

## The Myopia of the Handmaidens: International Lawyers and Globalization

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State sovereignty is not what it used to be. International lawyers, in particular, are acutely aware of the extent to which many of its characteristics have changed. But sovereignty is largely an abstraction and the developments that have made such an impact upon it are both multi-faceted and complex. For all its shortcomings, the term 'globalization' is now the one most commonly used to describe some of them. But despite its ubiquity in other disciplines such as economics and political science, it is a term which, at least until very recently, has been accorded little prominence in the literature of international law. The thrust of the analysis that follows is that this relative neglect is highly problematic in two respects. It reflects a failure to address adequately the implications for international law of both the changing internal role of the state and the changing nature and structure of the global economy.

### I. The Role of International Lawyers

International lawyers have, in many respects, served as the handmaidens of the changes wrought by globalization. Indeed, the characteristics of sovereignty have changed so much partly because of the role they have played in facilitating many of those changes and in seeking to reflect the new realities, both in their normative and institutional dimensions. Whether the focus is on exchange rates, monetary policy, arms control, chemical weapons, landmines, climate change, the ozone layer, endangered species, forest conservation, the rights of minorities, international trade or regional integration, the policy options open to states in any real sense have, especially in recent years, become increasingly constrained, both in practice and as a matter of international law. Developments in relation to sovereignty have been analysed at great length,<sup>1</sup> leading some authors to redefine sovereignty itself primarily

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<sup>1</sup> See, e.g., the sources listed by Biersteker and Weber, 'The Social Construction of State Sovereignty', in T.J. Biersteker and C. Weber (eds.), *State Sovereignty as Social Construct* (1996), at 1, note 1.

by reference to the consequences of these developments.<sup>2</sup> Others have characterized the gradual but steady erosion of state sovereignty as a potential win-win situation,<sup>3</sup> while others still have predicted or even announced the imminent disappearance of the state as we know it.<sup>4</sup>

Not surprisingly, however, international lawyers, as well as their international relations counterparts, tend to see changes in the role of the state from a largely vertical line of vision. In other words, they look down on the state from the external perspective of the 'international community' (however it may be defined) or of an international organ or organization (be it the UN Security Council, the World Trade Organization or even non-governmental groups such as Amnesty International or Greenpeace). Some still tend to treat the state as though it were the oft-cited opaque billiard ball, or black box, possessed of a vast and immutable *domaine réservé*, although most observers are, of course, not unaware of the changes which are occurring within the state itself.<sup>5</sup> But these changes seem often to be noted or analysed in an almost perfunctory manner in order to demonstrate a degree of analytical completeness, rather than because of any perceived need to ensure that all angles are taken fully into account if a properly balanced picture is to emerge. The result is that insufficient attention has been given to the implications for international law of the changing internal role of the state, as opposed to the implications of the changing international context for the state's external relations.

The brief analysis that follows reviews the approaches reflected in a cross-section of some of the recent international legal literature in relation to the process of globalization and its impact upon the role of the state.

## II. A Franco-American Duel?: Comparing the Approaches of Sur and Reisman<sup>6</sup>

At first glance, the approaches taken by Michael Reisman<sup>7</sup> and Serge Sur<sup>8</sup> would appear to be premised on radically different diagnoses of the existing situation and

2 A. Chayes and A.H. Chayes, *The New Sovereignty* (1995), at 27, defining sovereignty in terms of 'the regimes that make up the substance of international life'.

3 Sovereignty should not be thought of 'as the object of some kind of zero sum game, such that the moment X loses it Y necessarily has it. Let us think of it rather more as of virginity, which can in at least some circumstances be lost to the general satisfaction without anybody else gaining it.' MacCormick, 'Beyond the Sovereign State', 56 *Modern Law Review* (1993) 1, at 16.

4 W. Wriston, *The Twilight of Sovereignty* (1992), J.-M. Guéhenno, *The End of the Nation-State* (1995).

5 On the billiard ball metaphor see Abi-Saab, 'Preface', in M. Bossuyt, *L'interdiction de la discrimination dans le droit international des droits de l'homme* (1976), at viii; and, more generally, on the evolution of notions of sovereignty see, G. Abi-Saab, *Cours général de droit international public*, Académie de droit international, 207 *Recueil des cours* (1997).

6 This article is based upon comments made on papers presented by Sur and Reisman at the symposium jointly organized in Paris in March 1997 by the Faculty of Law at the *Université de Paris II-Panthéon* and the Editors of the *European Journal of International Law*.

7 Reisman, 'Designing and Managing the Future of the State', 8 *EJIL* (1997) 409.

8 Sur, 'The State between Fragmentation and Globalization', 8 *EJIL* (1997) 421.

to give rise to strongly divergent prescriptions. But on closer analysis, the distance between the two seems to be not nearly so great. The principal thrust of Reisman's analysis is that the state, in one form or other, is here to stay. He invokes an impressive array of factors which will contribute to this result, and notes the irony involved in the fact that the very success of globalization provides much of the impetus to protect and reinforce the role of states as 'exclusive territorial communities' and as 'primary organizations and value providers'. In this respect, his analysis does not differ fundamentally from that of Sur who portrays globalization and fragmentation of the state as complementary and reinforcing developments. Sur sees a resilient and adaptable state, albeit one that seems content to be little more than a vehicle for United States hegemony. In some respects, at least, the differences between the two analyses are a matter of mood rather than of competing perceptions of what is happening. Where they part company most dramatically is in their respective appreciation of the resulting outcomes. A commentator is tempted to explore the extent to which the different perspectives might be attributed to the respective nationalities and associated world-views of the two authors. But while a reasonably strong case for consistency with national stereotypes could probably be made, this would grossly oversimplify the significance of two very rich and innovative analyses.

Neither author dwells in any detail on the specificities of international law and both assume that neither traditional footnote-laden international legal scholarship nor close doctrinal analysis will carry us very far in our quest to understand the broad significance of current developments.

### **III. The Role of International Actors in Responding to Globalization**

The analysis of neither Sur nor Reisman reflects great sympathy for the approach attributed to 'liberal internationalists' or those who see the future in terms of a much stronger web of traditional international institutions. Sur might well be open to such a prospect, but confines himself in this analysis to lamenting the marginalization of the General Assembly, the sidelining of the Security Council when it really matters, and the move away from international conference diplomacy.

Reisman, on the other hand, seems uncertain about the role of international organizations. Although he has always been an informed and insightful observer of their ups and downs, there is either an unresolved ambivalence as to their future role or an unwillingness to highlight the contrast between what follows from his analysis and what is in fact happening to international organizations. Thus, on the one hand, he acknowledges the need for 'more transnational governmental structures', suggests an expansion in the 'categories of effective and authoritative actors in international politics and international law', and sees an indispensable role for them in improving 'the functions of the state in specific decision sectors'. On the other hand, he underscores the limitations of international bureaucracies in fulfilling 'the essen-

tial value demands that individuals make on their political communities', and concludes by suggesting that the human rights model (national implementation accompanied by rather soft international monitoring) is appropriate across the board.

In doing so he overlooks the relevance of two important developments. The first is the rapidly increasing power of the international financial institutions, which already play a decisive role in relation to a wide range of policy decisions at the national level and go far beyond any monitoring role which could ever be contemplated in the human rights field.<sup>9</sup> Does this imply that Reisman approves of that role in those domains, but wants a softer role to be played by other agencies? He suggests, somewhat limply, that 'the custodians of the trade network' should pay more attention to the detrimental consequences for struggling free market institutions of adverse terms of trade. But this prescription runs almost entirely counter to the direction being pursued by the World Trade Organization (WTO) and its key supporters. The second development that Reisman does not take into account is the realignment among international organizations that is being sanctioned, or perhaps more accurately pursued, by developed country governments. That realignment involves significant limitations upon the aspirations of the United Nations, the transfer of questions of social policy away from international organizations and back to the state, continuing budgetary pressures combined with an increase in the extent to which programmes and individual initiatives favoured by the West are funded and others are not, and consolidation of the power of the financial institutions and the WTO and their indifference to much of the broader policy 'debates'.

This discrepancy in Reisman's analysis is perhaps explained by a willingness to rely on a more diverse, less UN-centred, network of 'authoritative actors'. More light is shed on such a strategy in a recent analysis by Anne-Marie Slaughter.<sup>10</sup> She begins by echoing US policy in relation to the strengthening of existing international organizations (traditional multilateralism is going nowhere because nations will not 'cede their power and sovereignty to an international institution')<sup>11</sup> and is equally dismissive of those whom she describes as the 'new medievalists', who see a world in which power is shifting away from the state and is exercised by 'global governance networks', consisting of entities as diverse as 'Microsoft, the Roman Catholic Church, ... Amnesty International, ... the European Union, the United Nations, and Catalonia'.<sup>12</sup> Instead, Slaughter sees the emergence of a new 'transgovernmentalism', in which the individual elements of the state interact directly with their counterparts abroad, thus 'creating a dense web of relations that constitutes a new, trans-governmental order'. The relevant elements, or 'functionally distinct parts', are the courts, regulatory agencies, executives, and even legislatures. She sees several ad-

9 For an insightful critique of the role of the International Monetary Fund in particular see Orford, 'Locating the International: Military and Monetary Interventions after the Cold War', 38 *Harvard International Law Journal* (1997) 443.

10 Slaughter, 'The Real New World Order', 76 *Foreign Affairs* (1997) 183.

11 *Ibid.*

12 *Ibid.*, at 184.

vantages in this trend. It has a bipartisan appeal within the US Congress, and 'networks of bureaucrats responding to international crises and planning to prevent future problems are more flexible than international institutions and expand the regulatory reach of all participating nations'. But such an approach brings us perilously close to Sur's nightmare.

Slaughter's analysis is both perceptive and revealing. It brings to the fore the two key issues which tend to be overlooked by many commentators on globalization. They are: (i) what is the nature of the global agenda in a globalized world?; and (ii) who sets and implements that agenda?

#### IV. The Nature of the Global Agenda

Slaughter's answer to the first question is clear. She lists '[t]oday's international problems' as being 'terrorism, organised crime, environmental degradation, money laundering, bank failure and securities fraud'.<sup>13</sup> Michael Reisman's agenda is broader but still rather limited: preventing the diffusion of nuclear, chemical and biological weapons, stemming the transnational migration of disease, protecting the environment, and ensuring access to external markets. Under such international agendas, the plight of a billion or so people living in poverty<sup>14</sup> seems to become a domestic problem, or at least to have disappeared from the international agenda, perhaps to be best taken care of by the free market; the plight of 160 million malnourished children and 110 million who do not go to school is off the agenda;<sup>15</sup> the persecution of minority groups is perhaps sufficiently addressed by the international community through the promotion of the viable political institutions, the importance of which Reisman stresses; the distress of some thirty million refugees and displaced persons does not figure prominently; more effective regulation of the activities of transnational corporations is not on the agenda, except in relation to activities that are clearly criminal; human rights in general, including the rights of women, children's rights, among others, while important, are not prominent on the new international agenda; and nor are diseases that remain within national borders.

The agenda that emerges seems remarkably consonant with one particular, rather narrow, vision of the role of the international community in response to the challenges of globalization. Those issues that the industrialized countries can deal with among themselves do not need to be on the international agenda. Those that demand effective international cooperation, such as drugs, corruption, weapons of mass destruction, terrorism, etc., make up the minimalist new international agenda. US Under-Secretary of State Strobe Talbott recently observed that '[f]or many millions

13 *Ibid.*

14 It is estimated that 1.3 billion people live on incomes of less than \$1 per day and that more than 100 million people in industrialized countries live below the poverty line. United Nations Development Programme, *Human Development Report 1997* (1997), at 24.

15 *Ibid.*

of people, globalization has meant greater freedom and prosperity. But for millions of others, the same process has brought economic disadvantage and social disruption.<sup>16</sup> But at the international level this bundle of issues remains high only on a rhetorical agenda. If the market is unable to resolve the problem, we might assume that we look either to governments or to the international community, or both, to perform their traditionally accepted functions, albeit more effectively and in a more targeted manner. But, in practice the role and capacity of both actors in response to such matters are being minimized.<sup>17</sup>

## V. Who Sets and Implements the Agenda?

That brings us to the second question as to who sets and implements the new agenda? For Sur, the answer is straightforward. The new rules of the game are dictated by the United States. Globalization is little more than 'a convenient term to indicate American hegemony'. While such bluntness is as welcome as it is uncommon in the often semi-diplomatic arenas of international law, it is not very far from the approach adopted by many observers writing in other fields, such as economic development or political science.<sup>18</sup> Slaughter's answer is different. Rather than US hegemony, she sees the 'internationalists of the 1990s' to be 'bankers, lawyers, businesspeople, public-interest activists, and criminals' and the agenda is implemented in '[m]eetings between securities regulators, antitrust or environment officials, judges or legislators ...'.<sup>19</sup> Her favourite example is that of the Basle Committee, an informal but self-constituted and extremely powerful grouping of the governors of 12 central banks. 'Wall Street', she says, 'looks to the Basle Committee rather than the World Bank'.

16 Talbott, 'Globalization and Diplomacy: A Practitioner's Perspective', 108 *Foreign Policy* (Fall 1997) 69, at 70.

17 A detailed analysis of this proposition is well beyond the scope of this article. A strong and intellectually provocative version of the thesis, with parts of which the present author would take issue, is given by Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (1996). Strange argues that power has shifted dramatically within the last 20-30 years from government agencies to private bodies of various kinds and from states to markets. For her, all states are to some extent 'victims of the market economy'. 'Their failure to manage the national economy, to maintain employment and sustain economic growth, to avoid imbalances of payments with other states, to control the rate of interest and the exchange rate is not a matter of technical incompetence, nor moral turpitude nor political maladroitness. It is neither in any direct sense their fault, nor the fault of others.' *Ibid.*, at 14. For a micro-level analysis of such trends see Nina and Russell, 'Policing "By Any Means Necessary": Reflections on Privatisation, Human Rights and Police Issues - Considerations for Australia and South Africa', 3 *Australian Journal of Human Rights* (1997) 157.

18 See, e.g., the debate over the so-called 'Washington consensus' of the late 1980s as to the priorities (free markets and tight money) that US policies and conditionality insisted be followed within Latin America. L. Emmerij (ed.), *Economic and Social Development into the XXI Century* (1997), Part II. Also, Gilbert Rist, *The History of Development: From Western Origins to Global Faith* (1997).

19 Slaughter, *supra* note 10, at 185.

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If she is correct, her analysis, while less dramatic than Sur's, is actually more disturbing. It implies the marginalization of governments as such and their replacement by special interest groups, which might sometimes include the relevant governmental bureaucrats. It suggests a definitive move away from arenas of relative transparency into the back rooms, the emergence of what she terms a 'real new world order' in which those with power consolidate it and make the decisions which will continue to determine the fate of the excluded, and the bypassing of the national political arenas to which the United States and other proponents of the importance of healthy democratic institutions attach so much importance. Unlike Sur who sees the substitution of US law for international law, the outcome for Slaughter is 'the nationalization of international law'.<sup>20</sup> Yet, almost in the same breath, she suggests that the main purpose of the transgovernmentalists is 'to help regulators apprehend those who would harm the interests of American voters'.<sup>21</sup>

In general, Slaughter identifies an important trend but significantly overstates its actual or even potential impact. She seeks to single out and emphasize one, ultimately rather artificial, layer out of a much more complex set of strata. In practice, there are multiple points of interaction between decision-makers and these take place within a variety of public, private and 'transgovernmental' fora which facilitate and sometimes structure their interactions. Moreover, professional peer groups have always played an important role in both national and transnational regulatory and other decision-making contexts. While ease of travel and communications have enhanced and facilitated their functioning, it is far from clear that the result has involved such a fundamental shift in the locus of power that one can conclude that the state is 'disaggregating'.

Multilateral organizations cannot be simply sifted out of the picture like lumps in flour. To suggest that the real action lies in Basle rather than Washington in the case of banking, or with transnational litigation strategies in national courts rather than with the UN Human Rights Committee in the case of human rights, is to oversimplify the complex, essential and continuing interaction among different levels or fora that continues to characterize international relations in these areas. Slaughter also leaves little room in her analysis to take account of the extent to which decision-making in key areas of the global market economy is exercised neither by governments nor by transgovernmental actors, but by often unaccountable 'non-state actors'.<sup>22</sup> By tailoring the facts to fit a thesis, Slaughter presents a picture of domination, both of agenda-setting and decision-making (or as Sur would say, of hegemonic behaviour), by small, unaccountable, self-selected, non-transparent, elite

20 *Ibid.*, at 192.

21 *Ibid.*, at 191.

22 See, e.g., the analysis by Susan Strange, *supra* note 17. In addition to organized crime, which Slaughter also identifies, Strange points to the power wielded by firms in the telecommunications field ('telecoms'), insurance companies, international accounting firms, transnational firms exercising largely unhindered cartel powers ('private protectionism'), and 'econocrats' (officials in international organizations performing economic functions).

groups (which are, more often than not, wholly US-centred), which, happily, strongly overstates what is nevertheless a disturbing trend.

For her part, Slaughter is not pessimistic about the capacity of politicians to respond to the dispersal of power resulting from transgovernmentalism. As they become aware of the power of these 'transgovernmental networks, they will expand their oversight capacities and develop networks of their own'.<sup>23</sup> Similarly, in rebutting the new medievalist thesis, she emphasizes that private power (which she defines primarily by reference to NGOs) is no substitute for state power. But it is precisely in relation to these aspects that the impact of globalization is felt most strongly. Several parallel developments are working to reduce the powers of the state, of national legislatures, and of international organizations, while private power (that of corporations rather than NGOs) is taking up even more than the slack left by the emergence of the minimalist state.

Before developing this point, it is useful to take up the issue of the definition of globalization. The descriptions of the relevant processes by Sur and Reisman, while not identical, are more than adequate for present purposes. Both follow the majority of commentators in seeing globalization as being 'devoid of content or particular values', as Sur puts it. Others have described it as a market-induced, as opposed to a policy-led, process.<sup>24</sup> In my view, however, while globalization purports to be value-neutral, it is closely linked to two non-neutral trends. In the first place, respect for the free market has been introduced as an element which is capable of trumping other values. Thus, even some human rights norms are increasingly subject to an assessment of their market friendliness in order to determine what, if any, weight will be accorded to them. In the world of globalization, a strong reaction against gender and other forms of discrimination, the suppression of trade unions, or the denial of primary education or health care, can often require not only a showing that the relevant practices run counter to human rights standards but also a demonstration that they are offensive to the imperatives of economic efficiency and the functioning of the free market. If those tests cannot be satisfied, the continuing validity of the norms is seen to be at best anomalous, and at worst anachronistic and destined to be short-lived. In at least some respects the burden of proof has been shifted – in order to be validated, a purported human right must justify its contribution to a broader, market-based 'vision' of the good society.

Secondly, the means which are always assumed to be an indispensable part of the globalization process, have in fact acquired the status of values in and of themselves. Those means/values include, for example: privatization of as many functions as possible; deregulation, particularly of private power, at both national and international levels; reliance upon the free market as the most efficient and appropriate value-allocating mechanism; minimal government except in relation to law and

<sup>23</sup> *Ibid.*, at 197.

<sup>24</sup> Mittelman, 'The Dynamics of Globalization', in J.H. Mittelman (ed.), *Globalization: Critical Reflections* (1996), 3.



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order functions narrowly defined; and minimal international regulation except in relation to the 'new' international agenda items.<sup>25</sup>

When these assumptions, or values, are applied to the state, as well as to international organizations, the result is a dramatically reduced ability to act in any of the capacities which even the strongest supporters of globalization would generally concede to be necessary. However one describes the role that should continue to be played by the state – be it as a counter-balance, a watchdog, a regulator, the guarantor of the proverbial fair playing-field, or as an overseer – its ability to carry out such functions effectively has been significantly curtailed.<sup>26</sup> It is somewhat ironic that perhaps the most compelling testimony to the problems which are feared to flow from the dramatic shrinking of the public sector and the questioning of the appropriateness of many of the functions formerly performed by governments is the World Bank's 1997 report entitled *The State in a Changing World*. After more than a decade of leading the fight against statism, oppressive bureaucracy, and counter-productive attachments to over-regulation, the Bank has suddenly become the champion of the state, without which 'development – economic, social, and sustainable – ... is impossible. It is increasingly recognized that an effective state – not a minimal one – is central to economic and social development, but more as partner and facilitator than as director.'<sup>27</sup>

The sting, as usual, is in the tail, for the Bank's model is of a state apparatus as the facilitator for private economic initiative. Accordingly, it emphasizes privatization, decentralization, the strengthening of civil society, the eradication of corruption, increasing the efficiency and professionalism of a radically downsized bureaucracy, and promotion of the rule of law which is defined in effect as a legal system in which foreign investors can have trust. Thus the Bank's characterization of a good legal system is a set of laws and enforcement mechanisms which 'establish and apply the rules of the game, lower transaction costs, increase commercial certainty, create incentives for efficiency, and control crime and corruption so that businesses can focus on productive activities.'<sup>28</sup> In its emphasis upon the rule of law it confirms the trend towards 'judicialization', lamented by Sur and extolled by Slaughter. But in the present context, the report is significant not for its

25 In this respect, globalization can be seen as imparting values or norms not only in the economic, but also in the social, cultural and political domains. For a sophisticated analysis along these lines see Emmerij, 'Development Thinking and Practice: Introductory Essay and Policy Conclusions', in Emmerij, *supra* note 18, at 3. See also United Nations Research Institute for Social Development, *States of Disarray: The Social Effects of Globalization* (1995).

26 The complexity of establishing this proposition should, of course, be acknowledged. Thus, for example, *The Economist* delights in pointing out that governmental expenditure as a percentage of national income in the industrialized countries is today higher than ever and that the upward curve has been uninterrupted in recent decades. See 'The Future of the State: A Survey of the World Economy', *The Economist*, 20 September 1997, at 7. Note, however, that the situation in most poorer countries is very different and that government spending *per se* cannot be equated with control over the economy or the maintenance of the type of functions that are of particular concern here.

27 World Bank, *World Development Report 1997* (1997), at 18.

28 World Bank, *From Plan to Market: World Development Report 1996* (1996), at 86.

specific content,<sup>29</sup> so much as for its confirmation of the perception that the backlash against the state (a process encouraged in no small measure by the Bank) has gone too far.

The application of the 'values' of globalization to international organizations has had a similar impact. There can be no doubt that the United Nations is a particularly cumbersome, unwieldy and often inefficient organization. All large bureaucracies suffer, to a greater or lesser extent, from such afflictions. But the UN is worse than many and there is a clear need for reform. But the quest to build a lean, mean and clean organizational and bureaucratic structure, which has been underway for some years, although now reaching a peak, has been linked to the globalization agenda in ways that were by no means unavoidable or inevitable. This is not the place to go into detail about the impact of the values of globalization upon the agenda and approach of international organizations. A number of examples must suffice to illustrate the overall trend. Thus, the work on a code of conduct for transnational corporations has been abandoned, efforts to achieve a degree of accountability on the part of those entities are generally pursued through voluntary codes developed at the national level and largely self-administered. The functions of economic policy analysis and debate have become the de facto institutional preserve of the champions of privatization, deregulation and state minimization. A dramatic expansion has occurred in both the budget and the effective mandate of the Office of the UN High Commissioner for Refugees in an effort to stem refugee flows and expedite repatriation. The UN units coordinating the fight against drugs, crime and terrorism have been upgraded and strengthened in a new Office for Drug Control and Crime Prevention (the dropping of Criminal Justice from the title sends a clear signal). Corruption has become a major concern of both the World Bank and the IMF,<sup>30</sup> and hundreds of millions of dollars are poured into the new Organization for the Prohibition of Chemical Weapons.

At the same time, the regular UN budget for development activities, as well as the development cooperation budgets of the industrialized countries, are shrinking. While UNDP estimates that 40 per cent of sub-Saharan Africans live in poverty and that 32 per cent will not live to be 40 years old,<sup>31</sup> multilateral aid to Africa fell 22 per cent between 1994 and 1995 and bilateral aid dropped by 14 per cent. World Bank loans to Africa for education and health fell 43 per cent and 65 per cent respectively between 1995–96 and 1996–97.<sup>32</sup> Within the UN, Secretary-General Kofi Anan has announced the cutting of 1,000 jobs and a negative rate of budget

29 The content has been described, not unfairly, as 'a tedious text composed overwhelmingly of truisms', 'pure mush' and 'opaque and meandering'. Book review by Kaplan, 108 *Foreign Policy* (Fall 1997) 167.

30 World Bank, *Helping Countries Combat Corruption: The Role of the World Bank* (1997) and 'IMF Adopts Guidelines Regarding Governance Issues', *IMF Survey*, vol. 26, no. 15, 5 August 1997, at 1.

31 UNDP, *supra* note 14, at 24.

32 Actionaid, *The Reality of Aid 1997/8: An Independent Review of Development Cooperation* (1997).

growth for 1998–99.<sup>33</sup> The response to these developments is striking and instructive. While the Clinton Administration sought to negotiate a variety of somewhat questionable terms and conditions upon which it would commence payment of the \$1,468,525,799 that the UN indicates it owed in regular budget and peacekeeping dues as of 30 June 1997, the US Congress rejected the entire deal in November 1997. The Secretary-General had already announced in July 1997 that, in future, additional resources for development would need to be sought ‘through innovative mechanisms and modalities’, by which he meant, *inter alia*, tax-deductible contributions from individuals and private corporations.<sup>34</sup>

The response was swift. Ted Turner announced a gift of \$1 billion in Time-Warner stock to the UN in September 1997 and George Soros followed suit in October by allocating \$500,000,000 for social programmes in Russia. While such dramatic philanthropic gestures can only be welcomed, their symbolism in certain respects is surely as negative as it is powerful. Foundations and other philanthropic institutions have traditionally funded activities which lie outside the core of governmental responsibilities. It is difficult not to get the message<sup>35</sup> that support for the activities of the UN and even domestic social policy matters might in the future be funded, if at all, by whatever contributions are made voluntarily, whether by governments, foundations, corporations or individuals. In this way, downsizing, either driven or justified by reference to the imperatives of globalization, ensures that both the state and international organizations meet the same fate. One can almost envisage a small announcement at either level, or both, stating that: ‘For reasons beyond our control, we regret that the core has become optional. We regret any inconvenience to clients.’

## VI. The Response of International Lawyers

The central question then is how international lawyers have responded to these trends? As suggested at the outset, many seem to have paid them little heed. Even some of the most interesting writing in the field seems to have proceeded on the twin assumptions of a state that is strong enough to participate effectively in international fora as well as to respond to signals and pressures from the international community, and the existence of a set of multilateral institutions which is vibrant and evenly spread across the key issue areas. Philip Allott, for example, looks forward to a system of international law which will move beyond its current largely remedial functions and cover the gamut of public law activities in a way that ‘imposes legal accountability on the exercise of social power’.<sup>36</sup>

33 *Renewing the United Nations: A Programme for Reform, Report of the Secretary-General*, UN Doc. A/51/950 (1997) para. 32.

34 *Ibid.*, para. 169.

35 And this is so, no matter how much it might be stated formally that these gifts are supplementary and intended neither to replace, nor to pay for, core activities.

36 P. Allott, *Eunomia: New Order for a New World* (1990), at 336. While Slaughter does not refer to Allott, the contrast in the titles of their respective works is striking.

In a remarkable set of lectures given at the Hague Academy of International Law, Bruno Simma identified a shift from the pure bilateralism of early international law to a system in which the original principles, although still influential, are being increasingly interpreted in ways which respond and adjust to the broader community interest, defined in terms of 'a community that comprises not only States, but in the last instance all human beings'.<sup>37</sup> He sees the beginnings of a profound change in the nature of international law and links this with an expansive conception of the power of the state to intervene 'in any private bilateral relationship through the exercise of public power'.<sup>38</sup> The analysis focuses heavily on the drafting, interpretation and implementation of treaties and is very solidly supported by a wide range of case studies. But while the trend traced by Simma develops gradually within the international legal order, there is a counter trend unfolding much more rapidly within the state itself and being given considerable impetus from international forces that remain largely oblivious to the conclusions which might be drawn from the developments he identifies. This in turn reflects a not uncommon problem for law in general, and in this case for international law in particular. That is its capacity to roll merrily along within its own domain, while remaining relatively uninfluenced by developments which only assert their importance at a later stage when a clash between law and context becomes manifest.

Slaughter's analysis seems relatively unaffected by the minimal state phenomenon, although her largely equity-free international agenda is entirely consistent with that development. Her notion of transgovernmentalism, which seems to embrace a significant range of actors that are not governmental in any traditional sense, actually relies rather heavily on the marginalization of traditional multilateral organizations. It also seems to leave increasingly little significant or relevant space for international law, but this is not a dimension that seems to her to be problematic. Her analysis appears to lament the inadequacy of existing forms of corporate regulation, but her preferred new world order provides little indication that this will be addressed effectively except when it is seen to be a problem by key (i.e. generally United States) national regulatory authorities. Michael Reisman, on the other hand, devotes a footnote to the phenomenon of privatization but does not draw any particular conclusions from it.

Finally, Serge Sur highlights the significance of both trends. Curiously, it seems possible to agree with both halves of his analysis (the movement towards an externally subordinated minimalist state, and dramatic US hegemony in many areas) without accepting the argument as a whole. In other words, he seems to give less credence to the impact of autonomous forces, such as developments in technology, communications, and the media, than appears warranted. In the final analysis, however, Sur's diagnosis does not differ dramatically from that of senior US government officials, such as the Administrator of the US Agency for International Develop-

37 Simma, 'From Bilateralism to Community Interest in International Law', *Academy of International Law*, 250 *Recueil des cours* (1994-VI) 234.

38 *Ibid.*

ment, who recently wrote, in an entirely matter-of-fact vein: 'The United States is now in a unique position to provide leadership, and the world will not respond to crisis in peripheral states without our leadership.'<sup>39</sup>

## VII. Conclusion

From a range of significantly different diagnoses, it is possible to draw several conclusions that seem to follow from all of them. In the first place international lawyers cannot be expected to respond uniformly to the implications of globalization. They can, however, be urged to devote more explicit attention to the process and its consequences and to explore more systematically the implications for international norms, institutions and processes that follow therefrom. If many of the trends and processes described above are accurate, much of the mainstream of international law scholarship would seem to be close to the point at which the normative and institutional jigsaw puzzles that it is painstakingly trying to piece together are little more than exercises in nostalgia. One is reminded of a current advertisement for the Inter-Continental Hotel chain depicting a multiracial group of business people in discussion at the relevant hotel in Washington DC. The caption is: 'While everyone was debating the idea of the Global Village, we were building it.' The equivalent advertisement for today's international law might be: 'While non-state actors were building the Global Village, we were busy with yesterday's issues and concepts.'

Secondly, the values either implicit or explicit in the new order that is emerging need to be examined more systematically. International law is a value system, not merely a means of achieving predictable outcomes. Those values include the promotion of a corpus of human rights predicated upon a broad conception of human dignity. Yet the great majority of international lawyers seem content to compartmentalize those values within a small part of the overall discipline and assess the performance of the remainder of the system/framework by reference to values which are often quite separate and sometimes clearly antagonistic to those values. This is not a call for the analyses of specialists in every field of international law to be developed within a human rights framework, but there is a middle course which recognizes the interrelatedness of different parts of the international normative framework.

Thirdly, insufficient attention has been paid to the questions of the nature of the international agenda and who sets and implements it. Whether one accepts the approach of Reisman, Sur or Slaughter, there is an urgent need to re-evaluate the extent to which the emerging shape of the international system reflects the principles of transparency, participation and accountability that are being so strongly promoted in the names of democracy and good governance in relation to domestic processes.

39 Atwood and Rogers, 'New U.S. Guidelines for Providing Humanitarian Aid', *International Herald Tribune*, 13 March 1997, at 8.

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This is not to suggest a return to the somewhat artificial and unsustainable notions of democratic decision-making reflected in many of the New International Economic Order-era proposals. But if the trends described by these authors, and particularly Sur and Slaughter, are accurate reflections of reality, the premises upon which many international organizations are operating, as well as parts of the normative framework, are sadly obsolete and fictional.

Fourthly, the contraction of the 'real' international agenda, and the marginalization or exclusion of a significant range of issues, is a development that needs to be reversed. Equity and fairness, both in real and perceived terms, will remain central to a viable international legal order. Many aspects seem however to have been jettisoned by current developments and too little has been said by the community of international lawyers as a whole.

Finally, there is an urgent need to revisit the distinction that is reflected in international law between the public and private domains. The public/private distinction is more appropriately seen not as a single divide but as a series of often rather inconsistent cleavages in different areas.<sup>40</sup> The role of the Shell Oil Company in Nigeria, the fall of the Government of Papua New Guinea when it sought to contract out the resolution of the Bougainville 'problem' to a firm of South-African-based mercenaries with the delightful name of Sandline International, and the role of private American financiers in the 'de-Arabization' of Jerusalem, all raise questions as to whether existing doctrines and institutional arrangements are adequate to deal with the complexities and realities of a globalized world.

40 For an excellent set of analyses of the impact of globalization upon the field of administrative law, at least within Anglo-Saxon jurisdictions, see M. Taggart (ed.), *The Province of Administrative Law* (1997).