Introduction

In June 2004, the Wall Street Journal reported on the existence of a long, detailed draft memorandum on interrogation prepared by lawyers in the administration of United States (US) President George W. Bush.1 The memo concluded that the president had the legal authority to permit the use of torture during interrogation.2 Over the next two years, hundreds of pages of memoranda on torture, secret detention, the Geneva Conventions, and other aspects of the international law of armed conflict and human rights came to light.3 A number of passages in the memos quickly became infamous: One memo employed a macabre definition of torture, confining it to only those acts of interrogation that inflict the pain of organ failure or death.4 This definition and much of the analysis in the memos seriously misconstrue international law and, as a result, supplied badly flawed advice. Nevertheless, the memos are also evidence of the extraordinary lengths to which the Bush administration’s legal teams believed they needed to go to evade international law. They did not simply ignore international law; they attempted to circumvent it. Their memos at least succeed in demonstrating that international law has power even for the sole remaining superpower.

3 In addition to the Torture Papers, see also various websites such as the National Security Archive, http://www.gwu.edu/~nsarchiv/; the Center for Constitutional Rights, http://www.ccr-ny.org; and Human Rights Watch, http://www.hrw.org.
In 2005, one of the memo writers, Jack Goldsmith,5 and his former colleague from the University of Chicago, Eric Posner, published a book entitled *The Limits of International Law.*6 It is a challenging, ambitious assessment of international law, incorporating techniques used by economists for understanding human behavior. The use of this methodology—rational choice—quickly won the book wide attention in the United States. Among the book’s chief conclusions is that:

> [t]he international lawyer’s task is like that of a lawyer called in to interpret a letter of intent or nonbinding employment manual: the lawyer can use his or her knowledge of business or employment norms, other documents, and so forth to shed light on the meaning of the documents, but the documents themselves do not create legal obligations even though they contain promissory or quasi-promissory language.7

In other words, Goldsmith and Posner claim that international law serves more as a set of guidelines than a set of legal obligations. It can help states coordinate their pursuit of self-interest but has no independent pull to compliance; it does not constrain the pursuit of self-interest. “[I]nternational law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power.”8 For these authors, there really is no such thing as international law, only states coordinating their efforts to maximize interests. State participation in these coordination efforts gives “traditional” international law scholars the false impression that international law is really law with the capacity to constrain state behavior. Goldsmith and Posner say that what we are seeing is “a special kind of politics,” and not law at all.9 As politics or employee guidelines, of course, it cannot bind, and they admonish,

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7 *Id.* at 203.

8 *Id.* at 3.

9 *Id.* at 202.
“we cannot condemn a state merely for violating international law.”

The Goldsmith-Posner book provides any interested legal adviser with an apparent basis upon which to question the binding power of international law.

Like the torture memos, however, the book indicates how difficult it is to simply dismiss international law as nonlaw. As will be discussed in detail in Chapter Three, “New Classical Enforcement Theory,” of this book, Goldsmith and Posner base their analysis on games they construct incorporating implausible and inaccurate assumptions about international law. They provide case studies to bolster the outcomes of these games, but on the actual facts of the cases, we can reach quite contrary conclusions. International law has been treated as binding by states throughout history: claims are made on the basis of it; lawsuits are filed, and enforcement measures applied. The authors do concede that although international law may not be law as a general matter, some aspects of it are law, namely, certain types of bilateral treaties. Obviously, the US wants its own bilateral treaties honored, and to have the right to enforce them if violated. The authors would not wish to undermine such agreements. But it is not possible to have one’s cake and eat it, too. If bilateral treaties are enforceable as “real law,” it is because international law in general is accepted as law on the basis of its general theories of obligation, sources, and processes for application and enforcement. There is no special theory of obligation, or of sources, or special processes just for bilateral treaties.

Goldsmith and Posner are hardly the first to attempt to limit the importance of international law. There is a history of scholars attempting to free sovereigns or sovereign states from the rules of the world community. Hugo Grotius, the seventeenth-century Dutch scholar and diplomat credited with founding modern international law, responded vigorously to the theory presented by Machiavelli that sovereigns are above the law. In the Grotian worldview, law is as present and important for the rulers of nations in their relations as for individuals within nations. Grotius saw law for nations as a moral imperative. As Hersch Lauterpacht put it, for Grotius,

10 Id. at 199.
11 Id. at 135.
12 See infra, chs. 1 & 2.
"the hall-mark of wisdom for a ruler is to take account not only of the
good of the nation committed to his care, but of the whole human race."14
It was also a practical matter: "Such, in his opinion, is the impact of eco-
nomic interdependence or of military security that there is no state so
powerful that it can dispense with the help of others."15
To deflect the compelling insights of Grotius and his followers, later
scholars relied on the theory of the nineteenth-century British legal
scholar, John Austin, who opined that international law is only a type of
positive morality and not law because its rules are not the commands of
a sovereign backed by sanctions.16 This is the view of John Bolton, for
example, the US ambassador to the United Nations from 2005 to 2006.17
Goldsmith and Posner, however, distinguish international law from
morality.18 They imply that compliance with international law is not even
virtuous, let alone obligatory. Their conclusions about international law
are far more reminiscent of Hans Morgenthau than Austin or Bolton.
Morgenthau was the highly influential German-American theorist
of international law and relations, who spent 1943 to 1971 also teaching at
the University of Chicago.19 Morgenthau, like Goldsmith and Posner,
believed that international law could be binding on the United States in
some areas. He thought the United States should comply with interna-
tional law in the day-to-day aspects of international relations, such as
transportation, diplomacy, and treaty-making, but in questions relating to
the pursuit of national (military) power, US leaders must not consider
themselves bound.20 Morgenthau had a narrow view of human nature. He
believed human beings were compelled by their nature to pursue power
and that such a pursuit overrides other pursuits. Morgenthau stressed
his view that international law lacks effective sanctions to coerce compli-
ance, and, therefore, can impose no real price for noncompliance. As a
consequence, American leaders could and should pursue power free of
concern about international law.

14 Id.
15 Id.
17 See e.g., John R. Bolton, War and the United States Military: Is there Really ‘Law’ in International
18 Goldsmith & Posner, supra note 5, at 185.
Goldsmith and Posner apparently share Morgenthau’s narrow view of human nature. They do not explicitly say that people pursue power. They limit human pursuits to the sole one of “maximizing interests.” They do not state explicitly what interests we all maximize, though their book is rooted in the world of economic analysis and finds law in areas such as trade, implying that the interest we try to maximize is wealth or utility. The authors do not discuss the sanctions of international law to the extent or as explicitly as Morgenthau. Still, they point out that international law’s sanctions are, in their opinion, less effective than domestic law sanctions: “What is the anomaly for domestic law is the norm for international law.”

In their case studies, they avoid using the terms sanctions or enforcement measures, even though it is quite plain that those would be the accurate terms. Instead, they call actions in response to law violations reprisals or pressure. So, like Morgenthau, to their many arguments against international law, they add the argument that international law sanctions are weak.

Morgenthau’s attack on international law came not long after the end of the Second World War when the ideas of Lauterpacht and Hans Kelsen were in the ascendant. In 1946, Lauterpacht wrote the important article, “The Grotian Tradition in International Law.” In it, he contrasted the constrained view of human nature held by Machiavelli and Hobbes with that of the great founder of international law, the seventeenth-century scholar and diplomat, Grotius. “For Machiavelli and Hobbes man is essentially selfish, anti-social, and unable to learn from experience. . . . [T]he basis of political obligation is interest pure and simple. . . . This is the typical realistic approach of contempt towards the ‘little breed’ of man. On that line of reasoning there is no salvation for humanity but irrevocable subjection to an order of effective force. . . .”

By contrast, Lauterpacht writes of Grotius’s understanding of what impels human action. It is the “desire for society—not for society of any sort, but for peaceful and organized life according to the measure of his intelligence.” In fact, much of the appeal and potentialities of the Grotian

21 Goldsmith & Posner, supra note 5, at 195.
22 See infra, ch. 3.
23 Id.
24 Lauterpacht, supra note 13, at 24–25.
25 Id. at 24.
tradition lies in the lesson which can be drawn from his conception of
the social nature and constitution of man as a rational being in whom the
element of moral obligation and foresight asserts itself triumphantly over
unbridled selfishness and passion, both within the state and in the rela-
tions of states.”26

Kelsen, too, revived concepts associated with Grotius, who first
wrote comprehensively of international law as law superior to the various
national communities and enforced through the sanctions of war and
reprisals. For Kelsen, as for Grotius, law’s authority to bind even sovereign
states is grounded in our belief in the authority of law.27 The sanction sig-
nals the rule and works at the margin to support law compliance. Kelsen
presented himself as a positivist, but in his basic understanding of the
nature of law, Lauterpacht rightly points out that he, in fact, incorporated
natural law explanations as to the authority and aspirations of interna-
tional law.28

Kelsen, an Austrian, had defended these ideas in Germany during
the rise of the Nazis at the same time his colleague at the University of
Cologne, Carl Schmitt, was seeking to promote his career by working on
behalf of the Nazis and against international law.29 (Lauterpacht, also
Austrian, left for Britain in 1923.) Among other ideas, Schmitt had devel-
oped the concept of Grossraum which incorporated an asserted right of
Germany to use force to create a central European order.30 By the end of
the Second World War, Schmitt was discredited for his intellectual and
legal work on behalf of the Nazis. Morgenthau, like Kelsen, had been
forced out of Germany as a Jew, but nevertheless admired Schmitt’s ideas.31
Like Schmitt, Morgenthau attacked the concept that the United States was
bound to comply with international law in ultimate questions of power—
an idea central to Kelsen’s writings. Morgenthau attacked this concept, in
part, by exposing what he saw as the weak sanctions of international law.

By the 1960s, Morgenthau had a loyal following among American
international relations scholars who shared his skepticism regarding
international law. Louis Henkin of Columbia University offered a response

26 Id. at 26.
28 Lauterpacht, supra note 13, at 23.
30 Id. at 52. See also infra ch. 3, notes 3 & 4 and accompanying text.
31 See Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of
to Morgenthau and, even more, to the realist diplomat George Kennan, in an attempt to mitigate their impact on US foreign policy to the detriment of international law. In his book, *How Nations Behave* (1968), Henkin points out the importance of international law and its benefits for the United States. The book addresses, in particular, Morgenthau’s critique that international law cannot bind the United States in questions of power owing to its weak sanctions. Henkin famously observed that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.” He explained that international law, like all law, is more than the sanction—far more: it does not rely on “effective” sanctions for its classification as law. Henkin built his response on the work of H.L.A. Hart, the Oxford professor of jurisprudence, and Hart’s book, *The Concept of Law* (1961). Hart had set out to critique Austin’s limited view of law, explaining how all law, including international law, is law because of community acceptance and not fundamentally because of sanctions. This was not an argument for law without sanctions—both Hart and Henkin understood the need for sanctions in legal systems. Henkin recognized that international law has sanctions that impose a cost for law violation and that “[i]nternational ‘sanctions’ . . . may be particularly effective in the organs for cooperation for common welfare.”

As Kelsen taught, war and reprisals (coercive measures short of war) are international law’s primary enforcement tools: the sanctions of international law. Other measures have been added over time in the form of coercive measures imposed by international organizations, courts, and tribunals. Every rule of international law is in fact backed by a sanction; if not a specific one based in a treaty, then a general-purpose countermeasure. Austin was mistaken about the lack of sanctions in international law. What international law lacks is a compulsory system of dispute resolution so that neutral decision-makers more consistently play a role in the application of sanctions. International law enforcement still functions to

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33 *Id.* at 47.
34 *Id.* at 54.
35 *Id.* at 58.
a significant degree through self-judging and self-help, but with the growth of courts and tribunals this problematic aspect of the law is diminishing.

Those critics who recognize that international law includes sanctions but remain dismissive because the sanctions are weak, in fact have no empirical basis for their view. Goldsmith and Posner, for example, while assuming that international law’s sanctions are weaker than domestic law’s, acknowledge that domestic (presumably US) traffic laws, tax laws, and drug laws are not well enforced. They omit US immigration law, murder laws, domestic violence laws, rape laws, child support laws, and the vast numbers of other laws that also are only rarely effectively enforced. Nor do they seem to recognize that regardless of the efficiency with which law is enforced, people will still recognize the binding quality of rules. Americans believe that the tax laws, the murder laws, and even the traffic laws are binding. They do so for reasons other than the sure knowledge that a policeman will arrest them if they violate these rules. Legal theorists have assured us for decades that sanctions are not the major reason why we obey the law. As Hart explained in response to Austin, the quality of a rule as a legal rule does not require proof that the rules are always and effectively enforced but rather that each obligatory legal rule is in fact backed, directly or indirectly, by a sanction. International law’s rules have such sanctions.

In addition, however, “[n]ations observe law, in part, for what may be called ‘psychological’ reasons. There is an influence for law observance in the very quality of law, in the sense of obligation which it implies.”

More or less consciously, more or less willingly, all governments give up some autonomy and freedom and accept international law in principle as the price of ‘membership’ in international society and of having relations with other nations. For that reason, too, they accept basic traditional international law, undertaking to do (or not to do) unto others what they would have done (or not done) unto them.

Thomas Franck of New York University has also written of the psychological element in our understanding of what international law is and

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37 Henkin, supra note 32, at 60.
38 Id. at 30.
why it has authority. A primary rule has legitimacy if it was created through a valid process. The process in turn is valid if it was created with state consent. Why state consent gives validity:

cannot be demonstrated by reference to any other validating rules or procedures, but only by the conduct of nations manifesting their belief in the ultimate rules' validity as the irreducible prerequisites for an international concept of right process. It can only be inferred, that is, from the nature of the international system as a community of states.39

As Grotius, Kelsen, Lauterpacht, Henkin, Franck, and others indicate, there is much about international law that transcends the material, positive acts such as consent. International law's claim to be law is based ultimately on belief. It contains peremptory norms, *jus cogens* principles, that cannot be altered by positive acts, including the norms against genocide, apartheid, extra-judicial killing, slavery, and torture. The third primary source of international law rules after customary international law and treaties is the general principles of law—which have counterparts in principles articulated by the great jurists of classical Roman law. They understood them as requirements or implications of reason, inspired by the natural order of things. General principles from this category, such as necessity, proportionality, and good faith, play an important role in regulating enforcement measures.40 While most of international law is based on positive acts of consent, ultimately the ontology and legitimacy of international law is based on more than consent, just as it is more than sanctions.41


40 In addition to principles such as those considered to be inherent in a legal order (a natural, necessary part), it is also widely accepted that rules found commonly in national legal orders, such as rules on the nationality of corporations, are also general principles. See Joost Pauwelyn, *Conflict of Norms in Public International Law, How WTO Law Relates to Other Rules of International Law* 124-31 (2003); *see also* Schachter, *supra* note 36, at 49–58.

41 Chapters One, "Classical Enforcement Theory," Two, "Compliance Theory," and Three "New Classical Enforcement Theory," review traditional positivist critiques of natural law theory. These are arguments against any role for natural law in explanations of international law. A thesis of this book is that, in general, international law scholars have never wholly rejected natural law theory. Nor as the evidence shows was natural law completely lost from our thinking about national law either. See ch. 3 infra.
Nevertheless, consent and sanctions are vital aspects of international law, providing important evidence that the community believes in the system. Although it is true that “[t]he essence of a legal system is the inherent fact, based on various psychological factors, that law is accepted by the community as a whole as binding, and the element of sanction is not an essential, or perhaps even an important, element in the functioning of the system,”42 one of the ways that the international community demonstrates acceptance or belief that international law is law is through the system for sanctioning violations.

The violation of any rule of international law may be subject to a coercive sanction.43 These sanctions do not ensure complete compliance with the law, as some would like, but they do play at least three other significant roles in the establishment of international law as real law: they play a formal role in identifying legally binding rules; they coerce at least some violators into compliance; and, because of the first two roles, sanctions play a role in “internalizing” respect for international legal rules, thereby decreasing the need for coercive enforcement.44 Thus, sanctions are an essential part of international law, like any legal system, but not in the unsophisticated manner of simple police enforcement.

A community-created right to sanction noncompliance through forceful means is a key indicator that a rule is regarded as a legal rule and not a moral, social, or other type of rule. To allow coercive enforcement of anything short of a legal rule would be to allow the use of force outside the confines of law. It is to prevent just such unconstrained uses of force that law came to be instituted in human communities.45

In addition to signaling that a rule is a legal rule, the very fact of the sanction imparts authority to international law rules, generating respect

43 In the view of some, only obligatory rules are subject to sanction, not power-conferring rules. Yet, the failure to respect a power conferred by rule is subject to sanction directly or indirectly, as well. Therefore, the position taken in this book is that all violations of legal rules are potentially subject to sanction.
44 In studies in the 1970s, Milgram was able to show that people complied with legal rules in part because they learned the lesson to do so. They learned to respect law through school, family, civic organizations, and the like. Respect for law and the compliance habit were internalized. Sanctions for law violation are important in this internalization process as knowledge of what happens when the law is violated. That knowledge is often enough without the need to actually be sanctioned. See Stanley Milgram, Obedience to Authority: An Experimental View (1974).
without the need for the application of the sanction. As Harold Koh of
Yale University has written, international law compliance is the product of
rule internalization, too.\textsuperscript{46} He suggests that this happens if international
law rules are implemented in domestic law, enforced by domestic courts,
and administered by government agencies. In addition to all of these
things, which happen in every country in the world, international law will
share in a community’s respect for law generally. It is, after all, international
“law,” and in many countries there is a tradition of respect for interna-
tional law. Certainly that is the case of the United States.\textsuperscript{47} Some empirical
work supports the linkage between an enforcement system and the seri-
ousness with which international law rules are regarded. George Downs
has shown that governments believe that coercive enforcement is linked
to law compliance.\textsuperscript{48}

Further, and related to the first two points, some international law
violators will in fact be sanctioned.\textsuperscript{49} This actual application of the sanc-
tion will coerce some violators into compliance or into providing a remedy
for noncompliance. The application of sanctions reminds others that sanc-
tions exist, which in turn, supports more voluntary law compliance. Thus,
sanctions, in a variety of ways help to ensure that international law com-
pliance is occurring on a level sufficient to consider it effective law.
Penalties or sanctions are:

required not as the normal motive for obedience, but as the
\textit{guarantee} that those who would voluntarily obey shall not be
sacrificed to those who would not. To obey, without this, would
be to risk going to the wall. Given this standing danger, what
reason demands is \textit{voluntary} co-operation in a \textit{coercive} system.\textsuperscript{50}

The majority in society must voluntarily comply with the rules for a legal
system to be maintained. Without this majority compliance, it would

\textsuperscript{47} See, e.g., Mark Weston Janis, \textit{The American Tradition of International Law: Great
\textsuperscript{49} The actual use of enforcement measures in international law is the topic of part II of
this book.
not be possible to claim that the community believes in the authority of the law.\textsuperscript{51}

Thus, general compliance, which is connected to the existence of sanctions for law violation, is important evidence that international law is accepted as law.\textsuperscript{52} Further evidence is found in the formal processes of law making, which, again, are related to the existence of sanctions. As mentioned above, the sources of international law are positivist—treaty, customary international law, and to some extent general principles,\textsuperscript{53} but some general principles are grounded in natural law sources as are the peremptory norms. Rules emanating from these sources are binding and law violators may be sanctioned for noncompliance. Nonbinding principles are sometimes called “soft law” to indicate the expectation of compliance but no right of sanction. The term is perhaps misleading in that without the sanction, principles are not “law” at all, soft or otherwise.\textsuperscript{54}

Because some aspects of international law are best explained using natural law theory, courts and tribunals play an important role in interpreting these aspects, but courts are, arguably, just as vital in interpreting and applying the rules emerging from the positive sources. Some form of adjudicative process has been part of international law since it began with the end of the Thirty Years’ War in Europe in 1648. The treaties that ended that war, the Peace of Westphalia, contained elements that still comprise fundamental components of the international legal system, including the obligation to settle disputes through legal discourse not armed conflict. Grotius extolled the use of arbitration as an alternative to armed conflict in his 1625 book, \textit{On the Law of War and Peace}. Several of the Spanish Scholastics, Grotius’s predecessors, had suggested arbitration as a process

\textsuperscript{51} \textit{Id.} at 196.

\textsuperscript{52} The evidence of acceptance of law’s authority is presumably greater in a system where sanctions exist but are rarely used, as in the international system. Such evidence would be harder to find in an authoritarian system where the population may obey out of fear of sanctions rather than acceptance for law.

\textsuperscript{53} The Statute of the International Court of Justice refers to general principles of law recognized by “civilized nations.” This may indicate to some that the only general principles are those “posited” or found in national law. It is not clear this was the agreed meaning at the time of the Statute’s drafting. See G. M. Danilenko, \textit{Law-Making in the International Community} 173–81 (1993). But see Pauwelyn, \textit{supra} note 40 for a review of theories about general principles, today based on natural law. More importantly, the ICJ does not look to the national law in most cases where it cites a general principle of law. See ch. 3 infra. The problematic reference to “civilized nations” is usually read out of the ICJ Statute today. See also Schachter, \textit{supra} note 36, at.

to fill the gap in intercommunal relations left by the declining earthly authority of the Pope and Holy Roman Emperor. From these early ideas, courts have grown steadily in importance in both the theory and practice of international law. Not only do courts today adjudicate the existence and meaning of rules, they are playing a larger role in the proper application of sanctions. For sanctions to be legal sanctions, not just self-help actions of reprisal or revenge, Kelsen and Lauterpacht explained the importance of courts in adjudicating both the wrong and the remedy.\(^55\) In addition to courts resolving disputes among states, Kelsen was an early advocate of courts for the purpose of holding individuals accountable for violations of international law. Individual accountability was in line with his view that states are led by real people, and people exercise their will, not the state itself.\(^56\)

Today, courts are generally available for both the interstate resolution of disputes and individual accountability. Thanks in particular to the World Trade Organization’s (WTO’s) Dispute Settlement Understanding (DSU), ever more sophisticated principles for the application of sanctions are being developed and applied. International criminal courts are now active in several places in the world. Dinah Shelton, of George Washington University, writing on the hierarchy of norms in international law, has described the dynamic role of courts in 2006, the 100\(^{th}\) year of the American Journal of International Law and the American Society of International Law. In decisions concerned with finding \textit{jus cogens} norms, she points out that the European Court of Human Rights and the Inter-American Court of Human Rights:

considerably shift lawmaking from states to international tribunals, which henceforth may be asked to assess human dignity and international public order to determine which norms have a superior status that can override state consent (or lack thereof) and invalidate or deny effect to conflicting norms, including decisions of the UN Security Council.\(^57\)

\(^{55}\) Hersch Lauterpacht, \textit{The Function of Law in the International Community} 424 (1933).


With the growth of courts, international law is becoming more sophisticated with greater capacity to mitigate the world’s problems. These courts are a visible sign of the existence of international law and the international community’s wide acceptance of it. It is perhaps not surprising that just at this time a new attempt to undermine the authority of international law has appeared in the form of *The Limits of International Law*, but if the authors of this and other attacks on international law believe they are acting in the interest of the United States, or any state, they are mistaken. Given the nature of the problems we face in the world, undermining any tool for the maintenance of peace and stability could not be further from any nation’s interest. There is a long, proud and continuing history of US support for international law and the common pursuit of global norms.\(^{58}\) There is no reason to abandon that tradition now, and every reason to redouble our commitment. Even Goldsmith and Posner seem to think that having some rules, like bilateral trade rules, is valuable. Yet, the only way to have viable international law rules on trade, as already mentioned, is through a general system of international law—with theories of obligation, sources, and processes of application and enforcement. Any effort to weaken international law only serves to undermine the prospects for achieving an orderly world and progress toward fulfillment of humanity’s shared goals, including prosperity. The rational and moral choice today is to understand how international law actually works and how it can be made to work better.\(^{59}\)

International law has deficits, yet it persists as the single, generally accepted means to solve the world’s problems.\(^{60}\) It is not religion or ideology that the world has in common, but international law. Through international law, diverse cultures can reach consensus about the moral norms that we will commonly live by. As a result, international law is uniquely suited to mitigate the problems of armed conflict, terrorism, human rights abuse, poverty, disease, and the destruction of the natural environment. It is the closest thing we have to a neutral vehicle for taking on the world’s most complex issues and pressing problems. International law has been

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\(^{58}\) See, e.g., Janis, *supra* note 47.

\(^{59}\) Van Aaken points out with regret that Goldsmith and Posner never attempt to suggest on the basis of rational choice methodology how international law could be improved. Anne Van Aaken, *To Do Away with International Law? Some Limits to the ‘The Limits of International Law’,* 17 EJIL 289, 307 (2006).

attacked by postmodern critics for failing to be inclusive and for perpetuating the very power advantages that hegemonic realists say it thwarts. Other critical scholars point to the meaninglessness of all law owing to the meaninglessness of the words we use to try to express legal concepts. These criticisms, like those of the hegemonic realists, weaken international law and our best means of creating a better world for all. Such overwhelming critiques can lead to despair and retreat until we realize that the critique is exaggerated and inauthentic. People everywhere believe in law, both domestic and international. We are able to communicate across and within cultures. We can search for the ways to do this more effectively, using critique as a tool of improvement rather than an end in itself. Indeed, the post-modernists’ call for inclusion, equality and greater humanity in international law is having a generally positive impact.61

In the opinion of Judge Christopher Weeramantry (formerly a judge of the International Court of Justice), the world’s problems, which he associates with globalization, can only be addressed by an improved international law:

The inadequacies of globalisation, the paucity of its philosophical base, the inability of earth resources to sustain its requisite of continuous expansion, its monolithic nature and the tendency it breeds of accentuating economic divisions both domestically and globally will all combine to force upon the scholarly community a consideration of alternatives and out of this will emerge a new realization of the importance of making international law a truly multicultural system drawing on the richness of the universal cultural inheritance . . .

This phase is especially interesting and challenging because the revolutionary force that will bring about this fundamental change will come not from armed might or economic force but from the world of scholarship. It is scholars alone who will be able to illuminate the principles which lie at the foundation of international law and show how universal they are. It is scholars alone who can stimulate a wider popular perception of these truths.62

61 See infra ch. 2.
62 Weeramantry, supra note 60, at 5–6.
If the past gives any indication of the future, Judge Weeramantry will be proven right. The revolutionary moments in international law have typically come from the ideas of scholars such as Grotius, Lauterpacht, Kelsen, and Henkin. They have often been inspired to write in response to those who would tear down international law out of a false sense of promoting the national interest.

Part I of this book, “Enforcement Theory,” traces the evolving scholarship on the role of sanctions in giving power to international law. Part II, “Enforcement Practice,” provides evidence of the actual use of sanctions to enforce international law. The book’s general conclusion is that sanctions play a significant—if not essential—role in why international law has power to bind both nations and individuals. The real basis of international law’s authority is not the sanction per se, but the international community’s acceptance of law regardless of sanctions. Sanctions play a role in signaling and reinforcing acceptance, but we fundamentally accept the binding power of international law for the same reason we accept all law as binding. Our acceptance of law is part of a tradition of belief in higher things. To this tradition, we have added positivist and legal process theory. We can now see the emergence of a new classical theory of international law that revives the best of what has come before, adapted to the needs of the international community today. It is a theory that supports not the hegemony of a few, but the flourishing of all humanity.

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