STUDIES ON A JUST WORLD ORDER, No. 2

International Law

A Contemporary Perspective

edited by
Richard Falk, Friedrich Kratochwil,
and Saul H. Mendlovitz

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International Law: A Contemporary Perspective

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In a time when the international system is under increasing pressures from the problems of the arms race, overpopulation, food shortages, and ecological decay, *International Law* critically assesses the established practices and institutions for maintaining minimum global order. This ideologically balanced reader provides students with an understanding of the contributions and limitations of international law in creating a dependable environment in which nations can interact. The editors, while recognizing that the image of international law in political life has never been more tarnished, are certain that an opportunity for rejuvenating the international legal system—a new "Grotian moment"—is at hand.

This book avoids the pitfalls of either legalistic uniformity, wishful thinking, or cynicism with respect to international law. It critically probes the possibilities, trends, and processes that indicate opportunities for peaceful transformational change. The work addresses the traditional concerns such as lawmaking, the sources of law, problems of compliance, the interaction between power and normative preferences, and the classical issues relating to the regulation of force. But it is also sensitive to considerations usually inadequately treated in standard textbooks: new forces in world politics, demands for distributive justice, resource sharing, ecological protection, and human rights. Extensive introductions, carefully drafted study questions, and suggestions for further reading should make this book an invaluable teaching tool and reference work both for teachers and for concerned students of international law and international affairs.

Richard Falk is Albert G. Milbank Professor of International Law and Practice at Princeton University and a Senior Fellow of the World Policy Institute. **Friedrich Kratochwil** is assistant professor of political science and teaches international law and international relations at Columbia University. **Saul H. Mendlovitz** is professor of international law at Rutgers University—Newark, Ira D. Wallach Professor of World Order Studies at Columbia University, and coeditor of *Alternatives: A Journal of World Policy.*

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Contents

General Introduction

Perhaps not since the birth of the modern state system, usually associated roughly with the Peace of Westphalia in 1648, has the image of international law in the political life of the world seemed so tarnished. This is not, we believe, because there is "less" law or "more" sovereignty, but because the inability of law to satisfy steadily increasing minimal expectations about the requirements of global order and justice create an impression of "failure," deterioration, and disillusionment. Indeed, given the inability of international law to evolve at a pace comparable to that of increasing interdependence, *doing more* can still seem like *achieving less.*

Moreover, in recent years there has been an *absolute decline* in the perceived role of law with respect to the most basic ordering challenge of all—the prevention of war. Throughout this century, and especially since the end of World War I, there had been a sustained legal effort to prohibit all nondefensive uses of force in international affairs. The Kellogg-Briand Pact of 1928, which committed the major states of the world to a rule of law renouncing aggressive uses of force, was intended as a turning point, overcoming the earlier consensus that recourse to force was a matter of sovereign discretion, provided only that war was initiated by an appropriate declaration. After World War II, leaders of Germany and Japan were tried and punished as "criminals" before specially established international tribunals because they were found to have planned and waged aggressive war. The United Nations Charter proceeded from this central premise and required governments to submit all claims of self-defense for review by the Security Council. Work on an agreed definition of aggression went forward and culminated in a formulation accepted on all sides. Proposals for a standing international criminal court were seriously considered.

To be sure, there was a certain thinness or lack of credibility about this legal enterprise throughout the entire period. Realists dismissed the various steps taken by international law as window dressing or, in some cases, as victors' justice. The legal concepts were vague. The organized international community never possessed clear authority or relevant enforcement capabilities. The more ambitious undertakings, such as the security mechanisms to establish peacekeeping forces under United Nations auspices, were

stillborn, apparent casualties of the cold war. The Security Council procedures were subject to a veto; the General Assembly was conceived of as only a recommending body. Major states, it seemed clear, had not given up their discretion to decide when force was appropriate for their pursuit of national interests. At most, they had committed themselves to justifying claims to use force by reference to defense against aggression. Since there was no way to resolve competing claims of defensive force, the new international law arguably did no more than prescribe new verbal forms for habitual political realities.

Yet there seemed to many careful observers to be some significant correlation between the verbal demands of international law and emerging practices of restrained statecraft. World War II could as readily be perceived to be a vindication of the legal claims as an instance of their irrelevance. After all, the international community successfully resisted and punished the aggressor states and established a postwar international organization designed to carry on the struggle against aggressors. As long as the United States dominated the voting processes in the United Nations, there seemed to be a coherent set of responses to "illegal" behavior, that is, to the nondefensive recourse to force by the main agents of communism—namely, the Soviet Union, China, and their allies. Notably, the United Nations condemned North Korea's attack on South Korea as "aggression" and treated China's entry into the war on North Korea's side as complicity in aggression. Later on, the United States stretched its "legalist" commitment beyond its alliance relationships when in 1956 it joined in opposing an attack launched by its main allies, Britain and France, on Nasser's Egypt, a state with whom it had strained relations at the time. Again, reality is never lacking in ambiguity; some interpreters have suggested that the United States, eager to displace Great Britain as the principal Western force in the Middle East, used the Suez attack to complete the process of weakening the British presence in the region.

The Vietnam War represented, as in so much else, a crossroads. The United States' decade-long effort to sell its role as a "defensive" one against communist "aggression" never took hold. Increasingly, even in the United States, the American role seemed interventionary in its essence. Such an impression was reinforced by the increasing capacity of Third World actors and groupings (e.g., the nonaligned movement) to get a hearing in international political arenas. The loss of American credibility in relation to the prohibition of aggressive force was, perhaps, the decisive turning point in perceptions. The Soviet Union, the other pace-setting state in international life, never made a secret of its suspicion about international attempts to regulate sovereign rights. Soviet diplomacy attacked, of course, the condemnation of its allies (North Korea, China) as aggressors in the Korea War and considered such an appraisal as reflecting nothing more than a confirmation of Western dominance of the United Nations. The United States, however, was seen by the Western world as championing a liberal international order, which, in the aftermath of appeasement associated with the response of

the liberal democracies to Hitler in the 1930s, meant resistance to aggression plus renunciation of all nondefensive uses of force. Therefore, when the United States itself seemed to abandon the basic norm of restraint, not only in Vietnam but elsewhere in the Third World, the whole impression of a gradual growth of law in relation to international violence virtually disappeared.

This disappearance was reinforced by a loss of support, especially in the liberal United States, for the United Nations as a noble experiment that was pushing international politics in a more law-oriented direction. The rapid expansion of Third World influence, especially in the General Assembly, had engendered rapid disillusionment. More and more former supporters of the United Nations began to look upon the organization as an instrument for the expression of arbitrary and irresponsible views by a mere majority that neither had much weight in power politics nor contributed much to the overall budget (a 2/3 vote in the 1960s could be achieved in the General Assembly over the opposition of states that paid 95 percent of the annual dues). Particularly upsetting was the consistent UN espousal of the Palestinian cause, which, aside from its anti-Israeli features, was understood to be a virtual embrace of terrorism.

Almost unnoticed in the background, moreover, was the crucial and revealing failure of international law to address the use and development of nuclear weapons. Somehow, the basic legal enterprise described earlier survived the Hiroshima and Nagasaki explosions. Nevertheless, the continued development of nuclear weaponry, with all that it implied by way of rejecting restraint-in-war, further confirmed the limitations of international law, however optimistically assessed, to protect human society from catastrophe.

Now, in the decade of the 1980s, most of the earlier pretensions about legal restraint have been abandoned. Even such clear instances of aggression as the Iraqi attack on Iran in 1980, the South African "incursions" into Angola, and the Israeli invasion of Lebanon in 1982 have been ignored as "legal" events. Once more there is hardly even the necessity to provide a serious justification to the international community for recourse to force. The Soviet invasion of Afghanistan, although condemned and defended in East-West dialogue, represented further evidence of the deterioration of the modern regime of restraint, as have the indications by various U.S. leaders that the United States was quite prepared to protect oil resources with nondefensive force should a hostile revolution threaten to take power in a major producer country in addition to Iran.

This impression of deterioration has been further reinforced by the failure of the Law of the Sea negotiations. Year after year the negotiations had dragged on, only to result in the United States' suspension of its participation. In actuality, the process of disenchantment is even wider, as several of the most industrialized countries have moved steadily in unilateral directions, even with respect to deep sea mining. Germany and the United States, for instance, have already given out licenses for mining operations, thereby undercutting any prospect of preserving the deep sea as a "common

heritage." Here again, the sense of futility about law is growing stronger as time passes. It was argued by some prominent international lawyers that the oceans were a much better test of international law than was war prevention. It was contended that international law could be expected to work only where regulatory regimes did not intrude on the fundamental self-help rights of states. Therefore, the war system could be mitigated only to a slight degree by legal approaches, but functional cooperation in an increasingly complicated world was an essential foundation for economic development and political stability, inasmuch as it serves as a major terrain for the growth of international law. However, the formulation of acceptable rules to govern the relations of diversely situated states has proved very difficult in a political order in which the poor, as well as the rich, are now genuine participants. It may still be the case that a consensus on the role of law will eventually develop, even if it fails to fulfill the hopes of those who had earlier expected a more comprehensive arrangement. The antilaw mood seems quite volatile. A major treaty on the status of the oceans or in the area of arms control might yet even generate a wave of enthusiasm for the role of international law in world affairs reoriented toward the track of mutual interests in regimes of order.

Our point of departure in this volume is that the evaluation of international law needs to proceed without regard for these shifts in mood. It is based on a conviction that the structure of human activity on a global scale necessarily has a normative element that is best studied in relation to the place of law. To deny law this role is to give way to the nihilism of the age, a posture sometimes struck behind the defenses of social-scientific canons of inquiry. In this fundamental regard, we believe that even the study of lawlessness in international life is one way to take seriously the normative potential of the human experience, a potential that embodies much of what hope remains for the future well-being of our species.

In addition to this article of faith, we focus in this volume on three central ideas about the place of law in the game of nations. First of all, there is a lot more ongoing law on a day-to-day basis than meets the eye of the casual newspaper reader. The relatively high stability of routine transactions (travel, commerce, communications) in international life is successfully sustained by an elaborate framework of law. A clear understanding of this framework is important, as international law enables an enormous volume of transnational life to proceed reliably, even if it does not altogether relieve our anxiety about the danger of war, the spread of repression, or the threat of chaos.

Furthermore, we place emphasis upon the *structural* limitations of international law, given the organization of international society into states of unequal power and varying traditions, ideological outlooks, and goals. In our judgment, international law by itself can never adequately secure peace, protect human rights, achieve economic well-being, or ensure ecological balance in such a political order, given current levels of vulnerability, complexity, and interdependence. The primacy of the state, perceiving and