

US UNILATERALISM OR COLLECTIVE SECURITY?

On the Law of Nations

Daniel Patrick Moynihan

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Reviewed by David A. Deese

The renewal of US-Soviet cooperation since the mid-1980s has made possible a transformation of the international system. The bipolar international structure of the Cold War era, particularly in political-military affairs, prevented the UN collective security arrangements from working as intended. Instead, order depended on conflict management by the superpowers; when they confronted each other or intervened in regional disputes, disorder followed. By 1990, however, the UN collective security system and the rule of law had revived to the point of possibly replacing the superpowers as the ordering force in managing international conflict.

The principal question yet to be resolved concerns the role of the United States. Some analysts have already discerned the emergence of a unipolar world, dominated by US power, as the global peacekeeper. Is this the American intention? Or will the United States work within the UN system more often than in the past to deter and manage international conflict and provide leadership to ensure the rule of international law in dispute settlement? Which path promises greater international influence for the United States in the twenty-first century? And what role should the American people and the US Congress play in shaping this decision about the future of US foreign policy?

Iraq's conquest of Kuwait on August 2, 1990, put the United Nations, international law, and US foreign policy in the post Cold War era to an early and dangerous test. Saddam Hussein violated international law and the United Nations responded with an economic and financial blockade of unprecedented effectiveness. The UN Security Council, and the Soviet Union in particular, now play an important role in the regional and global political balance, but the Bush administration commands the primary military machine and wields the most influence with Saudi Arabia. Will President Bush succumb to

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pressure for a unilateral attack on Iraq to restore Kuwait, and then ask the United Nations to negotiate a settlement? Or will the United States commit itself fully to UN sanctions, a UN decision to use force, and the role of the international legal process for global peacekeeping? To what extent should the President involve Congress in this decision?

Senator Daniel Patrick Moynihan's new book, *On the Law of Nations*, offers powerful guidelines for making these decisions and framing the related roles of Congress, the United States, and international law in the future world order. To understand and evaluate his argument it is necessary to consider the context of international law and American diplomacy. What is the nature of order in international affairs and the function of international law?

Analysis in international politics frequently starts from a simple, but misleading assumption—that “anarchy” prevails in the absence of hierarchical international organizations and centralized enforcement institutions. By extension, “order” in international affairs exists only if it is the reflection of political systems of individual states. American officials and scholars seem particularly drawn to this unfortunate analogy for cultural and historical reasons. American affluence, power, and inward orientation make it difficult to understand a serviceable international system of order and law which departs so sharply from their effective and familiar domestic political system.

A prominent example of this ethnocentric and superficial view of international relations appears in the arguments of US Supreme Court nominee Robert H. Bork. In a 1989 article in *The National Interest*, he argued that “[T]here can be no authentic rule of law among nations until nations have a common political morality or are under a common sovereignty.”¹

In fact, more careful consideration reveals several systems of order, such as the collective security system envisioned by the UN Charter and now getting serious attention, or regimes relying on balance of power.² Both go well beyond a Hobbesian state of war, but stop far short of Kantian universalism. The regularity and predictability of the many thousands of daily transactions in international relations are evidence of an international system, even society, of states which originated with the Peace of Westphalia in 1648. Such a group of states, “conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.”³ Sovereignty and independence were central to the world order that followed the Peace of Westphalia, and more recently to the League of Nations Covenant and the UN Charter. Accordingly, states have generally been willing to enter into a social contract of sorts. By accepting restrictions on their own freedom, they have benefited from restraints on

1. Robert H. Bork, “The Limits of ‘International Law,’” *The National Interest* No. 18 (Winter 1989-1990): 10; cited in Moynihan, 173.

2. See Inis Claude, *Power and International Relations* (New York: Random House, 1962).

3. Hedley Bull, *The Anarchical Society* (New York: Columbia University Press, 1977), 13.

competing states and an important degree of order in their foreign relations. Common regimes—international norms, rules, and procedures that regularize and lend predictability to state behavior—and institutions have been forged in order to advance social, economic, political, and military goals.

Why do states generally live by the rules of international law? International law provides weak states with important protection against strong states. Likewise, international organizations and regimes provide weaker nations with important opportunities for political bargaining and access to economic resources. On the other hand, strong states benefit from the predictability that makes the thousands of daily international transactions efficient, and from the influence they wield over the international regimes that shape cultures, economies, and conflicts worldwide. For a great power, the incentives for orderly behavior are perhaps greatest of all, because its authority over other states derives ultimately from its legitimacy and the continued perception of weaker members that the prevailing system is beneficial to them. The higher the level of compliance with the rules, the stronger the system and the more influence available to the leading powers. Reduced adherence to the rules weakens the system so that it requires more governance and sometimes even great power intervention; in general, the more frequently strong states must intervene, the less effective and more costly it becomes, rendering the great powers less powerful. US leadership is particularly dependent on foreign perceptions that rules matter and force will be used only prudently and efficiently in order to ensure enforcement against critical violations.

Order in this horizontally structured society of states stems from several sources. These include: (1) domestic norms, rules, and political constraints; (2) basic principles such as reciprocity, reputation, and legitimacy, transmitted primarily through diplomacy; (3) coercive diplomacy, sanctions, and even war; (4) management by great powers; (5) the structure of the international system, usually a balance of power; and (6) rules and institutions, in the form of international regimes, organizations, and law. Except for the last, each source of order can also lead to disorder or conflict. But this final source—rules and institutions—may be evolving most rapidly and significantly in the 1990s.

This is therefore an opportune moment for serious reflection on international law, its role in the society of states, and its demise in US foreign policy during the 1980s. As scholar, statesman, and senator, Daniel Patrick Moynihan is uniquely positioned to address these issues. *On the Law of Nations* offers some thoughtful arguments on the role of law in American foreign policy. His perspective is fundamentally political and historical; his most original insight concerns executive-congressional relations in determining the role of law in US actions. His broad perspective on historical trends in the domestic process of American foreign policy is refreshing:

For the first 150 years or so of American history, issues such as international law were pretty much the province of presidents. They were to be heard advocating, sometimes preaching, international norms. Congress, sometimes agreeing, sometimes disagreeing, was

at most reactive. In the second half of the twentieth century, however, the idea of normative, "legalistic" behavior took hold within Congress—sections of Congress—even as it waned within the precincts of the Presidency (p. 137-38).

The Moynihan argument is simple and powerful: "[I]t is a fearfully dangerous thing, *the* thing most to be feared, to hold that some laws bind the president but others do not" (p. 177). More broadly, he delivers a passionate case for consistent American adherence to the rule of law. He argues that both the US Constitution and American strategic interests demand that the nation behave in accordance with international norms and rules; that US legitimacy and leadership depend directly on the rule of law at home and worldwide; and that the US, more than any other single nation, stands to lose the most from acting illegally in foreign affairs and thus weakening international law.

With the arrival of Ronald Reagan in the White House, Congress could have been an exceptionally important monitor and corrective for a president who strayed from the legal, and frequently moral, choice in foreign policy. Major decisions taken by President Reagan demonstrated the crucial nature of the potential check provided by Congress, but also demonstrated the power of a popular president who succumbs to periodic temptations to pursue short-term objectives to the detriment of more basic goals. The invasion of Grenada in 1983, covert and military operations against the Sandinistas in Nicaragua, and the Iran-Contra Affair all severely strained the credibility of American adherence to international norms and rules. For the first time, the US government consistently refused to argue its case, or even to seriously justify its acts in terms of international norms and rules. The US withdrawal of its submission to the jurisdiction of the International Court of Justice (ICJ) in 1984 as Nicaragua prepared to submit its case against American actions in Central America, and the Iran-Contra debacle, are poignant reminders of how far presidents can stray from deeper American standards and beliefs. Why not fight Nicaragua in court with arguments about their intervention in El Salvador instead of withdrawing American submission to the ICJ, which had been in place since 1946? Could the United States afford to be found, for the first time, in violation of international laws governing the use of force without having offered any words in its own defense?

Moynihan marks the Bush presidency as the "return to normalcy in American government" because "the terrible reign of doctrine was over" (p. 155). He is deeply concerned, however, about an apparently "normless normalcy," as shown by US behavior in Panama. Advocacy for Noriega's kidnapping or assassination by departments of the US government, and the subsequent US invasion of Panama, could not be seriously justified under international norms, rules, or treaties. I would add the criticism that the entire invasion would have been unnecessary if US leaders had prepared adequately for the earlier Panamanian coup attempt and the capture of Noriega by his own troops. We quickly forget how close Panamanians were to bringing down Noriega on their own; surely we should have done more to help the coup and to avoid

the invasion. While this is not to say that aid for the attempted coup would have been entirely legal, such action would arguably have been politically and morally more acceptable in the US as well as abroad.

What about the Security Council of the United Nations and the Iraqi invasion of Kuwait on August 2, 1990, which followed publication of Moynihan's book? Iraq's action may have provided impetus for a cure to the disease of bipolarity that crippled the UN during the Cold War. The Soviet Union has taken the lead in re-empowering the Security Council and its stillborn Military Staff Committee provided for under UN Charter Article 47. In 1987 the USSR proposed several measures that could invigorate the ICJ, and link its jurisdiction to a series of major treaties and dispute settlement mechanisms. It appears to be a new "era" for the United Nations, and possibly for the rule of law.

But wait. Why is the United States strongly supporting the UN role in this case? The broad international coalition arrayed against the Iraqi annexation of Kuwait, which—notably—has Soviet support, depends heavily on the UN framework. Without the UN's assertive leadership, the surprisingly rapid and effective embargo would not have been possible, and Arab and Gulf politics would not have supported the unprecedented multilateral military force confronting Saddam Hussein.

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No matter what the outcome—war, stalemate, or peaceful re-establishment of the state of Kuwait—the UN Security Council has passed a critical test with its speed and effectiveness of action. These events have strengthened the nearly universal UN norms, rules, and procedures against military aggression, and they will be available in the future. Unfortunately, however, Iraqi actions have been so blatant and egregious that this case is clearer than many. However, while the series of UN resolutions and associated actions demonstrate how power balances, great powers, and international organizations provide order to world politics, the longer term outcome depends on the United States. An attack on Iraq without Soviet and UN Security Council support could well destroy the political unity that has brought the UN so far, and it could turn the American public and Congress against the UN if the war does not go well. War pursued through the UN would, I believe, very likely succeed because the political force of a UN declaration of war would debilitate Iraq, or at least Saddam Hussein. Because of Baghdad's political isolation, the stakes involved in an Iraqi decision to fight the war are exceedingly high.

In this case, like any other, the international norms and rules that are violated are an important focus of analysis, as are the ones brought to bear by involved states. Exactly as advocated by Moynihan, the US Congress has advocated adherence to the rule of law. Key members and committees have insisted on US reliance on the embargo and US consistency on the goal of a multilateral military force, thereby deterring attack on Saudi Arabia. When it became clear that US forces might lead an attack on Iraq and Kuwait to drive the Iraqis out, members of Congress continued to emphasize the UN framework. Members of the UN Security Council have recognized the possibility of the need for war against Iraq, but they are unlikely to support the decision as soon as the United States is likely to reach it. This is a critical moment for the UN, but perhaps even more so for the United States.

The American embassy in Kuwait, barely surviving strangulation by Hussein, stands as a dramatic reminder of the power of symbols and international regimes in world politics. The reason that meticulous US respect for the sanctity of diplomats and embassies is so essential is the power of reciprocity, reputation, and precedents in international affairs. When the US military controlled much of Panama and its goal was to capture Noriega, it was still extremely important not to force the hand of the Vatican's mission where Noriega sought asylum. President Bush should not have allowed the nearly coercive pressure placed on the Papal Nuncio, nor permitted the military's entrance into the Nicaraguan ambassador's house. If the United States does not obey the rules, it cannot effectively mobilize wide international action against countries which violate them. Indeed, the stakes involved in Iraq's siege of foreign embassies in Kuwait are higher than they were in respecting embassies in Panama.

The Moynihan message is surely right. International law is the law of the land, in accordance with the US Constitution. We can attempt to change it, or even violate it from time to time, with carefully argued reasons and justification *within* the international legal process. However, when we consistently ignore, or even abuse law under the influence of negative presidential or congressional leadership, we threaten a key source of international order as well as US power and prestige. Actions taken with the pretense of doing right, but which ignore our history, our values, and our leadership in international justice and order, undermine our own foundations.

If a president violates norms and rules in a misguided pursuit of US goals, especially during a crisis, Congress is the strongest antidote—the other half of a process that protects deeper American foreign policy objectives. To appreciate how the process should work, one need only read *On the Law of Nations*. When Congress and the president go astray, only public opinion remains to correct the course. As long as the public gets adequate, honest information, the broader political process provides the ultimate corrective. Important elements of the US public seem to understand the political power of rules at least as well as the president and members of Congress. Informed Americans are, for example, concerned about President Bush's handling of

the Iraqi invasion of Kuwait and are clearly opposed to any war against Saddam Hussein undertaken outside the UN framework.

It is certain that the future will bring a series of new situations challenging US commitment to international norms, rules, and procedures. In learning from the past, three guidelines can strengthen US foreign policy and international order in such cases. First, as Senator Moynihan demonstrates, international law is our law and it behooves us to live by it. Second, the sources and operation of international order are clearly different from those of the US system. While authority in the society of nations is distributed much more across its members, horizontally, rather than above its members, or vertically, this order is still effective in shaping outcomes and the environment of world politics.

Finally, with consistent US and Soviet leadership, the 1990s hold the potential for realizing the UN collective security system as envisaged by presidents Woodrow Wilson and Franklin Delano Roosevelt. US commitment to such a system to deter and manage conflict provides the best prospect for securing American power, leadership, and foreign policy goals. Specific US choices of collective or unilateral peacekeeping should involve the US Congress and take careful account of public opinion. If the US chooses not to work within the UN system, it could be increasingly tempted to conduct unilateral police actions and ultimately, it could confront more frequent international conflict and war.



