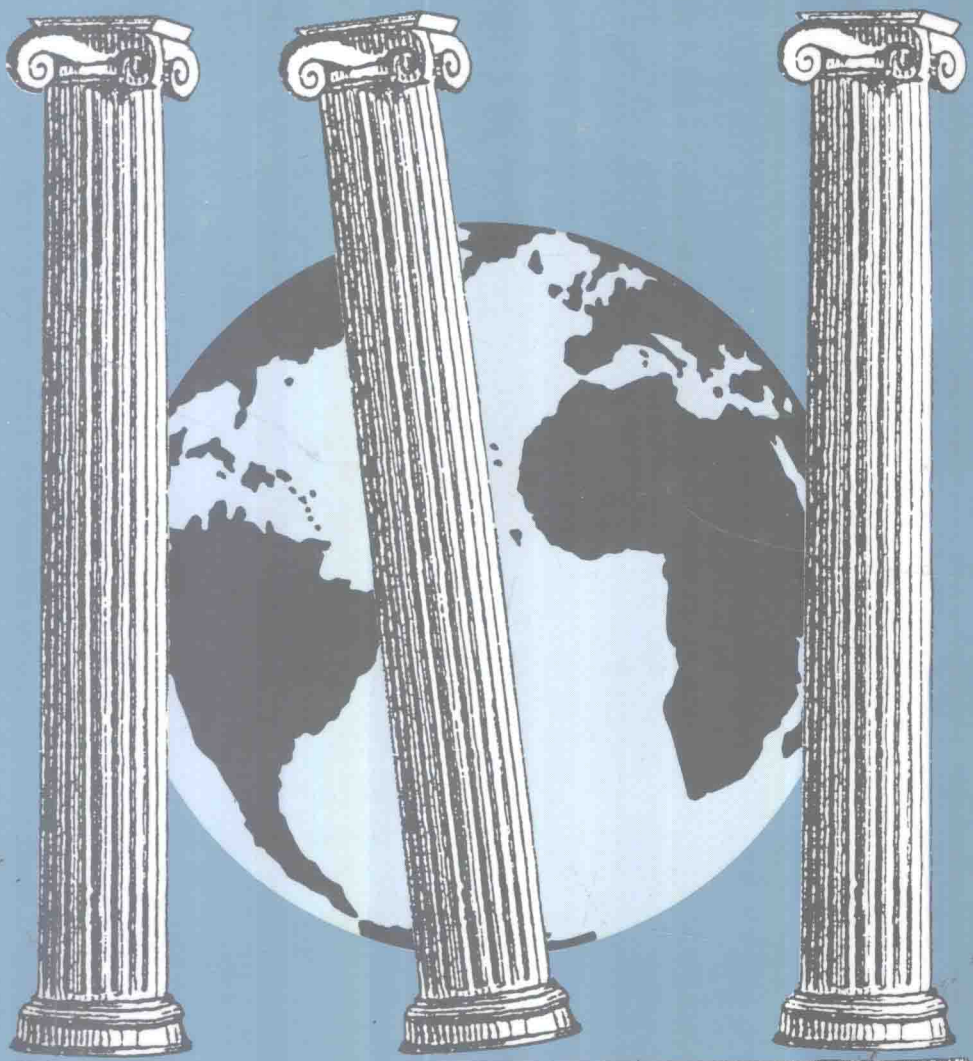
REVITALIZING INTERNATIONAL LAW

RICHARD FALK



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for Elisabeth

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I also want to thank the many activists around the country who have been insisting that their government in Washington act in accordance with international law, whether it be on nuclear weapons policy, Central America, or in relation to South Africa's apartheid. I have been particularly inspired by the Ground Zero community in the state of Washington that has done so much to evolve a practice of nonviolence that is relevant to resisting nuclearism and that takes account of the special quality of American political culture. From these dedicated citizens of our country I have learned to revalue international law as an instrument of political reconstruction at home. That such true patriots should be imprisoned while those who perpetuate massive and continuing crimes of state are rewarded with power, prestige, and wealth is one expression of our troubled times.

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INTRODUCTION

A LITTLE NOTICED ROLE REVERSAL has been enacted by the United States over the course of the last decade or so. The United States had built up a reputation before World War II, and just afterward, as being excessively law oriented in foreign policy. Such influential realist critics as George Kennan, Dean Acheson, and Hans Morgenthau worked hard to discredit an allegedly inappropriate legalism that got in the way of a more pragmatic assessment of national interests.

As so often happens, especially in democratic society, a lesson learned produces behavior that is excessive in the opposite direction. The pendulum swings out of control. Ever since the Vietnam War the United States finds itself increasingly reluctant to accept any obligation for a legal accounting of its foreign policy. After some years of strenuous efforts to sustain at least a semblance of respect for international law through efforts at official rationalizations of contested policy, during the Reagan years the United States stripped away the facade of legal deference. The repudiation of the Law of the Sea Treaty, the invasion of Grenada, the aerial attack on Libya, and the repudiation of the authority of the World Court in relation to its policies in Central America are part of a consistent profile of unilateralism in U.S. foreign policy, as well as courses of action at variance with most readings of international legal obligation.

Before attempting to interpret these developments, it seems appropriate to assess whether the earlier reputation for legality, let alone legalism, was deserved in either a positive or critical sense. After all, during the ascent of legalism the United States found little to inhibit its overseas armed interventions during more than a century after the proclamation of the Monroe Doctrine on the internal affairs of Western Hemisphere countries, especially those in Central America and the Caribbean. Also, during World War II, the United States did not seem more law oriented

than its more geopolitically sophisticated European allies, or for that matter, its otherwise morally degraded adversaries. As far as is known, no political leaders ever consulted government lawyers as to the legal status of the strategic bombing of cities or the use of atomic bombs, certainly issues of legal gravity if the supposed legalistic inhibitions were truly operational. This last point may be fully explicable as an expression of the moral enthusiasm associated with a war effort believed to be serving a just cause. The American political temperament is such that it is slow to abandon a posture of peace, but once abandoned, there arises an unconditional commitment to total victory.[1] Nevertheless, the suspension of legalist orientations toward foreign policy during wartime is a major area of exception to any generalized description of U.S. behavior as law oriented. Further in the background are the mystique of the frontier, with its legacy of glorified violence, and a general persisting disposition toward endemic violence, given almost mythic status by claiming the right to bear arms as inseparable from civic virtue and citizen prerogative.

At the same time, a reputation for legalism was not entirely based on fantasy. Notable statesmen, especially globalists such as Woodrow Wilson and Franklin Roosevelt, were given to flights of idealism that usually culminated in pleas for an expansion of the law in global affairs. Beyond this, professional associations of lawyers, influential in a country where those with legal training often emerged as secretaries of state and high officials in government, often seemed to equate peace with a global-scale extension of the U.S. judicial system. In effect, the legalism was associated with image, rhetoric, and aspirations whereas a pragmatic spirit seems to have pervaded the international behavior of the United States throughout its history as an independent state.

The Iran/contra disclosures of 1986–1987 pose vividly the issue of whether the United States is capable of carrying out its foreign policy without gross and persistent violations of international law. Surveying the bipartisan record since 1945, I believe it would have to be concluded at this stage that the will to violate has been consistently present, has been at the very center of the U.S. governing process, and has been endured as a fact of life by the American public and by cognate governmental institutions, especially the Congress and the courts.

If one asks the further question as to whether these violations have been really necessary or have helped the United States advance its foreign policy goals, then the response is more complex and problematic. It depends on counterfactual reasoning and suppositions (what would have happened if . . . ?). The question also raises issues associated with the degree to which the proclaimed goals (containment of the Soviet Union

and avoidance of the spread of communism) of U.S. foreign policy are coincidental with implicit goals (including, by various accounts, the spread of market capitalism and the destruction of anti-Western Political movements).

And then, there is a further dimension of inquiry. The United States emerged from World War II as the only truly global power. Would not any government acting within the boundaries of such an ascendent global role have found itself driven by geopolitical and economic imperatives that would produce a clear priority over respect for legality? In effect, the pattern of lawlessness associated with post-1945 U.S. foreign policy tells us more about the world-order system than it does about the weak influence that international law exerted on American leaders in this period. And besides, it can be asked, has not the Soviet Union, the principal rival to the United States, also seen fit to act without legal inhibition in pursuit of its vital interests?

Even here, a chain of reasoning can be initiated that leads to an appreciation that the option to ignore or violate international law is claimed by all governments whenever their security interests are at stake. It is not a matter, in other words, of gearing up for the cold war that has eroded compliance by American leaders with international law, although such settings have posed the tension between law and policy in starker forms.

These rhetorical questions help us focus on the vital link between policy concerns and structural issues. One underlying contention of this book is that the choice to adhere or not to international law is sharply constrained by the logic and character of the evolving state system as the prevailing form of world order. Within this system, a particular account of realism has triumphed, especially in relation to matters of war and peace, uses of armed force, and national security. This realist position associated with such thinkers as Hobbes, Machiavelli, and Clausevitz, and more recently with Brzezinski and Kissinger, regards armed conflict almost as a test of wills and capabilities, a characteristic unaltered even by the stark consequences of a nuclear encounter. Avoiding military defeat subordinates all other considerations. Of course, such realists adjust their image of conflict to the extent that they embrace deterrence as a way to reconcile the unconditional character of war with survival in the nuclear age. Yet, if deterrence fails, the realists seem prepared to drag the planet and its inhabitants down the trail to extinction. Their political imagination is trapped in what, from a neutral perspective, would surely seem to be a pathological double bind.

It should also be stressed that realists are not nihilists. Their position is not contra law as such, but contra what they conceive to be an

excessive reliance on law in a circumstance of political anarchy, especially relevant in the setting of security policy and war and peace issues. The realist, if legally oriented, sees no conflict between maximizing security and adhering to law.[2] The law and supportive facts can be bent into a kind of apologetic congruence, enabling the policymaker to invoke law for the most blatant uses of force and to do so in good faith. When the other side engages in such behavior we easily label it propaganda. When the apologetic posture is framed in accordance with our own democratic process then it is accorded full faith and credit, at most being labeled as one-sided or controversial, but even such mild criticism is rare. More common is for critics to enter a debate as to the proper interpretation of the relevance of international law to a contested policy of the U.S. government.

Further in the background is an unresolved jurisprudential controversy about the character of law. The Harvard Critical Legal Studies perspective, basing itself on post-Marxist views of the class character of law and on legal realist views of doctrinal indeterminacy, encourages the understanding that law will be inevitably bent by the interpreter and that the controversy over the proper line of interpretation can only be solved politically, that is, by the choice of goals of policy and affinities of the interpreter. In this regard, it becomes a foolish exercise in bad faith for the critic of existing policy to mount a legal argument in opposition.[3] It is foolish because it will not persuade or succeed, given the alignment of societal forces. It is bad faith because it supposes there is a correct, binding, dispassionate interpretation of legality and illegality in international affairs.

These essays reject such critiques of legal reasoning, although acknowledging their heuristic significance. My position is that discussion of controversial legal issues—such as the status of nuclear weapons or armed intervention in a Third World country—helps to clarify choices and can reinforce societal opposition to state policy. I agree that disinterested interpretation is a fiction, but it seems possible to contribute to the process of political evolution by advancing informed and honest interpretations of controversial foreign policy situations from the perspective of international law. The primary audience for such analysis is the citizenry, not the government or the policy-making community. Too much international law scholarship is preoccupied with official lines of debate in the capital city.

My aspiration is different. I regard the policymakers as mainly deaf, at least until a policy consensus is shattered. I think an informed, active citizenry is vital to enable democracy to function at this stage of history. Law has a vital part to play. Some interpretations of international law

seem much more likely to move us away from nuclearism and from reliance on military solutions. I favor these and believe that the citizenry of democratic countries should insist on binding their leaders to adhere accordingly. In this regard, to strengthen international law is primarily a matter of opening up the dynamics of constitutionalism at home, giving citizens a right to challenge foreign policy initiatives as illegal and expecting judges to feel independent of the government in assessing the substantive merits of the contesting claim. Such an undertaking is no more arbitrary or futile than fleshing out the broad grants of constitutional prerogatives at home (due process, privileges and immunities, equal protection of laws). More specific applications of broad concepts of international law such as self-defense, armed attack, and intervention could evolve by accretion; the influence of third-party assessments could guide the review process at national levels.[4]

Underneath this call for judicial activism and citizen initiative is the dual sense that governments need to be restrained from within on both pragmatic and normative grounds and that debates about the proper interpretation of international law doctrines will be eventually resolved in the direction of narrowing the discretion of governments to use military force and of repudiating all tactics that rely on indiscriminate application of force. Such a normative bias can be construed divergently in specific circumstances, but over time placing a burden of justification on the user of force is likely to produce patterns of expectation in international life that work against violent strategies of problem solving. In my judgment, to accept more permissive views of state authority to use armed force to resolve conflict or to sustain hegemonies is to validate barbarism and modes of security and imperial geopolitics that lead by their logic in the direction of nuclear catastrophe and the end of life on earth.

So we are confronted with this overarching question at the outset: how can we expect international law to function in the current world-order setting? Of course, the complexities of international life provide many settings where governments appreciate and are dedicated to the maintenance of mutual convenience across boundaries. Without a generally reliable international legal order, the international political economy would be in a shambles. It is imperative that information, capital, people, and things move safely and reliably across boundaries within an agreed transnational framework of rights and duties, reinforced by traditions of compliance, procedures of implementation, and even, as needed, sanctioning processes. Of course, such a transnational order is threatened by disruption (terrorism), by warfare, and by intensified forms of economic competition that generate protectionist reactions, the

formation of trading blocs, and a general drift toward more intense varieties of conflict. Despite this, the postulates of law are powerfully sustained by a dynamic of reciprocity that is rarely challenged in any systematic way. The dynamic of increasing interdependence associated with technologies that shrunk time and space, an uncontested reality of modern times, inevitably transnationalizes international life and strengthens bonds of reciprocity. These developments provide a practical foundation for such ethical norms as mutuality—do unto others as you would have them do unto you. The forced feeding of diplomacy incorporating the golden rule could over time significantly reorient political leaders without any restructuring of the world.

In this regard, at present the division between war and peace issues and the rest of the international legal agenda remains very distinct, although artificially so. This collection of essays concerns the general setting and prospects of international law, especially efforts by law and lawyers to encroach upon the autonomous operation of geopolitics in matters of national security and war and peace. It rejects the prevailing view that governments are the guardians of international law and locates such guardianship in the citizenry of active, functioning democratic polities. As such, there is a Kantian orientation present to the extent of associating a properly functioning state with effective arrangements of accountability by the leaders to the citizenry. Without democracy it is hard to imagine an effective international law at work; even with democracy this prospect of implementation requires considerable opening of informational channels for assessment.

Such an outlook can be criticized as naive. Why should a democratic country put itself at a disadvantage on world affairs? How can the acceptance of legal restraints be other than a type of appeasement if they operate unequally on different states, encouraging expansion by lawless aggressors and restraint by their law-abiding rivals? Such legal opportunism is facile and misleading. For one thing, to be inhibited within the contours of international law is not necessarily worse than to be unfettered; governments, even the superpowers, have not won many victories by reliance on legally dubious uses of force. Arguably, the United States would have been spared Vietnam had my extension of checks and balances been operative from the outset. Furthermore, Soviet "freedom" to invade Afghanistan without legal accountability is certainly a tragedy for the Afghan people, but it is also far from advantageous for the Soviet Union. It is intriguing that the Gorbachev rationale for democratizing initiatives within the Soviet Union rests as much on functional grounds as it does on normative. That is, the Soviet capacity for societal effectiveness is tied to a new spirit of initiative, which is related to the

strengthening effects of democratization. Thus, these Soviet shifts, encouraging on their own, should also help refute the view that insisting on constitutionalism at home is a way of undermining performance abroad. The broad argument set forth here is that violations of international law under current world conditions are generally not self-serving, given the structure of conflict and the means available to weaker societies to engage in armed resistance of their national homeland.

This position is sustained by an additional link. The character of international law is not dogmatic or one-sided. Ample provision for defensive force exists. It remains for authoritative interpreters of controversies to help us over time identify precisely what are the legal boundaries on claims of self-defense and on tactics of legitimate combat. International law as now structured is not pacifist in posture. It authorizes self-defense, at least in response to an armed attack; it enables victimized governments to seek relief by recourse to international procedures and institutions for uses of force less than armed attack; and it permits regional and alliance arrangements that are dedicated to collective self-defense.

In *Revitalizing International Law* these perspectives form the basis of inquiry. In Part I, "Orientation," three chapters seek to consider international law in the political and historical setting established by principal global conditions. These chapters argue that world-order developments have increased the vulnerability of the state system to collapse, posing special challenges to international law. These chapters also discuss the resilience of the state system as the most fundamental feature of the overall climate within which international law functions.

Chapters 4 and 5, comprising Part II on "Use of Force," seek to interpret the collapse of an incremental approach to international legal reform around the issue of armed force. As of 1945, there seemed to be a disposition in the United States that the rule of law in world affairs could be gradually strengthened. The cold war rivalry, the upsurge of anti-Western nationalism, the strains of being continuously mobilized for all-out war, and the loss of diplomatic leadership all took their toll on this postwar American commitment to constrain claims to use armed force to situations of manifest self-defense.

Part III emphasizes weapons and tactics, especially those that are novel in this period of international history. Chapters 6 and 7 explore the differing legal situation of nuclear and biological weapons, both weapons of mass destruction. In the nuclear setting, the legal effort is to constrain threats and use, given massive deployments and a variety of strategic doctrines and war plans contemplating use. In the biological weapons setting it is a matter of reinforcing a legal regime of uncondi-

tional prohibition that is being eroded by political and technological developments.

Chapter 8 considers the bearing of neutrality on nuclear-age geopolitics, arguing that neutrality during a nuclear war is a virtually meaningless option. Accordingly, if neutrality is to help governments avoid the effects of belligerency, then in relation to nuclear weaponry its claims must by anticipatory. Put differently, even the threat to use nuclear weapons is an illegal encroachment on neutral status and supports a present claim to insist that these weapons be renounced.

Chapter 9 deals with the exotic possibility of waging war by means of large-scale environmental disruption (provoking natural disasters such as tidal waves, earthquakes, or volcanos), as well as the bearing of nuclear weapons tactics on legal protection of the natural environment. The basic issue here is whether international law, without further norm-generating activities by way of treaty, prohibits environmental disruption. The issues posed are speculative. We have no assured legal theory, and no practical experience. Yet, to ignore the issues is ill advised; reacting after the fact is manifestly too late.

Part IV extends the inquiry onto the domestic terrain of individual resistance. In Chapter 10 the extension of law to the area of human rights is considered in the setting of confirming peoples (individuals and groups), not governments, as the principal basis of legal claims. This argument is developed with special reference to the status of legal grievances associated with the circumstances of indigenous peoples, those, arguably, the most consistently victimized peoples and generally neglected in standard juridical treatments of human rights concerns. Chapter 11 proposes that civil disobedience be reinterpreted in light of subsequent international law, especially as it pertains to individual responsibility for upholding international law (the Nuremberg Obligation). This line of thinking is anchored in reflections as to whether the whole Nuremberg experiment is relevant to the needs of international political life for procedures of accountability. Part of this discussion includes the flight from Nuremberg by the governments that carried out the original experiment back in 1945. Whether the torch of accountability can be seized by citizen activists is uncertain, but at least on the level of political education these efforts by individuals to implement Nuremberg are of great significance.

Overall, this collection of essays is bound together by a single conviction: all of us have an incentive to strengthen respect for international law, first of all, by our own government. Underlying this conviction is the belief that the reality of constitutional government now depends in critical respects on being able to insist that foreign policy conform to

international law as construed—to the extent possible—from a disinterested, third-party outlook. Such a contention works against the existing situation, in this country and elsewhere, that entrusts to the governing process virtually nonaccountable control over foreign policy, especially when it comes to national security. I am not deluded into believing that such a surge in the role of law can come about without the benefit of a political struggle. In this regard, the arguments set forth here are intended to be helpful for those who seek to extend constitutionalism to foreign policy, whether they be scholars, lawmakers, or concerned citizens. It is part of the struggle for international law from within and from below, a path that opposes the tradition of building international law from without and from above.

Notes

1. This interpretation is effectively argued in Robert W. Tucker, *The Just War: A Study in Contemporary American Doctrine* (Baltimore: Johns Hopkins University Press, 1960).

2. For representative formulations of this orientation of realist-as-legalist see John Norton Moore, *Law and the Indo-China War* (Princeton, N.J.: Princeton University Press, 1972); John A. Perkins, *The Prudent Peace: Law as Foreign Policy* (Chicago: University of Chicago Press, 1981); for theoretical underpinnings *cf.* Myres S. McDougal, "Law and Power," *American Journal of International Law* 46 (1956): 102–14.

3. In David Kennedy's words, by invoking law to support a position we deem desirable (in this instance, the legal prohibition of nuclear weaponry), ". . .we tend to encourage ourselves and those who are oppressed by the system to believe that this is the rhetoric of emancipation, rather than just a mythology." Remarks," *Brooklyn Law Journal* IX (1983): 307–10; by treating law as indeterminate in this radical sense legal argumentation is deprived of persuasive power and normative force. Of course, using the word "treating" begs the question here. The challenge is to establish a foundation for provisional choice among the range of plausible lines of legal interpretation.

4. This whole line of possibility in the war and peace area is significantly embodied in the divergent opinions of the World Court in litigation challenging the U.S. government's direct and indirect uses of force against the government of Nicaragua. *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) Merits, Judgment, *International Court of Justice Reports,* 1986, 14–546.

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