

Laws of Nations

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Anne-Marie Slaughter. *A New World Order*. Princeton University Press. 341 pages. \$29.95

Jack L. Goldsmith and Eric A. Posner. *The Limits of International Law*. Oxford University Press. 262 pages. \$29.95

Jeremy A. Rabkin. *Law Without Nations? Why Constitutional Government Requires Sovereign States*. Princeton University Press. 350 pages. \$29.95

Among American law professors, international law became in the 90s and continues to be today what American constitutional law was in the 70s and 80s — the fashionable front line for advancing progressive social change. Yet even more than constitutional law, international law's sources and authority are open to dispute. Even more than constitutional law, international law has an ineliminable and robust political dimension. And even more than constitutional law, international law invites an appeal to debatable moral principles in the controversies that arise under it. Despite these vexing features, the dominant view in the legal academy — which closely resembles the consensus among European elites and is associated with the European Union's self-understanding — is that international law has an identifiable content and that its content corresponds to a progressive interpretation of government's obligations at home and abroad.

The view is theory-driven and flies commonly under the flag of liberal internationalism. According to the liberal internationalists, a good portion of the structure and content of international law can be derived from reflection on our common humanity or, more precisely, our nature as free and equal rational beings. Such reflection generates an increasingly dense list of human rights that apply to all states everywhere; favors the strengthening of international institutions — such as the International Court of Justice, the International Criminal Court, and the UN General Assembly and Security Council — to promote these rights; seeks an increased role for multilateral initiatives; and applauds the growing role of transnational nongovernmental organizations. In the United States, the liberal internationalist view draws support from the writings of America's preeminent political theorist, John Rawls. In Europe, it gains intellectual heft from Germany's foremost philosophical voice, Jürgen Habermas. Both theorize about the principles under which rational individuals, freed from partiality and prejudice, would choose to live and from which they can derive binding laws and equitable public policy. To be sure, international human rights lawyers are less likely to invoke the abstractions of Rawls and Habermas than they are to look to developing state practice, or the achievements of international institutions and the fruits of diplomacy, as evidence of what international law requires. Nevertheless, it is theory — or, perhaps more accurately, it is a moral and political conception to which Rawls and

Habermas give theoretical expression — that determines for the scholars and jurists which examples of state practice, international institutions, and diplomacy they will appeal to as evidence of the structure and content of international law.

Critics raise a number of serious objections. First, officials of international institutions (to say nothing of ngos) charged with promulgating international law lack democratic accountability: Either they come from democracies but operate at several levels of remove from voters or, far worse, they come from autocracies in which the people whom they supposedly represent have never had a chance to vote for them in free and fair elections. Second, as most international institutions — possessing neither police force nor military — lack the capacity to enforce their rulings and resolutions, their legal pronouncements are impotent and make a mockery of the rule of law. Third, international institutions rely on the dangerous misconception that individuals do, or will come to, place a premium on global citizenship, and that states do, or will come to, place their obligations under international law and to global norms of justice ahead of their own national interest. In reality, the critics contend, individuals are inclined to put state, ethnic group, religious community, or tribal loyalties ahead of global citizenship. And considerations of raw power and refined national interest will, for states, always trump obligations that arise under international law.

Anne-Marie Slaughter, dean of the Woodrow Wilson School of Public and International Affairs at Princeton University and a leading figure among international human rights lawyers, is dissatisfied with the dominant view, but she believes that the major objections to it can be overcome. In fact, the aim of *A New World Order* is to rethink international law and global politics and thereby place the liberal internationalist view on a sounder footing. The key, according to Slaughter, is the rise of “government networks.” These networks, she contends, are pervasive and growing. They range from the wto and imf to the Organization of American States and Organization of African Unity, from the Central and East European Law Initiative to the Association of Southeast Asian Nations, from nato to the World Intellectual Property Organization. They are global and regional, powerful and weak, well-known and obscure. They involve regulators, legislators, ministers, and judges. Their work encompasses national security, global economy, world-wide environmental policy, and international human rights. They operate horizontally, bringing together officials from different countries to exchange information, to develop strategies for enforcing law, and to harmonize rules for the implementation of common regulatory standards. They also function vertically, enabling domestic officials to confer and cooperate with officials of supranational regulatory agencies and global courts.

A sizeable portion of Slaughter’s book describes the nuts and bolts of these multifarious networks. She emphasizes, however, that no mere description of their overlapping and crosscutting operations will yield a full understanding of government networks as they exist and might become. Nor would it be enough to appreciate networks as a form of “soft power,”

a fashionable term in Europe and the American academy for the role in world politics of persuasion, the sharing of information and expertise, and the exchange of opinions and ideas. What is needed is a “deeper conceptual shift.”

The shift is achieved by viewing the world through “the lenses of disaggregated rather than unitary states.” In a world of disaggregated states, the major branches of each country’s government would interact not only with each other, but also with their counterparts around the globe. Domestic legislatures, executives, and judiciaries would develop multiple loyalties. To take one of Slaughter’s principal examples, American judges would meet with increasing regularity with their judicial colleagues around the globe. They would share professional experience and insights, discuss common challenges, and search for shared solutions. This “judicial globalization” would produce an increasingly “global constitutional jurisprudence” of the sort practiced by Justice Breyer, who has recently cited cases from Zimbabwe, India, South Africa, and Canada as persuasive authority for the United States Supreme Court. “Global constitutional jurisprudence” is reflected in a recent opinion by Justice Kennedy, as well. In *Roper v. Simmons*, he interpreted the Constitution’s prohibition on “cruel and unusual punishment” in light of emerging international norms against the death penalty and concluded on that basis that the death penalty applied to minors was unconstitutional. Of course, cross fertilization among judges from different countries is not new or controversial. Neither is the “comity of nations,” or the respect national courts owe the laws and acts of other countries by virtue of their membership in the family of nations. What is relatively new and certainly controversial is Slaughter’s conviction that American judges are, or ought to be, bound not only by the Constitution and the laws and treaties made under it, but also by the emerging global jurisprudence of human rights law as developed by foreign national courts and supranational courts.

Slaughter is aware that global networks can be used for ill as well as good. “Terrorists, arms dealers, money launderers, drug dealers, traffickers in women and children, and the modern pirates of intellectual property,” she observes in the first sentence of her book, “all operate through global networks.” Yet with the proper training and intentions, she believes, humanity can turn the rise of a networked world to its advantage. Indeed, global government networks, argues Slaughter, have the potential to overcome what she calls the “globalization paradox,” which is really an enduring truth about government — we need it but fear it — applied to international affairs. World government, though, is not the solution. It is “infeasible and undesirable,” both because “the size and scope of such a government presents an unavoidable and dangerous threat to individual liberty” and because “the diversity of the people to be governed makes it almost impossible to conceive of a global demos.” But a world order based on global networks needn’t be illiberal or undemocratic, contends Slaughter. Since they are decentralized and dispersed, she says, global networks do not present the danger to individual rights posed by a powerful centralized government; and since the actors

in the global networks are sub-units of nation states, which will retain their primacy in the new world order, the people of each state can hold government officials accountable for the decisions they make as part of global networks.

Although she remarks that the nation state will retain its primacy in the new world order, Slaughter is also adamant that old ways of thinking about state sovereignty — the final authority to make and enforce law — must be abandoned. In particular, we must give up the notion, central to American constitutional law, of a unitary state. And we must reject the premise from which international law has for centuries proceeded: that a sovereign state's internal affairs are its own business and not subject to interference from other states or international organizations. Slaughter thinks these assumptions distort the reality of the emerging new world order and stand in the way of its full realization. If instead we think of states “as aggregations of distinct institutions with separate roles and capacities,” we can see the emergence of “a new international landscape” constituted by an expanding array of crisscrossing and interlacing government networks.

Slaughter has high hopes for the future. She envisions a new networked world order that institutionalizes cooperation, harnesses conflict, promotes peace and prosperity, safeguards the environment, and defends human rights. It will also foster convergence of opinion and informed disagreement around the globe, pave the way to improved compliance with international rules, and develop friendship and mutual understanding among national leaders. The danger, she admits, is the creation of a “global technocracy” managed by an unelected and unaccountable elite. But it is not, in her view, a grave danger, and she recommends a variety of measures for handling it: promoting recognition of the dual domestic and international functions of domestic officials, increasing transparency in the operation of government networks, expanding the role of legislative networks in monitoring themselves and other networks, improving the accountability of nongovernmental networks by linking them to governmental networks, and enacting domestic legislation designed to make domestic officials more accountable to voters for their role in governmental networks.

New laws, however, will take us only so far. To fully realize the new world order, it will also be necessary, Slaughter recognizes, to change hearts and minds. A shared sensibility among government officials of all nations must be fostered. Slaughter finds the backbone of such a sensibility in five principles, which in fact represent a vision of progressive liberalism applied to world politics. “Global deliberative equality” demands maximizing participation among nations. “Legitimate difference” calls for appreciation of nations' historical, cultural, and political differences. “Positive comity” goes beyond the traditional idea of the comity of nations by asking states to assume an affirmative obligation to assist other states. “Checks and balances” encourages the formation of a multiplicity of sources of power. And the principle of solidarity requires that governance decisions be taken as close to the people they affect as possible. The more these principles come to be embraced, she says, the more states

can become disaggregated; and the more states become disaggregated, the more the new world order will instill these principles in officials. Indeed, Slaughter goes so far as to imagine the disaggregation of sovereignty itself so that separate national government branches and institutions themselves become “bearers of rights and responsibilities of sovereignty in the global arena.” Then she goes farther, endorsing a change in the very meaning of the term sovereignty, “from autonomy from outside interference to the capacity to participate in transgovernmental networks of all types.”

One should not underestimate the radicalism of Slaughter’s proposal, encapsulated in her casual exercise in redefinition — as if one could disguise the rejection of a fundamental principle by keeping the name while changing the meaning. To be sure, the descriptive part of her book is generally illuminating and unexceptionable. And it is perfectly appropriate to suggest that “U.S. government representatives, in every branch, must take account of international events, trends and interests to represent their constituents adequately.” However, it is quite another thing to argue that U.S. representatives in every branch of government “should also see themselves as representing a larger transnational or even global constituency.” Such a vision of disaggregated states and disaggregated sovereignty would involve a revolution in American government. And it immediately gives rise to two rather large questions: What is the legal status of the international law on which Slaughter’s new world order depends? And what is lost in abandoning the traditional and, in her view, antiquated notion of state sovereignty?

Happily, two excellent books have appeared that address these concerns. *The Limits of International Law* is the product of a collaboration between Jack Goldsmith, who served the Bush administration as head of the Office of Legal Counsel in the Department of Justice before his recent appointment to Harvard Law School, and University of Chicago law professor Eric Posner, who has written extensively on the economic analysis of law. Their central assumption is “that international law emerges from states acting rationally to maximize their interests, given their perception of the interests of other states and the distribution of state power.” It is a refined version of an assumption familiar from the school of international politics known as realism, which holds that state actions are best understood as motivated by a desire for power. Goldsmith’s and Posner’s account, however, is distinguished by the rational-choice models they bring to the analysis of state behavior, their shrewd and contrarian readings of customary international law and treaties, and their sustained engagement with the liberal internationalist paradigm.

Although their book is written with scholarly detachment, it represents a frontal assault on the liberal internationalist view that international law emerges from reflection on moral principles and that states comply with it in significant measure because of its moral and legal claim upon them. The authors argue that states comply with international law for almost exclusively instrumental reasons. This is not to say that international law is not law. It is to say that the study of it does not provide the key to state conduct and that the elaboration of it will not decisively improve world order. Nor is it to contend that states lack good reasons to

comply with international law. They often do reasonably comply with their international obligations — because of a coincidence of interest, or because states gain by coordinating their behavior; or because cooperation in the short term will result in long term gains, or because of coercion by a stronger state or states of a weaker state or states.

The heart of Goldsmith's and Posner's book is their rational-choice analysis of how customary international law originates and changes, and why states comply with it, and their examination of why states makes treaties and honor them. It will raise plenty of hackles. The lucidity and accessibility of their theorizing and the incisiveness of their doctrinal analysis will only heighten the effect. Yet it is their conclusions about the relation between morals and international law that provides the greatest challenge to the liberal internationalism Slaughter champions.

First, Goldsmith and Posner reject the view that the increasing propensity of states to adopt the language of international law — particularly the language of human rights law — is evidence of the power of international human rights norms to shape state conduct. As with individuals, they argue, so too with states: Talk is cheap. Still, international-law talk serves strategic purposes. While talking tough about foreign affairs at home, a leader may make concessions or abdicate responsibilities abroad in ways that are invisible to an uninformed domestic audience. Alternatively, a leader may attempt to deceive foreign audiences by insisting on his country's benign intentions and sincere respect for international norms. Still, liberal internationalists would insist that the increasing use by foreign leaders of the language of international human rights can't help but exert a pull on their own thinking and the formation of state policy. Goldsmith and Posner doubt it. They think there is a perfectly good explanation, rooted in self-interest, for the fact that the language of international human rights law has come to supply the moral and legal content for the rhetoric of today's world leaders: In an increasingly interconnected world order, a state may develop relations with almost any other state and must make its case in the most universal language available.

Second, and more boldly, the authors contend that a moral obligation to obey international law does not even exist. They point out that states change regimes; it would not make sense to hold a state that has made the transition to democracy, for example, to treaties it signed while under communist dictatorship. They also observe that in the absence of a world government, there is no clear international authority that promulgates, enforces, and is responsible for the benefits of international law and to which states therefore might owe allegiance. And they note that the liberal internationalist practice of treating violations of international law as a step in the emergence of a new legal order — when the violation corresponds with the moral judgments of liberal internationalists, at any rate — is inconsistent with the usual understanding of legal obligation. As they argue throughout their book, Goldsmith and Posner maintain that the absence of a moral obligation to obey international law does not much affect the conduct of states, which have a variety of self-

interested reasons for compliance. In fact, they worry that the view that states possess such obligations may actually promote greater lawlessness in the international arena. One could wonder, for example, how the rule of law was served by the liberal internationalist consensus opposing the use of force to remove Saddam Hussein in March 2003 despite his flouting of 17 resolutions passed by the United Nations Security Council over a period of 12 years.

Third, Goldsmith and Posner argue that strong cosmopolitan duties are inconsistent with the imperatives of liberal democracy. Liberal internationalists maintain that states have a cosmopolitan duty to consider global welfare in the formation of national policy, to the extent of ratifying treaties and intervening to stop human rights abuses even when such actions would lower the net welfare of the state's own citizens. This is unrealistic and undemocratic, they argue. In a liberal and democratic society, sentiments and preferences among citizens differ, including those concerning the scope of cosmopolitan duties; security and prosperity are the organizing purpose of the liberal state, not charity for the world; and solidarity and altruism depend on familiarity and proximity. To these observations a liberal internationalist might respond that citizens of liberal democracies need to be educated to take their cosmopolitan duty seriously or that allegiance to the principles of liberal democratic states should not be seen as the highest value in the international system. Goldsmith and Posner counter that using the public school system to teach students of their moral obligation to combat world inequality and stop human rights violations imposes an impossible pedagogical burden. They might have added that seeking to instill in students the thick set of moral and policy judgments that form the idea of cosmopolitan duties is inconsistent with a liberal education. As for ceding sovereignty to transnational governing institutions, Goldsmith and Posner oppose it because such institutions would lack the loyalty of national citizens and the coercive power of a nation state.

In his learned and closely argued book, Jeremy Rabkin, professor of government at Cornell University, takes up where Goldsmith and Posner leave off, providing a wide-ranging exploration of the role that the doctrine of sovereignty plays in the theory and practice of liberal democracy. As his title suggests, Rabkin, too, takes aim at a fundamental tenet of the liberal internationalist outlook, arguing that state sovereignty is a prerequisite for international law and constitutional government. To make his case, Rabkin approaches the problem from many angles. He examines the human longing for universal political unity, the history of empire, the rise of the modern nation state, the classics of international jurisprudence, American foreign policy, and diplomacy from the founding to the present, the construction of the European Union, the post-World War II rise of international human rights law, and changes over the last several centuries in the practice and law of international trade. His argument is rich in scholarship, detail and nuance, yet his conclusion can be simply stated: The United States should hold fast to the doctrine of state sovereignty because

abandoning it would be both unlawful and unwise, contravening the Constitution and endangering the rights of American citizens while leaving responsibility for the protection of human rights around the world to unaccountable authorities and in weak hands.

The relinquishing of sovereignty contravenes the Constitution in both a narrow and a broad sense. More narrowly, it cuts against Article vi, Clause 2, which states that “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” How can the Constitution remain the supreme law of the land if, as Slaughter counsels, American judges look beyond and above the Constitution to an increasingly authoritative “global constitutional jurisprudence” and if office holders in all three branches “also see themselves as representing a larger transnational or even global constituency”?

More broadly, Rabkin argues, relinquishing sovereignty cuts against the theory of government on which the Constitution is based. That theory of liberal constitutionalism, developed most notably in the writings of Locke and in the pages of *The Federalist*, assumed the existence of a “law of nations.” Classically elaborated in the seventeenth and eighteenth centuries in the writings of Grotius, Pufendorf, and Vattel, the law of nations itself assumed the existence of sovereign states whose rights and duties it sought to delineate. By the end of the eighteenth century, this came to be known as international law. It certainly did not suppose that any body of nations could speak on its behalf, nor did it look to the creation of such a body. On the contrary, and to take the critical case, international law did not suppose that others could decide when a state could or should go to war. As Rabkin emphasizes, it had good liberal reasons for this. It assumed that all states were formally equal. It interpreted this to mean that no state had the right to interfere with the internal policy of another, and certainly not in regard to the gravest matter — determining when the most basic of rights, the right to self-defense, counseled the use of military force. It also held to the view of noninterference because it believed that the nation state had a greater interest in protecting the rights of its citizens than any competing state or body. Rabkin agrees. What his book brings home, in a variety of ways and in a variety of contexts, is that what is at stake in the doctrine of sovereignty is not whether there are universal principles binding on all states, but who has authority to interpret them and who has the interest and capacity to protect them.

Indeed, the debate between liberal internationalists like Slaughter and liberal nationalists like Goldsmith and Posner and Rabkin reflects a difference of opinion about how best to defend individual rights. Liberal internationalists pin their hopes on the justice and efficacy of international institutions. In this they are the descendants of Woodrow Wilson. Liberal nationalists stress the greater accountability and reliability of nation states in the defense of life and limb and in securing the conditions for liberty under law. In this they are the heirs of Ronald Reagan. Both have roots in the liberal tradition, and each tends to exaggerate an idea or principle critical to that tradition which the other is inclined to forget or suppress.

Liberal internationalists exaggerate the power of universal principles and forget or suppress the limitations on the ability of individuals and states to set aside self-interest. Slaughter, for example, is inclined to believe that self-interest not only can be enlightened, as the liberal tradition taught, but can to a significant degree be overcome — at least for those who rise to the top of business, intellectual life, and politics in their states, join global governance networks, and take upon themselves cosmopolitan duties. So little attention does she give to self-interest in politics that she seems never to factor into her account of the new world order certain salient features, comical as well as unlovely, of her central concept. In fact, “networking” also includes the posturing, posing, and preening for position; the creation of rigid hierarchies and exclusive cliques; and the lust for power that hides behind high-minded formulations and manipulates sound principles for personal and party advantage. Nor does Slaughter examine how, like constitutional law before it, the appeal to international law provides for progressive professors a tactic for circumventing majority will in the United States as it is expressed through the people’s democratically elected representatives and embodied in the Constitution.

Meanwhile, liberal nationalists exaggerate the role of self-interest and forget or suppress the universalizing pressure of liberalism’s internal logic. To correct the problem, they must consider the liberal origins of the quest for a juridical framework that encompasses all nations and explore the liberal sources of the disrepute into which the doctrine of sovereignty has fallen. And they need to examine the consequences of a culture of freedom on citizens’ habits of heart and mind. For the spread of liberty exposes liberal nationalists to hard questions. If all humanity is connected through individual rights, and if nation states are more secure when other nation states recognize and protect those rights, then wouldn’t liberal democracies have an interest in bringing all nation states into a larger system that guarantees human rights? And if sovereignty is a device or instrument for securing individual rights, then in an increasingly globalized and interconnected world shouldn’t the particularity and chauvinism that inheres in the nation state be reduced by empowering agents and organs that speak for all humanity?

In a globalized, interconnected world, where opportunities and dangers are great, providing an adequate doctrine of international law is highly desirable. Such a doctrine must do justice to the ineluctably universalizing claims of the liberal tradition and the irreducible realities of self-interest. The approach that deserves to prevail is the one that captures most fully the truth in liberal internationalism and the truth in liberal nationalism and respects the enduring tension between them.