Mary Ellen O'Connell. ***The Power and Purpose of International Law: Insights from the Theory & Practice of Enforcement***. New York: Oxford University Press, 2008. Pp 408. $45.00. ISBN: 9780195368949.[1]

The Power and Purpose of International Law is a critical response to the dismissive attitude adopted by the Bush administration, neo-conservatives, and some US writers and scholars – such as Goldsmith and Posner – towards international law. Advocating the reality and relevance of international law, the book is to be situated within the larger, classical literature on the foundations and legal basis of obligations of international law. It is expressly inspired by scholars (such as Grotius, Hersch Lauterpacht, Hart, and Franck) who have defended international law as true law against realists, positivists, and critics (including Hobbes, Austin, Morgenthau, Kennan, Schmitt, Kennedy, Carty, Koskenniemi, in addition to Goldsmith and Posner) from the beginning of the modern age to now, in particular Louis Henkin – to whom the book is dedicated together with Sir Elihu Lauterpacht. Henkin's famous adage, 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time', is repeatedly quoted as 'still true today' throughout the book (at 7, 76, 369).

The book is in two parts. Part I (at 16–149) deals with legal theory and is divided into three chapters. Part II (at 151–367) deals with the law and is made up of six chapters. A 16-page Introduction places the subject in context and clarifies its purpose, which is to show that international law rests on, and does indeed have, sanctions. A short two-page Conclusion summarizes the author's overall position that sanctions distinguish legal rules from moral, social, and other kinds of rules and that every international legal rule has a potential sanction which makes international law 'a legal system worthy of the name'. While Part I aims to trace 'the evolving scholarship on the role of sanctions in giving power to international law', Part II aims to provide 'evidence of the actual use of sanctions to enforce international law' (at 16). By this reasoning, the book claims that in practice a variety of sanctions (either armed or peaceful, individual or collective) as well as international and national courts' decisions, to the extent that they can be enforced by some coercive means, are actually operative to ensure international law's enforcement.

A central and recurrent word in the book is 'power', by which the author refers to the ultimate authority of international law (at 132). This authority is founded, as evidenced from practice (at 144), in both acceptance and sanctions (at 32). The author emphasizes as 'the book's general conclusion' that 'sanctions play a significant – if not essential – role in why international law has power to bind both nations and individuals' (at 16). This stress on sanctions appears stronger than Hart's and Henkin's, despite the author's overt leaning towards their conception of international law. By contrast, the book nowhere provides a definition of the ultimate 'purpose' of international law, although the author strongly believes in the general ability of international law to cement the world and, thus, suggests that its purpose is ultimately the survival of humankind.

The Introduction is particularly revealing as to the basic assumptions of the entire book. The author mentions a number of writers, holding that either sovereigns are above the law (Machiavelli and Hobbes), or law 'proper' – unlike international law – is backed by sanctions imposed by a political superior (Austin and Bolton), or international law is complied with for other than legal reasons (Goldsmith and Posner). Criticism is also addressed to postmodern critics of international law (Kennedy, Carty, Koskenniemi) and Third World approach adherents (Gathii) who suggest, by way of deconstruction, that international law only perpetuates the power of the most powerful (at 15, 91–96). Against these writers the author sets the advocates of international law who insist either on the social nature of man

[1] An extended version of this review is published on www.globallawbooks.org at http://www.globallawbooks.org/reviews/detail.asp?id=556.

(Grotius and H. Lauterpacht) or on the existence of – though decentralized – sanctions in international law (Kelsen), or on the mere background relevance of sanctions (Hart and Henkin), and finally on the legitimacy that supports rules and is the basic reason for compliance (Franck). As sanctions are the key subject of the book, the reader may extract from the Introduction the author's basic ideas on their role in international law. She critiques, first, those who hold that international law has no sanctions at all, on the ground that 'every rule of international law is in fact backed by a sanction' (at 7). Secondly, she finds fault with those who maintain that international law does have sanctions, but that they are too weak and in any case much weaker than those available in domestic legal systems, replying that lots of domestic (including US) laws are not well enforced and that 'regardless of the efficiency with which law is enforced, people will still recognise the binding quality of rules' (at 8). Thirdly, she criticizes those who defend the view that sanctions are irrelevant by arguing that 'consent and sanctions are vital aspects of international law, providing important evidence that the community believes in the system' (at 10). In short, while not ensuring complete compliance with the law, sanctions are believed actually to play an important role in international law in (i) identifying legally binding rules, since sanctions allow legal rules to be told apart from other rules (moral, social, soft law, etc.) (at 10), (ii) coercing at least some violators, to the effect that 'the application of sanctions reminds others that sanctions exist, which, in turn, supports more voluntary law compliance' (at 11), and (iii) internalizing respect for rules, in particular within domestic legal systems (at 10–11).

Chapter 1 discusses the just war doctrine, regarded as legitimate violence to enforce law. The basic ideas on just war of classical writers such as Aristotle, Cicero, Augustine, Thomas Aquinas, Bartolus, Belli, Vitoria, Ayala, Suarez, Gentili, and Grotius are succinctly summarized. Three further sections are dedicated to an equally brief description of other doctrines on war and sanctions, particularly those developed by Grotius ('Law over Nations'), Vattel, Austin, Jellinek, Triepel, and Oppenheim ('Sovereigns over Law') as well as Kelsen and H. Lauterpacht ('Law over Sovereigns'). Only a few classical writers (Grotius, Vattel, and Kelsen) are described on the basis of their own writings. Critical analysis and historical contextualization are generally avoided.[2]

In Chapter 2 the author begins by illustrating Morgenthau's theory of international law, followed by an exposition of the theories developed by the New Haven School, Hart, Henkin, and Franck. Here the author shows how Henkin paved the way for a theory of international law as true and sufficiently objective law (hence distinct from policy) where sanctions and enforcement remain in the background, priority being given to compliance. Interestingly, the author points out that Henkin, 'by minimising the importance of the sanction', on the one hand 'helped preserve a place for international law in United States foreign policy and the American Academy', but, on the other, 'opened the door to confusion about the nature of international law', suggesting that international law is 'just descriptive of pragmatic, rational conduct that states would pursue, whether required by law or not' (at 61). This point is important insofar as it clarifies why the author insists on sanctions even though she accepts Hart's and Henkin's notion that sanctions are not the main reasons why the law is obeyed (at 8). She seems to fear that a complete theoretical removal of sanctions ends up justifying realists (like Goldsmith and Posner) and the idea that international law is at best a set of guidelines which states remain ultimately free to follow.

Chapter 3 is divided into two sections. In the first section the author strongly criticizes Goldsmith and Posner's *The Limits of International Law*, along with neocons in general. Her observations cannot but be fully endorsed.

[2] For example, the author's view on Grotius is highly dependent on Lauterpacht's 'The Grotian Tradition in International Law', 23 *British Yrbk Int'l L* (1946) 31. For a critical discussion of the just war doctrine see the review of J. Bordat, *Gerechtigkeit und Wohlwollen. Das Völkerrechtskonzept des Bartolomé de Las Casas* (2006), 10 *J of History of Int'l L* (2008) 157.

The second section is particularly important since it is here that the author clarifies her theoretical ideas or preferences about the 'power and purpose' of international law before turning to the actual practice and law of sanctions in Part II. This section covers only 12 pages. Along with some pages in the Introduction and some other occasional pages here and there in the book, this is the only place where the reader may find direct and specific reflections of the author's own theoretical position on the power and purpose of international law. In her view, 'although positive law theory explains much of international law, it is inadequate for explaining the basis of legal authority' as well as 'to explain the ultimate limits on positive law'. These limits are explained by natural law theory and by *jus cogens* norms, which are defined as norms which 'cannot be changed through positive law methods and must, therefore, be explained by a theory outside the positive law' (at 132). The author is mindful of the classical problem associated with natural law, namely the question 'who decides?'. She answers by offering a response looking to the common good and to legal process theory. The former may be identified and specified by courts and other deliberative bodies through the latter. In fact, decision-makers are deemed to start in international law with the recognized sources (treaties, customary international law, and general principles), but 'to the extent that the law is ambiguous, needs updating, or may violate a *jus cogens* norm, the decision-maker should look first to the purposes of the community as indicated in the most applicable law' (at 138, 140), thereby reducing 'the risk of simply applying personal preferences'. The author's suggestion is to move to courts to ascertain international law's higher principles from both positive law and the international community's most fundamental values (at 140–141). She also asserts that *jus cogens* and natural law are central, but nowhere in the book does the reader find even a cursory treatment of these challenging topics. The chapter ends, turning back to the neocons, with a critical stance against the Bush doctrine and the Iraq War, rightly reminding the reader that 'there were no weapons of mass destruction, of course, in Iraq in 2003', 'no attack on the United States by Iraq and no relevant Security Council authorization' (at 146).

After this discussion of legal theory, the book shifts in Part II to international practice and legal rules on sanctions and domestic enforcement. This approach is in line with the author's view that sanctions do exist and are both relevant and effective in international law. Four chapters are devoted to measures that may be taken to enforce international law. These measures are divided into armed and peaceful, unilateral and collective. Finally, the role of international and national courts in applying international law is explored.

Chapter 4 deals with *unilateral armed* enforcement measures, namely self-defence as the most accepted exception to the prohibition of the use of force. The author advocates the persisting vitality of the UN Charter's prohibition of the use of force under Article 2(4) against critics such as Franck and Glennon. Discussing the requirement of an armed attack in Article 51, the author adopts a position against both pre-emptive self-defence (at 172–179) and unilateral humanitarian intervention, in particular the 1999 NATO bombing of Yugoslavia (at 179–181). She also rejects unilateral military interventions against terrorists when their conduct cannot be attributed to the targeted state, following the ICJ's standard of attribution laid down in its case law (at 181–186).

Turning to *collective armed* measures in Chapter 5, the author's main points are (1) that the UN Security Council is, in accordance with the UN Charter, the only international body empowered to authorize the use of force, and (2) in doing so the UN Security Council is limited by 'certain' unspecified *jus cogens* norms, international humanitarian law, and proportionality/necessity (at 215–216, 228). No discussion is devoted to the questions of the legal basis of such 'authorizations' (taking for granted their general legitimacy), of their legal characterization (recommendation, authorization, delegation, etc.), and of their diversity in legal effects depending on the context and resolutions' wording. Chapter VIII of the Charter is subsequently discussed, rightly claiming – despite contrary views in legal doctrine and certain readings of

the 'responsibility to protect' doctrine[3] – that no regional organization has the power autonomously to authorize the use of force in situations other than self-defence, such as humanitarian intervention on the occasion of NATO's Kosovo War in 1999 (at 225), a power which remains vested only in the Security Council.

Chapter 6 is devoted to *peaceful unilateral* countermeasures taken by individual states. The author's most relevant thesis is that countermeasures taken by third states as a reaction to particularly serious violations of international law are lawful. She distances herself from Article 54 of the ILC Articles on the Responsibility of States and suggests that 'on balance' third-party countermeasures may be taken against violations of *jus cogens* and obligations *erga omnes* (at 248). The international case law on the matter is reviewed, focusing on such conditions to the adoption of countermeasures as prior wrong, prior notice, proportionality, proper purpose, and prior dispute resolution. Apart from countermeasures by third states, analysis is limited to well-known international judicial decisions without going into state practice.[4]

In Chapter 7 the analysis turns to *peaceful collective* countermeasures, understood as enforcement measures adopted by groups of states organized under a treaty, either a treaty establishing an organization or a regulatory treaty not amounting to a classic organization. This chapter, divided into two sections respectively devoted to 'internal' and 'external' enforcement, tends to overlap different concepts and leaves a number of problems open, especially affecting the very distinction between 'internal' and 'external' enforcement.

Chapter 8 focuses on enforcement of ICJ and other international courts' and tribunals' decisions, in particular on the ICJ's power to impose and enforce provisional measures and on Article 94 of the UN Charter. What the author mostly discusses in this chapter is compliance with international decisions rather than enforcement or sanctions for violations of international law.

Finally, in Chapter 9 the reader finds an analysis of international law enforcement by national courts. We share the author's view that 'national courts are, in many respects, the most important institutions for enforcement of international law', as well as of international judgments and arbitral awards, because of domestic legal systems' effective enforcement mechanisms (at 328). Realists too often overlook this fact, relying on a partial (if not outdated) view of international law as only a sort of instrumental etiquette for diplomats and statesmen.[5] The author also briefly discusses impediments to national courts' jurisdiction, including respect for sovereign immunity, conveniently hinting at the Italian *Ferrini* jurisprudence against immunity in cases of alleged commission of serious violations of human rights (at 362).[6]

A few general criticisms, however, are worth making. First, theoretical questions about the 'power and purpose' of international law are often too tersely (hence unavoidably superficially) addressed. The book is decidedly

[3] Cf. Focarelli, 'The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine', 13 *J Conflict & Security L* (2008) 191.

[4] For an approach largely based on state practice see C. Focarelli, *Le contromisure nel diritto internazionale* (1994), reviewed by O. Paye, 28 *RBDI* (1995) 367.

[5] For a more detailed discussion on this point see C. Focarelli, *Lezioni di diritto internazionale – I. Il sistema degli Stati e i valori comuni dell'umanità* (2008).

[6] For the latest developments of the question – recently brought by Germany before the ICJ (cf. www.icj-cij.org/homepage/index.php?lang=en) – and a critical analysis see Focarelli, 'Denying Foreign State Immunity for Commission of International Crimes: The *Ferrini* Decision', 54 *ICLQ* (2005) 951; *ibid.*, 'La dynamique du droit international et la valeur du *jus cogens* dans le procès de changement de la règle sur l'immunité juridictionnelle des Etas étrangers', 112 *RGDIP* (2008) 761; *ibid.*, 'Federal Republic of Germany v. Giovanni Mantelli and Others. Order No. 14201', 103 *AJIL* (2009) 122; *ibid.*, 'Diniego dell'immunità alla Germania per crimini internazionali: la Suprema Corte si fonda su valutazioni qualitative', 92 *RDI* (2009) 363.

more focussed on the actual law and practice of sanctions, its aim clearly being to provide an adequate and concrete (rather than purely speculative) response to realist critics of international law. While this is plainly acceptable, there remains the fact that the question why sanctions must be regarded as central might have deserved a more theoretical articulation. Realists may not find the discussion of Part II adequate insofar as sanctions actually remain available essentially to great powers, and only when they see fit. The fact that sanctions are potentially available (at 369) and that 'some international law violators will in fact be sanctioned' (at 11) may not prove much. The breach of legal limits on sanctions by great powers is ultimately guaranteed by the same rules on sanctions, which can again be breached by great powers, and so forth.[7] Admittedly, the author's arguments against critics of international sanctions and in favour of enforcement methods which *actually work*, in particular national courts', should prove to realists (if not fully satisfactory) at least challenging. Secondly, where the book discusses theoretical problems a number of key issues remain unanswered, in particular *jus cogens* and natural law. This may appear hardly tenable to readers who are not convinced that *jus cogens* has an overriding legal meaning,[8] but may also disappoint advocates of *jus cogens* for lack of adequate elucidation of the key role *jus cogens* and 'common values' are believed to play in today's international law. Thirdly, the proposed 'power' and ultimate authority of international law vacillates throughout the book between the extremes of belief (hence spontaneous compliance) and force (hence coercive enforcement), sometimes leaning more on the former while at other times more on the latter, without making very clear how they match and what novel theory is proposed. The author constantly reminds the reader that 'people everywhere believe in law' (at 15), but gives no reasons why then sanctions are so important. Either people believe in law, in which case sanctions are not so important, or sanctions are really important, but then people cannot be so concerned with law and the community goals it protects. True, the author makes it clear that belief and sanctions are intertwined, the latter signalling and reinforcing the former (at 16), and seems generally more inclined to give prominence to sanctions rather than to acceptance, but this hardly suffices to specify her position. Fourthly, certain well-known and basic international law notions are detailed, here and there, in a fashion which would be far more suitable for a general textbook. Fifthly, a bibliography is lacking and nearly all bibliographical references in footnotes are to English-written works, which is regrettable, given the number of major works written on the subject in other commonly used scientific languages, including French, German, Italian, and Spanish.

Though perhaps slightly late, the book in any case has to be warmly welcomed at the moment when the new US President has taken office. As the author repeats on the closing page, 'people everywhere believe in law, believe in this alternative to force' and 'want the power of law to be used to achieve the community's most important common goals'. A bit more pessimistically we would say that people *need* law, but do not always believe in it to the extent that would be necessary for the benefit of all.

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[7] This is the reason why we remain sceptical of any attempt to give sanctions a special argumentative weight, either against or for the reality and relevance of international law, as discussed in Focarelli, 'Customary Foundations of *jus gentium* in Francisco Suárez's Thought and the Concept of International Community in Contemporary International Law', 16 *Italian Yrbk Int'l L* (2006) 41, at 51–56.

[8] For this position see Focarelli, 'Promotional *Jus Cogens*: A Critical Appraisal of *Jus Cogens*' Legal Effects', 77 *Nordic J Int'l L* (2008) 429.