

# Two Cheers for International Law

*by Oona A. Hathaway*

In March of this year, as U.S. tanks began to roll toward Baghdad, international lawyers in the United States and abroad decried the action as a violation of the United Nations Charter. The invasion, some worried, would strip away the last pretense that international law could constrain state action. Today, as we face an increasingly conflict-ridden post-September 11 world, questions linger about the place of international law in maintaining international order. When states so openly flout it, is international law worth having?

Even before the invasion of Iraq, events had given pause to all but the staunchest defenders of international law. Near the end of the Clinton administration, for example, Senator Jesse Helms (R.-N.C.), chairman of the Senate Foreign Relations Committee, bluntly declared before the UN Security Council that if the United Nations were to seek to impose its power and authority over nation states, it would “meet stiff resistance from the American people.” The administration of George W. Bush, which came to power almost exactly one year later, immediately made clear that it shared Helms’s disdain for international law. Within his first six months in office, President Bush withdrew from the Kyoto global climate accord, threatened to abrogate unilaterally the 1972 Anti-Ballistic Missile Treaty, and revoked the signature of the United States on the treaty creating the International Criminal Court.

But not all the blame for today’s state of crisis in international law can be laid in Bush’s lap. The issue of the role of international law in regulating international relations has bedeviled the world community for decades. After World War II, even as the world pressed ahead with the UN and other new international institutions, widespread dismay over the failure of earlier institutions to prevent the collapse of order prompted a wave of attacks on the Wilsonian ideal of an international system founded on global legal order. As long as there was no sovereign power to manage enforcement, critics argued, international law was meaningless. To regard it as anything else was not just unrealistic but dangerous.

And yet, these deep-seated doubts have done nothing to stem the growth of such laws. More than 50,000 international treaties are in force today, covering nearly every aspect of international relations and nearly every facet of state authority. The treaties range from ambitious multiparty agreements to narrow bilateral pacts. This great edifice is now under siege,



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yet those who built it have done little to explain or defend it to the public at large. Their inaction has allowed those who are skeptical of international law (and tend to know little about it) to fill the vacuum in the public debate. Little surprise, then, that the Bush administration has faced only a whimper of challenge to its policy of malign neglect.

**T**he failure to mount a persuasive defense of international law has its roots in the universities, where so many of the ideas that inform public debate are incubated. With a few notable exceptions, legal scholars have remained largely above the fray. Instead of addressing crit-

ics, they have focused most of their attention on interpreting and creating international legal rules—and simply assumed that states will observe the rules. At the same time, an intellectual chasm has opened between students of law and students of politics: Legal scholars, for the most part,

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have ignored many questions about the role of political power, while political scientists, who think of power first and foremost, have tended to ignore international law. That division has prevented the emergence of a fuller view of the role of international law in the world.

But the chasm is closing.

A new vein of scholarship, which takes international law seriously while examining it critically, confirms neither the greatest hopes of international law's advocates nor the greatest fears of its opponents. Consider a controversial study in the *Journal of Public Economics* (Feb. 1997) by James Murdoch and Todd Sandler. It suggests that the 1987 Montreal Protocol on Substances That Deplete the Ozone-Layer, often hailed as one of the most successful international agreements of modern times, had virtually no independent impact on countries' use of ozone-depleting gases. The authors argue that the treaty merely codified an existing trend of voluntary cutbacks in emissions. But a more recent study by Beth Simmons in the *American Political Science Review* (Dec. 2000) indicates that rules in the International Monetary Fund's Articles of Agreement governing the financial policies of national governments have indeed been effective in influencing behavior. It's not just IMF pressure that does the job, Simmons found, but the desire of individual countries to establish their credibility in world markets.

**M**y own recent research on human rights treaties suggests that they have effects fairly different from what either friends or foes of international law would expect. Countries that sign and ratify human rights treaties turn out to have better human rights practices than those that fail to ratify. Yet the difference is not very large. And some of the countries that *have* joined human rights treaties have worse human rights practices than those that have not joined. For example, the countries that have ratified the 1987 Convention against Torture have torture practices that are, on average, nearly impossible to distinguish from those of countries that haven't ratified the convention. Among the ratifiers are states—including Algeria, China, Colombia, Mexico, Peru, and Turkey—whose horrific abuses of their own citizens have been documented

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by the U.S. government and human rights organizations. Even more striking, states that have ratified regional conventions prohibiting torture, such as the Inter-American Convention to Prevent and Punish Torture, have *worse* practices on average than those that have not.

The facts may be bad news for those who see human rights treaties as an instant elixir, but they also confound the predictions of critics, who see the treaties as mere window-dressing. States do not agree only to treaties that require them to do what they're already doing, as critics contend. They actually join treaties that commit them to do something more.

My research also indicates that human rights treaties do not always have the effect their proponents intend. For example, while states with better practices are, on the whole, more likely to join human rights treaties than those with worse practices, only the most democratic states appear to *improve* their practices after ratifying human rights treaties. Signing a treaty is no guarantee that a country will make improvements. Egypt, Cameroon, and Mexico were among the earliest to ratify the Convention against Torture, yet they continued to have some of the worst torture practices well into the 1990s. Among states with otherwise similar economic and political characteristics, some that ratify human rights accords actually indulge in worse practices than those that don't ratify them. And some of the most brutal episodes of mass killing since World War II—the massacres in Cambodia, Rwanda, and Yugoslavia—occurred in countries that had ratified the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

**U**nderstanding how international law works in the real world requires a reorientation of our thinking. The critics are undoubtedly right about at least one thing: International law is nothing like domestic law. Unlike effective domestic law, it lacks a sovereign with the power to enforce it. The closest thing to an international sovereign is the UN, and it has virtually none of the powers necessary for effective governance, most notably the power of enforcement (for which it must depend on member states). Further, international law is largely voluntary; states are, for the most part, not bound by it unless they accede to it. If the same were true in domestic law, we all could decide for ourselves whether the nation's criminal laws applied to us. Needless to say, the laws would work much less well if that were so.

Whether states will actually abide by international legal commitments once they are made is, of course, another issue altogether. Law that is not enforced will not be obeyed. That seems obvious. But a closer look suggests that the assertion is questionable. If enforcement were the only

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reason people followed the law, the world would be a much messier place. I refrain from taking property that does not belong to me not solely because I fear punishment by the state. I abide by the law for a complex mix of reasons, including—besides fear of enforcement by the state—my moral beliefs, internalization of the legal rule, fear of retribution by the wronged party, and concern for my reputation if others learn of my wrongdoing. Even if I know there's no chance the state will punish me, there are many reasons why I'm likely to abide by the law.

Countries, too, observe the law for multiple reasons, and fear of enforcement is unquestionably among the more important of them; international legal rules that incorporate penalties for violations are more likely to be followed. But states, like individuals, observe rules for many other reasons as well. Because central enforcement of international agreements is rare, parties to international legal agreements often enforce the agreements themselves. Indeed, many trade and arms control agreements are effectively enforced by the threat of tit-for-tat retaliation. States may also face internal political or legal pressure to adhere to international law. Especially in democratic nations, people outside government can use litigation, media exposure, and political challenges to compel governments to abide by their legal commitments. Such pressure is a key reason why states abide by their commitments under human rights treaties.

**C**oncern for reputation is an additional powerful motivation for states to keep their international legal commitments. If violations are likely to be discovered (as is often true, for example, with violations of international trade laws), states will be disposed to follow international rules in order to foster a good impression among other members of the international community. By making themselves look good, they may hope to attract more foreign investment, aid donations, international trade, and other tangible benefits. They may also accept limits on their own actions to obtain similar limits on the actions of others. Thus, they may limit the tariffs they charge on imports, for example, to obtain a reciprocal easing of access to the markets of other states. But when violations of international commitments are difficult to detect—such as occurs with the dumping of toxic waste, excessive air pollution, or police abuse of suspects—violations are likely to be more common. And last but not least, let's not forget that government leaders may even be led, on occasion, by their own moral judgment to abide by international legal rules.

International law, in other words, is neither as weak as its detractors suggest nor as strong as its advocates claim. The events of the past year have made it painfully evident that international law is not the panacea some might hope it to be. Yet it remains a powerful tool for creating international order in a world that desperately needs it. The challenge now is to move beyond bitter and unproductive all-or-nothing debates over the effectiveness of international law and find ways of harnessing its real but limited power to change the world for the better. □