

## THE FUTURE OF OUR SOCIETY

The 2007 Presidential Address of the 101st Annual Meeting of the American Society of International Law was given on Thursday, March 29, 2007 in Washington, D.C. It was omitted in error from the 101st Annual Meeting Proceedings, and thus, is published here as part of the 102<sup>nd</sup> Proceedings.

*By José E. Alvarez\**

Those of you who attended last year's annual meeting dinner banquet have already heard something about my subject today. You surely recall the centennial toasts offered by two of my predecessors, former presidents of the American Society of International Law. Anne Marie Slaughter elegantly reminded us that we have transformed ourselves from a mere "learned" society serving only international law elites to a group that aspires to shape public opinion and public policy. Thomas Franck's toast supplied the entertainment for that banquet. His hilarious vision of our Society on its "200th" birthday in the year 2106 affectionately deflated our pretensions. Prof. Franck pointed out that ASIL reached its nadir in 2008 (during my Presidency) when then Attorney-General Ed Williamson closed us down for serving the interests of a foreign power, the United Nations. (Given the plight of our current attorney general, it has occurred to me that this prediction may yet come true so I remain on guard.) He noted that closing us down was just as well since our annual meetings had by then degenerated into elaborate cocktail parties where our patrons could be photographed alongside Secretaries of State and Supreme Court Justices. He told us that the Society's fortunes only improved after a friendly takeover, and we became the Sino-Euro-Americo-Japanese Society of International Law. (Given the Society's current fiscal fortunes, I may remind you of such risks in my next fund raising letter.)

As you see from this year's annual meeting, we have taken Prof. Franck's warnings to heart. There is not a single Secretary of State or U.S. Supreme Court Justice in sight this year and the only elaborate cocktail party is discretely offsite—at Georgetown Law School on the other side of town later tonight. The message we are conveying is that this is a SERIOUS annual meeting, suited to a SERIOUS learned society of extremely SERIOUS people interested only in very SERIOUS, if not downright depressing, things.

At the outset let us agree that a Society devoted to international law in today's United States has something of a mountain to climb. Prof. Franck was not altogether wrong to suggest that we are at a nadir when it comes to the understanding of international law in the United States. Beyond the folks in attendance at this annual meeting, I am not sure who actually reads our Journal. (When Prof. Franck noted in his toast that by 2010 there were only thirty-eight subscribers to our Journal, "all in Scotland and all unpaid," he was exaggerating of course. I am sure that at least half of our Scottish subscribers are current on their subscriptions.) The average American probably still thinks international law is something taught in some obscure, liberal divinity school in the northeast.

As is suggested by the ASIL's 100 Ways brochure on how international law "shapes our lives," we still have to convince the majority of people in the United States—never mind hopeless cases like certain high government officials or FOX News—that international law actually "shapes" anything at all, much less the acts of nations. Our 100 Ways brochure

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counters this by concrete accessible example. It shows how international law matters “in our daily lives,” “at leisure and in the world,” “when we are away from home,” and with respect to “liberty, public health, the environment, public safety, and in commercial life.”<sup>1</sup> While I was a skeptic of the 100 Ways Project, I tip my hat to Lucinda Low whose idea this was. Those 100 Ways, prominent on our Society’s website, remain, sadly, necessary.

Our central mission is to sustain a constituency that cares about the international rule of law, assure that judges and members of Congress are reasonably informed about it, and that the media more or less accurately reports about it. The 100 Ways brochure—with its inevitable simplifications and omissions—is a useful first step to reach the vast majority of persons outside this annual meeting who continue to believe that “law” properly understood exists only on the national plane. Our brochure illustrates 100 ways that John Austin’s view of sovereignty is wrong. It shows that sovereign power varies along a spectrum—not an on/off switch—and that it can be shared—among nations, between state and non-state actors, and between diverse levels of governance, from the regional to the municipal.

Our 100 Ways brochure, like much else that we are likely to do, indicates that entering into international obligations is an exercise of, and not a threat to, sovereignty. For as long as we continue to exist and are not taken over by another foreign law society we will need to remind people, including our leaders, that the international rule of law enables states to protect their citizens—in a world that increasingly challenges our governments’ abilities on their own to control their borders, their economies, their national security, their environment. Much of what we will do over our next 100 years will be devoted to showing that even great military and economic powers rely on international law to protect all the matters canvassed by our 100 Ways—from intellectual property rights to free markets, the ozone layer to whales.

This educational mission is not one that is easy to accomplish. Consider the challenge faced today by those seeking U.S. ratification of the 1982 Law of the Sea Convention. At present this treaty has been endorsed by every chairman of the Joint Chiefs, every chief of Naval Operations, every combatant commander of the U.S., every living legal adviser to the U.S. Department of State, every president since Ronald Reagan, and a politically diverse array of organizations—from a broad coalition of environmental groups to the American Petroleum Institute and the Chemical Manufacturers’ Association. This is a case where adherence to a treaty is seen as a compelling national interest—by, if you can believe it, both Bill Clinton and John Bolton—and yet remains stalled in the Senate.

As with respect to many other treaties that are unfortunately burdened with the title “UN convention on X,” the UN Convention on the Law of the Sea has been unfortunately tainted by association. Some continue to see it as an unholy Soviet/Third World/NIEO (and maybe Hollywood) conspiracy to redistribute resources in violation of free market principles, a dangerous step towards world government or towards despotic rule by unaccountable global bureaucrats. As treaty proponents have vainly pointed out, such views ignore developments like the 1994 Reagan-era renegotiation of its deep seabed provisions. The new deep seabed provisions adhere to free market principles and provide first-come, first-served rights to mine the deep seabed under joint venture arrangements that provide guaranteed access to minerals and the legal title that international lenders demand. Absent adherence, the U.S. industry will remain frozen out of a resource that has never been within any states’ jurisdiction.

<sup>1</sup> For the web version of INTERNATIONAL LAW: 100 WAYS IT SHAPES OUR LIVES, see <<http://www.asil.org/asil100/index.html>>.

If the United States ratifies, on the other hand, it will have a veto over the adoption of rules and regulations for deep seabed mining, share in any such revenues, and be involved in any amendments to these provisions. Ratification would enable the United States to have a judge on the International Tribunal for the Law of the Sea, have an expert on the Commission on the Limits of the Continental Shelf, and enable U.S. participation in the annual meeting of States parties. The Law of the Sea Convention is no threat to sovereignty. As proponents like John Norton Moore have stressed, it is the single most potent protector of sovereign rights (over 7/10s of the earth's surface no less) in human history.<sup>2</sup> It extends each nation's rights in: coastal resources, vastly enlarged exclusive economic zones, and the continental shelf. It recognizes vital navigational freedoms. The Convention advances our national interest in settling by law, and not by the sheer force of our over-burdened navy, illegal or excessive claims that interfere with navigational freedoms and over-flight rights, as well as our Navy's ability to traverse more than one hundred straits used for navigation. Treaty opponents fail to see that ensuring the protection of U.S. maritime interests by law is, especially after 9/11, more essential than ever. Criticism of the Convention's provisions requiring submarines to surface while in the territorial sea or that limit rights to board foreign flag ships seems, in comparison to the enormous benefits conferred, petty. Such criticisms also ignore that the United States is already subject to the underlying constraints under existing law and that such provisions secure desirable reciprocal rights. As Moore has asked, do we really want Chinese submarines clandestinely submerged off the beaches of New York?<sup>3</sup> More chilling are those who oppose the Law of the Sea convention because its Article 301 states that parties "should refrain from any threat or use of force against the territorial integrity or political independence of any state." Opposition to this paraphrase of Article 2(4) of the UN Charter tells us what may have us have long suspected: today the UN Charter itself would probably never emerge from committee to Senate floor.

As ASIL member David Kaye has pointed out in an op-ed in the New York Times, the Convention on the Law of the Sea is only one of more than two dozen treaties submitted to the Senate by President Bush and his predecessors—some going back to the Eisenhower Administration—that remain stalled in the Senate.<sup>4</sup> These include the Hague Convention on the Protection of Cultural Property in Time of Armed Conflict, Protocol II to the Geneva Conventions, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on Biological Diversity. They do not include "controversial" agreements like the Kyoto Protocol or the Convention on the Rights of the Child that have not even been sent to the Senate.

The arguments raised pro and con with respect to the Law of the Sea Convention parallel those heard on other fronts. As with respect to that treaty, the often mythical concerns of treaty opponents are that such compacts involve the "surrender" of sovereignty to new international authority, the transfer of wealth, resources or technology from us to them, the renunciation of economic or other forms of liberty interests, risks to our national security or intelligence concerns (especially post 9/11), or that such multilateral treaties erroneously rely on the weak reed of "law" instead of the more effective force of our power or bilateral leverage. Just as Law of the Sea proponents have to counter inaccurate charges that this

<sup>2</sup> See John Norton Moore & William L. Schachte, Jr., *The Senate Should Give Immediate Advice and Consent to the UN Convention on the Law of the Sea: Why the Critics Are Wrong*, 59 J. INT'L AFF. 1, Fall 2005; Prepared Testimony of John Norton Moore Before the House Committee on International Relations, May 12, 2004.

<sup>3</sup> See Moore & Schachte, at 4.

<sup>4</sup> David Kaye, K. Russell LaMotte & Peter Hoey, *Pacts Americana?*, N.Y. TIMES, Dec. 15, 2006.

treaty would compel the United States to submit all maritime disputes to international judges, CEDAW and Rights of the Child treaty proponents have to clarify the limited nature of dispute settlement contained in those agreements. They are forced to combat abysmal ignorance of the actual provisions of these treaties to counter often absurd contentions that have more to do with America's on-going "culture wars" than reality.

Proponents of the Law of the Sea Convention are forced to answer arguments, made in the *Wall Street Journal* no less, that this treaty "is designed to place fishing rights, deep-sea mining, global pollution and more under the control of a new global bureaucracy."<sup>5</sup> Just as CEDAW's proponents have to answer spurious charges that that treaty would: require the United States to send women into armed ground combat, promote abortion, force children into daycare, undermine the traditional "family," close single-sex schools, legalize prostitution and same sex marriage, and my personal favorite, end the celebration of Mothers Day. Some of these complaints stem from misinterpretations of the non-binding views expressed by the CEDAW committee in particular cases; others suggest only the paranoid fantasies of Anne Coulter.

Those advocating that the United States join the rest of the world in ratifying the Convention on the Rights of the Child are similarly forced to answer contentions that would be hilarious if the stakes weren't so serious. Those fighting that treaty also think they are protecting our "sovereignty," our federalism, or our families. As with respect to the Convention on the Law of the Sea, the proponents of CEDAW and the Rights of the Child Convention defend these treaties on the basis of flexible treaty language (such as CEDAW's repeated deference to "appropriate" state actions) and on the basis of proposed U.S. reservations or understandings. As do proponents of the Law of the Sea Convention, their case in favor of ratification is based in part on our national interest in becoming involved in the underlying treaty institutions. They argue, with considerable justice, that these treaties would be more effective in protecting the rights of human beings everywhere if we were involved.

Much of the opposition to such treaties would dissipate if opponents understood how rights that appear to be only constraints on us are actually in our national interest because they are reciprocally applied to us. The Convention on the Law of the Sea, for example, provides that fishermen that are arrested "shall be promptly released upon the posting of reasonable bond..." that coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment or other corporal punishment, and that mariners have "recognized rights" when accused of crimes. Such rights protect our nationals as well as others'. They have obvious parallels to now contested rights under Geneva law and the Vienna Convention on Consular Relations—as well as those in CEDAW and the Convention on the Rights of the Child. All of these treaties are grounded, at least in part, in reciprocity-based concerns to protect human dignity—of mariners, unlawful combatants, aliens in the United States and elsewhere, women, or children. There are 100 examples of the reciprocal nature of international law in our 100 Ways brochure.

As David Kaye points out, ratification of the many multilateral agreements before the Senate—never mind the Kyoto Protocol or the ICC Statute—would go some way to showing the world that the United States remains committed to solving global problems multilaterally at a time when much of it thinks U.S. unilateralism is a greater threat to the world than Al Qaeda.<sup>6</sup> I agree with him that, all else being equal, the symbolic value of U.S. adherence to

<sup>5</sup> Moore & Schachte, *supra* note 2, at 10 (citing a *Wall St. J.* editorial from Mar. 29, 2004).

<sup>6</sup> See Kaye et al., *supra* note 4.

widely ratified conventions may, in and of itself, advance a compelling national interest these days—when we can use all the international goodwill we can get. It is hardly new or breaking news that the United States is no longer seen as a principal maker of the post-war international legal order; as a beacon of enlightenment responsible for the UN Charter, the Bretton Woods system, the GATT, and the Universal Declaration of Human Rights. To the extent we seek to burnish our image as Winthrop's (and Reagan's) "shining city on the hill," we need to stop putting the lights that once made us the promise of the world into legal black holes.

Yet, as the centennial toasts from last year's dinner suggest, the ASIL aspires to remain a learned society and not only or even principally a cheerleader for the ratification of treaties, even widely ratified ones. Consider the morality lessons of that most moral of television programs: *South Park*. In a recent episode, Kyle, inspired by Al Gore, convinces the residents of South Park to switch en masse to hybrid vehicles. This results in a mass outpouring of liberal smugness, producing serious "smug" conditions over the skies above South Park. Even denser accumulations of smugness arise from the citizens of San Francisco and Berkeley and these join forces with those emerging from George Clooney's fatuous speeches over in L.A. Reacting to the evident risks, the residents of South Park quickly revert to their Hummers and SUVs. The residents of San Francisco are not so fortunate. Their continued smugness results in a devastating smugness attack, apparently endemic to California, which destroys the city.

As a hybrid driver and ACLU-card carrying liberal, I had nightmares after seeing that *South Park* episode. Smugness is a dangerous occupational hazard for us international lawyers. Indeed, I would not be surprised if the smugness levels in Washington become dangerously elevated every Cherry Blossom season when we gather here. And, as Harvard law professor, David Kennedy, suggested during the panel on his book *The Dark Sides of Virtue* at last year's annual meeting, our 100 Ways Brochure may be Exhibit #1 of our smugness. As he pointed out, all of our 100 ways are ever so positive.

Kennedy has a point. Our 100 Ways brochure is less useful to the "invisible college," who are, as a group, only too smugly certain of international law's manifold virtues. At the risk of being charged with corrupting the morals of a law student, I locked up my research assistant in a room with the collected works of the Four Horsemen of the Constitutional apocalypse (Curtis Bradley, Jack Goldsmith, John Yoo, Ernest Young), public choice theorists like Paul Stephan, critics of international law from the left (such as Lori Wallach, Makau Matua, Chimni, Koskenniemi, Nathaniel Berman, numerous "latcrits" and other "TWAAIL" followers, and of course, David Kennedy) as well as critics from the fuzzy liberal middle such as Jeb Rubinfeld and Peter Spiro. I asked him to emerge with something that Kennedy might respect. This is the product: "50 Ways that International Law Hurts Our Lives".<sup>7</sup> We were tempted to set these to music—Paul Simon's "Fifty Ways to Leave your Lover" came to mind—but wiser heads (and intellectual property concerns) prevailed.

As you peruse this draft, notice that we emulated the form and content of the original 100 Ways. Our list, like the 100, contains both the singularly important as well as the more mundane ways international law (negatively) "shapes our lives." Notice too that we did not always go for the easy route. Our list does not only include the sadly all too predictable harms that ensue because of the absence of international law or its credible enforcement.

<sup>7</sup> José E. Alvarez & David Lachman, *International Law: 50 Ways it Harms Our Lives*, obtainable from <[http://www.asil.org/ilpost/president/50\\_ways.pdf](http://www.asil.org/ilpost/president/50_ways.pdf)>.

(But it was hard to resist pointing out that, as the ICJ reminded us last month, the Genocide Convention does virtually nothing to protect us from genocides (see my item 36 under “public safety”) or that our ban on torture has failed to eradicate the practice (see item 14 under “liberty”).) We also tried to resist the temptation merely to “flip” the 100 Ways – and critically examine the less attractive half truths concealed in them. Admittedly, we did succumb to some cheap shots of that kind. We could not resist mentioning that, due to the inadequacies of the whaling regime, you might indeed see the actual killing of a whale while “at leisure” on your vacation (see item 10).

For the most part we tried to identify some of the ways that international law and its institutions affirmatively make the world a worse place. Our sins of commission and not merely of omission reflect criticisms from all parts of the ideological spectrum. The list of 50 Ways does not aspire to condemn international law or our work as international lawyers. Far from it. Consider this a kind of “to do” list. If last year’s annual meeting of our Society was an overdue and merited celebration of all we have achieved as international lawyers, the 50 Ways are a reminder, in our 101st year, of the need to roll up our sleeves and get to work on actually achieving the “Just World Under Law” that we celebrated when last we convened.

Notice how deftly I sought to avoid the initiation of ASIL impeachment proceedings as I head into my second and final year as your President. Our list of harms is only half as long as Lucinda Low’s 100 Ways. If asked by some reporter from U.S. News and World Report (who might take such a list more seriously than is warranted) what all of this means, I can respond that, on balance, international law does more good than harm—at least 50 percent of the time. I suspect that the empiricists in our midst (e.g., Oona Hathaway) can confirm that I am right about this.

I will be the first to admit that the 50 Ways are contestable. Some of you may wish to blame the failings of politicians and not international lawyers for much that is on my list. But if we are going to question cause and effect relationships, I hope that we do the same with our 100 Ways. Enough said.

Some of the harms identified in my 50 Ways emerge from what Derek Jinks and Ryan Goodman have called “races to the middle”—with respect to labor, environmental, and aviation standards, where states that could aspire to higher, succumb instead, to lower common denominator solutions because, as Jinks and Goodman would put it, they are not coerced, persuaded, or socialized to reach for something better.<sup>8</sup> See, for example items 1, 5, and 9. Other harms, such as the massive horrors resulting from our adherence to the principle of stable borders even when these were imposed by your friendly colonial ruler (see item 3), emerge from international lawyer’s continuing debt to the not-so-golden-age of imperialism. The inequities legitimized under some bilateral treaties, weighed voting schemes, or the principles of “specially affected” states and “persistent objector” (see items 18, 27-30) emerge from international law’s deference to power and the rights of states. Other harms—such as those consciously or unintentionally inflicted under IMF structural adjustment loans or the not always beneficial development advice given by the International Finance Corporation or the World Bank (see items 6 and 32-35), result from the opposite problem: the occasional ability our law now has to puncture what was once within the exclusive jurisdiction of states. As Benedict Kingsbury reminds us, sometimes our law curtails public policies

<sup>8</sup> See RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (forthcoming Oxford University Press).

intended to promote greater economic equality.<sup>9</sup> Some harms, such as those inflicted in the name of some human rights regimes or international criminal processes (see item 20), undervalue the local, the desires of those on the margin or the needs of those at various peripheries, from the geographic to the sexual. As our Grotius Lecturer, Joseph Stiglitz reminded us, other legal initiatives—such as some efforts by the Security Council, our proliferating international arbitrators, or WTO panelists, undervalue representative democracy, the merits of transparency, accountability, or checks and balances. These values are, of course, embedded in U.S. concepts of federalism and separation of powers. Other harms—such as those some see reflected in the Sale of Goods Convention (see item 48)—may result from overvaluing expertise or universality. International legal processes also harm us to the extent that they are abused by hypocritical governments—which can easily happen under our catch-me-if-you-can approach to treaty reservations, or because of inefficient, incompetent or corrupt bureaucrats responsible for such notable endeavors as the Oil for Food program for Iraq or disastrous peacekeeping efforts too numerous to mention.

Obviously, my list of 50 ways conveys a very different message from our 100 Ways brochure. It suggests that more global regulation, more international organizations (IOs), more international courts is not necessarily a good thing—it all depends on what the regulation/the organization/the court is and what it's for. The 50 Ways brochure is intended to suggest that the words "I am an international lawyer, and I am here to help" should sometimes draw the same derision that now accompanies neo-conservatives suggestions that the United States is adept at promoting democracy in alien territory immediately following "shock and awe."

I am aware that the 50 Ways, particularly if taken at face value and not put in context along with this speech, pose risks. Some of you may fear what Rush Limbaugh will do with it. But my suspicion is that Mr. Limbaugh will not become a fellow Grotian because of our 100 Ways brochure either. The ASIL cannot change minds that are unalterably closed. We can only enlighten those willing to listen.

The promise and perils of international law cannot be distilled into simplistic lists, whether the 100 Ways or my 50. But if our Society aspires to Dean Slaughter's grand goals and yet wants to take to heart Thomas Franck's warnings of hubris, we shall need both of these lists. The future of our Society rests on what these lists inspire.

As we see from distressing comments by, and the even more distressing behavior of, our government officials, our legislators, judges and those who work in the executive branch need a document like the very rosy 100 Ways. That brochure and comparable efforts help satisfy unmet needs in this country for basic international law education, even in our nation's law schools. Despite Harvard Law School's Johnny-come-lately discovery of the value of international law in the first year, not every law school is as enlightened, and not all our law professors are as educated about international law, as is David Kennedy.

Consider a recent conference co-sponsored by the ASIL at Berkeley Law School. At that event, a prominent federal circuit judge who will remain nameless proudly distributed a number of his judgments involving treaty interpretation issues. When I asked why none of the cases even mentioned the Vienna Convention on the Law of Treaties (VCT), the judge inquired whether I meant the Vienna Consular Convention. He had never heard of or been cited to the VCT by any litigant or law clerk in his years on the bench. Despite David Kennedy's qualms, I think that judge, most members of Congress, and not a few of U.S.

<sup>9</sup> Benedict Kingsbury, *Sovereignty and Inequality*, 9 EJIL 599 (1998).

district attorneys (those who still have jobs) could learn something from our 100 Ways brochure.

But those of us at this meeting probably can benefit most from the 50 Ways. We need them not only in the way Christians need original sin—because it builds character—and because humility is good for the soul. We need to avoid smugness because our society—and here I mean the broader United States and global societies of which the ASIL is only a very small and parochial part—needs, more than ever, critical, self-reflecting international lawyers. As the Society starts its second century, our fundamental tenets as international lawyers are under serious contestation. Our formal sources of law are challenged by diverse forms of “soft” law—from those promulgated by transnational government networks to those propounded by more than two hundred international judges. Our laws focus on states, long rendered questionable by the rise of human rights, is now untenable in the wake of the law influenced by sub-parts of our governments, by IOs, NGOs, MNCs, international civil servants, and delegated experts. Familiar notions of what it means to “comply” with international law or to have it “enforced” are being disrupted by new modes of persuasion and socialization, and severely tested by complaints of democratic deficits and accusations that we are using law to launder power or ideology. And some of our institutions—from ICSID to the European Court of Human Rights—are challenged by their success, namely too many litigants. The result is attention to problems of institutional design not seen since the end of the World War II. Even the IMF is realigning its voting and financial arrangements to make it more responsive to a more diverse set of members, including Mexico, Turkey, China and Korea.

If even the staid IMF can acknowledge the need for change, surely we can too. But we cannot hope to adapt to new rules, actors, or normative processes if all we do is affirm how good existing legal arrangements are.

Consider the need for honest and critical reassessment with respect to three of the gravest risks facing global society: nuclear weapons, the “war” on terror, and climate change. Recent calls for the total abolition of nuclear weapons including by nuclear powers, by George Shultz, William Perry, Henry Kissinger, Sam Nunn, and Mikhail Gorbachev are a direct challenge not only to our political leaders but to international lawyers.<sup>10</sup> These leaders are surely right that given the inadequacies of existing arms control regimes, novel approaches have to be found to prevent non-state terrorists from getting their hands on these weapons. The abolition of nuclear weapons and the effective prevention of their use by non-state actors will require something other than resort to traditional legal recipes. This at least is suggested by that major disappointment to judicial romantics everywhere, the ICJ’s Advisory Opinion on Nuclear Weapons.

As by my item 37 suggests, Cold War legal strategies based on mutual deterrence seem useless when it comes to denying WMDs to non-state actors. Steps toward abolishing these weapons or at least mitigating their use will necessarily include controversial approaches such as the United States Proliferation Security Initiative. Traditional international lawyers are suspicious of that effort, involving a U.S.-led “coalition of the willing” unsanctioned by formal treaty and outside the confines of the Convention on the Law of the Sea (though probably not in violation of its terms). Further, the battle against WMDs has also included Security Council resolutions such as 1737 of last December imposing “smart sanctions” on

<sup>10</sup> See George P. Shultz, William J. Perry, Henry A. Kissinger & Sam Nunn, *A World Free of Nuclear Weapons*, WALL ST. J., Jan. 4, 2007, at A15; Mikhail Gorbachev, *The Nuclear Threat*, WALL ST. J., Jan. 31, 2007, at 13.



individuals and organizations alleged to be assisting Iran's development of its nuclear program. This is another controversial effort because it deploys a body that under traditional theory cannot engage in such "legislative" action and should not be doing so, in any case, without benefit of due process. Our resort to these forms of "hegemonic international law" suggests why we need renewed attention to institutional redesign. As is implied by my item 16, we may find that the Council cannot engage in smart sanctions in the age of rights, in the absence of new checks, to enhance its accountability—and that these checks will in all likelihood need to be something other than unlikely "judicial review" by the ICJ.

Or consider a second threat to global society: terrorism. As we will hear tomorrow night at our annual dinner, Philip Bobbitt will tell us that international lawyers cannot afford to respond to this challenge merely by affirming the merits of our existing law. This is also suggested by items 39 through 43 in my 50 Ways. If we assume for a moment that the United States and other states are engaged in some kind of armed conflict not subject to territorial or temporal limits—as is suggested by the statements of Al Qaeda's leaders and not merely our highest officials—might it be necessary to re-examine our state-centric treaties about conflict, including the Geneva Conventions? And those who think this challenge is principally one subject to the criminal law, cannot possibly be satisfied with the status quo, involving more than a dozen treaties and duplicative counter-terrorism efforts at the international level. The prospect that we can overcome the terrorist threat through the United Nation's present intelligence and law enforcement capabilities—now derided as the operational equivalent of "two cops and a dog"—appears highly dubious. Here too is a serious need for re-tooling current bilateral, regional, and global arrangements.

I am aware that calling for changes in the law when it comes to terrorism may suggest that I have turned to the "Dark Side," alongside Vice President Cheney. But surely the problem with the U.S. government's lack of credibility on everything from Geneva law to the convention on torture is not because our leaders have engaged in too many multilateral attempts to change the law? Our problem results from people thinking that we have ignored the rule of law altogether—that we have, to put it starkly, "breached and run."

We have undermined our efforts to counter terrorism because we have dismissed existing law without trying to adapt it in ways that result in rules still subject to reciprocal application. It may be that the inherent right of self-defense has to be re-thought in the age of terrorists and WMDs—but that re-thinking needs to come up with something other than a doctrine of "preventive" force that only P-1 (the United States) can use. That is a pre-condition of any law worthy of the name.

And finally there is threat of climate change, my item 7. The current issue of the *Columbia Law Review* includes an essay by Cass Sunstein that explains the aggressive U.S. reaction to the risks posed by terrorists as compared to our meager efforts as a nation on climate change.<sup>11</sup> Sunstein explains the divergence in terms of "bounded rationality." Polling data show, he argues, that Americans believe, probably wrongly, that substantial steps to reduce the risk of terrorism promise to deliver significant benefits over the near term at acceptable cost but that the opposite is true for climate change. Our leaders, he argues, are merely responding to the bounded rationality of the U.S. public.

Sunstein argues that the best way to redress this is to change public perception of costs and benefits by showing that the costs of combating climate change are less than we anticipate

<sup>11</sup> Cass R. Sunstein, *On the Divergent American Reaction to Terrorism and Climate Change*, 107 *COLUM. L. REV.* 503 (2007).

and the benefits a great deal more. Duncan Hollis, blogging on *Opinio Juris*, points to one way of doing just that: namely by emphasizing the use of the Montreal Protocol and its common but differentiated regulatory approach to phasing out HCFCs (hydro-chloro-fluorocarbons) rather than Kyoto's exclusive focus on reducing developed world carbon dioxide emissions. Whether Prof. Hollis is right or wrong, I applaud him for reacting to my item 7 in a way that I hope inspires reactions to the other 49. We should respond to the 50 Ways not by throwing our hands up in the air in frustration but by creative legal thinking to get around current stalemates.

Sunstein also argues that our leaders shape public opinion and do not merely follow what the public thinks. He contends that leaders can influence public risk perceptions and estimates of relative costs and benefits. He takes note of polls of Americans and Europeans, including those in the United Kingdom, showing vast differences in how each evaluates the relative risks of climate change vs. terrorism and needs to act in each case. Sunstein suggests that the difference between American and British public attitudes may have something to do with the respective attitudes of President Bush and Prime Minister Blair. He points to statements of both extending back to 2004. Whereas the president, then as now, downplayed the risks of climate change but stressed that we are a nation that is perennially at risk of the next imminent terrorist attack, Blair argued, then as now, that there is "no bigger long-term question facing the global community" than the threat of climate change.<sup>12</sup>

My concern is not with the merits of Blair's or Bush's respective risk assessments. My point is that the role of the ASIL and all international lawyers is to lead on these and other challenges to our national and global societies. Where we can, our job is to unbind our "bounded" rationality—to make us, as well as our leaders, more rational. And where we cannot achieve that, our job is at least to elevate the quality of the discourse. To do either well we need to confront the flaws of our laws and our own correctable failings as lawyers.

The principal role of a leader—whether of the president of the ASIL or of the United States—is not to play on our fears but to instill fearlessness. ASIL members should not fear the 50 ways. We should not fear confronting them even if they were a thousand. The history of international law is all about innovating in the face of repeated failure—as when those present at the creation of the United Nations, including several former presidents of this Society, re-engineered around the birth defects of the League of Nations or when, in 1994, the United States led the effort to correct the birth defects of the GATT.

There may be one salient difference between me and some critics of international law. Unlike some who have criticized international lawyers' "progress narrative," I still believe progress is not only possible but necessary. If not, what exactly is the point of Societies like ours?

If we learn from the 50 Ways we will be able to switch items from that list to the other. If we pay heed to the 50 we will make the 100 more real and—if we are lucky—multiply them tenfold.

Thank you for listening.

<sup>12</sup> *Id.* at 552.

## IN MEMORIAM

### WILLIAM D. ROGERS—by Charles N. Brower\*

Bill Rogers died poetically at the end of a life of principle. The poetry first: The New York Times reported his death as follows: Mr. Rogers, a devotee of fox hunting, died during a hunt after suffering a heart attack while riding his favorite horse, Isaiah. He was declared dead almost immediately by a doctor participating in the hunt. An Episcopal priest was called, the hounds were collected and the hunters gathered for a short service on the spot. One by one, they rode past him and tipped their hats. What better way to depart this world than in an instant while fully engaged in what one loves most.

We pause a few moments this afternoon to tip our hats to a man of principle. Bill was too young to enlist in World War II, so he spent his summers working in a shipyard building warships. Following Princeton and Yale Law School, he clerked for the Chief Judge of the United States Court of Appeals for the Second Circuit and for then Justice Stanley Reed on the U.S. Supreme Court. And he arrived just in time to deal both with the first argument in *Brown v. Board of Education* and with the Julius and Ethel Rosenberg espionage case.

His life of personally demonstrated principle began more publicly when he left there for the brand new firm of Arnold, Fortas & Porter to become its ninth lawyer. And he went straight into the defense, which was successful, of Owen Lattimore, who at least older persons present will recall was a chief target of the subsequently disgraced Senator Joseph McCarthy.

A man of principle. He was appointed in the Kennedy Administration and continued in the Johnson Administration at the Alliance for Progress. But in 1965, he resigned out of disenchantment he expressed with President Johnson's invasion of the Dominican Republic and with his Vietnam policy.

Nonetheless, George Ball, who was then Under Secretary of State—we would now call that person Deputy Secretary of State—asked Bill to head up a task force to advise the Secretary of State and the President about what to do about Ian Smith's unilateral declaration of the independence of Southern Rhodesia and the British government's proposal to invade the rebellious former colony. Under Rogers' leadership, the task force concluded that the U.S. should not provide intelligence or logistical support for any such operation and the President should seek to dissuade the British Government from this course, and in all of this Rogers was successful.

But he was out of government and back at Arnold & Porter (Fortas had been dropped in the meantime because he was on the Supreme Court). Before this Society, at its annual meeting in 1970, this man of principle argued strongly against the Nixon Administration's incursion into Cambodia on a Society program entitled "Law and the Cambodian Incursion: International and Domestic Legal Ramifications."

For the next eight years, he practiced law. One day, President Nixon appointed Henry Kissinger as Secretary of State, and Henry Kissinger, on the recommendation of David Rockefeller, called Rogers and asked him to join him as Legal Adviser of the State Department. Bill, being Bill, refused, saying "I cannot serve in a Nixon Administration." Well, the Nixon Administration came to an end in August 1974, and it became the Ford Administration. And no sooner did that happen than Kissinger was on the phone again with Bill, asking him this time to become his Assistant Secretary of State for Inter-American Affairs. Before accepting, Rogers had a conversation with Kissinger and referring to the overthrow of President Salvador

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Allende in 1973, followed by the installation of General Augusto Pinochet, Bill said to Kissinger, "I heard rumors that the United States Government had destabilized Chile through the CIA. If there were any CIA covert operations going on during my watch, I would resign and denounce the operations."

When many years later controversy arose in some publications as to whether the Administration had or had not done something in should not have done in Chile later on, the chief author of the accusation that things might not have been what they should have been went out of his way to point out his "utmost respect" for Rogers. And as a bit of a footnote—you would think the former Assistant Secretary of State for Inter-American Affairs would have some vague loyalty to the Organization of American States (OAS), but at the Society's Annual Meeting in 1988, he spoke on a panel addressing the 40th anniversary of the OAS Charter, and he said this: "The OAS has lost the esteem of both Latin and North Americans—seen by the one as the slavish instrument of Washington's designs and by the United States as a bothersome debating society transfixed by abstract principles of maddening irrelevance to the realities of the world. The OAS in its present form therefore no longer serves a useful purpose."

In 1976 Kissinger elevated Rogers to be Under Secretary of State for Economic and Agricultural Affairs, and it has been revealed since that he wanted Rogers to become Deputy Secretary of State. The problem was it was 1976, and President Ford was in a hot and close race for the nomination to be elected in 1976 with the former Governor of California, Ronald Reagan, and it seemed it might not be a smart idea to install as Deputy Secretary of State someone who had sworn to give away the Panama Canal, which Bill was.

So, he left government in 1976, and although for thirty years and more he did not serve full time in government, he carried out many public tasks related to our foreign policy. Politics makes strange bedfellows, and it will probably seem very curious to you as in a way it has to me that during those 30 years and more, Bill Rogers and Henry Kissinger were such close friends that Henry has stated that during all of that time certainly not a week went by and rarely did a day go by without the two of them talking about something. He was Vice Chairman of Kissinger Associates. Henry Kissinger has described him as his friend, his adviser, his conscience.

He was appointed as executor and also as literary executor of Henry's estate. And Henry has made it clear that at their very last meeting a few days before Bill died, they concluded with Henry saying, "Now Bill, you have to promise to outlive me." And Kissinger has pointed out that that was the only promise Bill made to him that he was not able to keep.

Bill contributed much to the Society as President, as a member of the Board of Editors, through his various presentations to which I have referred, and I must say financially in connection with our Second Century Campaign. His last contribution to the Society was his bit in the journal commemorating Covey T. Oliver, former President of the Society and public official. In that article, he began by quoting Eric Sevareid, to the following effect: there are three sorts of people—the mowers of lawns, the well poisoners, and the life enhancers. Clearly Bill Rogers was a life enhancer *par excellence*.

But I leave the last word to his friend of over thirty years, Henry Kissinger, who spoke as follows in his eulogy of Bill Rogers: "A kind God brought some of us into proximity to a genuinely noble man who devoted his life to bringing about a world where the weak can be secure and the just can be free."