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Permanent Concerns, Legal Norms, and The Changing International Order

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FORMALLY OR INFORMALLY, four key sets of questions shape the manner in which those in the national security policy arena evaluate an issue fraught with legal implications: (1) what is the settled policy of the United States; (2) what specific interests are at stake, and what are the objective outcomes we seek; (3) what are the requirements of the contemporary international legal regime, and what concrete obligations has the United States undertaken; and (4) what is the nature and direction of the international system or environment. It is through the evaluation of the dynamic interaction of these factors that one determines the course of action. Law is no simple application of norm to situation, but a rigorous interpretation of both.

The key variable in future years will be the changing nature of the international system, including not only the general configuration of power but the technology of conflict. Policy makers and pundits alike are seeking both to define and to influence the characteristics of that environment within which the legal regime will evolve and which will in turn be shaped by the law.

It is worth noting in the first place that the United States is entering into "normal" times. The United States emerged as a great power in the late nineteenth century at the very moment when the relatively stable balances of the preceding period were giving way to titanic struggles over the mastery of Europe and Asia. America was about to be swept up in the vortex of universal history.

However brutal yet tawdry the drama would be, the twentieth century would be no *opera comique* or afternoon "soap." Many of the actors would be heroic and even the petty villains endowed with a wickedness to inspire a Dante or a Milton. The issues would be primordial and the stakes mortal. It would be a polarizing century. How fatuous it would be to ask in 1918, 1940, 1960, or 1980, though some, alas, in fact did, who the enemy was or what the contest was all about.

Now, after the heroic struggles of the twentieth century, the United States is seeking to understand and to play its role as a great power without a great quarrel. And we may discover that it is not peace that is enervating for military forces; it is a diffusion of the threats, uncertainty of the stakes, and ambiguity in the response. Such an era has dangers ultimately as deadly as the protean struggle of the giants, for the lines we must defend are not clearly marked and the perilous consequences of error and weakness less immediately apparent.

Even the polarizing clashes of the twentieth century had moments of deceleration and of lassitude. Winston Churchill, writing of the aftermath of World War I, observed:

To the faithful, toil-burdened masses the victory was so complete that no further effort seemed required. Germany had fallen and with her the world combination that had crushed her. Authority was dispersed; the world unshackled; the weak became the strong; the sheltered became the aggressive; the contrast between victors and vanquished tended continually to diminish. A vast fatigue dominated collective action. Though every subversive element endeavored to assert itself, revolutionary rage like every other form of psychic energy burnt low. Through all its five acts the drama had run its course; the light of history is switched off, the world stage dims, the actors shrivel, the chorus sinks. The war of the giants has ended; the quarrels of the pygmies have begun.¹

That same Winston Churchill believed that the devastation of the Second World War stemmed from the inability of the great democracies in the aftermath of that first Great War to manage the quarrels of the pygmies and the demands of the ordinary. As he again wrote, this time in the commencement of his study of World War II:

It is my purpose . . . to show how easily the tragedy of the Second World War could have been prevented; how the malice of the wicked was reinforced by the weakness of the virtuous; how the structure and habits of democratic states, unless they are wielded into larger organisms, lack those elements of persistence and conviction which can alone give security to humble masses; how, even in matters of self preservation, no policy is pursued for even ten or fifteen years at a time. We shall see how the counsels of prudence and restraint may become the prime agents of mortal danger; how the middle course adopted from desires for safety and a quiet life may be found to lead directly to the bull's-eye of disaster. We shall see how absolute is the need of a broad path of international action pursued by many states in common across the years irrespective of the ebb and flow of national politics.²

What, then, are the requisites of a great power in ordinary times? What do the people need from those who will stand guard over the animating values and concrete interests of the nation?

First, true leadership must retain a sense of those permanent values and interests that define and animate this remarkable democratic republic. And second, it must grasp, if only intuitively and "through a glass darkly," the changes that are moving us beyond the contours of international power in the twentieth century into the configuration of power and influence and the focus of competition and cooperation in the twenty-first century. "The future," as Yogi Berra observed, "isn't what it used to be."

Throughout the course of this century, two great systemic gulfs have opened. First, a disjuncture between social and political boundaries, and second, a chasm between the aspirations of our peoples and the competence of our governments. The two are probably related. This disjuncture between social and political boundaries is described in many ways—globalization of the economy, clash of civilizations, tribalization, global environmentalism, information revolutions, the universal reach of weapons, persistent mass migrations, and so forth. In effect, many important social activities transcend traditional territorial boundaries. This in itself is not bad and in many areas is a positive good. The difficulty stems from the fact that not only are many of these activities unregulated by political norms and legal understandings, but they are connected with no particular community and hence animated by no sense of the common good. This disconnect is particularly troublesome to the various governments around the world, because their peoples do hold those individual regimes responsible for the general welfare, the elements of which they sometimes have only tenuous control. In addition to all the historical

possibilities open to demagoguery, ambition, and avarice, these disjunctures provide even more opportunity for mischief.

Hence, the great issue of the early twenty-first century is likely to be that of political organization: how power and authority will be shared within, between, and across states and how individual liberty and collective action will be reconciled; what mechanisms will be developed on how and to what degree the growth in the general storehouse of wealth will be distributed; what norms will legitimize the exercise of power within and without; and what constraints will be expected and enforced.

A moral vision and a political and economic formula will be critical to the architecture of the new century, but without a foundation of security, the house will not withstand the inevitable vicissitudes of economic downturn, political ineptitude, and personal ambition. There will be at least three key ingredients of that foundation which will affect how we think about general norms of international law and the laws of armed conflict. They are:

First, a solid structure of deterrence and reassurance: to protect the sinews, even in the new era, of our political independence and territorial integrity and to guard against the undue concentration of international power;

Second, a modicum of international public order: to establish or renew limited but real norms of international behavior and to be prepared, as circumstance dictates and allows, to enforce those norms through independent and collective coercive action; and

Third, a residual capacity to apply military organization to relieve, where appropriate, human suffering.

What are the implications for international law in general and military operational law in particular of this new world and the required security system? Such a question raises both the possibilities and the limitations of any legal code. Law reflects social values and interests and provides predictable norms in terms of which both group and individual decisions are made. In simple terms, law, to be effective or legitimate, must embody a shared concept of justice and a promise of public order, that is, the minimization of arbitrariness reflected in widespread violence and random social behavior.

Every legal system constitutes rules *for* human behavior, not physical or biological rules *of* human behavior. Hence, even if reflective of the interests and values of the community, there is always a gap between the legal norm and social behavior. The issue for the legitimacy and continuity of the legal system is whether or not the gap is so great as to constitute a scandal, an irrelevance, a danger, or all of the above.

A central issue in any political-legal order is why one should obey at all. Typically the answer is three-fold:

First, the appeal to conscience. This raises such concerns as, is the regime “good,” is the social arrangement “proper,” and does the political order sustain the “good life”?

Second, calculations of interest. Important here is the balance between the immediate possession of “goods” (short term), on the one hand, and on the other hand, the continuous protection of or access to those goods by virtue of the social arrangements (long term).

Third, coercion. This involves not simply brute strength but the ability of a political regime to invoke obligations arising from a coordinated perspective of what constitutes collective values, goods, actions and a willingness on the part of the subjects of that regime to entrust to it the authority and the power to reconcile divergent claims and enforce compliance.

Politics is hence not simply consensus but implies enforcement of communal norms, i.e., coercion. Cicero described the political order as an agreement in justice. This specifically entails the joining of rights to duties within the framework of an agreed vision of the common good. Many social communities are primarily voluntary in character with little or no coercive core, and some have argued that the broader political community may be likewise. Indeed, this latter view is the basis of social utopian schemes, and undergirded Marx’s notion of the withering away of the State, ironical in view of the Soviet totalitarian experience. Nonetheless, the key problem of what Aristotle would have called a constitutional regime is to define the relationship between consent and coercion.

The coercive aspect of politics has three basic elements:

a. The legitimization of coercion—the political order is necessarily a moral order. It was by design that Aristotle’s study of ethics and of politics were considered of a piece;

b. The complex organization of coercion; and

c. The regularization and limitation of coercion, i.e., lawful force.

In the most stable political communities, persistent coercion is not normal and tends to be distant in the life of the ordinary citizen. This may be true of both domestic and of international politics; for instance, on the domestic side, Sweden, the Netherlands and Switzerland, and, on the international side, U.S.-Canadian relations or the European Union.

The “scandal” of the international political-legal system has, of course, always been endemic violence, even to the point of jeopardizing the very integrity or independence, sometimes existence, of the member States. As has

been often noted, this state of affairs stems in the first instance from the anarchic character of international affairs: there is no universally accepted or effective keeper of the "*ultima ratio*," the exclusive right of enforcement. Exacerbating this structural problem is the heterogeneity of political systems, with its differing conceptions of law, and the periodic disruptions associated with messianic or imperial visions.

Recall the two systemic disjunctures mentioned earlier—the increasing gap between social and political boundaries and the concomitant distance between the aspirations of the citizenry and the ability of government to meet those aspirations. In addition to the normal tensions which anarchy, ambition, and political heterogeneity introduce to the international legal regime, the denationalization and globalization of many economies and the increasing social tribalization within and across national boundaries have further complicated all the key elements of both domestic and international law enforcement.

In a sense we are building a "new international order" while seeking to cope with the old international order! We hear talk about the demise of the nation state and the declining utility of force whilst such states seem quite lively and prone, along with "non-state" actors, to use force on a regular basis. The contradictions may only be apparent. As noted above, there is always a gap between legal norm and social behavior. So too, human beings are always creating new forms of activity that transcend current legal institutions and political authority. In time, such activity has such impact on other individuals and groups that improvements in political and legal institutional competencies or new forms of cooperation and control are sought. States, alliances and coalitions, international organizations are not dying but being recast. In the security realm this has certain immediate implications.

One often hears American public officials, military officers, and political-military commentators speak of the importance of "stability" as an object of U.S. security policy. Assuming this is not simply a code word for the status quo and no change, it probably refers to a degree of security and satisfaction as well as the availability of means of peaceful change among peoples that is sufficient to minimize violence and reinforce a political order widely accepted as legitimate. In effect, even as we seek to realize our immediate interests, we need to do so in such a way as to reinforce existing standards or to develop new norms of international behavior and to employ our power unilaterally or in association with other states to "incentivize" adherence to such norms.

Earlier, three key elements of a security foundation were mentioned—a structure of deterrence and reassurance, a modicum of public order, and a capacity to alleviate human suffering. In concrete terms, these broad objectives translate in the first instance into political associations that join in predictable ways U.S. diplomatic, economic, and military power with that of a number of great powers. In this regard, some of the key diplomatic, economic, and military cooperative mechanisms developed after World War II are still relevant—such as NATO, the World Bank, the IMF, the American-Japanese alignment, the UN, and more recent innovations such as the World Trade Organization, the North American Free Trade Association, new connections being forged with Russia and China and others. If deterrence and reassurance are to be structural, they must be anchored in normative understandings and articulated in institutional mechanisms. In effect, structural deterrence is grounded in collective legitimization. It cannot be sustained by American power alone, though U.S. military predominance and economic preeminence are probably key preconditions, nor can it endure by unilateral or *ad hoc* responses.

If multilateralism is a key element of a deterrence and reassurance structure, it is equally so of the “routine” business of maintaining international public order. The control of transnational flows, many incident to globalization and driven by information and transportation technology, may require an unprecedented coordination of international efforts. Whether it be population movements, illegal commerce, or financial transactions, the development of rules, institutions, and cooperative procedures will become increasingly urgent. Constraints on the development, manufacture, and use of weapons of mass destruction will require a higher degree of consensus—both on the nature of the constraints and the means to enforce them—than currently exist. Witness the fragmented approach to Iraq. The same holds true for the general issue of terrorism. The definition and maintenance of international boundaries—whether they be territorial, diplomatic, economic, or military—will be at the heart of the agenda of re-articulating political organization in the twenty-first century.

Humanitarian assistance has become an important, if still inchoate, commitment of the member States of the United Nations. When such aid requires the commitment of coercive force, the line between humanitarian and political intervention becomes very fine indeed. It is difficult here too to see how such activity can be long sustained without a multilateral framework and collective legitimization.

In a real sense the international legal principles associated with the 1648 Treaty of Westphalia—political independence, territorial integrity, legal

sovereignty, and domestic jurisdiction—were a response to the emergence of independent states and provided the foundation for the international public order even to the present. Interdependence was not in 1648 nor in 1998 contradictory to these principles. Indeed, it was the fact that the emerging states of Europe were interdependent, often in a deadly way that impelled the princes of Europe to define guidelines for that interdependence. The issue of the emergent international order is not the interdependence of states but the globalization of economies and the transnational character of social movements. And, to a substantial degree, this transnational interlinkage is the end product of a particular political-economic philosophy, liberal economics, and the policy of an identifiable power, the United States.

The persistent, if not always consistent, exercise of American power since World War II for international economic liberalization provided the essential matrix for the substantial denationalization of the advanced industrial economies and the remarkably free movement of peoples, goods, services, and capital across national boundaries. The permeability of state frontiers has been hastened by the nuclear, information, communication, and transportation revolutions. But none of these technological innovations would have been sufficient to transform the state system as thoroughly as has the political model of liberal economics. Neither Adam Smith nor John Locke would have been surprised.

The essence of this model as embraced by the United States is the concept that state power should be so delimited as to allow a wide sphere for private choice and activities, including across national boundaries. At the same time, in theory and practice, the United States rejected the Bodinian concept that sovereignty cannot be divided but instead acted as if sovereignty could be dispersed and functionally-based. Coupled with the notions of natural, individual rights and of obligations transcendent of particular group (e.g., racial, ethnic, familial, religious, etc.) identifications—in effect, human rights and the rule of law—this philosophy of limited government and divided sovereignty became a powerful tool in the shaping of world politics. What is remarkable is that at almost any point from the end of the nineteenth century until very recently, one could as well have projected a wholly different vision—one of statism, nationalism, and autarky. As we approach the next century, however, it is clear that the liberal model reinforced by critical technological changes has decisively altered key elements of the international system. Social tribalization could ultimately trump this global society and reintroduce once again new forms of nationalism and statism, but it is not clear why the United States would favor such a return.

The implications of this line of reasoning should be clear: U.S. policy should be aimed at developing and sustaining universal norms that maintain open societies. This requires not only the removal of barriers to private social transactions, including commerce, across national boundaries but the creation and enforcement of rules for those activities that meet the expectations of our publics for justice and equity. This will require not only that many of the classical norms of the Westphalian order pertaining to the threat and use of force be upheld, but that norms relevant to a globalized system be defined and strengthened. This points to rules governing international commerce and what can only be seen as constabulary functions. The latter includes peace operations and arms control.

To be precise on the last point, whether it be a policy related to the proliferation of weapons of mass destruction or to the restoration of order in Haiti or the enforcement of the Dayton Accords in Bosnia, all entail an intervention into areas which used to be seen as falling within the sovereign jurisdiction of states. Unilateralism in these areas can only be seen as violations both of older concepts of international law and destructive of the development of norms adequate for societies that are increasingly interpenetrable.

To put a finer point on it, there are growing expectations concerning not only the external but as well the internal behavior of states and their citizens. Certain standards of government behavior *vis-à-vis* one's own citizens, presumed obligations concerning the development and manufacture of specified weapons systems, commerce in various items such as narcotics, decisions on trading partners, genocidal activities involving not only governments but parties to an internal conflict, the degree and character of public order, and comparable issues are increasingly being presented as raising questions of international law. And collective and individual state actions are being taken under this guise. The issue, in effect, is intervention within areas that historically have been thought as subject to domestic jurisdiction. Without a fairly specific set of agreed international rules in these areas and acceptable mechanisms to enforce them, there is a grave danger that states, and perhaps even non-state groups, will seek to legitimize unilateral intervention in behalf of parochial state interests by reference to presumed international standards. Ancient ambitions and modern globalization of our societies invite this abuse. Both the older order of Westphalia and the newer order generated by economic liberalization and contemporary technologies will fall victim—with consequent cascading disorder.

While unilateral capabilities and actions will remain a key element in a still fragmented international system, and while such capabilities are probably

crucial for the United States to play the role of coalition builder and, yes, global constable, it is important that those capabilities be employed in such a way as to be norm-creating or reinforcing, that is, to yield an international system that is held in balance less by brute force and narrow calculations of interest than by, again harking back to Cicero, an agreement in justice. Both the nature of U.S. interests and the costs of unilateralism dictate that American power be oriented not only toward specific goods but toward the creation of a political and legal regime that will command the assent of a large number of the great and lesser powers. In effect, U.S. policy makers must exhibit a persistent and sophisticated understanding of the process of collective legitimization.

In all this there is no area where all the elements of the security foundation will come together more clearly than in operational law, which crystallizes theory into practice in the development and application of rules of engagement (ROE). The *Annotated Supplement to The Commander's Handbook on the Law of Naval Operations* defines ROE thusly: "During wartime or other periods of armed conflict, U.S. rules of engagement reaffirm the right and responsibility of the operational commander generally to seek out, engage, and destroy enemy forces consistent with national objectives, strategy, and the law of armed conflict." It further speaks of Standing Rules of Engagement approved by the National Command Authorities that delineate "the circumstances under which U.S. forces will initiate and/or continue engagement with other forces encountered."

In a critical way, practice appears to be expanding this narrow definition of ROE to cover all sorts of activities, including those not normally associated with "periods of armed conflict," such as humanitarian intervention, and to be aimed not only at the control of U.S. forces but coalitional forces as well. The scope of peacetime rules of engagement and the practical meaning of the Standing Rules of Engagement are being progressively expanded. These norms have provided the foundation not only for instruction to American officers but to foreign officers around the world.

In a recent international simulation sponsored in Europe by the Naval War College, it became evident to the members of that distinguished foreign audience that abstract commitment to cooperate never has the clarity to affect events unless tied to rules by which armed forces would join and collaborate. Scholars of international politics and law will explicate the changing requirements of international security, and statesmen will forge general agreements. It is in the area of operational law, however, that the true dimensions of these requirements and agreements will be revealed.

Jean Girandoux, in a statement not meant to be complimentary, once wrote that international law is “the most powerful training ground for the imagination.” And in a real sense it is and should be. If vast social forces are transforming the international system, and if, as I have contended, the great issue of the twenty-first century will be that of political organization, both of states and the community of states, then we are in a period in which the legal imagination must be pressed into service. This will require a re-articulation of the general principles of international law and the extension of the scope and depth of operational law in the national security arena. Such an evolution is critical not only for a relatively stable international order but is likely to be fundamental to the role of the United States as a great regulatory and constitutive power. Both the short-term and long-term interests of the Republic are bound to the political imagination and will of those American leaders entrusted with the defense of those interests in a time when, in the words of Alfred Lord Tennyson, “the old order passeth away. The new is struggling to be born.”

Notes

1. WINSTON S. CHURCHILL, *THE AFTERMATH* (vol. 4, *THE WORLD CRISIS 1918–1928*) 17 (1929).
2. WINSTON S. CHURCHILL, *THE GATHERING STORM* (vol. 1, *THE SECOND WORLD WAR*) 17–18 (1948).