

Developments

Book Review—Eric A. Posner’s *The Perils of Global Legalism* (2009)

By Heather Cohen*

[ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* (The University of Chicago Press, 2009); ISBN: 9780226675742; 266 pp.; \$29.00 Hardcover]

A. Introduction

On January 25th 2011, the unthinkable occurred— following protests in Tunisia, Egypt exploded into a revolution that saw the resignation of a thirty-year dictator and an entirely new regime. While many in the international academic community may have been surprised by this result, Professor Posner, author of *The Perils of Global Legalism*, would not have been shocked by one aspect of the crisis: the international community’s response, or, more specifically, its lack thereof. In the age of global terrorism, “President” Hosni Mubarak was an important American ally in the “fight on terror.” Despite the alleged human rights violations committed by Mubarak and his supporters, President Obama was unable to do little more than ask that the Egyptian government explain itself and respect the rights of its citizens.¹ This minimal response in the face of outright human rights abuses is a classic example of the limits of international law, limits that Posner highlights in his text.

Professor Posner teaches law at the University of Chicago, and has published extensively on international law. His background is in rational choice and, with his emphasis on global collective action problems, much of his analysis is based in this theory. He concludes that the international rule of law is purely idealistic, and that to be truly effective, international law requires a world government that is, in his frank words, “no more plausible today than [it] ever [has] been in the past.”²

Part A of this book review provides a synopsis of *The Perils of Global Legalism*. In Part B, I offer a critical analysis of the text. Through my comments, I aim to highlight some of the

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¹ *Egypt Protests: Obama Sharply Questions Mubarak Pledge to Stay in Power*, THE HUFFINGTON POST, Feb. 10, 2011, available at: http://www.huffingtonpost.com/2011/02/10/egypt-protests-obama-mubarak_n_821736.html (last accessed: 23 December 2011).

² ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* 38 (2009).

problems and biases in Posner's defeatist attitude. Although there is much merit to his criticisms of global legalism, he offers no alternatives. Despite the dangers of a world that relies on international law, a world without it seems both practically and ethically, infinitely worse.

I. The Perils of Global Legalism: A Synopsis

The thesis of the text is that there is a current trend in international legal academia towards global legalism, which Posner defines as, "an excessive faith in the efficacy of international law."³ Professor Posner argues that for American scholars, this faith has developed out of the belief that international law is so valuable that when conducting a cost-benefit analysis for the purpose of deciding whether to violate it, there is such a strong presumption in favour of it that "for all practical purposes, it may never be violated."⁴ For European scholars, this faith arises from the intrinsic ethical value of international law. These academics believe that international law transcends state interests.⁵ Posner criticizes both of these views in his book. In the first part, he focuses on a theoretical critique of global legalism. In the second half, he adds a practical dimension by analyzing the failures of international adjudication, tribunals, courts, and litigation to promote a world of accountability and international law.

In the first chapter, Posner describes a number of collective action problems, including war, pollution, overfishing, disease, and terror. He explains how domestic governments are able to combat these problems because of their monopoly on force and loyalty which they can exercise through various institutional mechanisms that are lacking in international law. He argues that the global collection of states is too extensive and diverse to overcome competing interests and form the institutions necessary to create a world government. This is the basis of his critique of global legalism: he posits that international legal institutions are futile without the governmental institutions needed to support them, and since these institutions will never be formed, international law is no more than a sham to hide states' own interests.

Posner spends the remainder of the first chapter detailing the various solutions to global collective action. Political integration, or a world government, will fail because of the heterogeneous nature of the planet's population. Economic integration, the creation of a world market, will also be ineffective given that states continue to refuse to cooperate with one another, despite the acknowledged advantages of doing so. Ideological

³ *Id.* at xii.

⁴ *Id.*

⁵ *Id.* at xii.

integration, or “the universal adoption of a set of beliefs that define collective action problems out of existence,”⁶ will likewise fail, first and foremost because dissatisfied individuals will always turn to other ideologies. Furthermore, the world will still be composed of independent actors who may have difficulty cooperating despite their common subscription to democratic principles. Hegemony, or the domination of one or more states, is unrealistic, because there are currently no states powerful enough to act as hegemons, and in any case, many scholars take offence to its distributional effects. Posner concludes the chapter with a description of how legalism, i.e. the use of international law, might solve global collective action problems, thus preparing the reader for the critique of global legalism with which the remainder of the book is concerned.

Professor Posner uses the second chapter to delve more specifically into the flaws of global legalism since it is this “solution” to collective action problems that seems to have been adopted by the majority of international legal scholars. He explains that international law suffers from a number of institutional weaknesses: the lack of a legislature and enforcement mechanisms, the minimal jurisdiction of international courts, and its complete lack of legitimacy. This deficiency in legitimacy results partly from the aforementioned non-existence of enforcement mechanisms and minimal jurisdiction of international courts, but Posner clarifies that it also comes from the perceived biases in the international legal system. He states that for law to be perceived as legitimate, it is at least required that those governed by it must “believe that the law does good – serves their interests or respects and enforces their values.”⁷ He argues that because international law functions pursuant to state consent, it can be easily manipulated and so will not be perceived as good, thus losing its legitimacy.

In the third chapter, Posner takes an in depth look at some of the defences of global legalism and highlights the flaws in each of them. He argues that Harold Koh’s theory of transnational legal process and Anne-Marie Slaughter’s theory of networking do not explain “how and when non-state actors [specifically non-governmental organizations and international legal institutions] cause compliance with international law.”⁸ Both these theories suggest that such entities somehow cause states to comply with international law. Posner takes his critique of Koh and Slaughter one step further, holding that “nonstate actors in the aggregate do not have a clear incentive to pressure governments to comply with international law, per se.”⁹ He then offers a number of examples to uphold his claims.¹⁰ Posner also finds fault with these theories because they are based on the

⁶ *Id.* at 8.

⁷ *Id.* at 35.

⁸ *Id.* at 41.

⁹ *Id.* at 42.

¹⁰ *Id.* at 58-70.

disaggregation of the state, meaning that policy decisions are analyzed “in terms of the many individuals and entities that make them and influence them.”¹¹ Such a model is much more methodologically complex than the unitary state model according to which analysis “a state making a decision” is treated “as though it were a conscious being.”¹² He concludes that “[t]oo much methodological complexity renders prediction-making impossible,”¹³ and that there is simply too little data to work with when analyzing disaggregated states.

Posner uses chapter four to explain the impact of two global phenomena on global legalism: globalization and fragmentation. Global legalists tend to view these trends in a positive light because they weaken state sovereignty and thereby make powerful states more amenable to international law. However, Posner claims that international law actually “depends on powerful national governments and cannot exist without them.”¹⁴ State fragmentation makes cooperation more difficult.¹⁵ While he acknowledges that the cooperation present in the European Union seems somewhat problematic for his theory, he finds that its existence only highlights the limits of a potential global government. Regional cooperation may be possible, but it will never exist at the international level.¹⁶

In chapter five, Professor Posner analyzes the interplay between domestic and international law. He focuses on the incorporation of international law into domestic law which results from the deference granted by domestic courts to international judicial systems. To this seeming strengthening of international law, Posner responds with the usual critique of American Conservative legal scholars, such as Alexander Bickel, claiming that courts are by their nature, undemocratic. He later explains that while elected officials represent the public and agencies have expertise, “Judges are generalists who lack expertise, sensitivity to public concerns, and democratic legitimacy.”¹⁷ As a result, they must rely on the knowledge of the lawyers appearing before them who set out to represent only the interests of their clients, and not the public at large.

With chapter six, Posner switches to the practical problems of global legalism. He provides a history of international adjudication, including a detailed critique of the International

¹¹ *Id.* at 41.

¹² *Id.*

¹³ *Id.* at 71.

¹⁴ *Id.* at 81.

¹⁵ *Id.* at 99.

¹⁶ *Id.* at 92-94.

¹⁷ *Id.* at 224.

Court of Justice (ICJ), concluding that "it has done little more than offer a modest alternative to interstate arbitration."¹⁸ Posner claims that it is the lack of enforcement mechanisms which have rendered the ICJ all but useless.

Rather than accept that the ICJ's ineffectiveness means the end of international law, Posner claims that global legalists have responded by placing their hopes in more specialized courts with more limited jurisdictions. In chapter seven, he examines this fragmentation. He undertakes an analysis of the Inter-American Court, the World Trade Organization and its precursor, the European Court of Human Rights, the European Court of Justice, and The Law of the Sea Tribunal. He concludes that "courts do best when they exist in a political community that is thickly institutionalized (the ECJ) or when they have limited jurisdiction and remedial power (GATT/WTO)."¹⁹ Posner spends the remainder of the chapter discussing the rebirth of arbitration, analyzing its costs and benefits, and finding that its episodic nature explains why most global legalists choose to turn instead to international courts.

In chapter eight, Posner traces the history of human rights and international criminal law. He finds that although "[t]he legalistic version is the official ideology" behind these regimes, by which he means that international and criminal law are justified on a legal basis, "the security version is the actual explanation."²⁰ Posner concludes that it is security concerns which explain the international criminal prosecutions that have occurred and why there are so few enforcement mechanisms for international human rights law.

In the ninth and final chapter, Posner analyzes the international litigation that takes place in domestic courts, particularly that under the Alien Tort Statute in the United States. Posner finds fault with this litigation, again arguing that it constitutes a form of policy-making by undemocratic courts, and so is illegitimate, particularly in the context of addressing international concerns.²¹

II. The Perils of Global Legalism: A Commentary

For those readers unfamiliar with the criticisms of international law, Posner's text is an excellent read. It collects the most current of these critiques and organizes them in a clear, logical, and easy-to-follow format. Moreover, he adds superior reasoning skills and some empirical data to many of these supposed flaws in international law, making them much

¹⁸ *Id.* at 149.

¹⁹ *Id.* at 164.

²⁰ *Id.* at 205.

²¹ *Id.* at 225.

more convincing. Posner's analysis of the problems with international law is much more comprehensive and filled with real world examples, such as his characterization of the war in Iraq. Nonetheless, *The Perils of Global Legalism* does suffer from a number of issues.

Perhaps the biggest noticeable gap in Posner's work is that he does not offer an alternative solution to global legalism. He acknowledges that there are some benefits to international law, but spends the entire book explaining why it will not work without a world state. If Posner proposed some means of creating this state, then his conclusions might not be so defeatist, but he does not do so. He simply concludes that such a state will never be formed. What does this mean for international law? Are we doomed to the half-hearted, easy-to-manipulate system that currently exists? Must we undo globalization?

It could very well be that Posner does not intend to offer us an alternative solution, and that his book is meant to be purely defeatist. However, Posner himself seems to reject this characterization of his work, arguing that "[t]he book is not entirely negative about international law."²² Rather, he meant for it to explain "that international structures that assume good will and global consensus are bound to fail, and that nations should concentrate on less ambitious forms of international law that take seriously the national interests of states and the limited forms of cooperation that are possible."²³ Still, based on the text, what these forms of law are and what this will mean for international law more generally is pure conjecture.

Another issue with *The Perils of Global Legalism* is that it can, at times, be very speculative. For instance, in his critique of Posner's work, Joel Trachtman finds this exact fault with one of the book's major premises. Trachtman disagrees with Posner that "an increased number of states [means] that effective international law is less likely."²⁴ Trachtman highlights that Posner offers no "theoretical or empirical evidence" for such a claim, and argues that it is thus just "as plausible that the level of cooperation would remain the same, or increase, as it is that it would decline."²⁵ Moreover, he finds that even if Posner is right, it is pure theorizing as to how many states there will need to be to have any serious impact.²⁶ The book also becomes quite speculative where Posner undertakes an analysis of

²² Eric Posner, *Eric Posner on his Book The Perils of Global Legalism*, ROROTOKO, NOV. 2, 2009, available at: http://www.rorotoko.com/index.php/article/eric_posner_book_interview_perils_global_legalism (last accessed: 23 December 2011).

²³ *Id.*

²⁴ Joel P. Trachtman, *Book Reviews: Eric A. Posner. The Perils of Global Legalism*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1263, 1267 (2009).

²⁵ *Id.* at 1268.

²⁶ *Id.*

the economic impact of Alien Tort Statute (ATS) litigation.²⁷ He uses ATS litigation as an example of an approach that environmental rights groups might use in the climate change debate, but in order to do so, he makes so many assumptions that the exercise becomes almost wholly superficial.

Should Posner spend more time offering an alternative to global legalism and providing more concrete data for his arguments, the above criticisms are reparable. Where Posner's argument becomes especially problematic is in his seeming inability to differentiate between the domestic and the international.²⁸ In the fifth chapter, he notes that the implementation of international law is wholly reliant on domestic courts, so that "there is no 'international law' extant, in the sense of controlling the state, apart from domestic decisions about compliance."²⁹ This conglomeration of international and domestic law ignores the evolution of international law, and, particularly, those international institutions which have grown strong in their own right. When asked about this grouping of the domestic and the international, he justified it as a natural one given the lack of state interference in the personal lives of its citizens, which he took to mirror the lack of international regulation of states.³⁰ Even accepting Posner's reasoning, it does not follow that the comparison is a logical one. State governance of citizens is based on an entirely different premise than international governance of states, unless one views the entire world as one large state, but this would be a very circular argument. Posner would essentially be claiming that global legalism is ineffective without a world state to enforce it from the perspective that looks at the world as if it should be governed by a state.

Furthermore, Posner's basic premise is flawed: it assumes an American political system, that is, a liberal democracy with minimal state interference. One could hardly argue that the Cuban or even the Canadian government does not interfere in the lives of its citizens. The international legal system is not structured in the same way as the American political system. As an American legal scholar, it is natural that he would have this bias, however not only does he never attempt to rectify it, but he never even acknowledges it. By assuming that international law is meant to mirror American law, Posner's critique loses much of its value. While it is generally acknowledged that there are numerous flaws with international law, its inability to replicate the American political system is not one of them.

It is in this American bias that another of Posner's more problematic arguments is based, namely, his critique of global legalism as no more than an international form of judicial

²⁷ See *THE PERILS OF GLOBAL LEGALISM*, *supra* note 2, at 207-225.

²⁸ Benedict Sheehy & Donald Feaver, *The Perils of Global Legalism*, 20 *LAW & POLITICS BOOK REVIEW* 503 (2010), available at: <http://www.lpbr.net/2010/09/perils-of-global-legalism.html> (last accessed: 23 December 2011).

²⁹ *Id.* at 504.

³⁰ *Eric Posner*, *supra* note 22.

activism. As discussed above, Posner seems to take it for granted that in order to function, any global world order must be structured precisely the same way as the American political system, the only truly democratic regime in the world.³¹ His fear of judicial activism comes from this problematic premise.

The American political system is structured around the fear that non-democratic judges will use their position, and the court system, to influence American policy.³² As a result, Americans can elect their judges, and are highly critical of their decisions. Such a fear has also given birth to the “political questions” doctrine, namely the finding that an issue is too political to be justiciable. This is, however, an American concern that arises out of the specific wording of the American Constitution, in particular, its limitation on the Supreme Court’s jurisdiction such that it can only adjudicate matters which constitute a “case or controversy.”³³ The doctrine has been rejected by courts as diverse as the International Court of Justice, the Supreme Court of Canada,³⁴ and even the Israeli High Court.³⁵ Nonetheless, according to some critics’ understanding of Posner, the peril of global legalism is simply “that it is perilous to place one’s hope on conservative out of touch judges applying rules of questionable legitimacy to remedy global problems.”³⁶ There are two inherently problematic premises in this argument: the first is that it is not clear that judicial activism is entirely negative, and the second is that even assuming judicial activism is problematic, it is not clear that it functions in the same manner at the international level. While this is not the place to begin a heated debate about the costs and benefits of judicial activism, it is sufficient to note that this is a largely American concept, and that it is hotly debated, and therefore not to be blindly applied in the international context, particularly given that there is no world constitution which limits justiciability in a similar manner.

One final criticism of *The Perils of Global Legalism* is in its treatment of states. Although in his discussion of the disaggregated states theory Posner acknowledges that states consist of multiple actors, he ultimately rejects this theory, and consequently analyzes states from a purely unitary perspective. Such an approach seems somewhat strange and antithetical to his acknowledgment of the ethical aspects of international law, in particular his

³¹ Sheehy & Feaver, *supra* note 28, at 503.

³² One of the main proponents of this view is Justice Antonin Scalia of the United States Supreme Court. See for instance, his dissent in *Morrison v Olson*, (1988) 487 US 654.

³³ See US Const. art. III, s.2: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution....to Controversies....”

³⁴ *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441.

³⁵ SOLOMON SOLOMON, *THE JUSTICIABILITY OF INTERNATIONAL DISPUTES: THE ADVISORY OPINION ON ISRAEL’S SECURITY FENCE AS A CASE STUDY* (2009).

³⁶ Sheehy & Feaver, *supra* note 28 at 508; see also Trachtman, *supra* note 24 at 1269.

acknowledgment that many scholars see international law as a means to introduce ethics into international politics. After all, it is not states which observe ethics, it is individuals. It is at this individual level that one might be able to explain and justify international law, such as human rights. Here Posner might be able to benefit from looking at the work of international human rights scholars such as Jack Donnelly³⁷ to add depth to his argument, and perhaps develop an alternative to global legalism that continues to incorporate the ethical aspect of international law.

B. Conclusion

Egypt's population was being abused by its own government while the international community did almost nothing despite numerous international laws and institutions which should have brought about some kind of action. Here is an example of the triumph of politics over international law; a triumph which Professor Posner expects will be consistently repeated. The response of the international community to the so-called "Arab Spring" demonstrates the limits of global legalism. However, this does not render global legalism perilous, as Posner would have us believe. Just as the occasional failures of domestic criminal law do not result in calls for its elimination, neither should the failures of international law.

While *The Perils of Global Legalism* provides an excellent and thorough summary of the current problems facing international law, without providing any alternatives, it is of limited use. What is more, its strong American biases mean that many international legal scholars³⁸ might hesitate to take many of its arguments seriously. I would like to see Posner engage more with some of the ethical arguments in favour of global legalism, such as the need for international human rights protections, in order to create a suitable alternative.

³⁷ JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY & PRACTICE* (2nd ed., 2004).

³⁸ See for instance, Harmen Van Der Wilt, *Bilateral Agreements Between the United States and State Parties to the Rome Statute: Are they Compatible with the Object and Purpose of the Statute*, 18 *LEIDEN JOURNAL OF INTERNATIONAL LAW* 93 (2005).