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On the Balance Between International Law and Democratic Sovereignty
Daniel W. Drezner*

I. INTRODUCTION

The competition for authority between national sovereignty and international law has waxed and waned for centuries. Precursors to the modern nation-state rose to prominence in Europe by battling the Catholic Church, feudal suzerains, and commercial leagues for the right to rule.\(^1\) Even the documents underlying the Treaty of Westphalia, thought to represent a watershed in the rise of the state, are shot through with violations of state sovereignty.\(^2\) As the state has acquired more power as an institution, there has been a recurring tension between nations wishing to assert their own sovereignty while using international law as a way of weakening the sovereignty of others. Great powers constantly face the choice of maximizing their sovereign powers in an anarchic world or sacrificing some degree of sovereignty in the hope of constructing a stable order through multilateral institutions.\(^3\)

This tension has existed for some time, but has escalated in the past few decades for three reasons. First, the sovereignty that is contested is increasingly democratic in nature. A century ago one could count the number of democracies on one hand; today the number of governments claiming a democratic mantle is well over a hundred.\(^4\) Citizens of democracies are naturally reluctant to cede decisionmaking

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authority to unelected international bodies unless the benefits of doing so are crystal clear.

Second, the demand for international law has increased with the rise of economic globalization and transnational nongovernmental organizations ("NGOs"). Globalization has increased the degree and intensity of international economic exchange by several orders of magnitude. With this comes a demand for rules to govern these exchanges. This includes the need to settle trade disputes between nations, but also a desire by actors to harmonize different national regulatory schemes. Transnational NGOs have emerged to demand stronger international regimes to govern these issues. In the past decade alone, the number of transnational NGOs has quadrupled. NGOs like Greenpeace, Amnesty International, and the International Commission of Jurists are pushing for a codification of international norms governing a variety of issue areas.

Third, the supply of international organizations and treaties that make international law has increased. A century ago, there were very few standing international organizations. Since then, the UN system has grown in size, the Bretton Woods institutions have entrenched themselves, and a welter of international and regional regulatory organizations has come into creation. In the past twenty years, the number of international governmental organizations ("IGOs") and emanations has more than doubled, as has the number of treaties deposited in the United Nations. There is a growing epistemic community of experts on international law eager to expand its empirical domain. There are more formal avenues for international law to be created than ever before.

The question for democratic governments is how to balance serving the national will through democratic means with meeting international obligations that may be objectionable at points but are believed to advance the national interest in the long run. There are plenty of examples of governments acquiescing to international law in the face of vocal domestic opposition. The United States has had to void components of the Clean Air Act because of a World Trade Organization ("WTO") ruling. Yugoslavia arrested its former ruler, Slobodan Milosevic, in response to extradition demands by a UN War Crimes Tribunal. Japan has banned the commercial hunting of whales to comply with the dictates of the International Whaling Commission. These are clear cases where national governments have acceded to a policy that would have been politically difficult or impossible to implement through purely domestic mechanisms.

Some commentators argue that, with such results, international law is making a sure and steady encroachment on democratic sovereignty, affecting the United States

in particular. Officials at the highest levels have implicitly acknowledged this trend. In 1998, Secretary of State Madeleine Albright expressed the problem this way: "Great nations who understand the importance of sovereignty at various times cede portions of it in order to achieve some better good for the country."

This paper asks two questions. First, is it the case, as some have claimed, that principles of democratic sovereignty are eroding at the expense of international law principles? I argue that international law is increasingly utilized to circumvent sovereignty, even if such sovereignty is democratic in origin. However, it should be recognized that the actors most responsible for this trend are not NGOs, epistemic communities of international lawyers, or the United Nations, but the great powers of the world, namely the United States and the members of the European Union. The United States in particular has been adept at fashioning and marketing standards of international law that serve its interests, through a growing number of international governmental organizations. US sacrifices of democratic sovereignty pale in comparison to the compromises other countries have had to make. Furthermore, the United States and European Union employ diplomatic, economic, and other forms of coercion to codify their preferences in international law.

The second question addresses the normative ramifications of this trend. In the long run, what are the implications of this use of international law for democratic governance and international relations more generally? Here the record is mixed. The recent wave of international law has and will generate some beneficial results. In the short run, however, this approach will prove problematic for democratic sovereignty; in the long run, the coercive origins of these laws have created a legal foundation of questionable durability.

II. DEFINING TERMS

Sovereignty is a multifaceted term. For the purposes of this article, sovereignty endows a government with the power to regulate the affairs of a well-defined territory and its resident population without interference from organizations or individuals external to the jurisdiction. In other words, a sovereign state has the final say on the rule of law within its territory. Democratic sovereignty implies that the governing authorities derive their legitimacy from citizen preferences. These preferences could

8. Rivkin and Casey, Natl Interest at 38 (cited in note 7) (quoting Secretary Albright).
9. Anne-Marie Slaughter makes a similar, but not identical argument, that the growth in global governance is due to the growth of networks of national regulators. See Anne-Marie Slaughter, *The Real New World Order*, 76 Foreign Aff 183 (Sept-Oct 1997).
be expressed through popular referenda or through the election of official representatives. The key is that the mechanism through which these preferences are divined occurs on a regular basis and is free from coercion.

There are two sources of international law governing the activity of sovereign states. The first source consists of the treaties, agreements, and conventions signed between sovereign states. Treaties require ratification by national legislatures, and thus are not seen to reduce national sovereignty automatically. Some legal scholars have voiced concerns about the ability of treaty law to conflict with democratic sovereignty, because of the all-or-nothing nature of their ratification. However, the no-amendment rule can also apply to some categories of domestic legislation. Furthermore, most treaties also include clauses permitting signatories to renounce their treaty obligations so long as prior notification is given. Fears about the threat to democratic sovereignty may be based on the normative content of the treaties rather than the mechanism of ratification.

Customary international law is established when courts decide that certain practices or norms are shared widely enough such that they reflect a common custom of states. If a custom is widely embraced by the community of nations, courts can identify this custom as a source of law in their decisions. The key question, of course, is how to identify such norms and principles and to measure just how widely shared they are. No doubt, there exists a core set of norms that jurists could identify—the outlawing of slavery or the illegality of torture, for example. Most norms, however, are not as widely accepted. Scholars and jurists can search for them within national legislation and international treaties, but many also look for them in the “soft law” of UN General Assembly resolutions, International Monetary Fund (“IMF”) codes and standards, G-20 communiqués, or other multilateral political documents.

III. NGOs, EPISTEMIC COMMUNITIES, AND INTERNATIONAL LAW

Revisionist scholars of international law claim that unelected, unrepresentative groups advocate the use of customary international law as a means of bypassing democratic sovereignty. Some go so far as to point out that, since an element of customary law is the body of academic writings on the subject, scholars of international law can form an epistemic community of their own, with shared norms about the utility and application of the law. Professor Louis Sohn supports this contention, arguing that “states really never make international law on the subject of human rights. It is made by the people that care; the professors, the writers of

textbooks and casebooks, and the authors of articles in leading international law journals.\footnote{3}

There is no question that NGOs and other private actors have tried to use international law as a mechanism for advancing their interests. However, two points need to be made on this subject. First, private actors have relied more on treaty ratification than customary international law in advancing their agenda. NGOs embrace the power of norms, primarily to pressure recalcitrant states into ratifying treaties. Some tensions between democratic sovereignty and treaty law may exist but these concepts are certainly not antithetical. Second, the success of private actors in their endeavors has largely been dependent on the willingness of important nation-states to sign onto their agenda.

The most prominent examples come from the area of human rights law. NGOs have loudly advocated adherence to the UN human rights treaties, including the 1966 Covenant on Civil and Political Rights, the Covenant on Economic, Social, and Cultural Rights of 1966, and the 1989 Covenant on the Rights of Child. In addition to the UN treaties, human rights groups have also promoted the role of the European Convention on Human Rights in establishing human rights law for citizens of the European Union. Activists have tried to use this base of treaties to argue that US courts should apply human rights law beyond its borders.\footnote{14} The success of these instruments cannot be denied. As of June 2000, 138 countries had ratified all three UN covenants. All EU members accept that the European Convention on Human Rights supercedes their own laws on human rights issues. Basket Three of the 1975 Helsinki Final Act, requiring signatory states to respect their citizens' human rights, unwittingly sowed the seeds of communism's collapse fifteen years later.

Some political scientists attribute this growth in transnational human rights law to the growth of NGOs, epistemic communities, or transnational activist networks.\footnote{15} What is relevant to our discussion is how these groups have promoted the use of international law. Human rights have advanced largely through the ratification of treaties, as opposed to the use of customary international law.\footnote{16} Elected
representatives did not draft the various UN and EU conventions, but they approved them in order for the law to take effect. It is difficult to argue that treaties signed by the head of government and ratified by the appropriate legislative body constitute an infringement of democratic sovereignty. Theories of democracy that permit the delegation of decision-making powers to elected officials must respect the decisions made by those officials.

The attention paid to the role of NGOs also overlooks the important role of the great powers in ensuring broad acceptance of human rights norms. Both the United States and the European Union have threatened or applied economic sanctions against egregious human rights offenders for the past thirty years. In the 1980s, Congress passed three laws mandating sanctions against US trading partners that systematically violated core labor standards. EU governments have also linked human rights to preferential trade status. Certainly these instances of economic coercion have contributed to the broader acceptance of human rights law. Moreover, since the targets of coercive pressure are by definition authoritarian governments, one cannot say that democratic sovereignty has been compromised. NGOs and transnational activist networks have played a role in the development of international human rights law. Without the backing of powerful states, however, NGO pressure is not particularly powerful.

A similar argument about the encroaching power of international law has been made regarding environmental initiatives. Peter Haas argues that an epistemic community, based in the UN Environmental Program, elite research institutes, and national governments, was responsible for persuading governments to agree to the Montreal Protocol on stratospheric ozone. Similar narratives have been used to explain the international whaling regime, the 1992 biodiversity convention, and the Kyoto Protocol to reduce greenhouse gases.

19. This was true in the nineteenth century as well. The instigators of a global norm banning slavery were Christian organizations, the antecedents of today's NGOs. However, their success was not due to the power of transnational civil society, but to domestic log-rolling in Great Britain. Once the British backed the ban, their unilateral use of naval power eventually forced other nations into accepting the norm. See Chaim D. Kaufmann and Robert A. Pape, Explaining Costly International Moral Action: Britain's Sixty-Year Campaign Against the Atlantic Slave Trade, 53 Intl Org 631 (1999).
21. See M.J. Peterson, Whalers, Cetologists, Environmentalists, and the International Management on Whaling, 46 Intl Org 147 (1992); see generally Paul Wapner, Politics Beyond the State: Environmental Activism and World Civic Politics, 47 World Pol 311 (1995); Ann Marie Clark, Elisabeth J. Friedman, and
A closer look at this area raises questions about whether NGOs are that powerful and whether democratic sovereignty has been violated. First, the influence of NGOs and private actors is open to question. Just as NGOs have increased their prominence, sovereign states have increased their ability to marginalize troublesome NGOs. Analyses of the various environmental UN conferences reveal that over time states have become adept at excluding various NGO groups from key bargaining sessions. The inclusion of other professional groups, including economists and corporate lobbyists, also undercuts the power of environmental activists.

Second, the law here is growing largely through treaty ratification, not through customary international law. One could argue that the declarations produced by UN conferences are an attempt to use customary law as a way of bypassing democratic institutions. However, this overlooks the constraints that domestic legal institutions place upon international environmental accords. Case studies of fallout from the 1992 Rio Summit suggest that countries implement environmental accords only to the extent permitted by their domestic political institutions. In the case of the Kyoto Protocol, objections in the United States about the treaty's costs of implementation and the distribution of costs led the Bush administration to reject ratification of the treaty. These actions highlight the fact that when international environmental law has moved forward, it has only occurred with the backing of the great powers. While NGOs do play a role in persuading powerful states to alter their policies, so do other factors, such as the material costs and benefits of such treaties.

Intriguingly, international trade law has proven to be a roadblock for environmental groups attempting to apply US environmental regulations in an extraterritorial fashion. On three separate instances, WTO panels have overturned portions of US laws because they were applied to foreign jurisdictions in a discriminatory manner. These rulings spurred the large-scale street protests in Seattle during the 1999 WTO ministerial meetings. International relations theorists and legal scholars point out that an even more environmentally sensitive WTO would have ruled against the United States on these cases. These rulings also point to an

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22. See Kal Raustiala, States, NGOs, and International Environmental Institutions, 41 Ind Stud Q 719 (1997).


25. See Samuel Barkin and Elizabeth DeSombre, Domestic Sources of International Trade and Environmental Conflicts, paper presented at the International Studies Association annual meeting, Los Angeles, CA, March 2000, available online at <http://www. cisnet.org/isaa/dec01/> (visited Sept 30, 2001);
interesting problem private actors face in trying to use customary international law, namely that conflicting bodies of international law can act as a constraint on the ability of any single set of customary principles to dominate.

Two other examples are frequently cited in demonstrating the power of private actors in pushing international law. The first is the development of the international treaty to ban the use of land mines. This case is distinct from human rights or the environment, in that the origins of this law clearly lie with NGOs, as sovereign states were relative latecomers to this campaign. Even in this case the strategy was to negotiate a treaty, not to promote customary international law. It should also be pointed out that the governments actually relying on land mines to advance or defend their national interests, including the United States, refused to ratify the treaty. As with other issue areas, NGOs have only been successful in reinforcing coalitions of the willing. Beyond that coalition, the rise and fall of international law rests on the distribution of power in the international system.

Finally, there is the Rome statute creating the International Criminal Court. Again, NGOs and an epistemic community of international law scholars are commonly cited as the drivers behind the drafting of this treaty, although this tends to minimize the Clinton administration's promotion of the treaty in its earliest stages. Nevertheless, the treaty does state that once a sufficient number of states ratify the convention, it can be applied against citizens of states that choose not to ratify it. This is a clear case where international law could be used to contravene democratic sovereignty in the future. Its creation appears to have encouraged the expansion of legal justifications for trying individuals for human rights abuses conducted outside a particular court's jurisdiction. This can be seen in the British court ruling against former Chilean President Augusto Pinochet, as well as the arrest, trial, and conviction in Belgium of four Rwandans accused of facilitating genocide.

What is particularly interesting about the International Criminal Court is that it combines both components of international law. There is clearly a treaty component, in that a specified number of states must ratify the Rome convention before it applies to non-signatories. However, it also relies on customary law via the logic that if sixty states ratify the convention, there exists a sufficiently shared norm to justify violations of non-signatories' sovereignty. This intriguing combination of treaties and custom could be a harbinger of more innovative tactics by NGOs and other private actors to codify international law. However, private actors did not invent this approach. Other


actors in world politics have been extremely adept at combining treaty and custom to advance their interests, namely the United States and the European Union.

IV. AMERICAN AND EUROPEAN USES OF INTERNATIONAL LAW

In the past fifteen years, the United States and European Union have displayed an impressive dexterity in using international law to advance their interests on the world stage, even if doing so violates the sovereignty of other nations. Across several issue areas, the United States has mixed treaty, custom, and coercion as means of pushing international law towards desired ends. Furthermore, the United States is adept at “forum-shopping” among different international governmental organizations to advance its preferred set of international laws. The European Union and its members are latecomers to these practices, but have eagerly embraced them.

On trade issues, both the United States and the European Union have used unilateral threats and regional initiatives as a way of converting their preferences into accepted trade law. In the 1980s, the United States had difficulty overcoming protectionist barriers in other countries using traditional General Agreement on Tariffs and Trade (“GATT”) procedures. Furthermore, through the Single European Act, France and Germany seemed bent on creating a “Fortress Europe” to block American exports, while creating a large enough market to dictate global economic rules. In response, the US government dramatically increased unilateral coercive action through Section 301 of US trade law to force countries to end restrictive trading practices. Free trade agreements were also signed with Israel, Canada, and Mexico. These actions caused concern in other countries that the United States was willing to walk away from the multilateral trading system. The specter of an America unshackled by these rules was enough to rattle major trading states. The Uruguay round of trade negotiations led to the creation of the WTO, with a set of dispute resolution rules that largely reflect American preferences.

There is a similar pattern with regard to protecting human rights and enforcing the rule of law in the former Yugoslavia. At first, the UN Security Council provided the legal mandate and organized attempts to implement its resolutions. These efforts to keep the peace and end ethnic cleansing proved futile in Bosnia. The United States chose to act through the North Atlantic Treaty Organization (“NATO”), and was able to get the warring parties to agree at Dayton to end the violence. In the case of Kosovo, the United States rejected the United Nations and acted exclusively through NATO. Relying on a very loose interpretation of prior Security Council resolutions, NATO used military coercion to force Yugoslavia into backing down. With Kosovo,

the United States used a narrower multilateral grouping to attack a nation that was clearly in violation of international norms regarding the treatment of minorities. In other words, the United States used NATO to enforce customary international law.

A similar pattern emerges in the development of an international regime to guard against money laundering. In 1986, the United States was the first country to make money laundering a crime. In 1989, the G-7 countries created the Financial Action Task Force (“FATF”) to develop a set of recommended best practices affecting financial supervision and regulation, appropriate law enforcement guidelines, and protocols for international cooperation. These practices were called the FATF Forty Recommendations (“FATF 40”). FATF lobbied to enlarge the number of countries recognizing the FATF 40 as an accepted standard through the encouragement of FATF-style regional bodies. For those jurisdictions that resisted, in June 2000 FATF initiated an exercise to “name and shame” countries with inadequate money laundering standards. In the summer of 2001, both FATF and the G-7 threatened to implement countermeasures unless these countries enacted and implemented legislation corresponding to the FATF 40.29

This mix of policies has helped to produce customary international law. As of May 2000, over 10 international bodies, representing over 140 countries and territories, acknowledge the FATF 40 as the accepted international standard to prevent money laundering. At their Spring 2001 meetings, the IMF and the World Bank also conferred their recognition on the FATF 40, despite vociferous objections from China and Russia.30 All of the fifteen jurisdictions “named and shamed” by FATF in June 2000 have enacted some form of anti-money laundering legislation."


In this instance, the United States used a mixture of coordination and coercion, and treaty and custom to create international law.

The European Union has also been willing to use international law to circumvent democratic sovereignty. This can be seen in the internal structure of the European Union. Even observers sympathetic to the EU project have qualms about the democratic deficit. One sympathetic observer summarizes the current situation as follows:

[T]he European Central Bank and the European Court of Justice have exercised coercive powers with only the slimmest links to elected representatives, let alone to citizens at the grassroots. The decision-taking Council of Ministers has been responsible to no one: not to the Commission; not to the Parliament; not (as a collective body) to a multicountry electorate.\(^{32}\)

EU members are comfortable with the external promotion of international law. As Jeremy Rabkin points out: “Just as democratic states like to be surrounded by other democracies in the world, the European Union may seek to encourage similar structures that place great authority in supranational hybrid structures.”\(^{33}\) Europe strongly supported the creation of the International Criminal Court, with its ability to violate the sovereignty of non-ratifying states. EU countries have also been the primary backers of an Organization for Economic Cooperation and Development (“OECD”) initiative to crack down on harmful tax practices by offshore financial centers. Jurisdictions with minimal tax regimes such as Barbados or Monaco pose a threat to high-tax Europe. In June 2000, the OECD named thirty-five jurisdictions as having harmful tax policies, and threatened “defensive measures” against those regimes that refuse to amend their practices.\(^{34}\)

The EU has also been the strongest supporter of the “precautionary principle” in international environmental law. The principle states that potentially dangerous activities can be restricted or prohibited before they are scientifically proven to cause serious damage. The EU cited the principle as customary international law in its appeal to the WTO on its import ban of US beef treated with growth hormones. Failing to convince the WTO Appellate Body, EU members were more successful in codifying the principle by treaty. In January 2000, the Cartagena Protocol on Biosafety endorsed using the precautionary principle in the treatment of large modified organisms.\(^{35}\)

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The United States and the European Union have constructed international law consistent with their preferences through an interesting mechanism. Developing an immediate consensus in universal membership organizations can be extremely difficult. To facilitate consensus, the great powers first ensure agreement among a coalition of the willing. It finds this coalition of the willing through the creation and use of more exclusive organizations such as the North American Free Trade Agreement (“NAFTA”) or FATF. It then uses these more exclusive organizations, and their members, to coerce or entice resisting sovereign states into agreement. This process generates an interlocking series of statements, conventions and communiqués that can be viewed as custom. International law is not only enforced through coercion; these cases show that it is sometimes created through coercion.

V. NORMATIVE IMPLICATIONS

International law appears to be making inroads into the power of sovereign states, many of them democracies. However, the instigator behind this advance of international law is not an unelected group of non-governmental organizations or legal scholars, but the United States, the world’s oldest and most powerful democracy, and the European Union, which houses the birthplace of democracy. This fact raises some complex normative implications. While there are clear benefits from this recent expansion of international law, there are just as many problems.

The benefits from the advance of international law are significant. There are clear cases where the advance of international law has helped to preserve democratic sovereignty from antidemocratic impulses. The Southern Cone Common Market, MERCOSUR, contains a clause in its founding Treaty of Asunci6n that all members must be democracies. The clear threat of expulsion from MERCOSUR helped to avert an 1996 coup d’etat in Paraguay.36 Estonia and Latvia altered their laws to make it easier for Russian residents to acquire citizenship because of a threat of exclusion from the Council of Europe.37 For Hungary, Poland, and the Czech Republic to join NATO, they had to commit to civilian control over their militaries. In each of these cases, international law and international organizations provided a structure of incentives for states to reinforce their democratic underpinnings.38

It also should be pointed out that one motive behind these forays into international law is to combat undemocratic sovereignty. International law can be used to coerce autocratic regimes into democratizing. NATO actions in Bosnia and

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Kosovo were clearly designed to force out illiberal leaders in the Bosnian Serb republic and Serbia itself. The International Labor Organization's condemnation of Myanmar's violation of core labor standards is designed to force that regime to ease its repressive tendencies. In other instances, the idea is to force authoritarian regimes to respect international law in the hopes that these states will respect the rule of law more generally. A persuasive case can be made that Mexico's Institutionalized Revolutionary Party's fall from power was related to its entry into NAFTA. This is a key argument for those advocating China's entry into the WTO.

Finally, the use of international law by the United States has helped to advance and cement American interests through the creation of international organizations. The United States has sacrificed some of its own democratic sovereignty in the recent expansion of international law. In the process, however, it has reaped far greater benefits by ensuring multilateral cooperation on trade rules, human rights, money laundering, and core labor standards. The United States has also created international institutions such as the OECD and NATO that support US positions on global governance. Hegemonic states that seek a constitutional basis for world order are able to lock in their preferences for a longer period of time than states managing their foreign affairs without international institutions. For those interested in promoting democratic sovereignty, it is a far, far better thing for the United States to be the chief progenitor of international law than, say, the People's Republic of China.

There are also some disturbing implications that emerge from the state-sponsored expansion of international law, especially for democratic sovereignty. The development of international law in the past decade feeds the preternatural liberal faith in centralized elites and hierarchies at the expense of more decentralized approaches to law and governance. The more the United States succeeds in creating top-down legal standards, the more such attempts will be made in the future. There is only a limited set of circumstances where centralized hierarchies are appropriate for creating and enforcing international law. Other mechanisms such as decentralized contracting by private actors or jurisdictional competition among sovereign states are often the appropriate way to coordinate different bodies of law. However, these approaches are disdained by academics due to the lack of overt political cooperation. An elite belief in the "expansive structuration" of centralized control could drown out alternative coordination mechanisms.

39. See Ikenberry, After Victory at 47 (cited in note 3).
40. The reaction to the United States' May 2001 loss of its seat on the UN Commission on Human Rights while China, Sudan, Syria and Cuba were elected is proof positive of this point.
42. See John W. Meyer, et al, World Society and the Nation-State, 103 Am J Sociology 144 (July 1997).
The emphasis on coercion behind many of these international initiatives is also troubling for the long run. Scratch the surface, and it is surprising how much transnational law is created through military, economic, and diplomatic coercion. This has occurred in issues as diverse as labor standards, harmful tax practices, intellectual property rights, and the environment. This reliance on coercion comes at the expense of alternative means of advancing the rule of law, such as contracting or persuasion. Historically, international regimes created through coercion are brittle, collapsing if shifts occur in the underlying distribution of power. Regimes created through norms of reciprocity or consensus building have a longer shelf life, as rising powers are co-opted into an existing set of rules. Thus, much of what passes for international law is uniquely vulnerable to fluctuations in US power.

The lessons of this form of law-creation for fledgling democracies are also troubling. A large number of countries are still struggling with democratic practices, and look to the United States and other shapers of international law for guidance. The templates they are deriving from this new wave of codified international law support centralized rules requiring the government to regulate vast areas of human activity. For example, the states of Central and Eastern Europe, having thrown off the shackles of totalitarianism, are now being asked to create entirely new leviathans so they can join the European Union and cement their democratic transitions. New democracies viewing recent trends in international law will be more than willing to cede their sovereignty to international bureaucracies.

Another disturbing ramification is the effect that this wave of international law could have on federalism. International law imposes mandates on national governments without mention as to how they should be implemented. Central governments could use these laws as tools to strip power away from local authorities. Even the United States, which has advocated these laws, is not immune to this problem. The OECD Principles of Corporate Governance, for example, have the potential to conflict with Delaware’s laws governing the incorporation of businesses. If federal regulators had a choice, they would prefer to see Delaware’s laws compromised rather than the OECD Principles. Given the uncertain case law on this subject, the threat of the federal government using international law to bypass state and local institutions is very real.

Perhaps the most pernicious effect of recent trends in international law is the proliferation of international and national bureaucracies. When the United States fashions a new international organization as a vehicle for advancing new rules and regulations, that institution persists. International organizations rarely die, even if and when they outlive their utility. This is particularly true for those organizations with secretariats and physical assets under their control. One observer notes, “The

43. See Ikenberry, After Victory at 69 (cited in note 3).
UN Charter’s slogan of ‘we the people of the world’ still only thinly disguises a reality of ‘we the bureaucrats the world.’ The result is, at best, a lot of bureaucratic deadwood on the international stage, draining countries of resources, time, and patience. At worst, these organizations become well-connected advocacy groups with little to no accountability to anyone, expecting to be treated like states. The result is a situation where a significant share of an international organization’s membership is made up of other international organizations. For example, 35 percent of the Financial Stability Forum’s membership consists of other international institutions, groupings, and committees.

Furthermore, regulatory coordination often leads to the creation of new bureaucracies at the national level in order to implement multilateral agreements. A certain degree of regulation is necessary for any economy, but the recent wave of international law lets a thousand regulatory agencies bloom. The deleterious effects of such bureaucratic proliferation for a democratic society are legion, and have been discussed elsewhere. And as difficult as it is to shut down international organizations, eliminating established national bureaucracies is next to impossible.

VI. SOME CONCLUDING THOUGHTS

The power of international law should not be exaggerated. In the past decade, there have been instances in which a government has opted to retain democratic sovereignty rather than agree to the codification of international law. Great Britain chose not to join the European Monetary Union. The United States Senate rejected ratification of the Comprehensive Test Ban Treaty. Norway continues to hunt whales commercially despite the International Whaling Commission’s ban on such activity. The Russian Federation violated the Conventional Forces in Europe Treaty in order to move troops to secessionist provinces in the Caucasus. The question of whether international law will persistently trump democratic sovereignty remains open to debate.

Nevertheless, the growing influence of international law should not be ignored. NGOs are often cited as the source of much of this body of law, but this confuses advocacy with power. A closer look at recent developments in international law suggests that the biggest promoters of international law in both its treaty and customary form are the United States and the EU countries. In many issue areas,

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44. See Scholte, Globalization at 270 (cited in note 32).
45. One difference between the US Bill of Rights and international human rights treaties is that the former is couched in terms of limits on government activity, whereas the latter is phrased in terms of government provision. This translation of negative liberties into positive liberties encourages the creation of government agencies to provide these rights.
46. See Friedrich A. von Hayek, The Road to Serfdom 233 (Chicago 1944); see also Mancur Olson, The Rise and Decline of Nations 174 (Yale 1982).
states are using a mix of coordination and coercion to fashion new law. This recent wave of international law violates democratic sovereignty both in its desired ends and in its means of creation. There is no doubt that much of this law is designed to promote the global public good. However, its coercive origins must give even its creators pause about the whether the purchase is worth the price.