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THE PERILS OF GLOBAL LEGALISM, by Eric A. Posner¹

SIMON KUPI

TONES OF CAUTION AND RESTRAINT in the Obama administration's support for UN Security Council Resolution 1973² on Libya provide the latest sign that a convergence in official US and European attitudes toward international law—set in stark relief during the unilateralist “Bush Doctrine” years—is occurring. But is a new age of multilateralism, cooperation, and fidelity to aspirations of international legality any nearer, or is this all a desert mirage? In *The Perils of Global Legalism*, Eric A. Posner—son of the influential jurist and law-and-economics scholar Richard A. Posner—firmly rejects any cause for optimism. In Posner's view, scholars of international law have been seduced by “global legalism”—an enthusiasm for international law so blind to the inefficacy of its institutions that it becomes “a faith, or set of assumptions, or attitude ... not a theory grounded in a plausible reading of the evidence.”³

In part I of the book, Posner proceeds by describing global legalism as a last-ditch solution to international “collective-action problems” such as pollution, overfishing, disease, and terror, which have proven insoluble by political, economic, and ideological integration. The global-legalist camp, according to Posner, pushes for international law's role in all interstate disputes; for the expansion of treaty-making and of customary international law; for the grant of broad, compulsory jurisdiction to international courts; and for international obligations that have binding domestic effect. Yet global legalists provide little suggestion, he notes, of how these goals can be reconciled with the rich-poor, democrat-autocrat, east-west dichotomies of a diverse, multi-polar world.

In particular, Posner argues that the international system lacks rule-making

1. (Chicago: The University of Chicago Press, 2010) 228 pages.

2. *The Situation in Libya*, SC Res 1973, UNSC, S/RES/1973 (2011).

3. *Supra* note 1 at 79.

institutions beyond the limited mandate of the UN Security Council and the spontaneous treaty-making of states. Further, he suggests, international law's doctrines are largely unenforceable, save on individual states' own terms. Posner surveys the laundry list of international law violations by the leading world powers—from the “illegal but legitimate” doctrine adopted in NATO's Kosovo intervention to the European Union's rows over genetically modified food. For Posner, global legalists cling to a misguided conviction “that ordinary people or elites . . . will cause governments to comply with international law beyond what is in the government's narrow self-interest.”⁴ The evidence, Posner insists, suggests otherwise. Posner notes how even the high-profile efforts of human rights NGOs are often countered by well-heeled military or trade lobbies favouring putative infringements.

In part II of the book, Posner sets his crosshairs on the international judiciary. He tracks the decline of the International Court of Justice to developing nations' growing clout on its roster. Given the leading powers' lack of a Security Council-like “veto,” Posner argues, it was only natural that they turned to forums more conducive to their interests—hence, for Posner, the proliferation of regional, specialized institutions and arbitral practices. Against the post-World War II successes of European law, Posner argues that international courts work only when member-states see gains—in Europe's case, the stability and growth promised by post-war integration. Absent such perceived benefits, he notes, the institutions languish as states law-break at will. The Inter-American Court on Human Rights, for instance, has only rendered fifteen judgments at Posner's count.

Posner, a professor at the University of Chicago Law School, presents a lively, provocative case for taking any “Whig history” account,⁵ as he calls it, of international law's development with a grain of salt. In doing so, he builds on his earlier rational-choice approach to the subject set out in 2006's *The Limits of International Law*.⁶ Although Posner is not in uncharted territory in his scepticism—H.L.A. Hart pointed to missing institutions as the critical “defect” in international law five decades ago,⁷ and international relations “realists” have long bemoaned the idealist pretensions of global institutions—the value of Posner's contribution lies in connecting the legal angles lost to political scientists to the geopolitical ones lost to lawyers. If Posner is right, a clear-sighted view of international law may require one to be as versed in Chapter VII of the UN Charter as in Thucydides.

4. *Ibid* at 39.

5. *Ibid* at 96.

6. Jack L Goldsmith & Eric A Posner, *The Limits of International Law* (New York: Oxford University Press, 2006).

7. *The Concept of Law*, 2d ed (New York: Oxford University Press, 1997) at 229.