THE POLITICS OF INTERNATIONAL LAW

U.S. Foreign Policy Reconsidered

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Lynne Rienner Publishers ▪ Boulder and London

Published in the United States of America in 1990 by
Lynne Rienner Publishers, Inc.
1800 30th Street, Boulder, Colorado 80301

and in the United Kingdom by
Lynne Rienner Publishers, Inc.
3 Henrietta Street, Covent Garden, London WC2E 8LU

Library of Congress Cataloging-in-Publication Data
Forsythe, David P., 1941–
The politics of international law : U.S. foreign policy reconsidered / David P. Forsythe
p. cm.
Includes bibliographical references
ISBN 1-55587-207-7 (alk. paper)
ISBN 1-55587-208-5 (pbk. : alk. paper)
1. United States—Foreign relations—1981–1989. 2. International law—United States. I. Title.
JX1417.F675 1990
341'.04'0973—dc20 90-32486
CIP

British Cataloguing in Publication Data
A Cataloguing in Publication record for this book
is available from the British Library.

Printed and bound in the United States of America

The paper used in this publication meets the requirements
of the American National Standard for Permanence of
Paper for Printed Library Materials Z39.48-1984.
5 4 3 2

The current disorientation in American foreign policy derives from our having abandoned, for all practical purposes, the concept that international relations (and also to a degree the internal conduct of governments) can and should be governed by a regime of public international law.

— Senator Daniel Patrick Moynihan

such U.S. action. By understanding unilateral withholding of assessed U.S. payments to the U.N. by Congress and the Reagan administration, one understands the context within which the Bush policy-making team considered its options.

The same type of linkage between the recent past and the present can be demonstrated with regard to other issues covered in this book, such as strategic defense and arms control treaties, refugee policy, and intervention in Nicaragua. The Reagan past contributed directly to U.S. foreign policy under Bush. When President Bush decided to use military force in Panama in the fall of 1989, his decision was facilitated by Reagan's intervention in Grenada. George Bush even used many of the same arguments employed by his predecessor in trying to justify the forcible change of government in Panama—i.e., an asserted right of intervention in the name of democracy and human rights. The two situations were not identical, but in large part they played themselves out in similar fashion. Both uses of unilateral force proved politically popular at home, while they were clearly criticized at the United Nations and the Organization of American States as a violation of international law. There were other similarities as well. The more novel and sweeping arguments by the president were downplayed by professional diplomats and lawyers, who stressed traditional international legal arguments concerning self-defense and humanitarian intervention. Understanding Reagan and Grenada provides an appropriate frame of reference, not identical but still highly useful, for understanding Bush and Panama.

In addition President Bush retained Abraham D. Sofaer as the legal adviser in the State Department, and that ensured some continuity between the Reagan and Bush administrations on international legal questions.

Finally, at the time of writing, many policy positions of the Bush administration were not entirely clear, thus precluding detailed and definitive treatment of that era.

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The central value judgment permeating this work is that the United States cannot make a lasting contribution to world order by seeking short-term national advantage, but rather will promote its most fundamental national interests by adjusting its foreign policy to the transnational and cosmopolitan values found in contemporary international law. I am highly skeptical of the long-term benefits, even to ourselves and most certainly to others, of a moralistic and crusading American manifest destiny, which tends to confuse American nationalism and advantage with stable and equitable global order.

Realistically, attempts to build world order on disproportionate U.S. advantage are likely to prove unsuccessful in the late twentieth and early twenty-first centuries, given the relative decline of U.S. power, especially economic power. Stable and lasting order must entail a reasonably equi-

Preface

This book is intended for introductory students of international relations, U.S. foreign policy, international law, and policy-making in Washington. I am not one to nitpick over academic boundaries.

Its origin lay in my difficulty in finding suitably political material to use in my international law classes, and suitably legal material for my classes in international relations and U.S. foreign policy. Most of the published material on international law was written by law professors and lacks a realistic sense of the political struggle involved in applying international law to public policy. This legalistic material lacks especially a sense of the conflict between the Executive and Congress that so pervaded Washington politics in the 1980s (and even before, say from the early 1970s).

The present book tries to capture and represent international law, warts and all, as it really functions in the policy-making process in Washington. Rather than presenting that law as interpreted by the International Court of Justice or by a distinguished legal scholar, I present it as interpreted by policy-making institutions, then compare that interpretation—and especially the political factors behind it—with a more cosmopolitan view of international law oriented to a stable and equitable world order.

The question may be raised as to why I limit myself in this book to the Reagan era. First, to students, going back more than a decade seems like ancient history. While there is much to be learned from a longer historical perspective, there are sufficient lessons to be learned just by concentrating on the more recent past. I believe that one should not attempt too much in a short book designed for teaching purposes.

Second, that more recent past feeds directly into the present. For example, decisions in the Reagan era about U.S. financial assessments to the United Nations affect the Bush administration. President Bush inherited the controversy over U.S. assessments; and when Bush continued to threaten unilateral withholding of those U.S. payments, in order to block U.N. de facto recognition of Palestine as a state, he resurrected all the old arguments that had been brought into play both for and against

table sharing of values, advantages, and benefits. One of the geniuses of the American political experience, with the major exception of the Civil War era, has been the ability to compromise, to share values, between federalists and advocates of states' rights, between northerners and southerners, between liberals and conservatives, between developers and environmentalists. This point seems largely to have escaped those who manage U.S. foreign policy, and who have confused a temporary U.S. predominance in the world after World War II with the requisites of stable equilibrium in a basically polycentric world in which power, as well as other values such as wealth, must be shared. Greater U.S. attention to the legal rules of the game of international politics, since those rules encompass a sharing of benefits over time, is in fact in the real, if long-term, U.S. national interest.

* * *

The intellectual roots of this central value judgment, as well as of my approach in general to understanding law and politics, can be traced to Richard Falk's seminar on international law at Princeton University some decades ago. There were more recent and direct contributions to this book from a variety of persons who at least refined my biases, if they did not succeed in totally eliminating them. The manuscript was read in whole or part by Margaret Galey, consultant to the House Foreign Affairs Committee; Frank A. Sieverts, an aide to Senator Claiborne Pell, chair of the Senate Foreign Relations Committee; Larry D. Johnson, a principal legal officer in the United Nations Office of Legal Counsel; Patricia Fagan from the Washington office of the United Nations High Commission for Refugees; Margaret Crahan, Luce Professor at Occidental College in Los Angeles; Burns Weston, Murray Professor of Law at the University of Iowa; and of course Richard Falk and Francis Boyle. Lynne Rienner and her chosen readers were also more than helpful, as well as gracious, in producing the final version—the contents of which are, as usual, the final responsibility of only the author.

The University of Nebraska, through its "Congress Fund" as administered by the Political Science Department, greatly facilitated this study with a grant that made possible some concentrated research and uninterrupted writing during the summer of 1989. My graduate assistant for much of the preparation of the book, Kelly Pease, was diligent in locating material and checking sources, particularly with regard to Chapter 5. My daughter, Lindsey, then a political science major at Davidson College, read parts of the manuscript and told me what undergraduates might like or dislike, might find confusing or need elaboration. Finally, my wife, Annette, helped me recover from a brief hospitalization, which allowed a more rapid completion of this book.

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Foreword

Richard Falk

For too long, the importance of international law for the study of international relations and foreign policy has been undervalued, especially here in the United States. It is fairly obvious why this has happened. It was, first of all, a reaction to the widely shared view that an unwarranted emphasis on international law by the United States had led diplomats astray in the period prior to World War II. Legalism in foreign affairs was held responsible for two equally unhealthy attitudes by government officials—either an unwarranted confidence that a legally correct diplomacy could overcome the impulse of aggressive states to wage war, or a misleading belief that a legalistic isolationism from the geopolitical stage would keep the country out of foreign wars. The failure of appeasement to hold Hitler in check produced the lesson of Munich, whereas the surprise attack on Pearl Harbor overcame the U.S. isolationist impulse. The combination of these pre-1945 learning experiences was interpreted by the U.S. foreign policy establishment as reason enough to be wary about international law and international lawyers.

Getting rid of illusions stemming from a legalistic view of international political life has been interpreted during the Cold War years since 1945 to mean emphasizing the unavoidably central role of military capabilities for purposes of both deterrence and defense. Foreign policy has been built around the doctrine of containment in the setting of an East-West rivalry of such a deep ideological character that the opposing sides perceived each other as committed more or less unconditionally to a world of conflict in which, to be sure, rules of the game existed, but not an operative legal framework based on shared values, including a respect of legality.

And then there was a related factor at work. The United States emerged after World War II as the main guardian of the established international order. With the collapse of colonialism and the partial transfer of East-West tensions to Third World arenas, U.S. leaders were reluctant to acknowledge any legal limitations on government discretion—not just in the East-West rivalry but in Third World politics as well. This insistence on freedom of maneuver in "the periphery" helped generate

a national controversy during the Vietnam War, and then reached its climax during the Reagan years, when U.S. representatives seemed to take pride in flaunting their defiance of international law, perhaps most flagrantly in repudiating the World Court in the aftermath of its decision condemning U.S. support for contra efforts to disrupt Sandinista rule in Nicaragua.

Political scientists tended to follow the policy-makers' lead during this period. A realist consensus emerged among academics in which states were treated as the dominant actors in a world shaped by patterns of military and economic power. The subdiscipline of international relations gradually clustered around two nodes of concern: security studies on matters of war and peace, and international political economy on issues of money, trade, and investment. International law had little role to play in such a worldview, providing at most technical instruments for formalizing regimes set up to enable rational types of cooperation among states in various areas of international life.

This realist image of the world was always an exaggeration, although its ideological utility was evident during a period of protracted ideological struggle on an international level. It corresponded with the view that international security is mainly a matter of military balances and that the United States needed its freedom of action to combat its ideological enemies, who were being unscrupulously orchestrated from Moscow. The depreciation of international law followed naturally from the zero-sum logic of the Cold War. But realism as an explanatory perspective even in Cold War settings left too much of reality out of the picture. Realist diplomats all through this period were busy negotiating legal instruments for various areas of international life. Great care was devoted to the shaping of obligations in a manner that corresponded with the perceived priorities of the national interest. During the four decades after World War II, international law experienced unprecedented growth in several critical issue-areas: arms control, human rights, international economic arrangements, regulation of the oceans, and technical cooperation. Of course, realists could point to weak enforcement prospects in the event of noncompliance, but the record suggests high degrees of compliance and an increasing dependence on law to sustain stable expectations about behavior in international life.

Now, with the moderating of East-West tensions, the prospects for international law seem brighter than ever before. This optimistic assessment is reinforced by Mikhail Gorbachev's stress on strengthening international law and organization as a key ingredient of Soviet "new thinking" in foreign policy. Further encouragement for giving greater attention to the role of law in world affairs comes from the Third World, whose government representatives are now campaigning to have the United Nations formally dedicate the 1990s as the decade of international law.

These political developments occur at a time when the complexity and fragility of the ecological and economic dimensions of international life are becoming more apparent to all of us, providing the occasion—some would say the necessity—for the emergence of a global-scale legal order.

Against such a background, David Forsythe's book is beautifully adapted for teachers and students of international relations and foreign policy who want to move beyond *realism* so as to get a better grasp of *reality*. His approach to the relevance of international law has several attractive features: It grounds an affirmation of international law on a careful calculus of national interests, and thereby avoids certain preachy, legalistic tendencies to advocate adherence to law for its own sake; it explores the relevance of international law within the sinews of U.S. governmental decision-making (especially by the Executive and Congress) in circumstances of policy choice that range across several illustrative issue-areas, thereby introducing a modified "case" approach to the study of international law; it places law within the wider setting of an evolving political order and premises its advocacy on the desirability of conceiving of national interests in longer time cycles than has been habitual for policy-makers, who have tended in the past to be overly preoccupied with opinion polls and national elections; it puts the stress on the U.S. policy setting, but in a manner that casts light on the workings of the international system as a whole.

Forsythe's pedagogy is attractive. The role of law is presented as the outcome of carefully constructed narrative accounts of international events, such as a particular intervention, enabling an appreciation of the interplay of law and politics without the need to master a complex technical apparatus requiring years of law school study. Also, Forsythe understands clearly that most public international law is the work of the "political" branches, not courts. In the past, international law has often been artificially presented as a series of judicial decisions, an approach designed to make the subject matter seem more similar to the traditional subjects of legal study such as torts, contracts, and constitutional law. Forsythe realizes that this gain in respectability for international law as an object of academic inquiry is a turn-off to students of politics who are aware that the Judiciary is only marginally and inconsistently connected to the foreign policy process, which usually involves executive predominance reinforced or challenged by Congress.

It should be remembered that international relations as a serious subject of study has emerged rather recently, earlier in this century. And further, that it emerged by separating the study of politics and diplomacy from the study of law. Before the twentieth century, aside from the insights of historians like Thucydides and philosophers like Machiavelli, international law completely dominated the study of international life. In a sense, international law has served as the parent of international rela-

tions, and the latter, as it has come into its own, has acted out the role of rebellious adolescent, a necessary and desirable stage in achieving independence and a separate identity. However, once the work of differentiation has been completed, as is certainly the case for international relations, maturity has been achieved and the occasion for reconciliation is at hand; one way to perceive David Forsythe's fine book is as a reconciling initiative undertaken, significantly, by a political scientist rather than by a lawyer.

My hope would be that Forsythe's book will help make political scientists, generally, more inclined to reintegrate international law into the study of international relations as a central element. It is difficult to imagine a positive future for our own country and for the peoples of the world that does not include a much enhanced role for international law. It is not merely an aspiration on the part of idealists; it seems more like the necessary prudence that we should expect from practical diplomats entrusted with foreign policies built around the real security of the citizenry. In a constitutional democracy, one cannot always wait for enlightened bureaucrats to guide official policies. There is a responsibility to educate the citizenry, especially the young, in such a way as to ensure that democratic pressures will induce more enlightened patterns of governance. Here, too, we can be grateful to David Forsythe for putting into our hands a tool to educate a citizenry better prepared to face the challenges of the twenty-first century.

Contents

I

Introduction: A Framework for Analysis

Too often public international law has been taught as if it were just another black-letter law course whose subject matter was about as straightforward as the federal income tax code. . . . Unless we reestablish the integral connection between the study of international law and the practice of international relations, public international law professors will probably become as extinct as the dinosaurs. —Francis A. Boyle

International law exerts considerable influence on the political life of the United States, although this fact is not widely appreciated. While international law's influence is known to specialists of the subject, most observers of U.S. foreign policy do not perceive that influence so readily. Most textbooks and other academic works covering U.S. foreign policy do not usually treat international law. It is thus no wonder that beginning students of both international law and politics approach this central thesis about international law's influence with a good deal of initial skepticism. It is not uncommon to find students who believe that international law is not really law, but some kind of political morality. Skepticism is healthy, but the ultimate conclusion is inescapable. As a generalization, it is not politically realistic to dismiss international law as if it were an intellectual sandcastle built by moral philosophers, destined to be overwhelmed by the first wave of unmitigated national interest. There are exceptions to this generalization. But one can safely say that, although international law may not be always decisive and controlling, it usually exerts an influence nevertheless on the making of foreign policy in Washington. Refining our knowledge of how much, and when, international law is brought to bear on U.S. foreign policy is the major objective of this essay.

The conscious antecedent of this work is Louis Henkin's classic *How Nations Behave: Law and Foreign Policy*.[1] Like that work, a first theme of this essay finds international law to be a pervasive influence on foreign policy, as suggested above, since the law usually reflects a prior judgment that the rules enhance national interest. Seen thusly, it is no wonder that

states abide by most of the law most of the time, for by doing so they advance their long-term national interests in orderly international relations. As Werner Levi has made clear, international law is a subset of international politics.[2] In order to have international law in the first place, in either of its two basic forms of treaty law and customary law, states explicitly or implicitly have had to consent to the emergence of the rules.

This consent is based on a perception that the rule is consistent with national interests as understood at the time the rule is created. Thus, it is wrong to think of international law as a set of technical rules divorced from politics. International law results from a political process. The central problem is that national perceptions of interests change. Particular circumstances arise that generate a tension between current perceptions of national interest and the perceptions dominant at the time a particular international law was created. This situation results in a further political process in which the old rule of law is applied to the new situation.

But a second major theme of the present work differs from Henkin's excellent study. Henkin treated the United States as if it were a single, unitary, rational actor. Such an approach is normal in many legal studies, and it is certainly a well-established approach to the study of U.S. foreign policy in political science.[3] Many studies, both legal and political, speak of *the* United States, and *the* national interest. This book, however, stresses the separation of powers in Washington—or more accurately, the separation of institutions that share authority and power. In Washington in the 1970s and 1980s, as at other times in U.S. history, the Executive's conduct of foreign policy, mandated by the Constitution, had to compete principally with decisions made by Congress. Sometimes even the courts limited the Executive's freedom of decision, although there was a fairly strong tradition in the United States of judicial deference to the Executive concerning foreign affairs.[4]

Hence, a second theme supplements the first: Congress as well as the Executive, and indeed even the Judiciary, may interject international law into U.S. foreign policy. Particularly during those eras when Congress is assertive, or on issues where the Congress or the Judiciary refuses to be deferential, the careful observer who seeks a full understanding of U.S. foreign policy must look beyond the Executive alone to understand law's role in affecting policy. This point was fully appreciated in some of Professor Henkin's other splendid works,[5] but he did not incorporate it fully into *How Nations Behave.*

A third major theme springs from the second. It will become clear that I believe that the Executive's conduct of foreign policy during 1981–1988 frequently revealed a complete lack of serious respect for international law, and was therefore inherently dysfunctional to world order over time. Robert Pastor, a former staffer of the National Security Council, was persuasive when he argued, "The [Reagan] administration

showed a blatant disregard for international law."[6] Herbert W. Briggs, an honorary editor of the *American Journal of International Law*, wrote in early 1987, "It remains for the United States to acquire once again a decent respect for the opinions of mankind—and rules of law."[7] Thomas M. Franck, current editor of the same prestigious journal, when looking at the Reagan administration's treatment of international law, recalled Manley Hudson's erudite but witty analysis of an earlier American era: the United States "seldom loses an opportunity to profess its loyalty to international arbitration in the abstract. . . . the expression of this sentiment has become so conventional that a popular impression prevails that it accords with the actual policy of the United States."[8] So during the Reagan era, the profession of interest in international law may have wrongly created the impression that U.S. policy was law-abiding.

This is an important point in and of itself, especially for young students of international law and politics inclined—naturally enough—to associate their government inherently with order, legality, justice, motherhood, and apple pie. Because most American families are nonpolitical, and because most public schools exist to inculcate patriotism, among their other duties, it is to be expected that many if not most younger students are blissfully ignorant of many historical facts in their nation's public life. They find it surprising to learn that the Federal Bureau of Investigation (FBI) has consistently violated the civil rights of many Americans, especially of dissenters and minorities.[9] And they find it surprising to learn that abroad the United States has participated in assassinations, massacres, suppression, and repression.[10] I seek no personal vendetta against Reagan the man or Reagan the president. But I do wish to emphasize the yawning chasm between Reagan's personal popularity within the United States and the reality of the policies he endorsed. One goal of this book is to give readers ample reason to scrutinize the actions and rationalizations of any U.S. president.

It will become clear enough in the following pages that the two administrations of Ronald Reagan treated international law mostly as a self-serving afterthought to policy decisions. More will be said in the conclusion about how this orientation was based on a self-righteousness commonly referred to as American exceptionalism, or the "city-on-a-hill syndrome."[11] In this view, Americans constitute an especially good people with a manifest destiny to remake the world in its own image, so when the United States acts, it inherently acts for the good of all. It has no need of international legal rules as determined by others, for that would impede U.S. freedom of action. Any reinterpretation by the United States of traditional rules is for the good, by definition, and therefore both desirable and permissible.

To the extent that this pronounced tendency has been corrected in U.S. foreign policy, it has come from either Congress or the courts. It is

part of the purpose of this work to explore when and why the legislative and judicial branches will challenge the Executive's use (and misuse) of international law. Richard Falk wrote, after the Reagan administration disregarded the World Court's judgment in the mid-1980s case involving Nicaragua and the United States: "We must rethink the question of judicial effectiveness in the broader setting of public opinion and political democracy, and not confine our evaluation to conventional concerns about governmental [viz., executive] nonresponsiveness."[12] In other words, if one is interested in U.S. compliance with international law as adjudicated by the International Court of Justice, one has to look to Congress and public opinion, and on occasion to the courts, not just to the Executive.

There is a fourth theme as well. It is commonplace to observe a shrinking world in the sense that communication and transportation have made nation-states at least more interconnected, if not more interdependent. Without doubt states interact more (whether this interaction leads to real dependence or interdependence is debatable as a generalization applying universally). And as a result, at least partially, of this increased interaction among states (and also non-state parties), there is a great deal of international law on the books. Interaction may or may not breed conflict (it probably does)—but it certainly breeds regulation. Moreover, the growth in the number of public and private international organizations has been well documented.[13]

U.S. foreign policy is thus subject to increased review, some sort of increased reaction, from other states and also from international organizations—frequently in reference to international law. But however much one might read of resolutions passed by the United Nations Security Council or General Assembly, or read of protests by foreign friends or adversaries, this book argues that most such international influences do not have the impact on the Executive that Congress and the courts do. We may live in a shrinking world, but when decisions are made in Washington, congressional or judicial opposition to the Executive is usually far weightier in terms of actual influence than the response of the so-called international community. That this point may be distressing to those concerned with a cosmopolitan world order does not lessen its veracity.

This is not to suggest that Washington is the world. The assumption that the world centers on Washington, or follows Washington, or that the world outside the Washington beltway does not matter, is certainly one of the short-term problems in the making of U.S. foreign policy. Along with Michael Reisman in his useful book, *International Incidents: The Law That Counts in World Politics*,[14] it is important to chronicle the response of the international community—viz., the other states and international organizations—to U.S. foreign policy decisions. Whether that legal community supports, aquiesces in, or opposes U.S. policy affects both inter-

national law and world order in the long term. Indeed, international law is not simply the law on the books—the static law written down in treaties and found in court decisions interpreting customary international law. The living international law is also composed of how important states and the larger legal community understand and apply that law in concrete situations. Part of that process entails how the international community reacts to legal claims made by a state, the United States included.

But in the short term, what matters most to the Executive, which remains the primary institution for the conduct of U.S. foreign policy even in times of congressional assertiveness and judicial activism, is the position taken by those other U.S. branches of government. International influences, to the extent that they are not already incorporated in U.S. decisions in some form, usually occupy a tertiary position in impact on the Executive. As will be shown, the subject becomes highly complex when international influences seep into congressional or judicial deliberations. In many ways the boundary between what is national and what is international is highly permeable. Nevertheless, to the extent that national and international influences are distinguishable, the former usually count for more than the latter in Washington politics.

* * *

I chose the cases of decision-making for study in this book to elucidate these four basic themes. No short list of case studies could capture all the complex dimensions of international law and politics worth noting. Different cases could be utilized to drive home different emphases. All these cases show, however, that international law should be viewed in political context and that international law is usually an important part of the Washington debate on policy choice—although the importance varies. All the cases show that the legal arguments, claims, and justifications offered by Reagan officials raised major questions about their seriousness and credibility. All of the cases show that if the Executive's policy were altered to increase conformity to international law, that change transpired primarily because of congressional or judicial counter-decisions. Distinctly foreign influences were usually inconsequential, at least in terms of direct influence.

The first case, the Strategic Defense Initiative (SDI, or Star Wars Defense), shows that Congress, through the Senate, successfully forced a change in the administration's position concerning how to interpret the Anti-Ballistic Missile (ABM) treaty. Here is a case showing the clear influence of international law on U.S. policy; the law works, and it works because of the Senate. It will also be shown that the Senate's institutional self-interest had more than a little to do with a willingness to fight the Executive determinedly on the somewhat arcane subject of how to inter-