Book Review

A Review of THE ASSAULT ON INTERNATIONAL LAW by Jens David Ohlin


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This essay reviews Jens David Ohlin’s THE ASSAULT ON INTERNATIONAL LAW, an important new book that analyzes the arguments deployed by the New Realists in their efforts to detach the United States—and the Executive Branch, in particular—from certain international obligations. The essay finds compelling the book’s core argument: that the New Realists misconstrued and misapplied game theory. It also examines Ohlin’s contention that these mistakes led to many of the excesses in the so-called War on Terror, including, most notoriously, torture and widespread warrantless collection of private communications. The essay observes that, while Ohlin may be correct in this contention, a richer historical account would be necessary to prove it.

A Professor and Associate Dean at Cornell Law School, Jens David Ohlin has written an important and necessary defense of international law. Educated with a Ph.D. in philosophy as well as a J.D. from Columbia, Ohlin writes in the tradition of Wolfgang Friedmann, founder of this journal, to argue that nations’ compliance with international law yields more—not less—security. Ohlin believes that sovereign states remain the best protectors of individual security

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when they cooperate through the rules and institutions of international law. Like Friedmann, Ohlin takes an interdisciplinary approach to support his arguments, offering an innovative mixture of legal philosophy, recent history, and game theory to defend international law as an instrument of state power.

While this view of international law may appear commonsensical to readers around the world, it suffered serious setbacks in the United States in the years immediately following September 11, 2001. Ohlin contends that a defense of international law is necessary to rebut the arguments made by a handful of scholars whose academic contributions bolstered the presidential administration of George W. Bush. Ohlin argues that their works—as translated into law and policy by Bush Administration lawyers—seriously degraded U.S. compliance with international law. As a result, he further contends, these scholar-lawyers undermined the security the United States has long enjoyed on account of its place in an international rule of law regime. Ohlin focuses mostly on the theoretical works of Jack Goldsmith, Adrian Vermeule, and Eric Posner. For Ohlin, their academic challenges to the purported benefits of international law—and the logic of compliance—constitute the central front in this movement.

Ohlin can be forgiven if Chapter One overstates the novelty of his argument. In a trope that does not fully convince me, he reframes the most famous story about how “New Realist” scholars reshaped the landscape of international relations through their writings and, more importantly, through their legal work within the Bush Administration. His book opens with the oft-heard story of how in the months following September 11, 2001, Deputy Assistant U.S. Attorney General John Yoo drafted opinions for the Department of Justice’s Office of Legal Counsel (OLC) to justify the government’s use of “enhanced interrogation techniques” (i.e., torturous interrogation techniques) as part of its interrogation of individuals believed to be affiliated with al Qaeda’s terrorist network. When Jay Bybee, Yoo’s boss at OLC, left to join the U.S. Court of Appeals for the Ninth Circuit, his successor Jack Goldsmith was horrified to find memos so “tendentious, overly broad and legally flawed.”1 Goldsmith set to work revising them and even took the unprecedented step of withdrawing the most flagrantly unsupported “torture memo.” This traditional telling portrays Yoo as villain and Goldsmith as hero for bravely standing up for law’s constraints on power.

Ohlin believes that a more accurate telling of the story illumi-
nates instead “a much deeper and far more consequential movement”2 in which Goldsmith and a handful of like-minded New Realists applied ideas hostile to international law to provide legal justification for the Executive Branch’s decision to wage the “Global War on Terror” in a fashion that many would consider inconsistent with international law. Ohlin’s recast elevates Goldsmith to a central role in this movement and demotes Yoo to a “bit player whose ideas are having a secondary impact.”3 Ohlin acknowledges that Yoo’s thin and poorly argued legal memoranda4 served to immunize the government engaging in torture (and later, in warrantless wiretapping of the communications of U.S. citizens). Yet he contends that the New Realists’ intellectual movement was more consequential, and its leading authors more dangerous, than Yoo. Ohlin’s opening gambit may hold up from the perspective of legal philosophy and ultimately be borne out by history. But for those who were tortured as a consequence of Yoo’s memos, the claim might seem tenuous. Nonetheless, Ohlin is undoubtedly correct to argue these New Realists have dramatically reframed the United States’ relationship to international law and institutions.

Who are these New Realists? For Ohlin, the University of Chicago Law School served as the font of the movement. In addition to Jack Goldsmith, who went to OLC from the University of Chicago, Ohlin focuses primarily on two other University of Chicago professors, Eric Posner and Adrian Vermeule. While all three launched their academic careers at Chicago, Vermeule moved to Harvard in 2006, joining Goldsmith, who left Washington after only a few months at OLC. In addition to these three, Ohlin discusses the roles played by John Yoo (who returned to Boalt Hall, the University of California Berkeley School of Law upon leaving OLC in 2003) and other highly respected conservative professors, such as Julian G. Ku (now the Maurice A. Deane Professor of Law at Hofstra University), Curtis Bradley (then at the University of Virginia and since 2005 at Duke University where he currently serves as the William Van Alstyne Professor of Law), and Jay Bybee (a professor at Louisiana State University and then the University of Nevada, Las Vegas prior to his appointment to head OLC in 2001).

Ohlin’s focus on these key figures reflects his view that New Realist scholarship explains the Bush Administration’s turn away

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3. Id. at 12.
4. For text and context, see The Torture Papers: The Road to Abu Ghraib (Karen J. Greenberg & Joshua L. Dratel eds., 2005).
from international law during the critical two years following September 11, 2001:

When it comes to law, ideas really matter. . . . This is so because these professors do more than just write articles; they also serve as lawyers working for the State Department, the Justice Department’s Office of Legal Counsel, the White House Counsel’s Office, the Defense Department, and the CIA. And even when their arguments are not having this direct effect, their arguments are indirectly influencing policymakers, lawyers, and federal judges who deal with international law.5

By demoting Yoo and his first OLC boss, Bybee, to second-tier status, Ohlin places the Chicago scholars at the center of the New Realist movement and the United States’ turn away from international law.

Because the ideas and work of these central characters do matter, a reader might reasonably hope to see some fairly rich biographical information, if not a full-blown prosopography. Yet Ohlin does not provide biographical information or otherwise delve into why these individuals developed their dangerous ideas. He suggests that the New Realists wished to unshackle the President from constraints imposed by law so he could do what he believed necessary to best defend the United States against unprecedented threats posed by terrorist groups. The motive Ohlin offers seems both overly charitable and inadequate. This motivation works only as far as it goes; it explains the New Realists’ immediate intention to empower the President, but not any underlying motivation for their belief that the President should have this power.

Additional biographical information could also illuminate how these scholars implemented their assault on international law. The book contains few insights into the mechanisms whereby the New Realists influenced U.S. government policy. It does not describe how the New Realists pushed into effect their ideas or why senior administration officials chose to embrace them. A reader not already familiar with the story will be left wondering which New Realists served in the government during this key period—and in what roles—as well as how they managed to implement their academic theories.6 But the reader will leave with a clearer understanding of

5. OHLIN, supra note 2, at 11.

6. See, e.g., Mark Shulman, Institutionalizing a Political Idea: Navalism and the Emergence of American Sea Power, in THE POLITICS OF STRATEGIC ADJUSTMENT: IDEAS,
the logical errors of those theories.

For Ohlin, the essence of the New Realists’ assault on international law lies in a claim that, rationally, nations—and particularly the United States—ought to obey international law if and only when it is in their immediate self-interest. Contrary to the long accepted doctrine embodied in the Restatement (Third) of Foreign Relations Law, Ohlin’s New Realists argue that customary international law imputes no real obligation. Their argument stems from the view that the Executive Branch follows laws made or interpreted by the Legislative and Judicial Branches only out of a sense of political expediency or self-interest, rather than out of any real sense of binding obligation. According to Ohlin, the New Realists “transform international law from a real legal system that demands compliance to a voluntary legal system, composed of self-interested actors, that can and should be ignored at will.” The New Realists believe that international law only binds nations to the extent that the immediate costs of non-compliance outweigh the benefits.

Ohlin finds the New Realist approach to game theory thin, short sighted, and unconvincing. He offers instead a broader perspective on nations’ rational choice: a “large-chunk” theory that argues in favor of continued compliance, even when costs might appear to outweigh benefits. This, he notes, is a rationally considered strategy. Indeed, at the core of Ohlin’s book, and its most important contribution, is an extended philosophical discussion of why states ought to comply with international law as a matter of rational choice. Ohlin argues that the New Realists profoundly misapply game theory by assuming that self-interested behavior and normativity are mutually exclusive. He sees this as a false dichotomy, and argues that within an international legal regime states are at a point of Nash Equilibrium. In this state of equilibrium, failure to comply with a rule (e.g., defecting from the order) would impose greater costs than compliance. This remains true even when compliance incurs a significant cost—
so long as other conditions remain constant and the long-term value of the order remains mostly unchanged. For example, a state should not defect from an extradition treaty when it would otherwise want to avoid a request to extradite a particular individual or class of people. The state complies because refusing and defecting from the regime could prompt retaliation or impose other costs, such as the loss of the benefits of reciprocity.

According to Ohlin, such a system might not yield overall optimal regulation, but it generally ensures Pareto optimality. That is, it offers the stability and predictability of a system in which no one can be made better off without harming someone else. It also allows those whose position would be worsened to veto most changes. The level of efficiency may never rise as high as domestic law because no sovereign exists to impose it, but that fact does not negate its utility or even its normativity. A stable system operating at Pareto efficiency offers a multitude of concrete advantages over chaos. And, I would add, those advantages seem to be even greater for a rich, powerful status quo power such as the United States.

Ohlin highlights the special role his book plays in addressing the fundamental mistake of the New Realists, who incorrectly assume that because international law is based on self-interest it lacks normative value. While other writers have responded to various contentions that international law is “not law at all,” to my knowledge, none have explained in detail how the New Realists’ application of game theory is inherently flawed. Ohlin tackles these issues directly and in full command of the subtleties of the theory. He argues that international law is the only feasible good outcome for the form of prisoner’s dilemma that nations face when confronting rivals or bullies. With international law, states have the capacity to signal intentions, coordinate actions, and collectively punish aggressors and other defectors. Without it, they are all alone. Ohlin recognizes that defecting may sometimes have an initial appeal. But he counters that defection would lead to an unraveling of the system, leaving all states fearful and insecure. The optimal choice is the second best option: comply in order to promote self-interest for each and almost every player. Following this chunk theory logic, nations join and remain in the system as constrained maximizers. They may not benefit in every single interaction, but overall they will be far better off. Moreover, those states that do not accept the constraints imposed by the system are labeled rogue states or outcasts and suffer appropriately harsh

10. *Id.* at 101–02.
Ohlin also explains that the rationality of the system confers on it a normativity. The morality we derive from such a system derives from rationality as a value unto itself. It is rational for states to build and remain in this system. Rationality is a good value, so Ohlin argues for carrying that good value into the system. He argues that rationality constitutes a reason for “ought.” He claims that, “in the international realm, there is a convergence between what a state has reason to do (based on self-interest) and what a state ought to do according to morality. Under certain very complicated conditions, the two actually coincide. That is the whole point of the strategy of constrained maximization.” Rationality is a principle worth committing to, and it is a norm worth making sacrifices to maintain. If we agree to act in a rational way, then we can enjoy the benefits of a rational system that offers predictable outcomes.

In Chapter Three—at the heart of this book—Ohlin explains that this system benefits the weak and strong alike. He does so by tackling the old chestnut that only weak states have reason to embrace international law and its institutions. The story goes that because great powers can look out for their own interests—unilaterally protecting themselves against other powers and bullying small states—they do not need international law. If great powers do not need international law, then any sacrifices made on account of international law run counter to self-interest. Doing so may even violate a sovereign’s fiduciary duties to work in the nation’s best interest at all times. In contrast, the story continues, small states have more incentive to work through international law when bargaining with great powers.

Ohlin argues that the New Realists misunderstand the rationality that ought to guide strong countries, and the United States in particular. In a complex world of repeat transactions, strong states often bargain against other strong powers, and international law can help improve the outcomes of these agreements. Moreover, the difference in bargaining position should not affect a strong state’s willingness to enter into a bargain, but it should instead incentivize them to comply and disincentivize them to defect. Finally, I would add, the fact that some defections occur does not undermine the whole system. As Louis Henkin famously observed, “almost all nations observe almost all principles of international law and almost all of their consequences.”

11. Id. at 146.
12. Id. at 118.
obligations almost all of the time.\textsuperscript{13} A system with gaps remains preferable to no system at all.

As Ohlin compellingly explains, the fatal fallacy of the New Realists’ logic is to atomize decision-making. In their theory, states’ leaders could recalculate their options and decisions at every step in order to maximize the benefits. But, Ohlin observes, leaders tend to be (rationally) planning agents. For good reasons, leaders generally stick to initial strategies and assessments. The stickiness of plans means lower transaction costs. This stickiness liberates leaders from the various burdens of constant reevaluation.\textsuperscript{14} Ohlin further explains that it would be illogical to defect or change plans once a state has accrued a benefit and not yet paid the cost. States should—and do—constrain their options rationally. The fact that a foreseen bill comes due is generally not cause to undo the bargain. To do so would increase the cost of future deals to prohibitive levels. In other words, most nations should observe almost all principles of international law and almost all of their obligations almost all of the time. It only makes sense.

At its core, this book provides a coherent, deeply thoughtful argument for nations to comply with international law as a flexible, normative instrument of national security. By applying a sophisticated understanding of game theory to the logic of international law, Ohlin has built on the engaged intellectual tradition of transnational law worked out by Wolfgang Friedmann and updated it to meet today’s challenges. Scholars and policy-makers with an interest in understanding the systemic logic of an international system will find this book compelling and useful. I certainly did.

\textsuperscript{13} Louis Henkin, How Nations Behave 47 (2d ed. 1979) (emphasis omitted).

\textsuperscript{14} Ohlin, supra note 2, at 123.