

# Introduction

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The studies collected in this volume examine the effects of various aspects of globalization today on law and legal systems around the world. The term *globalization* has many meanings, but for present purposes it is being used to refer to the process of increasing interconnectivity and interdependence among nation-states and the development of what Anne-Marie Slaughter calls a “global community of courts.”<sup>1</sup> Arguably the forces of globalization have been at work for centuries, gradually shaping law and legal processes within sovereign nations. For example, the development of the *lex mercatoria*, or law merchant, is a story of how early norms and practices of the trading community became the law governing the resolution of commercial maritime disputes in courts both foreign and domestic. What is new today is the nature of the interconnections and extent of the interdependence among nation-states.

The nature and extent of legal globalization may be different today, but the central questions that this phenomenon raises remain the same: How are the forces of globalization today, including the global spread of international human rights norms, the rise of universal criminal jurisdiction, and the pressure for the establishment of rule of law and good governance in the developing world, affecting domestic law, courts, and processes? Are the effects the same in all places at all times? To what degree, if any, has the reception of international human rights norms and universal criminal jurisdiction undermined national authority and the concept of the nation-state?

This volume is divided into four parts: Transnational Influences on the U.S. Supreme Court; The Rise of Transnational Criminal Jurisdiction; Transnational Influences on Rights, Citizenship, and Democratization; and Transnational Law and the Boundaries of Sovereignty. The authors employ a variety of methodological approaches—historical, comparative, normative, and empirical—in an attempt to shed light on the three questions mentioned above.

In chapter 1, “The U.S. Supreme Court’s Use of Comparative Law in the Construction of Constitutional Rights,” David M. O’Brien assesses the influence of transnational human rights norms on the work of the U.S. Supreme Court. The U.S. Supreme Court, O’Brien argues, has come late to the new, global community of courts, and with considerable controversy both within the Court and in the American political system. Whereas O’Brien focuses on “the Rehnquist Court’s use of comparative law in the construction

of individual rights,” Francine Banner, Ken Miller, and Doris Marie Provine take a wider view in chapter 2, “Foreign Law in American Jurisprudence: An Empirical Study,” examining the transnational influences on rights and other areas of law. Based on their close analysis of the 2003–2004 Supreme Court term, Banner, Miller, and Provine show that “foreign law and foreign materials” have found their way into the briefs filed by litigants and amici and, as a result, have appeared with increasing frequency in the opinions of the Court. Christopher Whytock rounds out Part I with chapter 3, “Foreign Law in Domestic Courts: Different Uses, Different Implications.” He develops a typology of the various uses of foreign and international law in U.S. law and examines “the empirical implications of different uses of foreign law that may be useful to a wide range of scholars.”

Part II includes three chapters devoted to the rise of universal criminal jurisdiction and the global efforts to hold individuals responsible for war crimes, crimes against humanity, and genocide. This section commences with Donald Jackson’s chapter 4, “Legitimacy and the Exercise of Universal Criminal Jurisdiction.” In it he examines the “foundations for the legitimacy of criminal prosecutions brought in transnational tribunals exercising universal jurisdiction” and explores some of the “practical problems” encountered in key prosecutions before the ad hoc tribunals for Yugoslavia and Rwanda. In chapter 5, “International and Transnational Law, Sovereignty, and Hegemonic Power,” Jackson addresses the problems in persuading the United States to accept fully the idea of universal criminal jurisdiction and ratify the treaty (the Rome Statute) establishing the International Criminal Court (ICC). The key problem, Jackson argues, is U.S. hegemonic power and unilateralism in a post-9/11 world. In chapter 6, “The Promotion of International Criminal Law: Evaluating the International Criminal Court and the Apprehension of Indictees,” Lilian Barria and Steven Roper pick up where Jackson leaves off and closely examine the work of the ICC. Their aim is to gauge the effectiveness of the ICC by measuring its record in apprehending and prosecuting suspected war criminals.

Part III begins with an evaluation of the literature on this global phenomenon. Hans Peter Schmitz’s chapter 7, “The Globalization of Human Rights Norms: Understanding the Opportunities and Limits of International Law and Transnational Activism,” provides a critical, state-of-the-art review of “the contributions of political science scholarship to our understanding of the role of human rights ideas in global affairs,” giving special emphasis to the key roles played by “transnational advocacy networks.” The three chapters that follow show just how influential these networks can be. In chapter 8, “Rights and the Limits of Transnational Solidarity in Europe,” Lisa Conant examines the evolution of social rights in Europe, defined as rights to the resources to promote social welfare, and shows how the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) have forged what she calls a new “transnational social citizenship” that provides social benefits and

protection to citizen and foreigner alike. In chapter 9, "International Imposition and Transmission of Democracy and Rule of Law: Lessons from Central America," Rachel Bowen details the effect of transnational advocacy networks on democratization processes in several countries in Central America; and in chapter 10, "The Role of International Actors in Promoting Rule of Law in Uganda," Joseph Isanga describes the same for Uganda.

Part IV includes four chapters that show how the cross-border migration of legal norms has altered the ideas of nation-state and sovereignty. In some areas of law, especially those related to human rights, global legal forces have eroded many of the barriers that separated national and international law. As a result, international and, in the case of Europe, supranational law are able to penetrate deeper into national law. In chapter 11, "Blurring Sovereignty: The Human Rights Act of 1998 and British Law," Mary Volcansek describes how the United Kingdom's membership in the Council of Europe and its obligations under the European Convention on Human Rights (ECHR) pressured it to adopt its first bill of rights, the Human Rights Act, in 1998. After closely examining the impact of this reform on the judicial protection of rights, she argues that the penetration of European human rights law and principles into British law has had the inevitable effect of "blurring" the concept of parliamentary sovereignty. In chapter 12, "Fundamental Rights, the European Court of Justice, and European Integration," Michael Tolley examines "the transnational flow of human rights norms among the European Court of Justice, the European Court of Human Rights, and the constitutional courts of member states of the EU." He argues that the ECJ's development of a rights jurisprudence helped to consolidate common principles of liberty, respect for human rights, and rule of law, and altered the way national constitutional courts give meaning to fundamental rights. The final two chapters of this volume describe how international human rights law was introduced and received in Australia and Argentina. In chapter 13, "Spreading the Word: Australia's National Human Rights and Equal Opportunity Commission as Transnational Legal Entrepreneur," Rhonda Evans Case examines the work of the NHREC and finds that it serves as an important conduit, or what the literature calls a "norm portal," through which international human rights principles flow. And in chapter 14, "Judicial Globalization: How the International Law of Human Rights Changed the Argentine Supreme Court," Walter Carnota shows how the court's "new norms and canons of constitutional interpretation" were the direct result of the court's willingness to give the prominent human rights treaties of the twentieth century constitutional status. With its new "internationalist" orientation, the Argentine Supreme Court, Carnota argues, joins the new global community of constitutional courts, increasingly engaged in transnational discourse on human rights.

In addition to enlightening readers to globalization's effects on law and courts both in the United States and abroad, our aim has been to encourage

others to examine transnational legal influences and the cross-border migration of legal ideas in other contexts. The fourteen studies collected here are only the beginning.

Editors

Donald W. Jackson, Texas Christian University

Michael C. Tolley, Northeastern University

Mary L. Volcansek, Texas Christian University

NOTE

1. Anne-Marie Slaughter, "A Global Community of Courts," *Harvard International Law Journal* 44 (2003): 191–219.