

Oona Hathaway  
Does Delegation Undermine U.S. Sovereignty?  
Conference on Delegating Sovereignty

This brief cover note is intended to make a bit more transparent the connection that I see between my broader project as described in the attached book précis and the subject of the conference: delegations of sovereignty. In particular, I will focus attention at the conference on the debate in the United States over whether delegation undermines U.S. sovereignty.

The working definition of delegation offered to us by our organizers is: “a grant of authority by a state to an entity to make decisions or take actions that bind the state or commit its resources.” This delegation presumably takes place by means of international law—a state chooses to grant legally binding authority to make decisions to an international entity. Of course, this delegation may take a variety of forms, as helpfully described by the introductory memo. But the basic elements are the same: a state grants authority to some entity outside the state to make decisions or take actions that bind the state or commit its resources.

A central concern about this form of delegation—which has been particularly strongly voiced in the United States—is that delegations of binding authority to international entities brings with it significant “sovereignty costs.” Underlying this concern is a sense much of what is important in our lives is outside American control. From the moment we wake up to the wail of an alarm clock made in China, to the moment we go to sleep between sheets made of Egyptian cotton, we are almost constantly reminded of how much our lives are shaped by governments, companies, and individuals from far beyond our local community.

This large and growing foreign presence in our lives might not excite much worry if it simply meant easier and better access to cheap textiles and toys. But, as recent years have made painfully clear, that’s no longer true—if indeed it ever was. At the dawn of the twenty-first century, we are increasingly aware of the dark side of globalization. Factory jobs once believed stable are rapidly disappearing in the face of foreign competition; those who still have their jobs in manufacturing have seen their wages stagnate and their benefits shrink, leaving them closer and closer to the brink of financial disaster. And most sinister of all, the rising threat of global terrorism has placed a constant, nagging shadow of fear over the country. It is only a matter of time, we are told, before we will once again prove unable to control even the use of violence against us on our own soil.

It should come as no surprise, then, that the American public is sometimes less than eager to invite more foreign control over local practices and policies through international delegation. Indeed, the last few years have seen the rapid growth of a movement that reaches across academic, political, and public policy circles and is aimed at seizing back some control. The “new sovereigntists” see state sovereignty is the “ultimate authority to reject outside control.”<sup>1</sup> Citing a deep American tradition of local, democratic governance, they argue that delegating decision making authority to

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<sup>1</sup> Rabkin, *Why Sovereignty Matters* 34 (1998).

international organizations promises to undermine the very principles on which the country was founded.

While it is easy to understand the impulse to try to seize back some of the control over our lives that we feel slipping away, I will argue in the book that the new sovereigntists have chosen the wrong target for their enmity. Far from undermining state power, international law offers states a way to begin to master the forces of foreign influence that many find so troubling. International law brings not a release of state control but rather a reassertion of it. In the modern world, strong states need international law to achieve their policy goals. Refusing to use it—or, even worse, trying to undermine it—will only prove self defeating.

The book will explore this theme by delving briefly into the fundamental challenge to global governance offered by the new sovereigntists. This movement voices a fear that many find deeply compelling—that the United Nations, and the international law that it generates, will undermine U.S. sovereignty and is therefore unwise and un-American. From there, we will move back in time several hundred years to find the roots of the modern dilemmas we face. History teaches us that our problems may be new in scope, but they grow out of a process of transformation that began centuries ago. Finally, I aim to find a new way forward through the thicket. The new sovereigntists are right that state sovereignty is under threat. But international law is not the source of the problem. Instead, international law offers a partial solution to states' increasing loss of control. Strong states need international law just as much as international law needs strong states.

STRONG STATES, STRONG WORLD:  
WHY INTERNATIONAL LAW SUCCEEDS AND FAILS AND  
WHAT WE SHOULD DO ABOUT IT

*by Oona A. Hathaway* <sup>†</sup>

I met Emmy Breton at the headquarters of the Torture Abolition and Survivors Support Coalition International, a jumble of worn but homey rooms on the campus of Catholic University in Washington, D.C. Like everyone I encounter there, Emmy not only works for the Coalition but is herself a torture survivor. Although she fled her native Mexico five years ago, her memories are still freshly painful. She flinches at the very sight of my tape recorder, unable to talk until it is turned off and out of sight. It brings back too many painful memories, she explains. Even with the recorder hidden, she is never quite at ease. As she begins to tell about the events that led her here, Emmy falls silent with a look of profound sadness before bursting into sobs and fleeing the room.<sup>1</sup>

Mexico ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1986, just two years after the Convention's historic adoption by the United Nations. The Convention was seen as the culmination of an international movement to outlaw torture that began in the aftermath of atrocities of the Second World War. Yet violations of the Convention are rife, as Emmy's experience painfully shows. In 1995, Emmy began working as a human rights advocate for refugees from El Salvador. She knew she was putting herself at risk, and sadly, she was right. More than nine years after Mexico ratified the Convention, she was picked up by the police and brutally tortured. What happened to her was not unusual, she told me. Human rights activists stopped by the police expected to be either tortured or killed. And they knew that nobody would face legal prosecution for violating their most basic human rights. As another survivor put it, "What has become of these criminals? They are free to live a normal life while we are struggling to live every day. Where is the law? Where is the justice?"<sup>2</sup>

When it comes to violations of the General Agreement on Tariffs and Trade, a treaty that governs the trade relations of over 130 nations, the picture could not be more different. As Christmas approached in 2003, the U.S. Steel industry got a big lump of coal from the administration of President George W. Bush. He declared that he was lifting the safeguards from foreign competition that he had granted the industry less than two years earlier in the form of higher tariffs on imported steel. The domestic

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<sup>1</sup> Interview with Emmy Breton, September 29, 2005.

<sup>2</sup> Interview with Diana Ortiz, September 29, 2005.

industry had successfully transformed itself, he proclaimed, and no longer needed the protection.<sup>3</sup>

What you wouldn't know if you read the President's announcement (though Administration officials quietly admitted it in private) was that the decision signaled the triumph of international law.<sup>4</sup> In the fall of 2003, the eight-year-old World Trade Organization (WTO) had ruled that the steel tariffs granted by the Bush Administration were an illegal violation of the trade agreement that the United States had entered along with over one hundred and thirty other nations. The United States appealed the ruling, and again the WTO came out against the tariffs. As a result, the United States had to eliminate the tariffs or face a blizzard of retaliatory tariffs by the European Union, which had brought the case to the WTO and was therefore authorized to enforce the favorable judgment. With the blessing of the WTO, the European Union had crafted a devastating package of \$2.2 billion in retaliatory sanctions against the United States, targeting states expected to be the battleground in President Bush's upcoming bid for reelection. As the President of the United Steelworkers of America, Leo Gerard, later recounted, "It was the WTO and it was politics that made the President give up on the tariffs."<sup>5</sup>

Why did international law succeed in forcing the United States, the world's only superpower, to abandon its steel tariffs but was unable to protect Emmy from being brutally tortured by her own government? Why is international law sometimes so awesomely powerful and at other times so utterly powerless? Can we know when it will succeed and when it will fail? And is there anything we can do about it?

The answers to these questions are more important today than ever. International law now touches an astonishing array of activities, from trade to environmental protection to human rights. It affects nearly every aspect of our daily life in ways that few of us think about. It makes it possible for us to mail a letter abroad or make a phone call overseas. It lowers the price of the clothes we wear. It is the reason we can fly the most direct route between the United States and almost any other country in the world. And it tells some of the world's most powerful nations that they have no choice but to respect their citizens' most basic human rights.

And yet the more omnipresent international law becomes, the more obvious it becomes that it does not always work. Emmy's story is not an isolated one. In recent years, there have been public reports of torture in more than 100 of the 140 nations that have ratified the Convention against

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<sup>3</sup> To Provide for the Termination of Action Taken With Regard to Imports of Certain Steel Products, Presidential Proclamation 7741 (Dec. 4, 2003).

<sup>4</sup> David E. Sanger, "A Blink from the Bush Administration," *New York Times*, December 4, 2003.

<sup>5</sup> Interview with Leo Gerard, September 30, 2005.

Torture.<sup>6</sup> And many of the states that have ratified the treaty—including Egypt, Jordan, and Mexico—use torture just as aggressively today as they did before it entered into effect.

The same dismal facts describe many other international treaties. The Convention on the Elimination of All Forms of Discrimination Against Women, for example, has been ratified by 180 nations, and yet outright discrimination remains as rampant as ever in many of those states—including Saudi Arabia, where women still cannot drive or leave the house without a male relative. The Convention on International Trade in Endangered Species has been ratified by 167 nations, and yet only a small percentage of these states have fully complied with the straightforward reporting requirements of the treaty, much less its more strenuous protections for endangered species. Clearly, a state's ratification of a treaty is no guarantee that it will live up to the treaty's requirements.

Yet, alongside these failures, we see daily evidence that international law *can* be extremely effective under the right conditions. It can force almost every nation—including the United States—to change its trade practices. It can ease the flow of people, money, and information across borders. It offers states a peaceful means of resolving conflicts over territory, access to shared resources, and alleged mistreatment of their citizens. When used correctly, international law is a unique and remarkably powerful tool—more powerful, in fact, than just about anything else. Without international law, we could not accomplish half of what we now accomplish with its aid.

All these successes demonstrate how vital international law has become—and how much more vital it will need to be in the coming decades. With the ever-accelerating pace of globalization, individuals, businesses, and governments are interacting with one another more than ever before. These interactions lead to conflict that must be resolved, to cooperation that must be managed, to confusion that must be cleared up, to cries for justice that must be answered. As the countries of the world become increasingly intertwined, we need international law more than ever to establish and maintain world order.

Yet today international law is under attack as never before. Insistent detractors overstate its failures. Angry opponents see in its successes threats rather than opportunities. To these critics, strong, effective international law is bad for the United States and bad for the world, weakening states and threatening to erode democratic institutions. They could not be more wrong. It is international law's weaknesses that are the far greater threat to the world today, and strong, effective international law will strengthen the United States and other nations committed to its basic

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<sup>6</sup> This figure is based on reports on human rights practices produced by both Amnesty International and the United States Department of State.

principles. Strong law makes strong states, and strong states make strong law.

To hear its venomous critics talk of it, international law is either ineffectual, dangerous, or both—and the United States should have as little to do with it as possible. It has been labeled a threat to American democracy,<sup>7</sup> its destructive power compared to Hurricane Katrina.<sup>8</sup> It has even been called a menace to Mothers' Day.<sup>9</sup>

The attack on international law has not been limited to the op-ed pages and academic conferences. At the highest peaks of U.S. political power, a raging battle has been playing out over international law's reach and its impact on U.S. law and policy. At the center of this debate is none other than President Bush and his Republican allies in Congress. Within six short months of entering office, Bush withdrew from the Kyoto global climate accord, threatened to unilaterally abrogate the 1972 Anti-Ballistic Missile Treaty, and revoked the U.S. signature on the treaty creating the International Criminal Court.

Then came September 11, 2001 and with it the loss of thousands of lives in an unprecedented single act of terrorism. Many observers expected the Administration to retreat from its confrontational posture toward the international community. Surely, they argued, the United States would now see that it needs its international partners and international institutions more than ever.

Yet rather than abate, the offensive on international law only quickened. Several years later, revelations about the United States' treatment of detainees at Abu Ghraib and Guantanamo, and the CIA's operation of black sites—a worldwide network of secret prisons where suspected terrorists are held and interrogated—did not inspire contrition. To the contrary: Vice President Cheney unapologetically lobbied Congress for an explicit exemption for the CIA from congressional legislation that would require the rest of the government to observe a prohibition on cruel, inhuman, and degrading treatment. Meanwhile, Congress threatened to strip the Supreme Court of jurisdiction over cases relating to detainees in

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<sup>7</sup> Jed Rubenfeld, "Unilateralism and Constitutionalism," 79 *New York University Law Review* 79 (2004): 1971-2028.

<sup>8</sup> "Just as Hurricane Katrina ruptured the levees protecting New Orleans, the concerted U.N. assault on the barriers to further erosion of American sovereignty threatens to swamp our freedom of action and our Founding principle of 'no taxation without representation.'" Frank Gaffney, "Sovereignty Levees Breached?," *The Washington Times*, September 13, 2005.

<sup>9</sup> Representative Christopher Smith, speaking about the Convention to Eliminate All forms of Discrimination Against Women, held forth: "Do our constituents . . . really want a group of international bureaucrats telling them that the day set aside to honor our mothers much be abolished? I think not!" Pauline Jelinek, "UN Treaty Endangers Mother's Day, Lawmaker Says," *Chicago Tribune*, May 10, 2002, 7.

the war on terror and has berated the Court for referencing international law in its decisions. And the President continued to maintain that the most venerated international treaties—the Geneva Conventions that govern state conduct in war—are “outdated” and irrelevant to the war on terrorism.

What is fueling this frenzied assault on international law? Is it really just about these particular treaties or is there something more going on? The beginnings of a convincing answer can be found, I think, in a revealing statement buried deep in a Pentagon National Defense Strategy memo from March 2005. It declares, “Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak, using international fora, judicial processes, and terrorism.”

International fora, judicial processes, and terrorism—it is quite a strange list. Yet it reflects an attitude that permeates the top ranks of U.S. political leadership today. To the leaders who hold this view, international organizations and judicial procedures are akin to al Qaeda in one critical respect: They threaten our national strength and independence. International law represents an “assault on the barriers to further erosion of American sovereignty,”<sup>10</sup> much as al Qaeda represents an assault on our sense of security and our way of life. Moreover, both threaten to undermine the fundamental institutions of liberal democracy—one through violence, the other by taking power to make policy out of the hands of those who should have it: elected governments.

Viewed in this light, critics of international law aren’t best understood as fans of state-sponsored torture, as some defenders of international law might have it. The critics vigorously oppose international efforts to address global problems because the proposed cure is, in their eyes, worse than the disease. International law, in this view, poses a real and present danger to state sovereignty and democracy. It is a hindrance to state autonomy, a constraint that threatens to weaken states—the United States most of all. Jesse Helms, former chairman of the Senate Foreign Relations Committee, put the point perhaps most succinctly, declaring to the UN Security Council that “many Americans . . . see the U.N. aspiring to establish itself as the central authority of a new international order of global laws and global governance. This is an international order the American people will not countenance, I guarantee you.”<sup>11</sup>

This book argues that international law is not the threat to state sovereignty and freedom that its many critics think. To the contrary: Strong international law and strong, sovereign democratic states can, indeed must, go hand in hand.

Far from weakening states, international law strengthens those states that choose to use it. It offers them a tool that they otherwise would not have. And in doing so, it allows states to accomplish goals that might

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<sup>10</sup> Gaffney (2005).

<sup>11</sup> Senator Jesse Helms, Speech to the United Nations Security Council, January 19, 2000.

otherwise be out of reach. Hence international law empowers even the most powerful of states.

The reverse is true as well. Even as states depend on international law, international law depends entirely on strong state support. International law is almost completely voluntary—states are for the most part only bound by international law when they choose to be. Hence without state consent, most international law does not even exist.

There is a final reason why international law strengthens rather than weakens democratic states—one that is too often missed by both critics and defenders. Once states consent to it, international law can provide a counterbalance to the power of political executives, by empowering political opponents and animating existing democratic checks and balances. During the last several years, America’s leaders have been so busy protecting the nation against international law’s encroachment on state sovereignty that they have largely let pass the threat to our principles of democratic governance that unchecked executive power in foreign affairs represents.

Yet the newspapers have become filled with evidence of just how necessary it is to place reasonable limits on executive power. From the abuses of detainees at Abu Ghraib to the covert prison system operated by the CIA, we have witnessed example after example of how a “no-law” zone—free of domestic and international rules—encourages actions at odds with democratic beliefs and practice. If the study of international law teaches anything, it is that unilateral executive power is risky for the country and the world, no matter how enlightened the nation’s leaders. We should not confuse efforts to defend the sovereignty of democratic states with efforts to protect the privileges of political executives. Defending strong democratic states does not mean giving those who happen to run those states a blank check.

In sum, international law does not mean weaker states and an erosion of democratic governance. International law and state sovereignty are partners, not rivals. A strong and just world can only be made by strong and just states.

Any effort to understand what international law can and cannot accomplish must start from the principle that international law deeply depends on state power and state support. No matter how cleverly designed, a treaty will fail if it ignores this most basic rule. International law succeeds when it works *with* rather than *against* states.

To work *with* states, international law needs at least one of three sources of power, each of which is rooted in states’ own interests and institutions: It needs to be enforced from abroad. It needs to be enforced at home. Or it needs to be backed up with what I call “payoffs” followed by “payback.” International law does not have much of a fighting chance unless at least one of these three sources of power is present. When all three are present, as they were in the steel case, international law almost always succeeds. And when they are all absent, as they often are in

instances of torture, international law almost always fails.

International enforcement is what we usually think of when we think of international law. Yet it is comparatively rare. States are not willing to agree to treaties that provide for strong international enforcement very often. When they do, however, it often works. For example, the treaty at issue in the steel case—the General Agreement on Tariffs and Trade—is enforced through an international dispute settlement mechanism at the World Trade Organization. Under the rules of the WTO, when a state is found to be violating the treaty, the state that brought the case to the organization has the right to levy sanctions. Moreover, because the sanctions need not be aimed at the same industry in which the violation occurred, this can turn exporting industries within the violating state into powerful advocates for compliance with the decision. In contrast, the Convention against Torture has no similar international enforcement. There is a committee charged with reviewing states' annual self-assessment of the activities governed by the treaty, but it has no independent investigatory capabilities and no power to levy sanctions.

Just because international law is created at the international level doesn't mean it has to be enforced there. It can also be effectively enforced at home. But this only works in states with strong domestic rule of law institutions—hence the stronger the state institutions, the better the domestic enforcement. Here, then, we find one of the most important reasons why strong states and strong law go hand in hand: Most international law is enforced at home, not abroad.

In the steel case, the United States was charged with failing to abide by international law. The WTO decision against the United States was communicated around the country almost instantaneously. And almost as soon as it was, interest groups that had all along opposed the steel tariffs seized on the decision, arguing that it provided one more reason why the administration should immediately drop the tariffs. In Mexico in 1995, however, the government was in its 66th year of one-party rule. Corruption was widespread in government, and the judiciary far from independent. Those who suffered violations of their legal rights at the hands of the police could not pursue their claims without fear of retribution. There was no way for those whose rights under the Convention were violated by the state could enforce its promise.

Finally, international law also works well when “payoffs” for joining treaties are followed by “payback” against states that fail to live up to their commitments. In the steel case, the United States not only faced formal enforcement of the treaty, but also feared payback if it failed to abide by the WTO ruling. Leo Gerard of the steel workers union speculates that the Administration “caved in” to the WTO in part because of fears that failure to do so would undermine support for the United States

military operations in Iraq and Afghanistan.<sup>12</sup> Probably more important, steel-consuming industries within the United States seized on the decision as more evidence that the decision to impose tariffs threatened the exporting industries of the United States. Other domestic manufacturers concerned with their export markets and even private investors began voicing similar concerns—that flaunting the WTO decision would have ramifications far beyond the steel industry itself. By contrast, Mexico faced no payback for its violation of the Torture Convention. Indeed, few knew about the government’s actions until well after they occurred. And then, as one survivor put it, “no one cared enough to make the government pay for what it had done.”

No matter how it is enforced, international law succeeds only when it is mindful of its reliance on states. Even when international law is at its most powerful—when it is enforced through international sanctions—it depends wholly on states: It depends on states to levy the sanctions against those who have violated the law, and it depends on the states that are punished to remain in the treaty system rather than opt out altogether. When a treaty is not enforced internationally, it falls to states’ domestic institutions to make good on the treaty’s promises—a task that places the enforcement of the law wholly in the hands of domestic actors. And while payoffs and payback create incentives for states to comply with international law, it remains up to the states to decide how to respond. International law succeeds when states make it succeed.

Part One of this book shows that international law works best when it works with rather than against states. This basic insight helps explain why not all treaties are enforced abroad—even though almost everyone agrees that international law that is enforced this way is much more effective. And it helps explain why some treaties are simultaneously remarkably successful and terribly ineffective. For when international law is not enforced at the international level, it often falls to domestic institutions to enforce the law. Yet countries vary widely in their willingness and ability to actually enforce treaties against themselves—and the true reach of international law varies as a direct result. This suggests that strengthening domestic political and judicial institutions *within* countries can strengthen international law. And it also points to the importance of using “payoffs” and “paybacks”—whether supplied by states, international organizations, or private actors—to encourage states to follow international law.

How does all this work in practice? Part Two examines international law at work in three central areas of world governance: torture, trade, and global warming. When enforcement abroad is present, as it usually is in trade agreements, international law tends to work pretty well in almost

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<sup>12</sup> Interview with Leo Gerard, September 30, 2005.

every state. But what happens when such enforcement is largely missing, as it is in most human rights and many environmental treaties? Then the treaties work better in some states—the ones that enforce the law at home—than they do in others. Indeed, some states will join treaties and then ignore them altogether. That happens when there is no payback for states that fail to live up to their commitments. These failures undermine not only the environmental and human rights treaties that the states ignore, but also world confidence in international law as a whole.

Part Two shows that international law often works pretty well, but that it could be much more effective than it is today. Part Three explains how. We must begin by treating states not as barriers to effective international law, but as the keystone of international order. International law works *its* best when domestic institutions and domestic law are working *their* best. If the world invests in states, particularly in local judicial and political reforms, it will reap the reward of more effective international law as well as better domestic practices.

We can also make international law more effective by making more states *want* to obey. As Part Two shows, when international law doesn't work, it often fails because it asks states to do something for nothing. Thus, states need to be offered more enticing carrots ("payoffs") and more threatening sticks ("payback"). By looking for creative ways to use such incentives to further both the individual and collective interests of states, we can create a fairer and more effective system of international law. In the process, we can strengthen the world community as well as the states that are a part of it.

As I argue, however, the project of building a stronger world must begin at home. At the close of World War II, the United States led the charge to forge a system for pursuing collective security and well being through law. Yet during the last decade, the United States has neglected this project, and some would like the nation to abandon it altogether. The attacks on international law that now populate popular discourse rest on the fear that that international law will undermine the United States' sovereign power and democratic governance. Meanwhile, the country has allowed a far deeper corruption of democratic principles than the law's critics fear. Today, we see everywhere the consequences of having allowed unprecedented unilateralism in the conduct of foreign affairs. To revitalize international law, we must begin by correcting this imbalance. This will make the United States a stronger and more just state. It will also lay the foundation for a stronger and more just world.

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What follows is an outline of the book. The chapters I summarize here will build on academic research that I have published in the *Yale Law Journal*, *Stanford Law Review*, *Chicago Law Review*, *Harvard Law*

*Review*, *Wilson Quarterly*, and the *Yale Politic*. Much like the public debate I discuss above, existing scholarship on international law is extremely polarized, with one side arguing that international law almost always works and the other that much of it is mere window dressing. My academic work argues that neither side has it entirely right—a claim that I demonstrate using quantitative analyses of over 160 countries during the course of nearly a half-century. I also propose my own explanation for when international law does and does not work—an explanation that I show fits the empirical evidence far better than existing theories.

This academic work forms the backdrop for the book, but the book will seek to bring the ideas in that work to a significantly broader audience. In the book, I will use individual stories of the successes and failures of international law to illustrate the trends that my quantitative research has unearthed (trends that I will present in the book as background). To get inside the events that make international law succeed or fail, I am talking to the people involved in them—people like Hauwa Ibrahim, a top defender of women’s rights in Nigeria who successfully challenged several sentences of death by stoning and limb amputation; Louis Moreno Ocampo, who is the first prosecutor of the International Criminal Court; Ernesto Zedillo, the former President of Mexico; Judge Patricia Wald, a former judge on the International Criminal Tribunal for the Former Yugoslavia; the leaders of several environmental and human rights organizations, and many others.

## PART ONE

### WHY INTERNATIONAL LAW (SOMETIMES) WORKS

#### Chapter 1: Enforcement Abroad

*Everyone knows that international law works better when it is enforced abroad. So why isn’t all international law enforced this way? Because sometimes it can’t be. An agreement that requires enforcement from abroad only works consistently when the agreement can harness states’ preexisting power to retaliate against one another in kind, when violations of the law can be detected without too much trouble, and when states are willing and able to act alone to enforce the law against one another. In areas like trade, that can happen. But in many areas of international law—human rights, the environment, and some areas of arms control, to name a few—it cannot.*

#### Chapter 2: Enforcement at Home

*Just because international law is made at the international level doesn’t mean that it can only be enforced there. International law can also be enforced at home—that is, by the states themselves. The problem with relying on enforcement at home, however, is that not all states will do it. In democratic states, domestic political and legal institutions hold the government to its word—making it abide by its international legal*

*commitments whether it likes it or not. But in autocratic states, governments can make international legal commitments and then ignore them without fear of domestic enforcement. When they do so, they undermine the fairness and legitimacy of the system as a whole, leading the very states that take the law most seriously (like the United States) to question whether they should bother making international legal commitments at all.*

### Chapter 3: Payoffs and Payback

*International law that is not enforced at home or abroad can still have a profound effect on states. International law can work if states are drawn to accept the law by the promise of what I call “payoffs,” and then punished or rewarded with “pay back” when they fail or succeed to live up to their commitments. This little-noticed process can be immensely powerful. And almost anyone can get into the game: Payoffs and payback can be offered by states, by international organizations, or by private organizations, companies, or even individuals. The problem with this tool, though, comes when states get payoffs to join a treaty up front, but those payoffs are not followed by payback when the states fail to live up to their commitments (or they arrive too late or are too uncertain). When that happens, as it does all too often, states join treaties and then fail to live up to their commitments. In the process, they erode the value and legitimacy of international law.*

## PART TWO STORIES OF SUCCESS AND FAILURE

### Chapter 4: Torture

*The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is regularly celebrated as one of the most successful international human rights treaties. Today, with a membership of 140 countries, the Convention stands as a symbol of the triumph of international order over disorder, of human rights over sovereign privilege. And yet, violations of the treaty are rife. How is this possible? I show that it is the predictable result of the absence of any effective enforcement abroad, uneven enforcement at home, and payoffs that are often not followed by predictable payback. I explore the experiences of three countries—Israel, Mexico, and Nigeria—and of those living in them.*

### Chapter 5: World Trade

*The world trade regime and the treaty that governs it—the General Agreement on Tariffs and Trade—show international law at its most powerful. Thanks in no small part to the treaty, barriers to trade on*

*virtually every good that crosses state borders have fallen precipitously during the postwar period. Why has it been so successful? Part of the answer lies in a simple fact: The agreement gives states something they really want—access to other states' markets. But before they can get this prize, states must first bring their domestic policies into line with the agreement and commit to a stringent system of enforcement from abroad. Thus China's hopes of joining the WTO have led it to put in place rule of law reforms that were unthinkable even a decade ago. And some of the most powerful states in the world—the United States, the European Union, the United Kingdom among them—have given up on domestic policies once held dear in order to stay within the system.*

#### Chapter 6: Global Climate Change

*Soon after taking office, President Bush upset the international community by withdrawing the United States from the Kyoto global climate accord, thereby dealing a terrible blow to the effort to control global climate change using international law. Yet the regime was revived earlier this year when Russia did what the United States had refused to do, and joined the regime—in the process causing the treaty to enter into force. Why was the United States government so opposed to the Kyoto Protocol, which, after all, utilized an emissions trading scheme pioneered in the U.S.? I argue that at least part of the reason can be found in the fact that the treaty places a large up-front burden on the country while offering little direct benefits in return. The opposite is true of the many developing states that have readily adopted the agreement. While this may make sense for a whole host of policy and political reasons, it can't but undermine the base of support in the very states where the treaty would have the biggest immediate impact. Under these circumstances, what are the prospects for success of the Protocol? I answer this question in part by looking back to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer and considering the lessons it offers.*

### PART THREE

#### THE FUTURE OF INTERNATIONAL LAW

#### Chapter 7: The State is not the Problem, But it Can Be the Solution

*A key message of the book is that international law is at its most effective in states where domestic enforcement is at its best. Building up domestic enforcement not only produces more effective international law, but it means giving power to states rather than taking it away. I offer several ideas for precisely how to carry this out. I begin by looking at several successful rule-of-law reforms—including on-the-ground experiences in several former Soviet Republics. These experiences give important insight into which reforms can work, and which will not.*

#### Chapter 8: You Can't Get Something for Nothing

*When international law doesn't work, it is usually because it asks states to do something for nothing. I argue that the key to a successful international agreement is offering benefits to states that make them want to join and remain in the treaty, even when it requires them to make costly changes. This is where human rights and environmental treaties can learn something from the WTO. Although they cannot put in place a similarly rigorous international enforcement system, they can offer states ongoing benefits in return for ongoing compliance. For example, states might be offered trade, aid, and other tangible benefits for agreeing to—and continuing to comply with—their international agreements.*

#### Chapter 9: A Stronger World Begins At Home

*The effort to build a better international legal system has to begin at home. Over the last decade, the United States has gone from being a leader in international law to a spoiler. I argue that the internal attacks on international law are motivated at least in part by a fear that international law will undermine American democracy, taking the power to make policy out of the hands of elected state and federal officials and giving it to unelected judges and to international institutions. Ironically, though, this fear has led to a far deeper corruption of American democratic institutions than any that might be threatened by international law. It has led to an unprecedented unilateralism in the conduct of foreign affairs that places the reigns of power solidly in the hands of the President, with only occasional adjustments coming from Congress and the courts. As a result, domestic enforcement of international law has suffered. To begin to revitalize international law at home, then, we must begin by correcting this imbalance. This will make the United States a stronger and more just state and will lay the foundation for a stronger and more just world.*