



The Limits of International Law

By Jack L. Goldsmith and Eric A. Posner

*The global war on terrorism, the Kyoto Protocol, and the International Criminal Court have all highlighted the importance of international law. Does international law matter, or can states violate it with impunity? In *The Limits of International Law*, Jack L. Goldsmith and Eric A. Posner find that international law does matter but that it is less powerful than many public officials, legal experts, and the media believe. The authors argue that international law is largely a product of states pursuing their own interests on the international stage.*

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The role of international law in international relations and American foreign policy has received a great deal of attention since the end of the Cold War, and even more attention since 9/11. The end of the Cold War generated extraordinary optimism about the ability of international law to prevent war, preserve peace, and regulate economic and cultural relations among states. The UN Security Council became much more active and, notably, authorized the use of force against Iraq in the first Gulf War. Nations entered new, ambitious treaties governing the environment, human rights, and economic relations, including the creation of the World Trade Organization. These treaties created the first major international criminal tribunals since World War II, including tribunals to resolve cases arising out of civil war in Yugoslavia and the genocide in

Rwanda; and, then, a permanent International Criminal Court with jurisdiction over a broad range of international crimes. Europe made great strides toward integration, thanks in part to the successful operation of its European Court of Justice. As the twentieth century ended, optimism about international law was as high as it had ever been—as high as it was at the end of World War I and World War II, for example.

We can conveniently use 9/11 as the date on which this optimism ended, but there were undercurrents of pessimism even earlier. The UN played a relatively minor role in bringing the conflicts in the Balkans to the end. Members of the Security Council could not agree on the use of force in Kosovo, and the NATO intervention was thus a violation of international law. The various international criminal tribunals turned out to be cumbersome and expensive institutions, they brought relatively few people to justice, and they stirred up the ethnic tensions they were meant to quell. Aggressive international trade integration produced a violent backlash in many countries. Treaty mechanisms seemed too weak to solve the most serious global problems, including environmental degradation and human rights abuses.

American Reluctance on Treaties

The biggest problem, from the perspective of international law advocates, has been the United States. Long the champion of international legalization and the richest and most powerful country, the United States was a laggard in the 1990s. During treaty negotiations, the United States consistently worked to weaken treaty language and create exceptions. It ended up opposing the

International Criminal Court and has cajoled dozens of countries into entering bilateral immunity agreements, which require them not to turn over Americans on their territory to the ICC. It refused to enter the Kyoto Global Climate Change Treaty. It refused to enter a treaty that banned landmines. It has refused to enter several human rights treaties, and it has entered others only subject to reservations that ensure that they do not change American policy. It led the illegal intervention in Kosovo. Although many other states have been recalcitrant about these and similar international institutions—including Russia, China, India, and other major powers—it has come as a shock to many American internationalists that the United States acts more like these countries than like western European countries.

From their perspective, matters only became worse after 9/11. The American military response to the al Qaeda threat has raised grave questions of international law. So has both the invasion of Iraq—arguably, in violation of the UN Charter—and the conduct of the war there. The Bush administration also has forcefully reiterated American opposition to the ICC and to Kyoto, and withdrawn from the ABM treaty with Russia; and many of its officials have shown skepticism about the value of international law for American foreign policy.

International law advocates now regard the United States as a rogue state but have no ideas about how to change American behavior. Defenders of American foreign policy sometimes argue that nobody pays attention to international law, and so therefore the United States should not; and, at other times, they argue that weak states are using international law to prevent the United States from acting in its national interest. The partisan debate is hampered by lack of understanding about how international law really operates.

Relations between Self-Interested States

The Limits of International Law intends to fill that gap. The book begins with the premise that all states, nearly all the time, make foreign policy decisions, including the decisions whether to enter treaties and comply with international law, based on an assessment of their national interest. Using a simple game-theoretical framework, Goldsmith and Posner argue that international law is intrinsically weak and unstable, because states will comply with international law only when they fear that noncompliance will result in retaliation or other reputational injuries. This framework helps us

understand the errors of the international law advocates and their critics.

On the one hand, large multilateral treaties that treat all states as equal are unattractive to powerful states, which either refuse to enter the treaties, enter them subject to numerous reservations that undermine the treaties' obligations, or refuse to comply with them. The problem with these treaties is that they treat states as equals when in fact they are not, and they implicitly rely on collective sanctions when states prefer to free ride. Thus, many human rights treaties are generally not enforced, and so they have little effect on states' behavior. And the international trade system is mainly a framework in which bilateral enforcement occurs, so powerful states may cooperate with other powerful states but not with weaker states, whose remedies for trade violations are valueless.

International law has no life of its own, has no special normative authority; it is just the working out of relations among states, as they deal with relatively discrete problems of international cooperation.

On the other hand, international law is not empty or meaningless, as many critics have argued. States are able to cooperate with each other, especially on a bilateral basis, and their patterns of cooperation eventually congeal into the customary international norms. Cooperation also occurs within bilateral treaties and within the general frameworks set up in multilateral treaties. In the absence of a world government, the cooperation remains relatively thin, and often erratic; its character changes as the interests and relative power of nations change. But none of this is to claim that international law is phony or illusory or a great public relations game.

What it does suggest, however, is that international law has no life of its own, has no special normative authority; it is just the working out of relations among states, as they deal with relatively discrete problems of international cooperation. There is no reason to expect states to enter treaties just for the sake of expanding the domain of international law; and there is no reason to expect states to comply with treaties when their interests and powers change. The aggressive international legalization expected and yearned for by international lawyers

just cannot happen as long as there are nearly 200 states with independent interests, agendas, and ideologies. Even democratic states have no reason to commit themselves to international law when doing so does not serve the interests of the voters.

Goldsmith and Posner do not try to defend the U.S. government's attitude toward international law, but their arguments help make that attitude explicable. The U.S. government is not hostile to international law as such and continues to make and comply with international law when doing so is in its interest. But two factors have combined to make the United States less enthusiastic about international law than other wealthy liberal democracies. First, U.S. relative power increased with the self-destruction of its only rival, the Soviet Union. Thus, the premise of Cold War-era international legal institutions—the containment of the Soviet Union—suddenly vanished. Although the United States continued to seek international legalization, it demanded immunization when the legalization would harm American interests. For example, the American proposal for the ICC was to maintain a Security Council veto over its operations, which would have ensured that the ICC would never acquire jurisdiction over the United States without the U.S. government's consent. Other countries are not prepared to consent to a free hand for the Americans, but as a result the ICC will have to operate without the assistance of the U.S. military.

Second, the U.S. security agenda changed after 9/11. For the Bush administration, it became more important for the United States to be able to react quickly and

vigorously with military force against any country that might harbor international terrorists who threaten American interests. Traditional legal limits on the use of force, the conduct of war, and the limits of jurisdiction had to make way for a new conception of national security. The prospect of stateless terrorist groups armed with nuclear weapons has rendered obsolete, for the United States, the prospect of an international criminal order, which could only hamper American action.

Because other countries do not fully share the American agenda, and fear American power, conflicts between these countries and the United States have erupted over the meaning of existing legal structures, and the desirability of new ones. These conflicts are no different from the kind of great power conflicts over international order that have been going on for hundreds of years. Preoccupation with international law—the failure to see that international law is a part of international politics, not a way of eliminating it—has led its advocates to overlook this essential continuity, and to hold unrealistic expectations about what international law can accomplish.

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