THE POLITICS OF INTERNATIONAL LAW AND THE LAW OF INTERNATIONAL POLITICS: AN AMERICAN PERSPECTIVE

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I. INTRODUCTION

Thirty-five years ago, Lou Henkin made the observation that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[2] Years later, this assertion prompted another scholar, Harold Koh, to ask "[i]f transnational actors do generally obey international law, why do they obey it, and why do they sometimes disobey it?"[3] This essay shall also make the optimistic assumption that Professor Henkin is correct, but it shall address the questions of when and how do states obey international law.[4] In other words, borrowing from the title of this Symposium, does only power speak to law, or does law also speak to power?

These are not easy questions to answer. They relate to a number of issues at the heart of debate about the role international law plays in international relations. Is international law a fig leaf that enables states to do as they wish, exercising power without regard to legal constraints? Or is it a straight-jacket that law-abiding states gladly don, since they do not wish to live in a world where power is unbridled by law? Or is it an element that shapes foreign policy but does not determine it, thereby enabling law to influence, but not outrank, power? Underpinning these

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[2] LOUIS HENKEN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 42 (1968).

[3] Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599, 2600 (1997).

[4] It should be noted that one rarely sees political scientists debate whether foreign policy matters in shaping international law. But international lawyers continue to debate the influence of international law on foreign policy. This might suggest, without need for further analysis, that the scales are already tipped in favor of power.

issues is the question of whether we can even speak of international law when enforcement mechanisms are weak or nonexistent.[5]

Answers to these questions depend in part upon how we define law and what we mean by power. Power is the harder of the two disciplines to quantify in this context, as it has both objective and subjective elements. It can be measured objectively in terms of economic strength, such as a country's gross domestic product or per capita income. Japan, for example, embodies objective elements of power. It can also be measured in terms of military strength, both conventional and unconventional. North Korea, for instance, possesses military power by virtue of its large conventional armed forces and its alarming development of nuclear capabilities.[6] But power is also subjective – some countries wield it, while others do not. France, for example, is but one of 25 member states of the European Union. It may not lead anyone's list in terms of economic or military strength, but it indisputably wields power. It is for obvious reasons that Paris quickly dispels any notion of giving up its seat on the U.N. Security Council in favor of a pan-European seat. For purposes of this essay, we shall define power as a combination of objective and subjective elements, which culminates in the success with which one state can persuade, cajole or—to be frank—force another state to do something it would otherwise be unlikely to do.

Law is less of a challenge to define than power. International law has evolved more in the last two decades than in the last four hundred years.[7] Globalization has given the discipline more prominence and begun to meld distinctions between public and private international law. As borders in commerce and communication have all but disappeared, the need for law to regulate trans-border behavior has increased. Non-governmental organizations have succeeded in using new technologies to organize

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[5] *See, e.g.,* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 110-11 (2002).

[6] *See, e.g.*, THE WORLD FACTBOOK (2004), *available at* http://www.cia.gov/cia/publications/factbook/geos/kn.html#Intro.

[7] The birth of modern international law is commonly traced to the Peace of Westphalia, which ended the Thirty Years' War in 1648. LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW xxviii–xxxvi (4th ed. 2001).

more effectively and extend their influence more broadly. Countries and problems that once seemed far away are no longer so. Public international law – often defined as "the law which regulates the intercourse of nations"[8] – has been influenced by these developments as they have steered states towards new areas and new commitments. Agreeing to establish the International Criminal Tribunal for Rwanda, for example, led to the first judgment on the crime of genocide by an international court.[9]

But international law, just as domestic law, is more than "black-letter" law, and this is where debate about the relationship between law and power becomes most interesting. The role that international custom, or states' behavior, plays in determining what international law is enables states to move the law in a different direction over time. Article 38 of the Statute of the International Court of Justice refers to "international custom" as "evidence of a general practice accepted as law." In addition, the interpretation of international law, like municipal law, has an element of subjectivity. Indeed, were international law crystal clear in every instance, the role of power would likely be more circumscribed.

Let us now consider a few cases from the annals of recent U.S. diplomacy that illustrate some ways in which international law can influence international relations. These examples embody efforts to prevent conflict, to manage conflict where prevention has failed, and, where management has failed, to resolve conflict by peaceful means or – on occasion—by the use of force. In looking at these cases, we shall consider how international law affected the foreign policy decisions that were made.

II. Preventing Conflict

It is generally unknown that within the past few years, war nearly broke out between two countries in the Middle East region (neither of which was Israel). It is not hard to ignite the tinderbox of political, religious, ethnic and economic tensions that have been present in the Middle East for centuries. The two countries — which we will call A and B so as not to jeopardize

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[8] Black's Law Dictionary 733 (5th ed. 1979).

[9] Message from Kofi Annan, Secretary-General of the United Nations, *About the Tribunal*, http://www.ictr.org/about.htm.

present relations — share a border and history of political differences. They have sparred diplomatically, but neither has used force to settle their differences. Country A was facing a domestic terrorist threat and came to view Country B as taking insufficient steps to curtail cross-border support for such activity, and possibly even providing some support. Country A started to move its troops towards Country B, and was preparing to cross the border as necessary to deal with the problem. Had this happened, Country A would have begun a war and could have sparked a wider regional conflict.

The United States had a relationship with both countries. It was, as a factual matter, in the best position of any country or organization to try to defuse the crisis. It accomplished this by borrowing a page from international law on the use of force. Washington immediately instructed its ambassadors to Countries A and B to see the heads of government and deliver a strong message directly from the U.S. President. Country A was reminded of the prohibition in international law against using force to resolve disputes, and told in clear terms that no one in the international community would sanction an invasion of Country B. The United States also told Country A that it would – and did—pressure Country B to start cooperating in addressing the cross-border terrorist problem. The United States indeed made it clear to Country B that it had to curtail any support for such activity. Fortunately, both countries saw the wisdom of backing down, and U.S. efforts to avert an outbreak of hostilities in this volatile region succeeded.

One could argue that Country A would have had a right to use force to deal with its concerns under Article 51 of the U.N. Charter by arguing that the terrorist attacks constituted "an armed attack."[10] While this argument might be easier to win today, after the tragedy of 9/11 and its aftermath, the situation described above was not analogous to the facts that justified U.S. use of force against Afghanistan. In any case, Country A would have found it difficult to win such an argument on grounds of

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[10] "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." U.N. Charter art. 51.

necessity, for peaceful alternatives to the use of force had not yet been exhausted.

III. Managing Conflict

An example of an ongoing conflict under international management is Cyprus. The tense situation there has threatened to erupt into war several times since 1974, but has so far been managed effectively. The Greek and Turkish Cypriot communities share the small island, as well as a history of political and military skirmishes. Passions led to violence in 1963 and 1974, but since that era the situation has been contained by a combination of U.N., U.S. and U.K. efforts. More recently, Greece and Turkey have also been constructive sources of influence over their respective communities.

Both the Greek and Turkish sides of Cyprus, however, remain heavily armed. Potentially inflammatory incidents have been defused with the assistance of a U.N. peacekeeping force, which is one of the oldest in existence.[11] The United Nations Peacekeeping Force in Cyprus (UNFICYP) continues to patrol the 180 kilometer "Green Line" that bisects the country. Basic principles derived from legal obligations under the U.N. Charter and political commitments agreed in the Helsinki Final Act of the Organization for Security and Cooperation in Europe have guided the international response to the underlying conflict.[12] The breakaway Turkish Republic of Northern Cyprus (TRNC), for example, has not been recognized as an independent state or government. Cyprus continues to be recognized as one state, and the leaders of the Republic of Cyprus as the sole recognized government. Other important principles, such as the right of refugees to return home or receive appropriate compensation, have also helped pave the way for an eventual settlement.

During the past few years, U.N. Secretary General Kofi Annan and his team made heroic efforts to persuade the parties to reach a settlement of all issues, with strong support from the

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[11] S.C. Res. 186, ¶4, U.N. SCOR, 1102d mtg., U.N. Doc. S/RES/186 (Mar. 4, 1964).

[12] Section I of the Helsinki Final Act states that the participating States "consider that their frontiers can be changed, in accordance with international law, by peaceful means and by agreement." Conference on Security and Co-operation in Europe: Final Act, sec. 1, Aug. 1, 1975, 14 I.L.M. 1292, 1294, *available at* http://www.osce.org/docs/english/1990-1999/summits/helfa75e.htm.

United States and the United Kingdom. The proposed settlement was based on the principles outlined above. Unfortunately, in April 2004, the Greek Cypriots rejected the proposal.[13] The international legal principles addressing recognition of new states and basic human rights, mentioned above, have helped the two Cypriot communities and third parties manage the conflict over the years and move closer to a settlement. The critical ingredient of political will on all sides is still missing, but will hopefully materialize.

IV. Resolving Conflict

A. Bosnia

When parties have exhausted themselves on the battleground, or stopped fighting due to external pressure or threats, there can be a chance for law to speak to power with some authority. This was the situation in Bosnia in 1995. The United States had sought to treat the war that erupted among the Muslim, Croat, and Serb sides of the newly independent country as a problem for Europe to address. But Europe's solution was to draft settlement agreements that could not stick and to dispatch U.N. peacekeepers to places where, unlike Cyprus, there was no peace to keep.[14] Brazen Serb forces even seized U.N. peacekeepers as hostages and conducted atrocities under their helpless gaze.

The United States came to realize that it had little alternative but to get more actively involved in the search for a solution to the underlying horrors of the Bosnian war. Through intense negotiations led most visibly by Washington, the parties were persuaded to come to Dayton, Ohio for as long as it took to forge a settlement. The peace process was laborious but ultimately succeeded. There were times when the negotiating team, of which I was a member, felt that failure was imminent. But peace won the day in a settlement that was fair without giving any party

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[13] Press Release, Secretary-General, "Unique and Historic" Chance to Resolve the Cyprus Problem Missed, Says Secretary-General, After Settlement Plan Rejected, U.N. Doc. SG/SM/9269 (Apr. 26, 2004). U.N. Press Release SG/SM/9269 (April 26, 2004) ("unique and historic chance to resolve the Cyprus problem has been missed").

[14] *See generally* Richard Holbrooke, To End a War (1998).

all that it sought. Naturally, law played an important role in forming the baseline position on several issues. There would continue to be a single Bosnia, and not two (or three) independent states. The crime of ethnic cleansing in which the Serbs had engaged would not be treated with impunity. Although contentious, all the parties finally accepted that there would be no immunity for war criminals. Then Serbian president Slobodan Milosevic agreed to this provision, never believing that he would one day find himself facing charges before the Hague Tribunal.

B. Kosovo

It is not surprising that law influences power when the situation involves drafting a peace treaty or developing principles of conflict management or prevention. The more interesting paradigm is what happens when measures that do not involve force fail. Indeed, much of the debate about the influence of international law revolves around the extent to which it justifies or undermines a state's decision to use force to resolve a particular conflict. Kosovo, which turned out to be NATO's first major military action, presented a challenge in which the precise role of international law proved to be somewhat ambiguous.

NATO had laid down a gauntlet that if Milosevic and the Federal Republic of Yugoslavia (FRY) did not honor the agreements made in fall 1998 to pull back troops and ease up on the Kosovar Albanians, the NATO Alliance would act. The Administration of George H.W. Bush had adopted the foundation for this policy several years earlier. It had issued a "Christmas Warning" in December 1992, as its Administration was coming to an end, which stated there would be severe consequences to any action against the Kosovar Albanians. For a while, the situation stabilized while international attention focused on resolving the conflicts in Bosnia and Croatia.

A few years after Dayton, however, Milosevic began tightening the noose around Kosovo. The United States, as the major player in NATO, was contemplating options for dealing with this situation, including the use of force by NATO. In a now famous story, Secretary of State Madeleine Albright was displeased to learn that the British government had circulated a draft U.N. Security Council resolution authorizing the use of force. Foreign

Minister Robin Cook informed Secretary Albright that his lawyers had told him a Council mandate was necessary. She responded that he should "get himself some new lawyers."[15] She was concerned that, if such a resolution had passed, it would have set a precedent constraining NATO and given China and Russia a veto over the Alliance's freedom of action. Alternatively, the resolution might have failed to pass, or could have been watered down. None of these outcomes was acceptable to the United States in its determination to limit the FRY's ability to intimidate the Kosovar Albanian community.

Negotiations with Milosevic to reach a settlement providing for Kosovar self-government failed. On the afternoon of March 24, 1999, NATO launched the first air strikes against Serbia, as it had threatened. The strikes began what turned out to be an intensive military air campaign lasting more eleven weeks. Adam Roberts has astutely ascribed several claims of "uniqueness" to Kosovo, including the "first time a major use of destructive armed force had been undertaken with the stated purpose of implementing UN Security Council resolutions but without Security Council authorization" and "the first major bombing campaign intended to bring a halt to crimes against humanity being committed by a state within its own borders."[16]

The Administration did not put forward an explicit legal basis for NATO's action, but sought to justify it on several grounds. There was concern about Serbian brutality in Kosovo and the threat continuing repression posed to regional security. There was a clear sense that the pursuit of peaceful alternatives had been exhausted. There were indications of Serbian preparations for a major offensive yet to come. And there was non-compliance by the FRY with the terms of U.N. Security Council resolutions, the U.N. Charter, and other human rights commitments.[17] London seemed more uneasy than Washington about the absence of a firm legal basis. As noted above, the United Kingdom initially sought to introduce a resolution in the Security Council

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[15] MADELINE ALBRIGHT, MADAM SECRETARY 384 (2003).

[16] Adam Roberts, *'Humanitarian War' over Kosovo*, 41 SURVIVAL 102, 102 (1999).

[17] William J. Clinton, Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro) (Mar. 26, 1999), *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: WILLIAM J. CLINTON 1999 459 (GPO 2000).

authorizing the use of force, which the United States viewed with concern. London later sought to craft a theory of "overwhelming humanitarian necessity where, in the light of all the circumstances, a limited use of force is justifiable as the only way to avert a humanitarian catastrophe."[18] Lawyers for the U.S. Government feared the slippery slope of a doctrine focused essentially on "humanitarian intervention," even if that theory described *de facto* the approach Washington had adopted.

Although NATO's decision to bomb Kosovo was understandable in many ways,[19] debate over its consistency with international law lingers.[20] Was the United States or NATO constrained because there was no prior authorization by the Security Council to use force and the rationale of self-defense on the basis of Article 51 was absent? Not visibly so. Does that mean Kosovo represents a triumph of power over law? Not completely so. Policy-makers were preoccupied more with national interests and political considerations than the black-letter law of the U.N. Charter. With Serbian behavior so egregious, the humanitarian component so compelling, particularly after initial inaction in Bosnia, and 16 NATO governments united in resolve (albeit to varying degrees), it was hard to conceive that international law might not accommodate an impulse to "do the right thing" in Kosovo. In addition, legal concerns – particularly concerning serious violations of humanitarian law and the plight of refugees – were important considerations.

In Kosovo, law spoke to power, although perhaps more softly than many international lawyers would have preferred. Accordingly, the Security Council resolution welcoming deployment of an international military and civilian presence was

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[18] Foreign Affairs Committee, Fourth Report - Kosovo, 1999-2000, H.C. 28-I, *available at* http://www.publications.parliament.uk/pa/cm199900/cmselect/cmfaff/28/2802.htm.

[19] *But see* Roberts, s*upra* note 16, at 118. Professor Roberts suggests that at "the beginning of the air campaign, if NATO governments had known that it would have to last 11 weeks, would involve so many difficult issues and incidents, and would require a serious prospect of land war, it is far from certain that they would have embarked on it." *Id.*

[20] *See generally* Richard B. Bilder, *Kosovo and the 'New Interventionism': Promise or Peril?*, 9 J. TRANSNAT'L L. & POL'Y 153 (1999) ; Christine M. Chinkin, *Editorial Comments: NATO's Kosovo Intervention: Kosovo: A "Good" or "Bad" War?*, 93 AM. J. INT'L L. 841 (1999).

viewed by some as providing the necessary juridical basis for NATO's action, even it was *ex post facto*.[21] But power spoke also to law, at least in the United Kingdom. Motivated by a combination of moral and legal imperatives, Prime Minister Tony Blair sought a solution that would justify intervention under certain limited circumstances.[22] The United States was not prepared to go that far. Kosovo left many wondering whether there is a way to reconcile the Charter's prohibitions against the use of force with a regional organization's commendable impulse to address a humanitarian catastrophe. At the same time, others saw danger lurking behind the subjectivity of such an analysis.[23] While power trumped the black-letter law, law got the last word as states sought its cover. Kosovo can be interpreted to have reflected a relatively unique combination of factors, including subsequent validation by the international community.

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[21] S.C. Res. 1244, U.N. SCOR, 4011th mtg., U.N. Doc. S/RES/1244 (June 10, 1999). Regional interventions by forces on behalf of the Economic Community of West African States (ECOWAS) were not authorized by the Security Council before they occurred, but implicitly afterwards. *See, e.g.*, FRANCK, *supra* note 5, at 155-62.

[22] Tony Blair, Speech before the Economic Club of Chicago (Apr. 22, 1999) (transcript *available at* http://www.pbs.org/newshour/bb/international/jan-june99/blair_doctrine4-23.html)

> First, are we sure of our case? War is an imperfect instrument for righting humanitarian distress; but armed force is sometimes the only means of dealing with dictators. Second, have we exhausted all diplomatic options? We should always give peace every chance, as we have in the case of Kosovo. Third, on the basis of a practical assessment of the situation, are there military operations we can sensibly and prudently undertake? Fourth, are we prepared for the long term? In the past we talked too much of exit strategies. But having made a commitment we cannot simply walk away once the fight is over; better to stay with moderate numbers of troops than return for repeat performances with large numbers. And finally, do we have national interests involved? The mass expulsion of ethnic Albanians from Kosovo demanded the notice of the rest of the world. But it does make a difference that this is taking place in such a combustible part of Europe.

Id.

[23] The development of an exception for regional action could, for example, be used to justify "peacekeeping" by the Commonwealth of Independent States (CIS), i.e., as the basis for maintaining Russian troops in Moldova or Georgia.

V. Conclusion

There is a symbiotic relationship between international law and international affairs. International law does matter, but it does not necessarily override the power of political calculations when dealing with the most important decision a country can face – the use of force and, in some cases, its very survival. International law establishes norms and principles as a framework for peaceful, predictable relations between states. It also plays a more subtle role in shaping decisions and supporting their rationale.

Foreign policy, on the other hand, is almost by definition, interest driven. Fortunately, law is one of those interests. It shapes, prods, and sometimes frightens policy-makers with the "parade of horribles" that could befall a government that chooses wrongly. Sometimes law is the paramount interest, as we have seen in Bosnia with respect to the refusal to accord immunity to war criminals. Other times, law represents an important interest, which must be balanced with others. Drafting a peace treaty is an example of how legal and political considerations are often balanced in order to broker an agreement. On other occasions, law is a crucial consideration, but not determinative. We saw this in Kosovo, where a history of ethnic cleansing, a looming humanitarian crisis, and the credibility of a NATO ultimatum proved to be powerful impetuses for justifying the use of force.

Anyone who doubts that law nonetheless plays an important role in international politics should look no further than controversy over whether the U.S.-led invasion of Iraq was legal.[24] Putting substance aside for a moment, whether one challenges or accepts the Bush Administration's argument, Washington went to great lengths to explain its legal position. It may not have persuaded many countries, but it is significant that the Administration tried to make the case. Of course, it may be that the greater the effort expended, the less certain the Administration really was about its arguments. It will be some time before its internal

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[24] *See, e.g.*, Miriam Sapiro, *Agora: Future Implication of the Iraq Conflict: Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 Am. J. Int'l L. 599 (2003); William H. Taft IV & Todd F. Buchwald, *Agora: Future Implication of the Iraq Conflict: Preemption, Iraq and International Law*, 97 Am. J. Int'l L. 557 (2003).

debates become public, and we can only surmise what they will reveal. Iraq and the examples mentioned in this essay demonstrate that law does matter, but its precise impact will vary with the particular problem being addressed. The relationship between power and law is indeed a two-way street, even if some drivers do not heed a blinking yellow light.