

SECOND EDITION

Between Peril and Promise

THE POLITICS OF INTERNATIONAL LAW

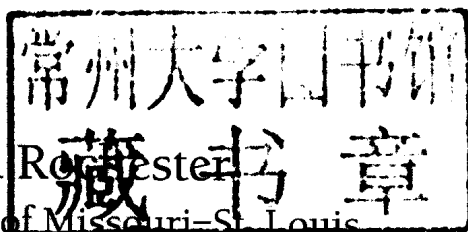
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Between Peril and Promise: The Politics of International Law

Second Edition

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*To Sara, Sholom, Raya, Lottie, and Samantha, in the hope the world
they have recently joined will be a more peaceful and law-abiding
place as they grow up in the twenty-first century, and also to Elliott,
who surely made it a better place while he was here.*

Preface to the Second Edition

As in the first edition of *Between Peril and Promise*, in this second edition I try to walk the line between realist and idealist (liberal) views of international law in examining the relationship between international law and international politics—how law affects politics and vice versa. As in the original edition, Part I addresses the foundational questions of the relevance of international law and whether international law is really law—and, if so, how is it made, enforced, and adjudicated? Part II again focuses on the operation of international law today in specific issue-areas, including human rights, war and peace, economic and environmental matters, and the allocation of legal competences (on land and sea and in airspace and outer space). And Part III again offers a concluding chapter that speculates on the future of international law and politics. The second edition also retains several pedagogical features found in the original volume, namely appendices containing Questions for Study and Discussion, a Table of Cases, and Resources for Researching International Law.

This revised edition also contains several new elements. First, because the world never stands still and, indeed, much has happened since the book's initial publication in 2006, I have made a point of not only updating basic information but also discussing recent developments such as expansion of the war in Afghanistan, the 2008 global economic meltdown, the 2010 BP Deepwater Horizon oil spill in the Gulf of Mexico, the 2011 “Arab spring” of popular revolts throughout the Middle East, and other important events. Second, I have reorganized the text slightly, moving Chapter 7 (“The Law of the Sea, Air, and Outer Space: Negotiating Troubled Waters and Other Territorial Issues”) up to the beginning of Part II, as a newly named and somewhat reframed Chapter 4 (“Jurisdiction: The Allocation of Legal Competences over Places and Persons on Land, at Sea, in the Air and Outer Space”); this was done in response to several reviewers’ suggestions that jurisdictional questions, including matters of state responsibility, were best treated earlier rather than later in the book. Third, I have added at the end of each chapter

in Parts I and II an “International Law in Action” box that fleshes out the workings of international law in the real world through a case study involving a judicial decision taken by a national or international court; this was done in response to reviewer concerns that some professors and students might wish to see more legal-formal aspects of international law discussed in the book.

I thank the several reviewers who made very useful, constructive suggestions on how the book could be improved: Paul Diehl, Christina Fattore, Denise Garcia, Lawrence Leblanc, Daniel McIntosh, Karen Mingst, Elizabeth Nyman, Emilia Powell, and Laura Sjoberg. Thanks go also to Elise Frasier, acquisitions editor at CQ Press for international relations and comparative politics, who was most supportive of my doing a revision of the book, along with her excellent support staff at CQ Press, managing editor Catherine Getzie and others, who masterfully shepherded the manuscript through the production process. And once again I thank my wife Ruth for always putting up with the tensions and frustrations that go with any writing project. The book dedication is to our newest grandchildren—Sara, Sholom, Raya, Lottie, and Samantha—who were left out of the dedication the last time around but are now part of a world that hopefully will be a more law-abiding place as the twenty-first century progresses, and also to my late brother-in-law Elliott, who surely made it a better place while he was here.

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I

Introduction

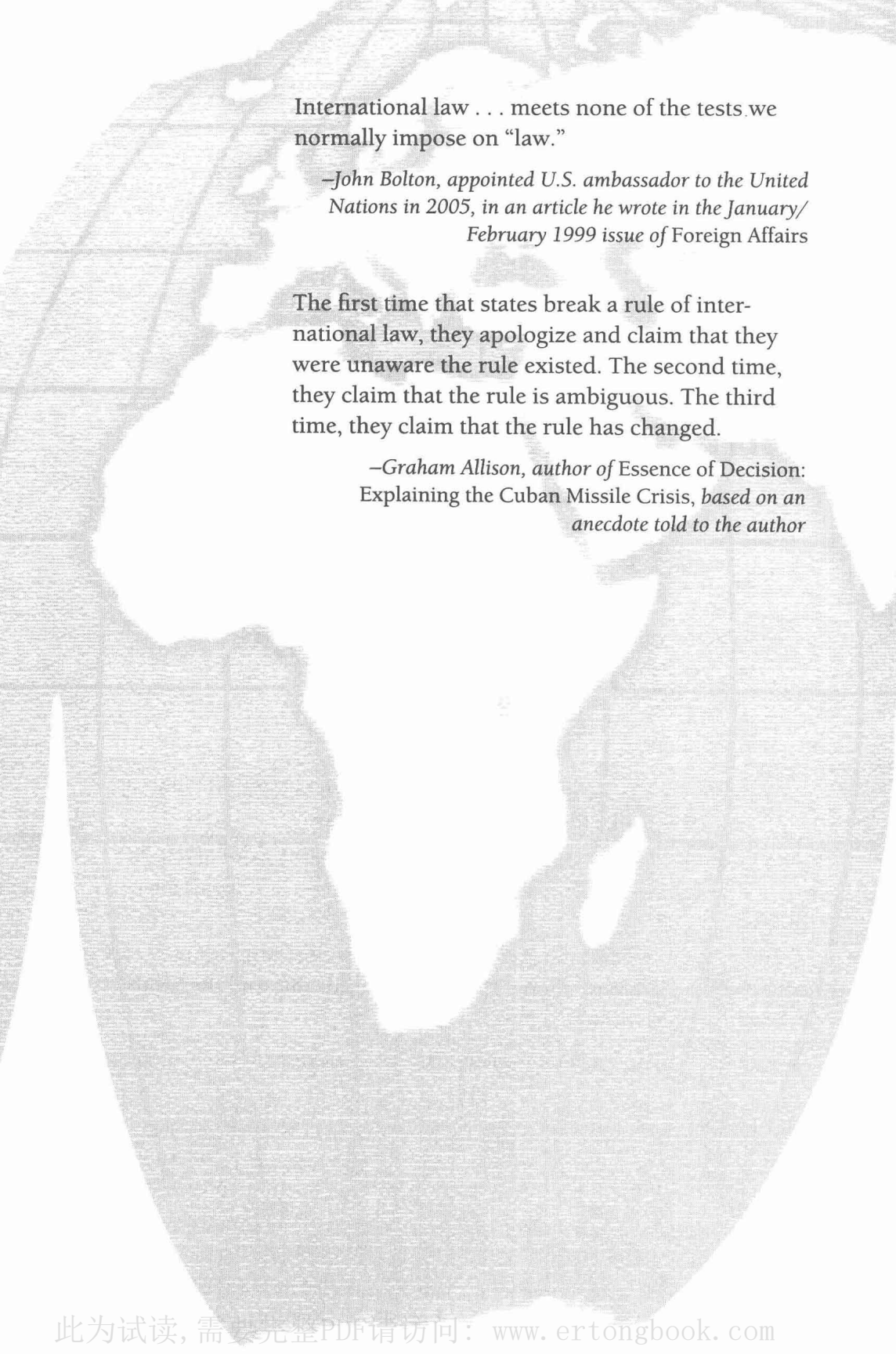
Putting International Law in Proper Perspective, or Putting Your Legal Prototypes Aside

In my office and in my Department, we are, first of all, students of international law.

*—Paul Martin, former Canadian secretary of state for
external affairs*

Law is to be found within nations rather than above them. There is no world state and therefore no world law.

—David Fromkin, The Independence of Nations, 1981



International law . . . meets none of the tests we normally impose on “law.”

—John Bolton, appointed U.S. ambassador to the United Nations in 2005, in an article he wrote in the January/February 1999 issue of *Foreign Affairs*

The first time that states break a rule of international law, they apologize and claim that they were unaware the rule existed. The second time, they claim that the rule is ambiguous. The third time, they claim that the rule has changed.

—Graham Allison, author of *Essence of Decision: Explaining the Cuban Missile Crisis*, based on an anecdote told to the author

1

International Law and International Politics

THERE IS A JOKE THAT GOES AS FOLLOWS: Two close friends, Larry and Harry, are avid baseball fans and attend almost every home game at Yankee Stadium. One day Larry asks, "Harry, do you think they play baseball in heaven?" whereupon Harry says, "That's a good question—I don't know." Several weeks go by without Harry being seen at the ballpark or anywhere else, and Larry gets worried. Finally, Harry turns up at the stadium. Larry says, "Harry, where have you been? I have been worried sick." Harry replies that he had been hit by a truck, had gone to heaven, and had good news and bad news. "The good news is, yes, there is baseball in heaven. The bad news is you're pitching next Tuesday."

On a more serious note, there is both good news and bad news about the state of the world. The good news is that people all over the globe are more interconnected than ever before, not only in terms of being "wired" but also in sharing a common destiny, which is also the bad news, in that problems that in the past might have been localized now are often globalized. Spurred by the arrival of the new millennium, forecasters are hard at work pondering what the twenty-first century holds for humanity. One can find both optimists and pessimists. It has been said that a pessimist is an optimist with experience. But experience itself can be an uncertain teacher whose lessons can be difficult to grasp. This is especially true for those trying to make sense of happenings in the realm of world politics, where the future of humanity will largely be determined.

On the hazards of trying to predict the future—even of five-year cycles—in international relations, allow me another anecdote, this one based on recent history. I can still vividly recall sitting in a paneled room at the International Studies Association annual meeting in Washington, D.C., in April 1987, attending a session featuring two American diplomats

engaging two Soviet diplomats in a speculative discussion about “The Future of U.S.-Soviet Relations.” This was at a time when the cold war was still raging, when Soviet leader Mikhail Gorbachev had just come to power in the Kremlin, when U.S. President Ronald Reagan was continuing to characterize the USSR as the “evil empire,” and when Reagan’s own secretary of defense was quoted as saying that East-West tensions were such that “we are no longer in the postwar era but the prewar era.” One of the Russian diplomats began his comments by uttering what he took to be an old Romanian proverb, that “it is always hard to predict anything, especially the future.” Indeed, who in that room, or for that matter in any room anywhere that day, can claim to have predicted that within a half decade the world would witness the end of the cold war and the end of the Soviet Union itself, with hardly a shot being fired?¹ It is fair to say that most people—scholars, practitioners, and laypeople alike—shared the 1986 assessment of former Carter administration National Security Advisor Zbigniew Brzezinski that “the American-Soviet conflict is not some temporary aberration but a historical rivalry that will long endure.”² Yet, by December 1989, the Berlin Wall that had symbolized the Iron Curtain separating the free and nonfree worlds had collapsed, and the Soviet Red Army Chorus could be heard in Washington, D.C., leading Reagan’s successor and a throng of dignitaries at a Kennedy Center gala in a stirring rendition of “God Bless America”; by December 1991, the USSR had dissolved into Kazakhstan, Tajikistan, Uzbekistan, and assorted other independent republics.

At that very moment, amid much fanfare and jubilation, President George Bush declared a New World Order of peace and harmony and Francis Fukuyama of the U.S. State Department proclaimed “the end of history,” arguing that the forces of Western liberal democracy and free-market capitalism had seemingly achieved their final triumph over all other competing ideologies.³ The “holiday from history”⁴ was short-lived, as was the jubilant mood. If 11/9 (the fall of the Berlin Wall on November 9, 1989) had been earthshaking, 9/11 was no less so: on September 11, 2001, some 3,000 people lost their lives in the attack by al Qaeda terrorists on the United States—abruptly ending the post-cold war era and ushering in the post-9/11 era. What had been euphoria turned to despair, and what had been advertised as the New World Order was renamed the “New World Disorder”⁵ or, according to even gloomier pundits, the New Dark Age.

The moral of the story is that you should proceed at your own risk in making predictions about the direction in which the world is headed. The cold war lasted fifty years, the post-cold war era far less. It is hard to know how long the post-9/11 era will last and what the post-post-9/11 era might look like. Some predictions, however, are safer bets than others. When I said at the start that the future of humanity would largely hinge on what transpires in the realm of world politics, I was perhaps betraying my bias as a political scientist. Still, it seems a reasonable proposition to argue that developments in the political arena will inform developments in economic, cultural, environmental, and other arenas. And it seems an equally reasonable proposition to argue that politics will continue to be mostly about governance, which in turn has to do mostly with the creation and functioning of rules, what most people think of as “laws.” One of the safer bets is that there is likely to be little progress in international politics without progress in international law—the *law of nations*, defined as “the body of rules which are binding upon states in their relations with one another.”⁶

The purpose of this book is to examine and encourage further reflection on the nature of the relationship between international politics and international law, and on the role that the latter might plausibly be expected to play in improving the former. In short, how does politics shape the development of international law, and how does international law shape politics? We need to examine not only what rules exist in the global polity but also how they are created, the extent to which they are obeyed and influence behavior, and how they work (or do not work). Most important, we need to consider whether international law *matters*. In other words, as one symposium posed the question: “What good is international law?”⁷ If we can answer that question and improve our understanding of the relationship between international law and international politics, we may then be in a better position to speculate, should we wish to, about which alternative world futures are possible and desirable. We begin our investigation here by looking at the current setting in which international law has to operate.

The Relevance of International Law

Judging by its coverage in the mass media, international law would appear to matter quite a bit, although the media are more likely to report



"Don't get me wrong. Legality has its place."

How relevant is international law?

on major violations of law than on its routine observance. ("U.S. Troops Invade Iraq" or "Russia Attacks Georgia" or any other apparent act of aggression is front-page news, while we would be surprised to see, even buried in the back of a newspaper, an article trumpeting "7 Billionth Piece of Mail Is Delivered Safely across National Boundaries This Year," a fact made possible only through the existence of the Universal Postal Union, an international organization created by a treaty that has established a single planetwide postal territory.)

Among the headlines that have appeared in the world's newspapers in recent times are the following:

- "As Time Runs Short for Global Climate Treaty, Nations May Settle for Interim Steps," referring to the failure of the 190 countries at the 2009 Copenhagen Conference to reach an agreement on a new treaty to address the problem of global warming.
- "Cluster Bomb Ban Takes Effect: Convention Becomes Binding International Law," referring to the 2008 treaty that prohibits the

production and use of projectile munitions that maim and kill civilians through their indiscriminate explosive effects.

- “Would an Attack on Iran Be Legal?” raising the question of whether the United States, Israel, or any other country could legally attempt to destroy the nuclear weapon facilities that Teheran was suspected of developing in violation of its obligations under the Nuclear Nonproliferation Treaty.
- “Major Portion of Israeli Fence Is Ruled Illegal by World Court,” alluding to the 2004 opinion (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*) issued by the International Court of Justice that called on Israel to dismantle the 400-mile barrier it was erecting as a response to Palestinian terrorist attacks because the wall violated “humanitarian law” and other norms.
- “Taliban Stones Man and Woman to Death for Allegedly Having Affair,” noting the verdict of a local sharia law Islamic court in Afghanistan, which found two individuals guilty of an adulterous relationship, a decision at odds with human rights treaties that most countries are parties to.
- “International Court Adds Genocide to Charges against Sudan Leader,” calling attention to the killing of at least 100,000 black, non-Arab villagers by militias supported by the Sudanese government, for whose president the International Criminal Court had issued an arrest warrant.⁸

Indeed, on almost any given day, if we were to read the *New York Times* or any comparable newspaper, we would probably find a number of stories that have some sort of international law angle, either reporting on arms control, environmental, or human rights treaties or dealing with more mundane but not insignificant matters, such as the regulation of trade in foodstuffs, overseas air and sea travel, disease control, or countless other concerns—all of which have relevance to the life of the average citizen on this planet. In this book, we examine how international law relates to the use of unmanned drones by the Central Intelligence Agency (CIA) to target terrorists in the Afghanistan War, the North Atlantic Treaty Organization (NATO) humanitarian intervention in Libya, the attacks by Somali pirates on international shipping in the Indian Ocean, the BP oil spill in the Gulf of Mexico, the scramble to gain control over oil and

natural gas deposits in the Arctic, and numerous other issues that have been in the news recently.

Still many would question the relevance of international law in a world in which so much lawlessness and violence exist.⁹ To be sure, order is not the only function to be served or the only value to be promoted by law. Others, as suggested earlier, include democracy, justice, economic prosperity, and ecological quality. However, order is the *sine qua non* because it is hard to maximize any of the others in the absence of at least a modicum of stability (that is, peace). Obviously, to even the most casual observer, the globe has not been a very peaceful place of late. As Charles Tilly has written, “More collective violence was visited on the world (in absolute terms, and probably per capita as well) in the twentieth century than in any century of the previous ten thousand years. . . . Between 1900 and 1999, the world produced about 250 new wars, international or civil, in which battle deaths averaged at least 1,000 per year. . . . Altogether, then, about 100 million people died in the twentieth century as a direct result of action by organized military units backed by one government or another.”¹⁰ The first decade of the new millennium was not any less violence-prone, although the primary security threat today arguably stems somewhat more from nongovernmental actors such as al Qaeda—that is, more from nonstates than from rogue, outlaw states.

Jonathan Schell, in *The Fate of the Earth*, has eloquently captured the ultimate cataclysm that might possibly await us in the twenty-first century, the extinction of the human race:

Only six or seven thousand years ago civilization emerged, enabling us to build a human world, and to add to the marvels of art, of science, of social organization, of spiritual attainment. But, as we built higher and higher, the evolutionary foundation beneath our feet became more and more shaky, and now in spite of all we have learned and achieved—or, rather, because of it—we hold this entire terrestrial creation hostage to nuclear destruction, threatening to hurl it back into the inanimate darkness from which it came. And this threat of self-destruction and planetary destruction is not something that we will pose one day in the future, if we fail to take certain precautions; it is here now, hanging over the heads of all of us at every moment.¹¹