ESSAY

GLOBALIZATION AND DEVELOPMENT—FREE TRADE, FOREIGN AID, INVESTMENT AND THE RULE OF LAW[†]

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On the morning of September 11, 2001, I stepped out the door of my apartment building and witnessed Armageddon. I live only four blocks from the World Trade Center, and I stood—stunned—as flames licked the side of the North Tower. As I made my way to the site, against the crowds fleeing through the narrow streets, I waded through the ash and cinder that blanketed downtown Manhattan like an out-of-season snow; and I watched in horror as people chose to plummet to the earth rather than await their certain death in the raging inferno.

I have spent much of my career in international law working in the developing world, and I am no stranger to war-torn zones. I was a member of the first international judicial delegation into Tuzla after the Dayton Accords.[1] And I traveled to Nairobi on a mission sponsored by the U.S. Agency

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1. The Dayton Peace Agreement—known as the Dayton Accords—was initialed at Wright-Patterson Air Force Base in Dayton, Ohio on November 21, 1995, and signed in Paris on December 14, 1995 by Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia. Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Dec. 14, 1995, 35 I.L.M. 75. The Accords sought to end ethnic and religious conflict in the region by establishing a unified country, Bosnia and Herzegovina, consisting of two multi-ethnic regions, the BH Federation and the Republika Srpska. *Id.*

for International Development just weeks after the Embassy bombings there.[2] But the events of 9/11 were different. In the most literal sense of the words, the events of 9/11 "hit home."

The symbolism and the irony of the tragedy were striking. In essence, the terrorists turned globalization against itself, mounting an attack planned via the Internet, fueled by electronic funds transfers, coordinated via cell phone, and executed using two commercial U.S. jets—the wings of globalization—hijacked by immigrant extremists to reduce to rubble the iconic World Trade Center (the very symbol of U.S. economic power), and to bring Wall Street (a key cradle of globalization) to its knees, killing some 2,800 people from more than sixty countries in the process.[3] Paradoxically, the very forces that drive globalization—transportation, information and communication technologies—were marshaled by opponents of globalization, in an effort to destroy it.[4]

In the poetic words of one thoughtful observer, "globalization means the terrible nearness of distant places."[5] Terrorism is the truly dark side of globalization. *The New Yorker* magazine has offered up its own, darkly comic take on the phenomenon. A cartoon published barely one month before 9/11 depicts two businessmen in a bar.[6] And one says to the other: "Look, I've got nothing against globalization, just as long as it's not in my backyard."[7]

Of course, everyday events in the world paint a much more vibrant picture of the phenomenon. One recent article in the *Financial Times* opened with thumbnail sketches of: Lucio Garcia, a gardener in Virginia who speaks daily to his family in a remote Bolivian town, using a prepaid phone card that costs him a few cents a minute; Edie Baron Levi, a Mexican congressman who commutes weekly from Mexico City to Los Angeles, where he and his constituents live; and Iqbal Farouqi, a Pakistani waiter who works in Milan, saving his tips to buy trucks in Karachi, which he rents to relatives and

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2. On August 7, 1998, bombs leveled the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. *Prosecutors Tied Defendants to bin Laden*, N.Y. TIMES, Oct. 19, 2001, at B10. Two hundred twelve Kenyans and twelve U.S. citizens perished in the Nairobi incident. *Id.* Four followers of Osama bin Laden were later sentenced to life in prison for their role in the bombings.

3. *See* Linda Williamson, *Living With Pain: New Yorkers "Vigilant But Defiant,"* TORONTO SUN, Sept. 11, 2002, at 2 (reporting number and nationality of World Trade Center victims).

4. In another ironic twist, two of the most ubiquitous symbols of American-style capitalism and favored targets of anti-globalization activists—McDonald's and Starbucks—played significant roles in the post-9/11 search, rescue and recovery efforts. The neighborhood McDonald's was one of the first sites commandeered to help feed emergency workers, and "my" Starbucks was closed for months while it was used as a relief center.

5. Okwui Enwezor (Artistic Director of Documenta 11, the latest edition of what is often called "the Olympics of contemporary art," held every five years in Kassel, Germany), *quoted in* Peter Plagens, *Doubts at Documenta*, NEWSWEEK, June 24, 2002, at 84.

6. *See* NEW YORKER, Aug. 6, 2001, at 4.

7. *Id.*

manages over the Internet.[8] Globalization has made it possible for people in one country to be involved in the day-to-day cultural, economic and political affairs of other countries. And with it comes the need for a new world order.

The old paradigms no longer suffice, as September 11th proved. More and more, it is rogue forces, such as Al Qaeda—not sovereign states—who wield power. Or, to put it another way, Al Qaeda *is* a virtual state. As one commentator has observed:

> "[Al Qaeda has a] standing army, a Treasury, a consistent source of revenue, a civil service, and an intelligence corps. It even runs a rudimentary welfare program for its fighters and their relatives and associates." It declared war on the U.S. in 1995; and, as at the time of Pearl Harbor, the U.S. faces "death and destruction on a scale associated with war."[9]

Framed in that fashion, Al Qaeda does indeed sound like a state.

National boundaries and notions of territoriality are increasingly meaningless—irrelevant given economic integration and the accelerating movement of people, capital, goods and services, information, and ideas across invisible (and increasingly porous) geographic borders.[10] Problems that once were purely national now have a clearly international dimension. Many of these so-called "problems without passports" cannot be solved by a national-only approach, or even a bilateral, nation-to-nation approach.[11] While it may be premature to proclaim its demise, the nation/state is increasingly a flawed agent for cross-border bargains. A firm based in the U.S., for example, may "raise[ ] capital from Japanese pension funds and Belgian dentists, . . . operate[ ] subsidiaries in China and Chile, . . . employ[ ] people of all faiths and cultures, and . . . compete[ ] globally . . . ."[12] Yet national lawmakers and regulators of the world around still, naturally, tend to focus narrowly on the territory within their boundaries. Even now, each nation/state generally acts only in its own interests, and typically with only the short term in mind.

Even as individuals, we still tend to think locally, even as we inadvertently act globally. By spraying myself with antiperspirant in my apartment in New York every morning, I may be contributing to skin cancer deaths,

8. Moises Naim, *The Diaspora That Fuels Development*, FIN. TIMES (2d ed., U.S.), June 10, 2002, at 13.

9. Samuel Brittan, *The U.S. is More Nearly Right*, FIN. TIMES (1st ed., London), Aug. 1, 2002, at 15 (quoting Philip Bobbit, *The First Terrorist War of the World*, FIN. TIMES (1st ed., London), July 13, 2002, at 2).

10. *But see* Martin Wolf, *Location, Location, Location Equals the Wealth of Nations*, FIN. TIMES (2d ed., London), Sept. 25, 2002, at 23 (arguing that, in another sense, "[b]orders have never mattered so much. Two or three centuries ago, the most important determinant of most people's fate was the class into which they were born, closely followed by their sex. Today, where one is born matters far more" than class or sex; and that "a large proportion of humanity find[s] itself locked inside bad locations with poor policies and worse governance.").

11. John Ruggie, *Managing Corporate Social Responsibility*, FIN. TIMES (2d ed., U.S.), Oct. 25, 2002, at 13 (referring to "proliferating 'problems without passports'").

12. *Capitalism and Conscience*, WASH. POST, July 10, 2002, at A16.

years from now, in some remote village in Brazil.[13] It is a haunting spectre: nation/states, each huddled within its own borders, leaving the world's most harrowing problems "orphaned": AIDS, climate change, drug trafficking, money laundering and terrorism, to name but a few.[14]

Of course, all that is changing. To be sure, the number of nation/states has soared in recent decades. But recent years have also witnessed a dramatic proliferation of multilateral organizations and institutions to which those nation/states are relinquishing defining elements of their sovereignty: authority over the use of force, over economic and social policy-making, and over their own environmental resources.

Moreover, these supranational organizations and institutions are not the only forces to which the world's nation/states are ceding power. The role of multinational corporations iis being re-conceived as well. Today, twenty-nine of the world's 100 largest economic entities are multinational companies.[15] The leader of the pack is Exxon, which is larger than all but forty-four national economies.[16] Exxon is about the same size as the economy of Pakistan, and larger than Peru.[17] Ford, Daimler-Chrysler, General Electric and Toyota are all comparable in size to the economy of Nigeria.[18] Phillip Morris is akin to Tunisia, Slovakia and Guatemala, while BP, Wal-Mart, IBM and Volkswagen all rank in size between Libya and Cuba.[19] Pharmaceuticals giant GlaxoSmithKline and BT, the smallest of the top 100 multinationals, are equal in size to Syria.[20] Around the globe—but particularly in the developing world—multinational corporations have begun to assume some of the functions traditionally reserved to nation/states . . . states whose economies they often dwarf.[21]

And then there is the rise of civil society: public policy think tanks, independent media, trade unions, and other non-profit organizations and voluntary associations dedicated to civic, cultural, humanitarian, and social

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13. A recent campaign promoting *Economist* magazine makes the point rather more lyrically (and affirmatively): "When a butterfly flutters its wings in one part of the world, it can eventually cause a hurricane in another." (copy on file with California Western International Law Journal).

14. (Citing "[b]iological weapons proliferation, global warming, and rapidly accelerating biodiversity loss" as some of the more pressing issues on the "global to-do list," one analyst recently warned that "future historians may see in the glacial pace of diplomacy during the early twenty-first century not merely failures of collective action but symptoms of collective denial."). *See* P.J. Simmons, *Global Challenges: Beating the Odds*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Policy Brief No. 17), Aug. 2002, at 1.

15. Guy de Jonquiyres, *Companies "Bigger Than Many Nations,"* FIN. TIMES (1st ed., London), Aug. 13, 2002, at 7 (reporting data compiled and released by the U.N. Conference on Trade and Development).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

causes. Who can doubt the power of organizations like Amnesty International? Greenpeace? Oxfam? The International Committee of the Red Cross? They have earned, and demanded, a place at the table, and now operate as an independent international force.[22]

The waning power of the sovereign nation/state—and its replacement by a multiplicity of structures and institutions that share in political, economic and legal authority—heralds a new era.[23] Familiar concepts of municipal and international law are yielding to an emerging international legal pluralism. In more and more instances, no one entity has the sort of legal authority that has traditionally been the hallmark of sovereign states. It is, indeed, a brave new world of global governance, with a whole new cast of players.

That brave new world was perhaps most recently in evidence at the World Summit on Sustainable Development, held in Johannesburg in late August and early September 2002.[24] The focus of Johannesburg was on ending poverty; and the consensus there was that aid, trade and foreign direct investment are the way forward; and that nation/states, multilateral institutions, multinational corporations and civil society all have integral roles to play.[25]

One of the more intriguing aspects of the Johannesburg dialogue was the emphasis on "partnerships," and the "morphing" role of multinational corporations.[26] U.N. Secretary General Kofi Annan first garnered worldwide

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22. Indeed, the increasingly popular mainstream status of civil society was confirmed when *Vanity Fair* magazine, in its December 2002 "Hall of Fame" issue, featured a glossy two-page photo spread recognizing "World Nongovernmental-Organization Leaders," including top executives of the International Rescue Committee, Human Rights Watch, the International Crisis Group, the Open Society Institute, the Catholic Relief Services, Oxfam, CARE, Amnesty International, and Save the Children. *World Nongovernmental-Organization Leaders*, VANITY FAIR, Dec. 2002, at 321 (photographed by Jonas Karlsson).

23. Although the status of nation/states may, in many respects, be in decline, they now have their own game. Launched in late 2002 by 29-year old Australian author Max Berry, NationStates is an online government-simulation game (www.nationstates.net) in which players create and rule their own countries in accordance with their personal beliefs. The game is based on *Jennifer Government*, Barry's satirical novel set in an ultra-privatized world run by giant U.S. corporations, where taxes are illegal and employees assume the last names of their employers. *See* Leslie Walker, *NationStates, the Game*, WASH. POST, Jan. 5, 2003, at H6.

24. *Hope Versus Experience*, FIN. TIMES (2d ed.,London), Aug. 24, 2002, at 8 [hereinafter *Hope*]; *Doing Business in Johannesburg*, FIN. TIMES (1st ed., London), Aug. 29, 2002, at 18 [hereinafter *Doing Business*].

25. *See Hope, supra* note 24, at 8 (noting place of aid, trade and investment on Summit agenda); *Doing Business, supra* note 24, at 18 (noting that "[t]he big idea at Johannesburg is . . . promoting collaboration between companies, governments and NGOs rather than sterile action plans for governments.").

26. James Lamont, *Companies Court Partners Among World's Poor*, FIN. TIMES (1st ed., London), Aug. 29, 2002, at 7 (reporting that the "buzzword echoing in the corridors" at Johannesburg was "partnership"—specifically, "development partnerships between companies, governments and civil society."); James Lamont & Alan Beattie, *Don't Rely on Business, UN Warns*, FIN. TIMES (1st ed., London), Sept. 4, 2002, at 9 (noting that "[a]t Johannesburg, companies have emerged—with encouragement from Kofi Annan, UN secretary-general—as vehicles to bring development to poor people in small-scale partnerships.").

headlines on those topics in January 1999, when he used the World Economic Forum in Davos as his platform to warn of an impending backlash against globalization and to deliver an impassioned appeal focusing on the principles underpinning the burgeoning "Corporate Social Responsibility"/ "Sustainable Development" movement.[27] Three of the issues identified in the Secretary General's remarks—human rights, labor standards, and environmental protection—are at the heart of the Corporate Social Responsibility movement.[28] The Secretary General's thesis was straight-forward: The widespread adoption of high standards in the business world should result in a global environment maximizing free trade and ensuring open markets—with multinational corporations both Doing Well *and* Doing Good.[29]

Some of the more high profile champions of good corporate citizenship are global giants that have weathered public relations crises in the past. For example, stung by worldwide criticism of its cozy relations with Nigeria's military government (which hanged human rights activist Ken Saro-Wiwa and other opponents in 1995), Shell opened a dialogue with human rights groups and incorporated respect for human rights into its official corporate business principles.[30] In addition, Shell established a new policy requiring the heads of its 100-plus subsidiaries to submit periodic written reports on actions taken to meet human rights, social and environmental goals.[31] Similarly, news reports of Nike's use of sweatshop factories in Southeast Asia ignited firestorms of consumer, investor and labor rights protests, damaging the Nike brand.[32] Multinational corporations have learned the hard way that socially responsible conduct pays dividends many times over in savings of management time, brand reputation, and consumer loyalty that can be destroyed in a single high-profile negative incident.[33]

Nor are the potential benefits of corporate social responsibility limited to cost avoidance. Some corporations—such as the textbook example, the retailer Body Shop—have sought to make their socially responsible conduct itself a competitive advantage, working to build brand loyalty on their pledges of socially responsible operations.[34] Further, socially responsible conduct may not only enhance consumer loyalty; it may also give a corporation a competitive edge in the labor market, helping to recruit and retain a

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27. U.N. Secretary-General Kofi A. Annan, *An Appeal to World Business*, BOSTON GLOBE, Feb. 1, 1999, at A15; *Annan Calls on Firms to Put "Human Face" on Globalization*, DEUTSCHE PRESSE-AGENTUR, Jan. 31, 1999 (Financial Pages).

28. *Id.*

29. *Id.*

30. *See* Christopher Swann, *Little Brother is Watching*, FIN. TIMES (U.S.), June 1999, at 18 (Special Supplement: Responsible Business).

31. *Id.*

32. *Id.* at 18-19.

33. *Id.* at 18.

34. *See* Geoffrey Heal, *The Bottom Line to a Social Conscience*, FIN. TIMES (U.S.), July 2, 2001, at 6 (Survey: Mastering Investment).

pool of talented employees.[35] As a senior officer of BP recently observed, "All employees want to feel good about what they do."[36]

Yet another potential benefit (at least in the eyes of multinational corporations) is the possibility that self-regulation may stave off government or other regulation of corporate conduct.[37] And, as a Conference Board report concluded, "egregiously poor corporate citizenship which invites regulatory or legal sanction has negative consequences for shareholders."[38]

Perhaps the greatest potential benefit of Corporate Social Responsibility, though, is that cited by the U.N. Secretary General, and echoed by World Bank President James Wolfensohn (among others): a global environment maximizing free trade and an environment of open and stable markets worldwide.[39]

There is, of course, a price tag attached to Corporate Social Responsibility. Even if the U.N. Secretary General is right about the long term benefits of social responsibility (such as open markets and free trade), corporations that adhere to rigorous standards in their global operations may find themselves at a short-term disadvantage *vis-à-vis* competitors that exploit child labor, pollute the environment, and bribe public officials to win contracts.[40]

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35. *See, e.g.*, Alison Maitland, *Bitter Taste of Success*, FIN. TIMES (1st ed., London), Mar. 11, 2002, at 14 (noting Starbucks internal surveys show that the company's corporate social responsibility record is a major factor in personnel retention, and that reducing the turnover rate of "barista" employees by one percentage point adds $100,000 a year to the company's bottom line).

36. Kate Burgess, *Power of the Individual*, FIN. TIMES (U.S.), Oct. 22, 2001, at 6 (Special Supplement: Responsible Business).

37. *See generally* Maria Livanos Cattaui (Secretary General of the International Chamber of Commerce), *Code of Conduct Will Turn Clock Back*, FIN. TIMES (2d ed., U.S.), July 21, 1999, at 12; Alison Maitland & Michael Mann, *Challenge to a Voluntary Preserve*, FIN. TIMES (1st ed., London), May 30, 2002, at 14 (discussing business opposition to government-mandated reporting of corporations' social and environmental performance). *But see* Andrew Balls & Quentin Peel, *Call for Rules on Global Integration*, FIN. TIMES (1st ed., London), July 12, 1999, at 4 (discussing U.N. Development Programme's 1999 Human Development Report, which urged "[t]ougher rules on global governance, including principles of performance for multinationals on labour standards, fair trade and environmental protection.").

38. Kevin Brown, *Growing Legal Complexities Make Competence an Issue: Directors' Qualifications*, FIN. TIMES (U.S.), Oct. 1, 1999, at 6 (Survey: FT Director).

39. *See, e.g.*, *Call for Social Responsibility*, FIN. TIMES (1st ed., U.S.), Nov. 8, 2002, at 7 (reporting on Wolfensohn speech to TransAtlantic Business Dialogue, in which he stated, "Social responsibility is not a question of charity, it's a question of enlightened self-interest.").

40. For similar reasons, the developing world is not universal in its embrace of Corporate Social Responsibility. Some representatives of less developed countries may not welcome stringent labor, environmental and human rights standards. They may view cheap labor and lax environmental regulation as their competitive advantage in a global marketplace. *See generally* Bernard Wasow, *Good Intentions That Prolong Poverty*, FIN. TIMES (1st ed., U.S.), Apr. 20, 2000, at 13 (noting the fierce opposition of governments in some developing countries to strengthening labor standards, out of concern that labor rights campaigns "only serve the interests of workers in rich countries that fear competition from cheap foreign labour"); Richard Tomkins, *When Caring is a Good Investment*, FIN. TIMES (2d ed., London), Oct. 5, 2001, at 15 (noting that "[f]or example, forcing western labour standards on factories in de-

Moreover, the Corporate Social Responsibility movement has potentially profound ramifications for nation/states, their functions, and their sovereignty.[41] Some corporate usurpation of what have traditionally been considered public functions seems to be inherent.[42] Whether that is a good thing or a bad thing is open to debate. Secretary General Annan spoke to that point when he framed the issue in Johannesburg, concluding that "[g]overnments *cannot* do the job alone."[43] But, he continued, "[w]e are not asking corporations to do something different from their normal business; we are asking them to do their normal business differently."[44]

Although it makes for a snappy soundbite, the second half of the Secretary General's formulation is at least as debatable as the first, as some claim that Corporate Social Responsibility reflects a dangerous blurring of the roles of corporations and nation/states alike. Invoking Nobel Prize-winning economist Milton Friedman, who wrote that "the social responsibility of a business is to make a profit,"[45] some critics of Corporate Social Responsibility argue that a corporation's assumption of responsibility for the health care or education of a developing country's citizenry represents at least as much a perversion of the corporation's function as it does an abdication of responsibility by the state.[46]

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veloping countries can backfire by reducing investment and job creation. And meeting unjustifiably alarmist concerns about the environment imposes extra responsibilities and heavy costs on businesses, limiting competition and economic development.").

41. *See* Alan Beattie et al., *Business Resists New Partnerships 'Solution,'* FIN. TIMES (1st ed., London), Aug. 27, 2002, at 10.

42. *Id.* (noting NGO skepticism of "private sector solutions to complex economic problems," and U.N. statements recognizing that "[p]artnerships are not a substitute for government action or responsibilities").

43. Genevieve Tremblay, *Taking the Pulse of the World Summit*, SUSTAIN, Nov. 2002 (quarterly newsletter of the World Business Council for Sustainable Development) (emphasis added).

44. *Id. See also* U.N. Secretary-General Kofi A. Annan, *A Word to the Wise*, WASH. POST, Sept. 2, 2002, at A23.

45. Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6, at 32.

46. The charges leveled by these critics go well beyond the assertion that the embrace of Corporate Social Responsibility effectively constitutes a repudiation of fundamental principles of free market economics. Reviewing one of the more thoughtful (and damning) critiques, the *Economist* noted that the critique's author—David Henderson (the former chief economist of the Organization for Economic Cooperation and Development):

> is not content to argue . . . that the new commitment to corporate social responsibility is a sham . . . . Still less is he willing to argue that paying lip-service to corporate social responsibility may actually do some social good—albeit less than its more enthusiastic supporters would advocate. [He] claims, rather, that the fad for corporate social responsibility is doing real harm. The appropriate response, in his view, is not to laugh at it or tolerate it, but to recognise it for the danger it is and oppose it. . . . [T]he problem, Mr. Henderson emphasizes, is not merely that the fad for corporate social responsibility is intellectually wrong, or that it poisons opinion against market capitalism. It also promotes policies that are directly welfare-reducing. . . . In seeking a level regulatory playing-field based on their ethical in-

So those are the players—nation/states, multilateral organizations, multinational corporations, and civil society. What about the means—the triumvirate . . . trade, aid and investment?[47]

Bashing foreign aid has been much in vogue in certain Washington circles in recent years.[48] True enough, foreign aid has been plagued with problems.[49] Foreign policy and politics distort the destination of aid, diverting funds from the truly needy.[50] And too many foreign aid dollars actually stay

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> sights, rich-country "good global citizens" limit competition, worsening the performance of the global economy as a whole and putting developing countries at a particular disadvantage.

Curse of the Ethical Executive, ECONOMIST, Nov. 17, 2001, at 70 (reviewing DAVID HENDERSON, MISGUIDED VIRTUE: FALSE NOTIONS OF CORPORATE SOCIAL RESPONSIBILITY (Inst. of Econ. Aff., Hobart Paper 142, 2001). *See also* Martin Wolf, *Sleep-walking With the Enemy*, FIN. TIMES (1st ed., London), May 16, 2001, at 21 (also reviewing *Misguided Virtue*).

47. Debt forgiveness is a key fourth element of alleviating poverty. In recent years, British rockers Radiohead, and Bono (the lead singer of U2), have done for debt forgiveness what Princess Diana did for landmines. Their Republican colleagues in the White House and on Capitol Hill were quite bemused by the sight of Bono squiring then-Secretary of the Treasury Paul O'Neill around Africa, and whispering in then-Senator Jesse Helms' ear. *See* Ed Crooks, *Radiohead Rock the Boat Over Global Trade Rules*, FIN. TIMES (2d ed., London), June 19, 2002, at 5 (noting Radiohead lead singer Thom Yorke's involvement in the Jubilee 2000 campaign for debt relief); *Of Celebrities, Charities and Trade*, ECONOMIST, June 1, 2002, at 68 (noting Bono's role as a champion of debt relief as part of the Jubilee 2000 campaign). *See also* Alan Beattie, *Twelve Days to See Where the Money Goes: Paul O'Neill, U.S. Treasury Secretary, and Bono, Musician and Aid Activist, Begin a Trip to Africa Today*, FIN. TIMES (1st ed., London), May 20, 2002, at 8. High levels of unsustainable debt are a major impediment to growth in many developing economies, particularly in Africa. Debt relief is particularly attractive as an engine of economic growth, because it avoids some of the problems associated with development lending in years past, including conflicting obligations imposed by different lenders. Moreover, because it improves poor countries' finances, debt relief may encourage the private sector to risk capital there, preferably in the form of direct investment. *See Creditors, Cough Up*, WASH. POST, Sept. 25, 2002, at A26.

48. For a very readable account of the history of foreign aid, see John Cassidy, *Helping Hands: How Foreign Aid Could Benefit Everybody*, THE NEW YORKER, Mar. 18, 2002, at 60 [hereinafter *Helping Hands*]. Cassidy aptly notes:

> The international aid agencies tend to be criticized whatever they do. On the left, critics accuse them of carrying out the free-market agendas of multinational corporations and the United States government to the detriment of poor countries. On the right, critics . . . accuse them of throwing good money after bad at corrupt and incompetent regimes. In fact, the aid agencies are staffed with apolitical professionals who try to do their best in difficult circumstances.

Id. at 66.

49. *See* Michael Dobbs, *Foreign Aid Shrinks, But Not For All*, WASH. POST, Jan. 24, 2001, at A1 [hereinafter *Foreign Aid Shrinks*]; Michael Dobbs, *Investment in Freedom is Flush With Peril*, WASH. POST, Jan. 25, 2001, at A1; Michael Dobbs, *Aid Abroad is Business Back Home*, WASH. POST, Jan. 26, 2001, at A1 [hereinafter *Aid Abroad*].

50. Hugely disproportionate sums are sent each year to the Middle East—Israel, Egypt, Jordan, and the West Bank and Gaza—which receives much more U.S. aid than any other region, even though it is by no means the poorest part of the world. The United States is thus "one of the biggest offenders when it comes to doling out aid according to political priorities, rather than directing it to where it will be best used." *Helping Hands*, *supra* note 48, at 65. *See also Foreign Aid Shrinks*, WASH. POST, Jan. 24, 2001, at A1.

in U.S. hands, paid out to U.S. companies who deliver food, medical supplies and other assistance abroad, under contract to the federal government.[51]

But a recent World Bank analysis suggests that criticisms of the *effectiveness* of foreign aid are overblown—and, in fact, that aid can be effective in any country where it is supported by sound economic policies.[52] According to that analysis, "[b]etween 1970 and 1993, developing countries with good économic policies but *low* aid payments grew at an annual rate of 2.2 percent per capita, whereas developing countries with good economic policies and *high* aid payments grew almost twice as fast."[53] Yet, as important as foreign aid is, the reality is that trade and investment account for 80% of the money available for development.[54] Trade and investment are therefore far greater sources of funds for development than foreign aid will ever be.

In a phrase, trade dwarfs aid. The U.S. *alone* imports more than $450 billion in products from the developing world every year—more than eight times the amount that developing countries receive in aid *from all sources*.[55] International trade is thus a vital engine for poverty-reducing growth. Trade liberalization is one of the few policies that virtually all economists can agree on.[56] It creates wealth. It reduces poverty. It is a zero-sum game. The countries of the world that have intensified their links with the global economy through trade have tended to grow more rapidly over a sustained period, and have experienced greater reductions in poverty. The evidence is quite clear. While, at low levels, globalization often appears to hurt the poor, beyond a certain threshold, it does indeed reduce poverty.[57] In other words, when globalization hurts the poor, it is *not* because it has gone too far, but rather, because *it has not gone far enough*.[58] Hence, the slogan: Trade, not aid.

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51. *See Aid Abroad*, *supra* note 49, at A1. A recent article in the *Washington Post* reported that:

> The U.S. Agency for International Development's Web site has boasted, scandalously, that close to 80 percent of its contracts and grants goes directly to American firms. If the Bush administration is serious about wanting to make aid effective, it must free poor countries to spend aid dollars on the most efficient suppliers—including suppliers who themselves come from poor countries.

Rethinking Foreign Aid, WASH. POST, Nov. 27, 2002, at A16.

52. *Helping Hands*, *supra* note 48, at 63.

53. *Id.* (emphasis added) (discussing study of fifty-six middle-income and low-income nations, conducted by World Bank economists Craig Burnside and David Dollar).

54. U.S. Secretary of State Colin L. Powell, Remarks at World Summit on Sustainable Development (Sept. 4, 2002) (on file with California Western International Law Journal).

55. President George W. Bush, Remarks on Global Development, Inter-American Development Bank (Mar. 14, 2002) (on file with California Western International Law Journal).

56. *See* PIERRE-RICHARD AGENOR, DOES GLOBALIZATION HURT THE POOR? 1 (World Bank, Working Paper No. 2922, 2002).

57. *Id.*

58. *Id.*

> Claims that the rich [countries] are the big winners from [trade] liberalisation ig-

Foreign direct investment is arguably even more important as an engine of global economic integration. But investment depends, in turn, on trade, which is a prerequisite. Businesses build plants, bring in machinery, and supply technology—all creating jobs—*if* they can trade their products.[59]

All three of these engines of economic development—trade, aid, and investment—depend on the rule of law,[60] and—often—on democracy[61] and

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> nore the fact that their exports rose barely half as fast as developing countries' in the 1990s. The real problem is the 50-odd very poor countries, which generate only 0.4 per cent of world exports. Their plight is due to too little globalization, not too much.

Trading Up, FIN. TIMES (1st ed., London), June 20, 2002, at 20. The anti-globalization activists' oft-leveled charge that world trade benefits the rich at the expense of the poor, and that so-called "global inequality" is getting worse, has now been largely debunked. Karen Lowry Miller, *Is It Globaloney?* NEWSWEEK, Dec. 16, 2002, at E4. A key source for that argument was a 1999 U.N. report, which found a widening gap between increasingly rich countries and increasingly poor ones. *Id.* But a recent, highly-acclaimed analysis found that weighting the relevant data by the size of the national population (rather than, for example, treating Grenada as the equivalent of China) shows dramatically rising living standards for both rich and poor. While it is true that the gap is widening (that is, the rich are getting richer), the poor are also getting richer—just not as quickly as the rich. *See Convergence, Period*, ECONOMIST, July 20, 2002, at 68 (discussing XAVIER SALA-i-MARTIN, THE WORLD DISTRIBUTION OF INCOME (Nat'l Bureau of Econ. Res., Working Paper No. 8933, 2002)). In short, globalization has improved everyone's lot.

59. A recent study documents the benefits to developing countries of investment by multinational corporations. Although certain potential problems are inherent, the study concludes that the benefits of foreign direct investment generally greatly outweigh the costs. *See* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: MAXIMIZING BENEFITS, MINIMIZING COSTS (2002).

According to the new study, the benefits of foreign direct investment to host countries include not only jobs, tax revenues and economic growth, but also "spillover benefits" such as improvement of the quality of the local labor force and management skills, as well as the introduction of new technology and the transfer of technical know-how. *Id.* The study disputes the anti-globalizationists' claim that multinational corporations move production to developing countries to avoid stringent labor and environmental standards. According to the study, foreign-owned enterprises operating in developing countries typically pay higher wages and take their higher environmental standards with them when they invest. *Id.*

The report concedes that foreign direct investment can result in some unintended side effects, including competition with local firms; job losses at those firms; and volatility in the balance of payments, related to the import and export activities of major investors. *Id.* But the report also notes that such problems are generally temporary, and can be mitigated by appropriate host country policies. *Id.*

60. In defining "the rule of law," scholars and practitioners often resort to Lon Fuller's list of the virtues inherent in a true system of law: (1) the law is general in its application; (2) the law is public; (3) the law operates prospectively; (4) the law is reasonably clear; (5) the law is internally consistent; (6) the law is practicable to comply with; (7) the law is relatively stable; and (8) there is a congruence between the letter of the law and the way in which it is enforced. LON L. FULLER, THE MORALITY OF LAW 33-41 (rev. ed. 1969).

61. As Winston Churchill famously quipped, "[D]emocracy is the worst form of government, except for all those other[s] that have been tried from time to time." Winston Churchill, Address to the House of Commons (Nov. 11, 1947), *in* THE IRREPRESSIBLE CHURCHILL 236 (Kay Halle ed., 1966). According to a recent report by the U.N. Development Programme, the world is more democratic than ever before in history, with 140 countries holding multiparty elections. *See Democracy-Building Stalls, U.N. Report Says*, WASH. POST, July 25,

free market principles[62] as well (what one writer has termed the "trinity . . . underpin[ning] liberal capitalism").[63]

John Davies, the Attorney General of Ireland in the early 1600's said: "The first and principal cause of making kings was to maintain property and contracts, and traffic and commerce among men."[64] In today's complex world, the rule of law is all the more important to those ends. Kofi Annan has underscored the point: "Without good governance, without the rule of law, predictable administration, legitimate power, and responsive regulation—no amount of funding, no short-term economic miracle will set the developing world on the path to prosperity."[65] Capital is fundamentally a cow-

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2002, at A17 (discussing SAKIKO FUKUDA-PARR ET AL., DEEPENING DEMOCRACY IN A FRAGMENTED WORLD (U.N. Dev. Programme, Human Dev. Rep., 2002)). However, only 82 of the nearly 200 countries studied are considered full democracies. *Id.*

For more on the subject, see *Phoney Democracies*, ECONOMIST, June 24, 2000, at 20 (noting that—for the first time in history—the proportion of the world's population living in countries that can claim to be broadly democratic is greater than 50%, but arguing that a significant number of those countries are "imposters" masquerading as democracies in order "to gain just enough respectability to attract private foreign capital, and to qualify more readily for the public sort, from multilateral bodies such as the IMF and the World Bank.").

One picture is worth a thousand words. A cartoon in *The New Yorker* depicts a woman quizzing a gentleman at a cocktail party: "Has there ever been a country that had the word 'Democratic' in its name that was?" THE NEW YORKER, June 2, 1997, at 72. A case in point is the old communist dictatorship in the former East Germany, which called its country the German Democratic Republic ("the GDR"). That use of "democratic" so infuriated anti-communists in West Germany that they routinely added "so-called" to the name of the GDR. (In German, that would be the *sogenannte Deutsche Demokratische Republik*, or *sogenannte DDR* for short). E.J. Dionne, Jr., *Chattering Class: Sticks and Stones*, WASH. POST, Dec. 20, 1998, (Magazine), at 6.

62. In *Eat the Rich*, author and humorist P.J. O'Rourke offered up his own unique take on the relative merits of the capitalist system: "The free market is ugly and stupid, like going to the mall; the unfree market is just as ugly and just as stupid, except there's nothing in the mall and if you don't go there they shoot you." John Leo, *You Can Say That Again*, U.S. NEWS & WORLD REP., Jan. 11, 1999, at 18 (quoting P.J. O'ROURKE, EAT THE RICH (1998)).

Although a detailed discussion of the relationship between the free market economics and the rule of law is beyond the scope of this essay, that relationship is well established. *See, e.g.*, Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar. - Apr. 1998, at 95 [hereinafter *The Rule of Law Revival*].

> Basic elements of a modern market economy such as property rights and contracts are founded on the law and require competent third-party enforcement. Without the rule of law, major economic institutions such as corporations, banks, and labor unions would not function, and the government's many involvements in the economy . . . would be unfair, inefficient, and opaque.

Id.

63. Maxwell O. Chibundu, *Globalizing the Rule of Law: Some Thoughts at and on the Periphery*, 7 IND. J. GLOBAL LEG. STUD. 79 (1999).

64. O. Lee Reed, *Law, The Rule of Law, and Property: A Foundation for the Private Market and Business Study*, 38 AM. BUS. L. J. 441 (2001).

65. U.N. Secretary General Kofi Annan, Address to the United Nations Association of Canada (Dec. 3, 1997), *quoted in* Carlos Santiso, *Promoting Democratic Governance and Preventing the Recurrence of Conflict: The Role of the United Nations Development Programme in Post-Conflict Peace-Building*, 34 J. LATIN AM. STUD. 555, 555 (2002).

ard. More than anything, international trade and foreign investment require legal certainty—precisely what so many developing countries lack.[66]

Indonesia is a case in point. A recent *Washington Post* analysis highlighted the connection between the absence of the rule of law and the flight of investment capital from that country:

> [T]he poverty of Indonesia's legal system is a major part of why [investors] are staying away. It has contributed to a general lack of confidence that is draining away badly needed capital and undermining the country's struggle to recover from the 1997-98 Asian financial crisis.
>
> Foreign investors complain they are subject to the arbitrary demands of government officials, tax collectors and local partners. They have little meaningful recourse in the courts, where bribery is rampant and favoritism the legal standard.
>
> Domestic and foreign businessmen alike also complain that judges routinely fail to enforce contracts. . . . "Investors in Indonesia doubt whether their rights will be preserved and about the sanctity of contracts," said Hikmahanto Juwana, a professor of international economic law at the

66. U.S. Secretary of State Colin Powell has been an ardent and plain-spoken advocate for the rule of law in the developing world, emphasizing that it is a prerequisite for international trade and foreign investment. In one recent speech, he explained:

> *Markets need* good government, functioning institutions, transparent policy-making, and *above all the rule of law*. Capital is a coward; money flees uncertainty and corruption. To entice capital in and then keep it in, governments must recognize private property rights, deeds of trust, and the sanctity of contract, and they must enforce these rights transparently and fairly.
>
> *I have made this point to every foreign minister, trade minister, prime minister or president who has come to see me from an underdeveloped country.* We sit in my office and I [say], "Look, I got a dollar bill. I want to invest it somewhere where it's going to be safe. . . . And I'm not going to send it to some place where there is no rule of law, where if I had a problem . . . there is no court I can take it to, there is no justice. I am not going to invest it in a place where corruption is rampant. . . ."
>
> "*And so* [Secretary Powell tells the visiting dignitaries] *if you want to be a part of this game, you've got to have the rule of law*, you've got to understand contract rules of law, you've got to eliminate corruption, you have to have political freedom, you have to have economic freedom. . . . *And unless you're going to move in this direction, you will discover that you may be able to get an occasional grant, you might even get some help from the World Bank and the IMF, but you're not going to get the private investment that you really need.*

U.S. Secretary of State Colin L. Powell, Remarks to National Association of Manufacturers (Oct. 31, 2001) (emphasis added) (on file with California Western International Law Journal). *See also O'Neill Stresses Targeting of Aid; Free Enterprise is Better Still, He Says*, WASH. POST, June 6, 2002, at E4 (quoting the then-U.S. Secretary of the Treasury, who stated that potential entrepreneurs and investors in Africa "have no chance for success without governments that fairly enforce laws and contracts, respect human rights and property, and fight corruption."); Allan Gerson, *Peace Building: The Private Sector's Role*, 95 AM. J. INT'L L. 102, 106-07 (2001) (noting that "the absence of an established rule of law . . . bode[s] badly for foreign investment.").

University of Indonesia. "The main thing is that Indonesia is no longer a good place to invest."

For the first seven months of [2002], the amount of foreign direct investment approved by the Indonesian government declined 50 percent compared with the same period in 2001, which itself showed a sharp decrease from a year earlier, according to the government's figures. In part this stems from a global economic slowdown, rising labor costs and fears of political instability. But investors say it's hard to overstate how the legal problems of doing business here keep them away.

As a result, capital is leaving. According to the central bank, the country suffered a net capital outflow [in 2001] of $5.7 billion.[67]

In *The Rule of Law Revival*, a seminal essay published in *Foreign Affairs* magazine a few years ago, Tom Carothers (of the Carnegie Endowment for International Peace) identified three types of rule of law reform undertaken in countries transitioning to democracy, distinguishing among them based on the depth of reform.[68] Type one reform focuses on rewriting laws, particularly commercial and criminal law.[69] Type two reform involves "the strengthening of law-related institutions," through initiatives such as increasing salaries for judges and court staff; training police, prosecutors, public defenders, and prison staff; improving legal education; and strengthening legislatures and local government.[70] Type three reform, in turn, "aim[s] at the deeper goal of increasing *government's* compliance with the law"—the type of reform most needed in Indonesia and in other emerging democracies around the world.[71]

As Carothers noted, rewriting constitutions, laws and regulations is relatively easy, compared to the "heavy lifting" of institutional reform.[72] Hardest of all is type three reform because, to succeed, it must "get[ ] at the fundamental problem of leaders who refuse to be ruled by the law."[73] While "nonstate activities such as citizen-driven human rights and anti-corruption campaigns can do much" to advance type three reform, "much of the impetus must come [from inside government] from the top."[74] And, as Carothers observed, "[e]ven the new generation of politicians arising out of the political

67. Alan Sipress, *Flawed Legal System Impeding Indonesia*, WASH. POST, Oct. 29, 2002, at A17. *Cf.* JOHN HEWKO, FOREIGN DIRECT INVESTMENT: DOES THE RULE OF LAW MATTER? 4-5 (Carnegie Endowment for Int'l Peace, Rule of Law Series Working Paper No. 26, 2002) (concluding that "extensive overhaul of a [post-communist] country's legislative and institutional framework is generally not a necessary precondition to attract direct investment" from multinational corporations, and that the presence of foreign investment itself promotes and encourages the rule of law).

68. *The Rule of Law Revival*, *supra* note 62 (emphasis added).

69. *Id.*

70. *Id.*

71. *Id.* (emphasis added).

72. *Id.*

73. *Id.*

74. *Id.*

transitions of recent years are reluctant to support reforms that create competing centers of authority beyond their control."[75]

Carothers noted that most governments attempting rule of law reform are not going it alone, as funding for rule of law programs has become the fastest-growing type of international aid.[76] Government agencies, multilateral institutions (particularly the development banks), foundations, universities and human rights organizations from the U.S. and other Western countries (most notably Germany, France, and the United Kingdom) are all getting into the act, "descend[ing] on transitional societies with Western legal models in their briefcases."[77]

Carothers characterized the effects of this rule of law assistance as "generally positive, though usually modest."[78] To date, most of the assistance has been devoted to type one and type two reforms. Thus, "it has affected the most important elements of the problem the least."[79] He concludes that "[h]elping transitional economies achieve type three reform . . . is the hardest, slowest kind of assistance," requiring "a level of interventionism, political attention, and visibility that many donor governments and organizations cannot or do not wish to apply."[80]

Perhaps most chastening is Carothers' conclusion that "even large amounts of [rule of law] aid will not bring rapid or decisive results," since "[t]he primary obstacles to . . . reform are not technical or financial, but political and human. . . . [and] outside aid is no substitute for the will to reform, which must come from within."[81] Above all, he says, meaningful change requires "patient, sustained attention, as breaking down entrenched political interests, transforming values, and generating enlightened, consistent leadership will take generations."[82]

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75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id. See Semi-democracy*, FIN. TIMES (1st ed., U.S.), July 24, 2002, at 14 (asserting that "[T]he primary impulse for the attainment of democracy and good governance—and for economic development—must come from within countries. The rest of the world can encourage that process. It cannot impose it.").
82. *The Rule of Law Revival, supra* note 62. Another Carnegie Endowment analyst, Anatol Lieven, has observed:

> [T]he creation and development of states is rarely a pretty sight. It usually involves copious amounts of what Bismarck called blood and iron. This is true even in western history if we go back a few centuries. It is even more the case with non-western countries, many of which have been compelled to try to imitate western success by adopting forms of state organization that may have no roots whatsoever in local tradition.
>
> Essentially, these countries are trying to jump to 21st-century Britain from the Britain of the 15th or even the 5th century in a few decades. It is hardly surprising that so many make a mess of it, and that the process is so often bloody.

Carothers' reference to rule of law consultants "with Western legal models in their briefcases" calls to mind a true story from my work with one rule of law organization a decade or so ago.[83] The organization received an unsolicited fax from a certain central European country, consisting of two lines: How do we make stock exchange? Hurry response. The fax arrived on a Friday afternoon, so there was much scurrying around; but, through a lot of hard work, some volunteers had pulled together by Monday afternoon an impressive "white paper" on securities markets and their regulation. The white paper was promptly faxed off into cyberspace, and we all felt good about ourselves—till we saw the incoming fax awaiting us Tuesday morning. "Thank you," the latest transmission read. "But how many desks? How many chairs?"

There is another story of a high-ranking official in a developing country, who eagerly accepted the bundles of fill-in-the blank constitutions and other legal documents provided to him by earnest and well-intentioned rule of law consultants. The official was privately asked by one of his colleagues whether the documents were of any use. And the official confided that all the documents were printed on just one side of the page, and paper was a precious commodity, so he willingly took all the documents the rule of law advisors had to offer.[84] Talk about a constitution being worth nothing more than the paper on which it is printed!

The lesson to be learned here is that there are no "one size fits all" solutions, and that we must abandon any notion that "America knows best." There are fundamental differences between legal cultures around the world on basic concepts such as fact-finding, precedent, and the roles of various branches of government; and some other systems work at least as well as that in place in the United States.[85]

We also do well to remember that the citizens of the U.S. haven't cornered virtue.[86] Many countries, for example, find the United States' espoused

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Anatol Lieven, *The World Is Still Made Out of Nations*, FIN. TIMES (1st ed., London), Dec. 19, 2002, at 19.

83. *Rule of Law Revival*, *supra* note 62.

84. *See generally* Jacques DeLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PENN. J. INT'L ECON. L. 179, 179-80 (1999) (recounting similar anecdotes).

85. Tom Carothers has pointedly observed:

> Americans frequently assume [the rule of law assistance they offer] is of paramount importance. They mistakenly believe that rule-of-law promotion is their special province, although they are not alone in that. German and French jurists also tend to view their country as the keeper of the flame of civil code reform. British lawyers and judges point to the distinguished history of the British approach. Transitional countries are bombarded with fervent but contradictory advice on judicial and legal reform.

The Rule of Law Revival, *supra* note 62.

86. When Mahatma Ghandi was once asked what he thought of western civilization, he replied (only half in jest) that he thought it would be a "good idea." Mohandas K. Ghandi, *in*

commitment to human rights and the rule of law difficult to reconcile with its embrace of the death penalty.[87] And some—here at home, and abroad—

THE COLUMBIA WORLD OF QUOTATIONS, No. 24377 (Robert Andrews et al. eds., 1996).

87. The U.S. has drawn intense fire for failing to fulfill its treaty obligations and flouting the decisions of the International Court of Justice (ICJ) in a series of cases involving the Vienna Convention on Consular Relations. That convention, to which the U.S. is a party, requires that law enforcement officials promptly inform any arrested foreign national of his or her right to confer with consular representatives from his or her country. Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. In February 2003, the ICJ issued a Provisional Measure ordering the United States to take "all measure necessary" to stay the executions of three Mexican nationals on death row in Texas and Oklahoma, pending the ICJ's ruling on Mexico's claim that the three were detained in violation of the Vienna Convention. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) 2003 I.C.J. No. 128, ¶ 59(a) (Provisional Measures of Feb. 5, 2003), *at* http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iorder_20030205.PDF (last visited May 16, 2003).

The Mexico case is the third time in five years that U.S. compliance with the Vienna Convention has been before the ICJ. The two prior cases involved Paraguay and its national, Angel Breard, and Germany and its national, Walter LaGrand. *See* Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 426 (Apr. 9); LaGrand Case (Germany v. U.S.) 1999 I.C.J. 28 (Mar. 5). In both of those cases, the ICJ issued orders requiring the U.S. to temporarily stay the executions pending ICJ decisions on the merits; but, in both cases, the men were executed by the states where they were being held. LaGrand Case (Germany v. U.S.) 1999 No. 104, at ¶ 29(I)(a) (Mar. 3, 1999), at http://www.icj-cij.org; Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. No. 99, at ¶ 41(I), at http://www.icj-cij.org. What makes the Mexico case different is that the ICJ's order requires that the U.S. take not just all measures at its disposal, but "all measures necessary" to prevent the impending executions. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) 2003 I.C.J. No. 128, ¶ 59(a) (Provisional Measures of Feb. 5, 2003), at http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iorder_20030205.PDF (last visited May 16, 2003). That wording is stronger than the language of previous orders, and is intended to foreclose the United States' defense in prior cases—that the Executive Branch of the federal government did all that it could to comply with the ICJ's orders but that, in a federal system, it could not force states to delay executions. Marcia Coyle, *A Death Penalty Duel*, NAT'L L. J., Feb. 17, 2003, at A1.

Capital punishment puts the U.S. in rare company. The death penalty is now banned (except in extraordinary cases, such as treason) in more than 100 countries around the globe. *Executions*, THE ECONOMIST, June 10, 2000, at 21. Indeed, the U.S. is the sole Western democracy that retains the practice; India and Japan are the only other large democracies in the world that have not abolished it. *Id.* And the U.S. finds itself in truly unsavory company when the statistics on actual implementation of the death sentence are considered. In 2000, there were 85 executions on American death rows, placing the U.S. third in the world, behind Saudi Arabia (123) and ahead of Iran (75). *Of Death's Dominion*, U.S. NEWS & WORLD REP., June 25, 2001, at 14.

Europeans, in particular, widely view the death penalty as "barbaric" and are baffled by Americans' strong support for it. T.R. Reid, *Europeans Reluctant to Send Terror Suspects to U.S.*, WASH. POST, Nov. 29, 2001, at A23. *See* T.R. Reid, *Many Europeans See Bush as Executioner Extraordinaire*, WASH. POST, Dec. 17, 2000, at A36. The European Convention on Human Rights prohibits the death penalty for any crime. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953). Furthermore, European Union states refuse to "extradite individuals to the U.S. unless they receive assurances [that] the death penalty will not be applied." Judy Dempsey, *Europeans Dismayed by US Go-It-Alone Approach to Justice*, FIN. TIMES (2d ed., London), Dec. 14, 2001, at 8.

viewed the 2000 Presidential elections as a failure of the rule of law as well.[88]

The next—and possibly greatest—challenges on the democratization and rule of law front are Afghanistan and Iraq.[89] And Tom Carothers and his colleagues at the Carnegie Endowment have been cautious on this topic too, disputing the notion that regime change will bring swift democracy to Iraq and will, in turn, trigger a wave of democracy throughout the Middle East.[90] Writing on the eve of war, they warned:

> It is hard not to be tantalized by the notion that with one hard blow in Iraq the United States could unleash a tidal wave of democracy in a region long gripped by intransigent autocracy. But although the United States can certainly oust Saddam Hussein and install a less repressive regime, Iraqi democracy will not be soon forthcoming.
>
> In other countries where the United States has forcibly removed dictators or engaged in nation building after civil wars, democracy has not flowered readily. For example, the Bush administration's bold promise of democratic renewal for post-Taliban Afghanistan has yet to be fulfilled. The government in Kabul is far from establishing control across the entire country. Democracy building exercises such as the loya jirga have, thus far, created only uneasy power sharing pacts among warlords.
>
> Earlier attempts have often fared no better. In 1994, the United States ousted a dictatorial regime in Haiti and afterwards attempted to build democracy. But what has emerged is political chaos, renewed repression and dismal U.S.-Haiti relations. In Bosnia-Herzegovina and Kosovo, international administrators have been given tremendous legal powers and financial resources, and been charged with the task of building stable, ethnically inclusive democracies. But more than six years later in Bosnia and almost four in Kosovo, both areas would likely lapse into renewed ethnic violence if international forces pulled out.

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88. Hendrik Hertzberg, *2000 and Two*, THE NEW YORKER, Nov. 4, 2002, at 43. Hertzberg characterized the 2000 election as a "travesty," yielding a President chosen not by the people, but:

> by the five most conservative Justices of the Supreme Court, in a decision so shoddily reasoned and so at odds with their normal jurisprudential inclinations that the only plausible explanation . . . is that they were simply imposing their political preference.

Id. Hertzberg's article was a review of *The Longest Night: Polemics and Perspectives on Election 2000*, a published collection of essays by two dozen scholars of law and history, including Shlomo Avineri of Jerusalem's Hebrew University, who pointedly observed: "Certainly there is no other democratic society [than the United States] in which an executive president can be elected if he receives fewer popular votes than his major contender." *Id.*

89. *See, e.g.*, GUY DINMORE & JOSHUA CHAFFIN, *U.S. Sets Out its Blueprint for Task of Rebuilding*, FIN. TIMES (2d ed., London), Mar. 12, 2003, at 3 (discussing U.S.'s announcement of nation-building plans for Iraq, reflecting "a determination by the Bush administration to be in full control of Iraq—at least in the initial stages—to a degree that the US has not exercised beyond its shores since the aftermath of the second world war.").

90. Thomas Carothers & Bethany Lacina, *Quick Transformation to Democratic Middle East is Fantasy*, SEATTLE POST-INTELLIGENCER, Mar. 16, 2003, at E1.

> Panama, where the United States removed General Manuel Noriega from power in 1990, has achieved some degree of democratic government. But Panama had some genuine experience with pluralism before Noriega rose to power and Panamanian politics today, though not dictatorial, are still mired in corruption, public disillusionment and fecklessness.
>
> In all these countries, post-invasion politics have come to closely resemble those that prevailed before the toppled regime took power. Iraq before Saddam Hussein was conflict-ridden and authoritarian. And Iraq, like Afghanistan, is a nation challenged by profound ideological, religious, regional and ethnic divisions.
>
> All this does not mean that Iraq can never become democratic. But the idea of a quick and easy democratic transformation is a fantasy. The United States would have to stay engaged in the country over many years, both providing security forces to keep the country intact and helping to maintain the momentum and integrity of new political structures. . . .
>
> As difficult as creating a democratic Iraq would likely be, it is even more doubtful that ousting Saddam Hussein would trigger a wave of democracy throughout the rest of the Middle East. The most likely political effects of war would be a surge in the already burgeoning anti-Americanism in the region. This would strengthen the hand of Islamist opposition forces in many Arab countries, which in turn would impel governments in those countries to restrict what little political space exists, out of fear of political unrest that could get out of hand. The net effect therefore would likely be even less political reform and freedom in the region rather than more.[91]

Carothers and his co-author concluded:

> The United States should promote democracy in the Middle East. But it must recognize that rapid transformation is unlikely. U.S. goals must be initially modest, and our commitment to change must be long term. The core elements of a democracy-oriented policy are not hard to identify. The U.S. government should exert sustained, high-level pressure on Arab states to respect political and civil rights, to create or expand the space for political debate and to carry out pro-democratic institutional, legal and constitutional changes. This pressure should be coupled with increased aid to bolster democracy activists and reform advocates, political parties, rule of law reforms and civil society groups, including moderate Islamists.
>
> The United States has limited leverage in most Arab countries. . . . [It] will be forced to work with existing regimes toward gradual reform. It will also be forced . . . to struggle with substantial obstacles to building a democratic Iraq. No one should expect a wave of democratization in the Middle East in the near term. And no one should expect that toppling Saddam Hussein would create one.[92]

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91. *Id. See also* MARINA OTTAWAY ET AL., DEMOCRATIC MIRAGE IN THE MIDDLE EAST (Carnegie Endowment for Int'l Peace, Policy Brief No. 20, Oct. 2002) (amplifying the themes of the *Seattle Post-Intelligencer* op-ed).

92. Carothers & Lacina, *supra* note 90, at E1. *See also* OTTAWAY, *supra* note 91.

If Carothers and his colleagues are on the mark, it will be time and patience—and not oil—that will be the most important resources in Iraq in the months and years that lie ahead.