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ABILA Keynote Address: Beyond International Law? A Dangerous Time

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ABILA Keynote Address

Beyond International Law? A Dangerous Time

By Gregory Shaffer¹

The title of this year’s conference *Beyond International Law* is controversial. One can view it as depressing for those committed—to cite the mission of the American Society of International Law—to promoting “the establishment and maintenance of international relations on the basis of law and justice.” One can also see it as a dangerous title in its implications for our future, as well as the violence, turmoil, and chaos besetting the world today in Israel, in Gaza, in Ukraine, and elsewhere.

This is a horrible time. There is trauma from the brutal attacks, deaths, and horror in southern Israel. There is ongoing horror, violence, and deaths of civilians in Gaza, including the most vulnerable—the sick, the elderly, and young children. There is immense suffering of those close to us, and those we do not know but are part of our human family. There is immeasurable grief that is heartbreaking and touches us all, wherever we may stand. I wish to start by acknowledging this trauma and asking you to join me for have a moment of silence in recognition.

I prepared this talk before the attacks and the war and their hemorrhaging broke out. There is no easy segue to this talk. But to carry on, to engage in working for a better world, we must.

I see the title of this conference as a call for us to take stock of where we are and imagine, propose, and implement ways—and I stress the uncertainties in the plural form of *ways*—forward. I will do so in this talk with a conceptual framework and examples of common challenges, often existential ones, beyond the current war, while I encourage us to think creatively across the challenges that this small, complex world and we, among its inhabitants, face.

As Groucho Marx apocryphally is quoted, “I’m not crazy about reality, but it’s still the only place to get a decent meal.” As one who works within the legal realist, sociolegal, pragmatist tradition of law, we need to start with reality. In a moment I will sketch out those traditions and their relevance today in terms of where we might go from here. But within those traditions, I stress, although the understanding of our current situation is contested, striving to understand it is the only responsible place to start.

We have been here before. Richard Haass wrote a gripping essay three years ago where he speculated that the times in which we live do not recall the Cold War, which arose after World War II.² That time was difficult enough. It was a time where international relations realists took charge of U.S. foreign policy and scoffed at the illusions of liberal international law and the

¹ Gregory Shaffer is Scott K. Ginsburg Professor of International Law and President of the American Society of International Law. This is the keynote address at the 2023 International Law Weekend conference of the American Branch of the International Law Association (ABILA) held at Fordham Law School in New York on October 20, 2023.

² Richard Haass, *The Pandemic Will Accelerate History Rather Than Reshape It*, FOREIGN AFFAIRS (Apr. 7, 2020), <https://www.foreignaffairs.com/articles/united-states/2020-04-07/pandemic-will-accelerate-history-rather-reshape-it>.

concept of a liberal international legal order. The realists like Morgenthau did not forego law, but they turned to an international policy of co-existence where law was largely an epiphenomenon and thus played no generative role. Their focus was on how to manage the adversarial relationship with the Soviet Union in which both sides could destroy each other with the mere push of a button, possibly after misconstruing the other's actions. It was a time far from an international law of cooperative problem solving, much less one that supported the liberal norms embedded in the Universal Declaration of Human Rights whose seventy-fifth anniversary we celebrate on December 10th.

I was raised at that time in Ohio. It may have been a Cold War for a young white boy in Cincinnati, but it was all but cold for those maimed and killed in the proxy wars between the two ideological adversaries. On the nightly news we watched Americans die and we watched Vietnamese die and then Cambodians die as the war spread to what end? It was a time, when the day after student protestors were shot and four killed by the Ohio National Guard at Kent State on May 4, 1970, our sixth-grade home room teacher, Mr. Mjello, started the day by telling us that the students deserved it; they deserved to die. It was a time where the US government helped orchestrate coups that overthrew democratically elected governments and supported right-wing authoritarian regimes in the name of freedom, despite their torture chambers and extrajudicial killings.

No, Haass was not speaking of *that* time. Rather he was speaking of the interwar period beset by economic and geopolitical crises. In Germany, the leading legal thinker was Carl Schmitt. Schmitt theorized law as purely instrumental and political, and he defined politics as an existential struggle between friends and foes—in today's populist terminology between Us and Them—that could only be resolved through domination, and ultimately killing, and thus potentially, a bloodbath. Schmitt theorized law in terms of “who decides on the exception.”³ Since the exception is always available, law is without normative constraint, and the concept of the rule of law is illusory, a mask for the “will to power.”⁴ Schmitt found the exception “more interesting than the rule,” because “[t]he rule proves nothing; the exception proves everything.”⁵

Schmitt's work was influential not just on the right, and embraced by the Nazi regime, where he became a party member. It was also influential and remains influential among many on the left. His student, the young Marxist Otto Kirchheimer, who later became a leader of the Frankfurt school which later heavily influenced the US critical legal studies movement, was Schmitt's admiring student. In his early work, Kirchheimer borrowed from Schmitt to applaud Leninism's pursuit of “a brand of politics that ruthlessly distinguishes friend from foe.”⁶ The foe needed to be eliminated.

³ CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., Univ. of Chicago Press 2005) (1922).

⁴ WILLIAM E. SCHEURMAN, *CARL SCHMITT: THE END OF LAW* 34 (2019).

⁵ SCHMITT, *supra* note 3, at 15.

⁶ WILLIAM E. SCHEURMAN, *BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW* 25 (1997).

For both Schmitt and the early Kirchheimer, liberal democracy was their mutual enemy, reflected in the weakness and indecisive squabbling of Germany's Weimer republic. The answer for both was purging of the enemy, for Schmitt of the leftists, Jews, and other undesirables; for Kirchheimer of the bourgeoisie and class opponents. Both envisioned a homogenous society, whether it be composed of Aryan Christian nationalists or a unified working class. Such instrumentalism potentially could lead to pacts among rivals, as it did with the Molotov-Ribbentrop Pact, to ensure the two enemies' dominance over peoples within their respective geographical spheres of influence. That is one take on the theme Beyond International Law, and the consequence are easy to foresee.

Yes, today we are in a different time and place, but—coming back to Hass—we have been here before. Think of the parliamentary cynicism, indecisive squabbling, and threats of government shutdowns of our days. Think of the rise of White Christian Nationalists, Hindu Nationalists, Chinese Nationalists, who view the world in terms of us versus them, of we the people versus the “enemy of the people,” of political ads with opponents in a sharpshooter's crosshairs.⁷ Think of hate spewed on the internet, of the postings of the young white supremacist who enters the grocery store with body armor and rapid fire weapons to eliminate the other—the other defined not by whether one has blue eyes or gray eyes, wavy hair, straight hair, or no hair, is tall or short, or is pudgy or slim, but on the slight genetic variation affecting the production of melanin and thus the pigmentation of one's skin. Think of the terrorist entering a synagogue or a mosque strapped with explosives or armed with assault weapons and documenting the killing, all live on a GoPro camera aimed at stirring further hate. Think of militia training, of death threats against our loved ones, of the “active shooter” training sessions psychologically scarring our children, grandchildren, and we as educators, prepping us for that random day.

Think of rising economic insecurity and inequality to levels not seen since the interwar period—coming back to Haass—where people hold multiple, low-wage jobs and yet still are evicted for lacking cash to pay the rent. Think of the homeless camps, of those in tents and those without tents, where, to borrow from Anatole France, “The law, in its majestic equality, forbids rich and poor alike to sleep under [the overpasses of our cities].”⁸

Think of the challenges to science, and the popularization of conspiracy theories, of Pizzagates and Infowars. Even radical postmodernists begin to question the cynical use of distortions, deep fakes, and conspiracy theories, that propagate, confuse, sow doubt, reap distrust, and feed hate.

These *domestic* realities are transnationally linked with the challenges besetting international law and institutions today. Those attacking international law and institutions seek to

⁷ William P. Davis, ‘Enemy of the People’: Trump Breaks Out This Phrase During Moments of Peak Criticism, N.Y. TIMES (July 19, 2018), <https://www.nytimes.com/2018/07/19/business/media/trump-media-enemy-of-the-people.html>; Jeff Muscus, Sarah Palin's PAC Puts Gun Sights on Democrats She's Targeting in 2010, HUFFPOST (Jan. 9, 2011, 11:56 AM), https://www.huffpost.com/entry/sarah-palins-pac-puts-gun_n_511433.

⁸ ANATOLE FRANCE, THE RED LILY 91 (Winifred Stephens trans., Cambridge Univ. Press 1924) (1894) (The French original reads: “La majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain.”).

weaken their constraints. They simultaneously attack and undermine domestic institutions, whether in this country or abroad. Take Russia and its war on Ukraine. Russia launched its blitzkrieg on Ukraine less than one year after Haass wrote his cautioning essay. It did so after poisoning, killing, and otherwise incapacitating domestic opponents through legal charades. This instrumental use of law to dominate, reflected in the phrase *rule by law*, was brilliantly captured in the award-winning Russian film *Leviathan*, which takes place in a small, northern coastal Russian town above the Arctic circle. There, the law is the Leviathan, wielded to destroy any threat to the local powerholder, the mayor.

To turn to Ukraine, it did not pose an external threat to Mr. Putin's rule, but an internal one. The threat was its democratization where Ukrainian activists combatted corruption and promoted political and civil freedoms, and the Ukrainian government, in turn, sought closer political and economic ties with Europe. These ties would facilitate the conveyance of liberal norms, which also could seep into Russia given the historically close cultural, social, ethnic, and linguistic ties of the two countries' peoples. In his televised address announcing Russia's invasion of Ukraine, Putin offered a broad conception of the threats to Russian national security—that paradigmatic exception to international law and all law. Putin—a la Schmitt—decided on the exception. He blamed “the West” not for any imminent military threat, but rather for its ongoing social and cultural attacks on Russia's traditional values, including through imposing attitudes that, to quote Putin, “are contrary to human nature.”⁹ Putin saw the extension of legal rights and cultural acceptance of L.G.B.T.Q+ peoples as evidence of Western cultural decadence and Western assertions of normative hegemony. His challenge to the international legal order in his invasion of Ukraine, in other words, is not just a question of international relations. It also is, in no small part, endogenous to the internal threats to Putin's reign through liberalism's normative demands of tolerance, pluralism, and individual civil, political, and social rights. We face those same challenges here in our own country.

And now we live in the midst of the new outbreak of war between Israel and Hamas. The cycles of calls for vengeance reign while Israeli civilians and Palestinian civilians and civilians of other places die and suffer. Does not law provide a foundational framework for us to work toward peace and human exchange and better understanding? Are we to think beyond international law at these times? Does not standing for and upholding the requirements of international law offer a better means toward a pathway to peace grounded in the upholding of human dignity?

Legal Realism: Five Dimensions. In the United States, a movement arose in response to the traumatic economic and social challenges of the interwar period. It became known as legal realism. I with others have written on this development as part of a call for a new legal realism, which is of

⁹ Vladimir Putin, Russ. President, Nationally Televised Address (Feb. 24, 2022), in *Transcript of Vladimir Putin's Speech Announcing 'Special Military Operation' in Ukraine*, SYDNEY MORNING HERALD (Feb. 24, 2022, 6:50 PM), <https://www.smh.com.au/world/europe/full-transcript-of-vladimir-putin-s-speech-announcing-a-special-military-operation-20220224-p59zhq.html>.

considerable relevance for international law today.¹⁰ There are many takes on what legal realism means since its proponents were less an organized school than representatives of a common intellectual thrust in response to crises that called for law and policy that were more responsive to social conditions. I foreground three interacting components of legal realism: pragmatism, empiricism, and experimentalism, in which open inquiry and non-dogmatic response and adaptation from experience are critical.

The legal realists were informed by and grounded in pragmatist philosophy, building upon the leading political philosopher of the time, John Dewey. Dewey and the other pragmatists depart from post-modernists today in their view of truth. As non-dogmatists operating in a world of uncertainty and flux, they do not put forward a view of truth with a capital *T*. Like postmodernists today, they learned and built from scientific understandings of relativity and quantum theory. They understood that what we see is shaped by where we stand, and that where we stand affects where we look. They further understood that when we act, we affect what there is to investigate and assess. Facts and acts, cognition and volition, are inextricably in relation with each other.

What pragmatists nonetheless stress, however, is the importance of *truth-seeking*, and thus of empirical inquiry, the second component that I stress. Legal realism is committed to empirical inquiry and investigation, whether of a qualitative or quantitative bent. For legal realists, law and legal decisionmaking should be grounded in an empirical understanding of social context. If law is to be institutionally responsive, it must build from an understanding of the contexts in which we are situated. Truth-seeking is a process that involves reasoning and deliberation. We strive, however fallibly and however reflexively, to get at *right* answers. What legal realism opposes is decisionism—the idea that law creates no constraints because the sovereign decides on the exception. In 2012, Tom Ginsburg and I published a piece on *The Empirical Turn in International Law*,¹¹ and this year ASIL launched a new interest group on International Law and Social Science that builds from legal realist traditions.

Third, given that we live in a world of uncertainty, legal realism stresses the importance of experimentalism as part of pragmatic problem-solving. It stresses the importance of creating institutional structures that can respond to uncertainty and adapt to changing contexts in light of our experience. It calls for us to break down larger problems into smaller ones where we can make meaningful improvements.

Legal realism integrates these different components—pragmatism, empirical investigation, and experimentation with a view toward adaptive problem-solving. The Roosevelt administration, in which so many legal realists worked, exemplified such an approach in response to the onslaughts of the Great Depression with its pronouncement of the four freedoms.¹² The administration had its

¹⁰ See, e.g., Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can A New World Order Prompt A New Legal Theory?*, 95 CORNELL L. REV. 61 (2009); Gregory Shaffer, *Legal Realism and International Law*, in INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS 82 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2022).

¹¹ Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1 (2012)

¹² Franklin Roosevelt, U.S. President, Four Freedoms Speech, Annual Message to Congress (Jan. 6, 1941), in *President Franklin Roosevelt's Annual Message (Four Freedoms) to Congress (1941)*, NAT'L ARCHIVES,

failings, as all administrations do, but it took experimental action in response to problems in light of experience in a world of considerable uncertainty.

Finally, let me add two further complementary dimensions to legal realism, a critical and an institutional one. There is an important critical dimension to legal realism because of its views on uncertainty and its advocacy of truth-seeking despite inevitable fallibility. Because reality is dynamic and shaped by our actions, and because our perceptions of reality are fallible and shaped by where we stand, legal realism stresses the importance of humility, reasoned deliberation, and democratic exchange. It requires reflexivity about what shapes our perceptions if we are to be open, responsive, and effective. It requires deliberation where we hear the views and perspectives of others, particularly those who are more vulnerable and generally less represented. Social equality is thus a core component of liberty for legal realists, so that people have the capacity to pursue their life choices and participate in broader social and political processes.

Critique, however, is not sufficient for legal realists working in a pragmatist tradition. Problem-solving requires institutions and since institutions are highly imperfect, difficult choices must be made, a point to which I will turn shortly.

Transnational Legal Ordering and International Law Today. So what are the lessons for international law in terms of where we go today? How might we positively conceive, as international lawyers, of engagement beyond international law? As a starting point, given the rise of authoritarianism in the 1930s and the horrors of World War II, persuading our fellow citizens of what the past teaches us regarding the importance of international engagement, and its relation with domestic policy—and in particular social policy—is critical. Out of the ashes of World War II, new international institutions arose, and declaratory aspirations proclaimed. But the Cold War almost immediately stymied their promise. International law scholars and advocates thus turned to alternative mechanisms that are relevant for this conference’s theme Beyond Law.

I turn first to the concept of transnational law and its problem-solving mechanisms, as developed by Phillip Jessup in 1956. Jessup wrote of the concept of transnational law as problem solving during the Cold War when hope in public international law and public international institutions had withered. He had served on the United States delegation to both the 1943 Bretton Woods conference and the 1945 San Francisco conference that created the United Nations. By 1956, however, the prospect of international institutions and international law as problem-solvers had dimmed. During those polarized times, Jessup himself was attacked and investigated as a communist sympathizer by U.S. Senator Joseph McCarthy during the Red Scare.¹³ Jessup turned to analyze other means of fostering international problem solving which incorporated but went *beyond* public international law. He defined transnational law as “all law which regulates actions or events that transcend national frontiers.” It includes public international law, private international law, and “other rules which do not wholly fit into such standard categories.”¹⁴

<https://www.archives.gov/milestone-documents/president-franklin-roosevelts-annual-message-to-congress> (last accessed Oct. 24, 2023).

¹³ Oscar Schachter, *Philip Jessup’s Life and Ideas*, 80 AM. J. INT’L L. 879, 885-89 (1986).

¹⁴ PHILIP JESSUP, TRANSNATIONAL LAW 2 (1956).

Jessup's turn to transnationalism is highly relevant to this conference's theme of thinking beyond international law. If international law is viewed solely in terms of the formal sources listed in article 38 of the Statute of the International Court of Justice, it clearly is insufficient for responding to today's problems. From a socio-legal perspective, I have developed with others the related concepts of transnational legal ordering and transnational legal orders.¹⁵ This approach focuses on processes that transcend national boundaries and give rise to the transnational construction and understanding of problems and legal responses to them. Public international law is a tool, whether it assumes binding hard law or non-binding soft law forms, that is one component of these processes. In many areas, international organizations and transnational networks formulate principles, guidelines, model laws, and peer review mechanisms to monitor progress in achieving common ends, and to adapt goals and mechanisms in light of experience. Work on transnational legal ordering assesses both how problems are constructed and understood, and how legal norms in response to such problems settle at multiple levels, from the international to the national and, most importantly, the local in terms of practice.

From a legal realist perspective, at the international level, institutions are needed to engage in pragmatic problem-solving grounded in empiricism and experimentalism, and that are adaptive in light of experience. I turn now to the work of Chuck Sabel who has been collaborating with others to assess different experimental techniques to unsettle gridlocks and holdups so that we can more effectively respond to transnational challenges, such as climate change. His important book with David Victor, *Fixing the Climate*, exemplifies this approach.¹⁶ The two build from numerous examples of international coordination and problem solving in different contexts characterized by high uncertainty and significant risks.

A transnational experimentalist approach aims to catalyze structured processes of regulatory dialogue that bring together public and private actors at multiple levels of governance. Officials working on distinct issues in particular regulatory fields jointly deliberate over and set regulatory goals and measures to gauge their achievement, while permitting variation in how agencies pursue the attainment of these goals in light of their varying contexts. These agencies commit to report to each other and central bodies regarding regulatory outcomes, and they participate in peer review processes aimed at improvement and potential reassessment of goals.¹⁷ This approach involves ongoing mutual scrutiny of outcomes and their effectiveness based on information exchange by regulators committed to regulatory improvement and attentive to risk, including potentially catastrophic risks in many sectors, ranging from pharmaceuticals, medical devices, food, agriculture, and finance. The development, implementation, and review of Hazard Analysis of Critical Control Points (HACCP) systems to identify and protect against food

¹⁵ TRANSNATIONAL LEGAL ORDERS (Terence C. Halliday & Gregory Shaffer eds., 2015); Gregory Shaffer & Carlos Coye, *From International Law to Jessup's Transnational Law, from Transnational Law to Transnational Legal Orders*, in THE MANY LIVES OF TRANSNATIONAL LAW: CRITICAL ENGAGEMENTS WITH JESSUP'S BOLD PROPOSAL 126 (Peer Zumbansen ed., 2020).

¹⁶ CHARLES F. SABEL & DAVID G. VICTOR, *FIXING THE CLIMATE: STRATEGIES FOR AN UNCERTAIN WORLD* (2022).

¹⁷ Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 55 (2011).

pathogens illustrates such a systemic approach to reduce and respond to transnational risks.¹⁸ Given variation in local contexts, implementation ultimately depends on local actors engaged in local contexts.

In their book, Sabel and Victor explain how countries addressed the depletion of the ozone layer through a framework treaty that catalyzed such an empirically based, experimental approach. Both the nature of the problem and feasible solutions to it were beset by considerable uncertainty. This uncertainty required experimental projects from which the parties and industry could learn and develop new technologies and alternatives. An international treaty—the 1985 Vienna Convention and its follow-up 1987 Montreal Protocol on Substances that Deplete the Ozone Layer—set forth the necessary framework with broad goals, which were to progressively curtail and eliminate production methods and substances that threatened the earth’s ozone layer. Such solutions would require innovation and the creation of new industries, building from experience which would involve many false starts. The treaty catalyzed the creation of structures that brought together scientists, regulators, and industry to study the problem and develop alternative technologies for production in different economic sectors.

The system created a schedule for progress that the parties reviewed and adapted, as new knowledge and challenges arose. Problem-solving was broken down and addressed contiguously and serially in different sectors. Networks of committees convened users and producers to spur and assess efforts to find concrete, economically feasible, sector-specific solutions. To give just one example, study was required regarding the question, on the one hand, of “whether a refrigerant that depletes the ozone layer can be replaced by an analogous and more benign alternative,” and, on the other hand, of “whether refrigeration systems that utilized these new chemicals can work reliably and at an acceptable cost.”¹⁹ Both questions were critical. The process spurred pilot projects that if successful could attract larger scale experimentation. Oversight bodies granted exemptions and extended phaseout timelines in response to unexpected challenges. The parties created a Multilateral Fund to build local capacity and provide technologies for developing countries, in which local contextualization was needed. Positive and negative incentives were critical in promoting change. Positive inducements through financial and technological transfers complemented the threat of trade sanctions involving “potentially draconian penalties for governments and firms” that did not cooperate.²⁰

Sable and Victor show how this model is central for tackling the multi-faceted problem of climate change. We have a treaty, one now based on the pledging of commitments, as MJ Durkee writes.²¹ Such pledging is not formally binding or enforceable. It exemplifies a type of mechanism that goes beyond traditional public international law. It is critical in providing a coordinating device, one which can inspire national action and help spur and support domestic actors who press for further national action. Yet what will be required is to go beyond the treaty and the ensuing

¹⁸ See Charles F. Sabel & William H. Simon, *Contextualizing Regimes: Institutionalization as a Response to the Limits of Interpretation and Policy Engineering*, 110 MICH. L. REV. 1265, 1283, 1285 (2012).

¹⁹ SABEL & VICTOR, *supra* note 16, at 5.

²⁰ *Id.* at 7

²¹ Melissa J. Durkee, *The Pledging World Order*, 48 YALE J. INT’L L. 1, 1 (2023).

pledges, and to break down the problem of climate change into its many components, and to enable and support networks that bring together regulators, industry, and scientists to address challenges within particular sectors. The treaty provides an overarching collective goal and thus legitimating mission. But most work will occur outside of it, whether by clubs of nations or individual national and sub-national governments, working with industry, scientists, and civil society, who reference it and its goals. Some success has already been attained in some sectors, such as shipping, in what Dan Bodansky calls a micro transnational legal order, in that international standards and practices settle transnationally with the aim of reducing greenhouse gas emissions in a sector.²² But so much more is needed to address the overarching problem of climate change.

To turn to the institutional component of legal realism, there is no single institutional alternative to addressing global challenges in a pluralist world, and thus comparative institutional analysis is needed. Such analysis accepts that there is no institutional nirvana but rather a choice among imperfect institutions that involve different tradeoffs. For legal realists, these choices should be made and adapted in light of experience, as empirically assessed.

One institutional alternative is where a lead regulator takes action that catalyzes market responses affecting private actors and regulators transnationally. Paul Stephan's book *The World Crisis and International Law* highlights how, in a polarized world, this type of transnational process can provide potential advances. There are risks to such an approach for less powerful countries because jurisdictions with large markets are best positioned to adopt regulations that have transnational effects. Regulation in such jurisdictions is more likely to be deemed legitimate if the target is not to change other countries' laws, but rather to protect the regulating jurisdictions' citizens, or to avoid complicity in human rights violations, environmental degradation, or other harmful acts abroad through consumption of products domestically.²³ Take, for example, California's creation of emission standards, how they affect industry production decisions to access California's huge market, and how the standards eventually diffuse, including transnationally. There are tradeoffs in terms of participation and outcomes between such unilateral approaches and multilateral ones.²⁴ From a transnational perspective, these approaches also interact, as when multilateral institutions create constraints on unilateral measures to require that they be non-discriminatory, transparent, and provide for due process.²⁵

Regulatory entrepreneurs also try to persuade others to adopt similar regulations that prescribe harmful acts out of competitiveness concerns. These efforts can spur the

²² Daniel Bodansky, *Climate Change: Transnational Legal Order or Disorder?*, in TRANSNATIONAL LEGAL ORDERS 287, 290 (Terence C. Halliday & Gregory Shaffer eds., 2015).

²³ I develop the distinction between attempts to impose changes on other countries, on the one hand, and the aim to not be complicit in the violation of labor rights and environmental degradation through consumption of products produced in harmful ways, on the other hand. See Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 U. ILL. L. REV. 1 (2019); Gregory Shaffer, *Governing the Interface of U.S.-China Trade Relations*, 115 AM. J. INT'L L. 622 (2021).

²⁴ Gregory Shaffer & Daniel Bodansky, *Transnationalism, Unilateralism and International Law*, 1 TRANSNAT'L ENV'T L. 31, 35 (2012).

²⁵ See, e.g., the WTO Appellate Body's decision in the famous shrimp-turtle case, discussed in Gregory Shaffer, *Power, Governance and the WTO: A Comparative Institutional Approach*, in POWER IN GLOBAL GOVERNANCE 130 (Michael Barnett & Bud Duvall eds., 2004).

multilateralization of domestic legal norms through treaties. Take the issue of combatting corruption. Rachel Brewster documented how the U.S. first enacted a statute—the Foreign Corrupt Practices Act (FCPA) in 1977, which criminalized the bribery of foreign officials, made companies and their officers liable for corruption regardless of the location of the conduct, and imposed accounting requirements on publicly traded companies listed on U.S. exchanges to promote transparency.²⁶ However, the United States only rarely enforced the FCPA during its first two decades because of resistance from other countries about application to their companies, as well as from U.S. companies concerned that they would be placed at a competitive disadvantage.²⁷ The United States thus sought to convince other advanced economies to adopt similar laws, and they negotiated the OECD Anti-Bribery Convention (formally named the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions), which was concluded in 1997 and entered into force in 1999.²⁸ Today the Anti-Bribery Convention includes all 38 OECD-members, as well as six non-members, including Brazil. It includes a peer review process that helps to monitor compliance and create pressure for enforcement. It legitimated U.S. enforcement against foreign companies as well as national ones, so that U.S. companies would no longer be disadvantaged, and U.S. enforcement dramatically increased.²⁹ Importantly, the U.S. did not prosecute bribe-takers, but rather bribe-payers, such as multinational corporations. Who are complicit in corruption The effort to combat corruption subsequently spread to other treaties and international instruments, including the 2003 UN Convention against Corruption, which has 189 parties as of 2023.³⁰

The European Union is at the forefront of regulatory norm making that engages transnational processes. Take EU rules on data privacy, chemicals, and climate change. One of my first articles as a junior scholar was on the mechanisms through which EU data privacy rules would have transnational impacts. In her later book *The Brussels Effect*, Anu Bradford illustrates how, and the conditions under which, the EU more generally has been a regulatory entrepreneur in its responses to problems within the EU that have transnational implications in light of the transnational nature of the problem.³¹

To return to the challenge of climate change, on October 1, 2023, the EU’s Carbon Border Adjustment Mechanism (CBAM) took effect, raising both international controversy and promise. Developing countries, in particular, are concerned about its impact on their trade and development prospects. Yet they too are threatened by climate change and their citizens generally are more vulnerable than those in wealthier countries. They are right that technology transfers and financial

²⁶ Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1.

²⁷ Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611, 1614 (2017).

²⁸ Org. for Econ. Coop. & Dev. [OECD], *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (Nov. 21, 1997), <https://www.oecd.org/daf/anti-bribery/oecd-anti-bribery-convention-booklet.pdf> (last visited Oct. 25, 2023).

²⁹ Brewster, *supra* note 24, at 1617.

³⁰ U.N. Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41.

³¹ ANU BRADFORD, *THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD* (2020).

assistance are required for a just transition. Positive incentives must be combined with negative ones, and hopefully CBAM and responses to it will help catalyze them in more effective ways.

As part of dynamic transnational processes, the EU legislation can help spur domestic action abroad so that norms and mechanisms to effectuate them spread. For example, Vietnam and Indonesia have announced plans for a carbon tax and emissions trading scheme.³² and China will likely expand its existing emissions trading system. The U.S. is working with the EU to see what can be done to reconcile their different approaches. The processes are dynamic and need to be seen in that vein as part of transnational legal ordering going beyond conventional international law. They could fail, and if they do, we will face systemic, existential consequences. But engaging in these transnational processes by using tools that both incorporate and go beyond public international law is the point.

I conclude with words from the cosmopolitan philosopher Kwame Anthony Appiah, “As populist demagogues around the world exploit the churn of economic discontent, the danger is that the politics of engagement could give way to the politics of withdrawal.”³³ Forgetting that “we are all citizens of the world—a small, warming, intensely vulnerable world—would be a reckless relaxation of vigilance.” “Elsewhere,” Appiah writes, “has never been more important.” Engaging collaboratively and transnationally with elsewhere is essential if we are to address the challenges of our time. We have been here before. International law and transnational legal ordering have never been in greater need. Thinking *beyond* international law does not signify its abandonment. We must rather integrate international law as part of broader transnational processes so that we pragmatically and cooperatively enhance our understanding of problems, and effectively address them.

I applaud the organizers of this international conference here in the heart of New York City across just seven avenues from the United Nations for convening us to deliberate over how to think *Beyond International Law* to address more effectively the common but differentiated challenges that confront us. We live in uncertain, dangerous times. We must learn from what we don’t know. How? The central way to do so is through pragmatic engagement in problem solving involving transnational cooperative structures and experimental action and empirical analysis that dynamically and recursively interact. In that way, we may adapt our understandings and practices to address the different challenges we face.

To channel Yogi Berra, an icon of this great city, “It’s tough to make predictions, especially about the future.”³⁴ And particularly because “the future ain’t what it used to be.”³⁵ As a player,

³² *How Carbon Prices Are Taking over the World*, THE ECONOMIST (Oct. 1, 2023), <https://www.economist.com/finance-and-economics/2023/10/01/how-carbon-prices-are-taking-over-the-world>.

³³ Kwame Anthony Appiah, *The Importance of Elsewhere: In Defense of Cosmopolitanism*, FOREIGN AFFAIRS (Feb. 12, 2019), <https://www.foreignaffairs.com/world/importance-elsewhere-cosmopolitanism-appiah>.

³⁴ Paul Newberry, *Column: A Bold Prognostication of What College Football Will Look Like a Decade from Now*, ABC NEWS (July 28, 2023, 2:37 PM), <https://abcnews.go.com/Sports/wireStory/column-bold-prognostication-college-football-decade-now-101776949>.

³⁵ *Yogi Berra’s Most Memorable Sayings*, MLB (Dec. 7, 2021), <https://www.mlb.com/news/yogisms-best-yogi-berra-sayings>.

Berra new uncertainty. As thinkers and actors, we must develop ways to respond cooperatively and effectively to uncertainty, working through and beyond international law.