in Hiroshima and Nagasaki;[80] Benjamin Netanyahu has valued Israeli lives over the lives of Palestinian civilians in Gaza. We cannot prevent such horrific choices from being made, but at least law and process can ensure that they are made by human beings who face political accountability and who will bear the moral and legal consequences when they are wrong.

Second, a rising tide of global authoritarianism is offering a harrowing alternative to this Kantian vision that recalls George Orwell's haunting *1984*.[81] Orwell described a nasty and brutish world in which cynical global mega-powers—virtually indistinguishable from one another in their authoritarianism and totalitarianism—regularly violate human rights and the rule of law within their own spheres. They make today's adversaries tomorrow's allies by forging cynical expedient alliances and manipulating public opinion by disseminating disinformation and "fake news." For President Donald Trump, yesterday's demon Kim Jong-Un can become tomorrow's worthy summit partner. Depending on the day, the Chinese, Russians, and Europeans can alternate between being adversaries and partners.

Everywhere we look, open societies are under siege.[82] The global heyday of democracy in the 1990s unleashed global economic forces and technological shifts that arguably killed domestic jobs, froze wages, forced the migration of manufacturing, and left the middle class everywhere feeling abandoned. As inequality grew, so too did middle-class anger, building into a global nationalist and authoritarian countermovement against such perceived liberal orthodoxies as diversity, inclusion, and multiculturalism. Racism and xenophobia have fused to quash compassion for outsiders.

This infectious global countermovement has fostered the proliferation of a group of "closed democracies" that now thrive on identifying enemies. Today's populist movements supporting Donald Trump in America, Vladimir Putin in Russia, Xi Jinping in China, Jair Bolsonaro in Brazil, Viktor Orban in Hungary, Tayipp Erdogan in Turkey, and Nicolas Maduro in Venezuela share a common emotional vocabulary of marginalization, anti-elitism, economic nationalism, and militarism. This cohort of global authoritarians all use the same playbook: they demonize immigrants, cow legislators, disparage multilateral bureaucrats, intimidate the judiciary, reward cronies, intimidate the media, and claim that constitutional checks and balances must give way to "will of the people." China,

80. KAI BIRD & MARTIN J. SERWIN, AMERICAN PROMETHEUS: THE TRIUMPH AND TRAGEDY OF J. ROBERT OPPENHEIMER (2005).

81. GEORGE ORWELL, 1984 (1950).

82. As German Foreign Minister Sigmar Gabriel warned, "a longing for order, clarity, hierarchy and control is now emerging. Diversity and individuality, equality and inclusion are being derided and called into question by representatives of populist parties as an expression of excessive 'political correctness.'" Sigmar Gabriel, Speech at the Berlin Foreign Policy Forum: Europe in a Less Comfortable World (Dec. 5. 2017), https://www.auswaertiges-amt.de/en/newsroom/news/berliner-forum-aussenpolitik/909376 [https://perma.cc/2JFX-K2BG].

Russia, and illiberal democracies such as Hungary, the Philippines, Turkey, and Venezuela have emerged not just as spoilers, but as active predators within the liberal international order. These trends have devastated human rights, which are under global challenge from both the left and the right, with courts being used increasingly as tools of oppression.

Against this background, the initial election and later resurgence of Donald Trump can be understood less as a cause than as a symptom of this anti-globalist countermovement. Unlike Kant, Trump does not seem to believe in universal rights or accept the notion that everyone can rise together. His "America First" strategy views America's interactions with the world as grimly transactional and zero-sum, an approach that inevitably promotes reciprocal self-centeredness on the part of other powerful nations. Under domestic constitutional law, Trump has justified his extreme unilateralism by arguing that all of his actions were authorized, justified by, and immunized from inter-branch interference by his plenary constitutional authorities. Thus, any restraints coming from within the executive branch may be ignored under a theory of "unitary executive," while any restraints coming from outside the executive may be treated as unconstitutional intrusions upon the President's plenary national security powers. Candid interviews Trump has given during his 2024 presidential campaign vividly expose an even more ambitious plan, if he is again elected, to launch a monolithic imperial presidency that would nullify the rule of law for his second administration.[83]

This trend toward extreme unilateralism, internationally and domestically, poses new threats to the Kantian smart power system. That system has shown significant capacity to dampen mood swings and maintain policy and legal consistency across political transitions. The Yale School acknowledges that as the world's preeminent economic and military power, the United States has had an outsized, and at times detrimental, influence in shaping the global norms. But nevertheless, it remains a part of the same global system. To answer skeptics, there *is* one international law, and the United States is not exempt from it.[84] Subject to each country's "margin of appreciation," America and its citizens remain bound to follow the same international rules. Affirming that America is part of one international legal system has been a core commitment of the Yale School, which sees international law as a constitutive process through which free states can build frameworks of law within which they can cooperate to achieve peace and other shared goals.

In addressing these shared twenty-first century challenges, the Yale School's similarities to non-American schools far outstrip its differences. To be sure, some national legal traditions do not share the American legal academy's emphasis on clinical education or interdisciplinary studies, or suffer from the

83. *See* Eric Cortellessa, *How Far Trump Would Go*, TIME (Apr. 30, 2024), https://time.com/6972021/donald-trump-2024-election-interview [https://perma.cc/W66M-6MEP]. For a foreign relations law analysis placing Trump's constitutional arguments into historical perspective, see HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION IN THE 21ST CENTURY 204-29 (2024).

84. *See* Harold Hongju Koh, *American Schools of International Law*, 410 RECUEIL DES COURS 9, 74-77 (2020).

parochial insularity that can sometimes afflict the American legal academy. But even if all of its methodologies are not shared, the Yale School's defining values are widely shared among the legal academies of other law-abiding nations. Of course, each cultural or regional system may claim its own "margin of appreciation" for how it construes rules of international law and studies its operation and enforcement. But we are talking about regional variations on the *same* concept of international law, not radically different visions—Kantian versus Orwellian—regarding whether international law is meaningful at all. The basic similarities among Kantian regional law-based approaches committed to preserving global peace, security, prosperity and justice overwhelm their differences in emphasis.

This commonality of global perspective and response makes this a crucial moment for international lawyers from all nations to band together to preserve this Kantian system from attack by authoritarian nationalists who share a very different, Orwellian vision. For if globalization is producing its own law (law *as* globalization), and if this law is distinctively public, normative, and international (law *of* globalization), international lawyers must work together to make this law spur humane globalization (law *in* globalization). The Yale School of International Law argues that the emerging global order must not just uphold the rule of law, but also reflect a process of globalization that addresses real human concerns. By so doing, it can offer a welcoming umbrella to members of other international law schools who find themselves similarly embattled by an age of authoritarianism and AI.

Today, we witness almost daily dire pronouncements about the impending collapse of the rules-based international order.[85] But in the same way as the strength of the human body and the doctors who maintain it must be measured by how effectively they respond to disease, the strength of world public order and the international lawyers who foster it must be measured by how effectively they respond to large-scale violations and uplift those who are most adversely impacted.

Going forward, the Yale School must continue to ask whether international law is serving not just order but justice: the purposive goals of an enlightened global order committed to universal values. The global rise of authoritarianism and AI, along with other global challenges, have only sharpened the inquiry. In the twenty-first century, the promotion of human dignity through the rule of law requires lawyers to function not as mere scriveners, but as leaders and architects.

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85. *See, e.g.*, *The Liberal International Order Is Slowly Coming Apart: Its Collapse Could Be Sudden and Irreversible*, THE ECONOMIST (May 9, 2024) https://www.economist.com/leaders/2024/05/09/the-liberal-international-order-is-slowly-coming-apart [https://perma.cc/42ZK-TNTD]; Ishaan Tharoor, *In Ukraine and Gaza, Twilight for the 'Rules-Based Order'*, WASH. POST (Feb. 23, 2024), https://www.washingtonpost.com/world/2024/02/23/gaza-ukraine-israel-russiarules-based-order [https://perma.cc/2ZBM-34GW]; Paul Gewirtz, *China, the United States, and the Future of a Rules-Based International Order*, BROOKINGS (July 22, 2024), https://www.brookings.edu/articles/china-the-united-states-and-the-future-of-a-rules-based-international-order [https://perma.cc/9BK5-WEEP]. These warnings echo those in Barack Obama's 2009 Nobel Peace Prize Acceptance Speech, *A Just and Lasting Peace*, https://www.nobelprize.org/prizes/peace/2009/obama/lecture [https://perma.cc/MV8D-MAQC] ("[A] decade into a new century, this old architecture is buckling under the weight of new threats.").

Lawyers acting as leaders can creatively manage a humane process of globalization to tackle such knotty global issues as migration, equality, trade, technology, climate change, and public health.[86]

As the decades unfold, Michael Reisman's legacy will remind us to ask insistently how legal frameworks can organize many actors to build a world public order that can advance human dignity and attack emerging global problems that we may now only dimly foresee. Grappling with these grave and growing challenges will form the twenty-first century agenda for the Yale School of International Law.

86. *Cf.* Harold Hongju Koh, *An Uncommon Lawyer*, 42 HARV. INT'L L.J. 7, 8 (2001) ("[I]f international relations are to be more than power politics, . . . international lawyers must be moral actors. Our job is not simply to do as we are told. We must fuse our training and skill with moral courage, and guide the evolution of legal process with the application of fundamental values. By having the courage to argue with our clients, to invoke illegality, to bring lawsuits, to negotiate treaties, international lawyers guide difficult policy choices into lawful channels, and thereby stand up for the rule of law."); *see also* Ben W. Heineman, Jr., *Lawyers as Leaders*, 116 YALE L.J. POCKET PART 266 (2007).