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A Bright Future for International Law?

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Key Points

► The international strategic environment can be seen as having seven dimensions (political, economic, physical, military, social and cultural, scientific and technical, and normative), each with an interlocking relationship with the others. Law within the normative dimension is the focus.

► The optimum conditions for international law arise in a multi-polar equilibrium. A single superpower can do as it pleases; with two there was stalemate. Power can ignore law and there is a perception that the United States, under the Bush administration in particular, did so in pursuit of its interests.

► However, while law might not have been expected to have enhanced its influence since 1945, it seems to have done so. How and why? There are several reasons:

- Systemic change arising from the upheaval of the Second World War and the consequential creation of a new body of law – human rights law – that is now having growing effect.

- The United States, while a superpower, is politically and philosophically supportive of the notion of the rule of law. Although on occasions it has seemed to ignore or breach the law, examples are exceptional.

- Although states traditionally determine the law, increasingly international institutions are taking on this role, especially international tribunals and the network of judges and lawyers working in the field of human rights.

- Domestic law is the means by which most international law is enforced and domestic courts are increasingly independent of governments, especially given the shift towards democracy and the separation of powers.

► As the 'unipolar moment' passes and with the 'rise of the rest' producing what is more akin to multi-polarity, the influence of international law will surely increase as the 21st century proceeds.

During the period of the Bush presidency, from 2001-2009, there was much concern expressed, both domestically within the United States and internationally, about Washington's apparently cavalier attitude towards international law.[1] Much of this – though by no means all – was prompted by the US reaction to the 2001 attacks on New York and Washington (the so-called 'global war on terrorism'), and the decision in 2002/3 to opt for regime change in Iraq. For many commentators it seemed as though US policy in that period provided solid evidence that law within the international system was of little influence in the face of determined power. This perception reflects realist assumptions about the pre-eminence of national interest and power as determinants of policy. Of particular moment is the power of those states that fall within the category of 'great power' – and 'superpower' has a special quality all its own.

Although it is uncomfortable for some to accept it, the nature and role of law have to be assessed against a backdrop of power. Despite rumours to the contrary, power within the international system resides principally in states and is likely to do so for some time to come. It is they that still formally determine what is and what is not international law. In that sense, the law derives from two principal sources: formal agreements (conventions and treaties) and the customary practice of states. Interests and power influence both. States make the law that regulates their relations and only really do what their interests require. If national interest suggests that a proposed formal agreement is inappropriate, a state is not obliged formally to agree. The practice of states is also a product of their perception of interest drawn against a backdrop of power. As Thucydides illustrated through the Melian Dialogue, the powerful agree or act as they wish, while the weak may frequently have to acquiesce – because it is in their interests so to do.[2] Regional hegemonic powers may dominate their neighbours and exert what others might regard as unfair influence. But at least in a system consisting of several regional hegemons, their individual accumulations of power and the influence they project can be balanced by that of others. In such conditions, in which the balance of power and influence is in some measure of equilibrium, law can develop and be (or at least appear to be) of greater utility as a regulator of action than it does in a system dominated by a single concentration of power. This was certainly the view of perhaps the most important realist analyst of the international system, Hans Morgenthau, whose *Politics Among Nations* has been the starting point for the study of realism since it was first published in 1948.[3]

Ironically, since the moment of that first publication, there has been no such equilibrium. During the Cold War the international system was dominated by the two superpowers. They certainly balanced each other but the result was far from the sort of multi-polar equilibrium that characterised the classical formulation optimal for an effective and enduring balance of power. Then came the 'unipolar moment' as Charles Krauthammer labelled it – one single superpower dominating the system and able to do very much as it wished. What might the next half century produce in power terms? Many foresee the relative decline of the United States and, as Zakaria put it, the 'rise of the rest'. What might be the role of international law in the resultant system? While clear and accurate prediction is impossible, it is certainly useful to reflect on the possibilities.

War and Systemic Change

A reasonable period in prospect – let us say to the middle of the 21st century – does not represent a timeframe that will necessarily produce substantial systemic change. The world might look very much then as it looks now, although with some inevitable shifts in the concentrations of power. As Bobbitt has demonstrated, significant systemic change in modern history has usually been triggered by war followed by a paradigm shifting post-war settlement. The wars that have been the essential trigger have not been just any wars, of course. They have been wars involving the great powers in open conflict.[4] Even though the period of superpower rivalry has been characterised as a form of warfare (the 'Cold War'), general great power war has actually been absent from the international system since 1945. This is the longest sustained period of great power military restraint since the middle of the 17th century – the so-called Westphalian era.

The reasons for this are not the subject of this commentary, but include, perhaps, both the development of global organizations that have the effect of both institutionalizing and resolving conflict, and the possession of nuclear weapons by those states in the 'great power' category (the latter factor having a profound significance that it is dangerously fashionable today to deny). Great power war between now and the middle of the current century is probably unlikely, for these and other reasons. Nevertheless, prediction is a risky business and it would be grossly irresponsible to dismiss the possibility altogether. Hopefully, though, significant systemic change occasioned by great power rivalry escalating into general warfare will be avoided. Would this necessarily mean that there could be no change affecting the role and development of international law in that period? If one bases one's assessment on purely realist assumptions, one's answer is most likely to be

'yes'. On balance, however, and based on recent evidence, those who see it that way are probably misguided.

The Changing Nature of International Law

Seen from a pure realist perspective it is strange that the absence of a classic balance of power over the last half century or so seems not to have prevented international law increasing its influence within the international system. Nevertheless, its influence has increased. One feature appears to be the re-emergence of Natural Law tendencies and the gradual decline of Positivism since 1945. Positivism remains a major influence on the way we regard international law but it is no longer dominant, as it was in the 19th century in particular. International law today is best characterized as reflecting a real tension between the conflicting influences of Positivism and Natural Law, with the latter having a growing impact.[5] While it is difficult to establish beyond doubt a clear causal link between the rise of Natural Law and the growing influence of international law, the two trends seem to represent more than mere coincidence. The principal reason for this is to do with the emergence of a particular body of law – international human rights law – that is both increasingly influential and more appropriately (although admittedly not exclusively) associated with a Natural Law tradition. International human rights law simply did not exist prior to the Second World War. Global conflict in the middle of the 20th century arguably produced significant change in the nature of the international system as a result of its profound humanitarian consequences. That upheaval created the conditions for the emergence of international human rights law and ushered in a paradigm shift the extent and potential of which is only now beginning to be realised.

From 1945 we entered the era of individual human rights recognized at the international level.[6] The gradual erosion of states' rights and the concomitant development of state responsibilities correlative to individual human rights, commenced with the UN Charter, was advanced by the 1948 Universal Declaration on Human Rights, achieved a significant measure of legal recognition in an important 1970 judgement of the International Court of Justice, and has been further advanced most recently by the notion of a 'responsibility to protect'. This latter was unanimously endorsed by the UN General Assembly in its 2005 vote on the World Summit Outcome Document, and by the UN Security Council in UNSC Resolution 1674 (2006). While it is simply not credible to claim that R2P (as it is frequently called) has already become an effective legal norm, it is certainly possible to regard it as having jurisprudential significance.[7]

Reasons for Change

A paradigm shift within the international system produced by general great power war in the middle of the 20th century is now becoming obvious through the progressive development of international human rights law. The predominance of initially two superpowers followed by the post-Cold War reduction to just one did not create conditions that would ordinarily have been regarded as conducive to a development of this sort in international law. So why has it happened? Three reasons are worth examining.

US Support for the Rule of Law. First, with the United States the world has benefited from a major concentration of power that is also a major concentration of philosophical and political commitment to the liberal notion of the rule of law. While the United States has often been in a position, arguably, to do as it wishes and to play the Athenian superpower to many, overall it has *tended* not to do so (although occasionally it admittedly has). This assertion may come as something of a surprise to those who are critical of what they perceive to be a US tendency to unilateralism and the privileging of self interest over international community values. Critics will undoubtedly quote examples of US policies such as those that have led to allegedly unauthorized uses of force (eg: Nicaragua (1981), Grenada (1983), Panama (1989), Kosovo (1999), Iraq (2003)) or a refusal to adopt or retain measures favoured by the wider community of states (eg: the UN Law of the Sea Convention, the Anti-Ballistic Missile Treaty, the Rome Statute of the International Criminal Court, the Additional Protocols to the Geneva Conventions, the Ottawa and Oslo Conventions on anti-personnel landmines and cluster munitions). These issues have not, however, *generally* resulted in the United States failing to comply with international law. On the contrary, the United States has usually been especially careful to comply with the law, with exceptions being precisely that. Importantly, many of the accusations made against the United States are utterly erroneous. The United States did not, for example, flout international law when it withdrew from the ABM Treaty or signalled its opposition to the Rome Statute. It was acting fully within its lawful rights in both instances. Although it is not a party to either the Ottawa or Oslo Conventions, US policy has shifted in their wake. Despite not being a party to the Additional Protocols to the Geneva Conventions, the United States has led

the field in conducting legal reviews of new weapons, means and methods of warfare in accordance with Article 36 of Additional Protocol I. This is considerably more than can be said of the vast majority of states party, who are still not compliant over thirty years after it was agreed. While there were certainly high profile legal controversies generated during the Bush presidency, they should not blind us to the far more substantial evidence of US compliance with legal obligations. Rather than cynically flouting international law, the single superpower has served to strengthen it.

Institutions Developing Law. Second, while international law has traditionally been law agreed to or practiced by states, there has been a growing tendency for the law to develop through institutions not necessarily dominated by state interests. This is particularly notable in relation to the jurisprudence of international human rights tribunals, which has developed almost entirely independently of states' interests. Indeed, as Anne-Marie Slaughter has observed, there is a growing network of lawyers and judges that can have greater interpretive influence on the development of the law than officials working in foreign ministries.[8] The tension between the rights and obligations of states on the one hand and the rights and obligations of individuals on the other, has become a central issue in the integrated fields of international law and politics. The idea that there are peremptory norms that no state can lawfully breach is now a given.[9]

Domestic Influence on International Law. One important means by which this influence is growing is related to the essential link between international and domestic law – the third reason for international law's enhanced position. International law is enforced primarily through its relationship to domestic law. To remain with the example of the tension between states' and individuals' rights and obligations, domestic courts are increasingly tending to apply human rights standards in their jurisprudence. This has become particularly marked by a noticeable shift towards democratic forms of governance in recent decades. This shift towards democracy has emphasised the separation of powers between executives, legislatures and judiciaries. Whether separation is constitutionally *de jure* (as it is in the United States) or *de facto* (as it is in Great Britain), domestic judiciaries are becoming more independent of governments generally within the international system. This allows them to reach conclusions about the law that do not necessarily chime with national interests as perceived by national governments. The ability of both international tribunals and domestic courts to exercise jurisdiction, often to the embarrassment of governments, over individuals (especially former leaders like Augusto Pinochet, Slobodan Milosevic and Charles Taylor) is causing many exercising domestic power to think seriously about the long term legal consequences of their actions. It is early days yet in that sense but a trend has certainly emerged and is likely to become more pronounced. Although, for example, there has never been any prospect of former British prime minister Tony Blair being brought to legal account in the UK for his decision to invade Iraq, doubts about the legitimacy of that war certainly undermined his political position and contributed to his resignation. It is also very realistic to believe that some measure of legal review of such executive decisions will be introduced in the UK in the future. No British prime minister post-Blair is ever likely to get away with the sort of legal obfuscation that occurred around the final decision to invade Iraq in March 2003. Nor is it only strategic activity that is affected by the growing influence of law. In Helmand Province, Afghanistan, British forces are working to rules of engagement heavily influenced by human rights standards rather than on the more permissive standards for the application of force contained in the law of armed conflict. An important reason for this is an awareness within government that British courts might privilege human rights over the *jus in bello* if ever issues relating to that conflict are addressed by them. Subsequent appeals by interested parties to the European Court of Human Rights, if the British Supreme Court fails to deliver their desired verdicts, are almost a certainty. Governments in these circumstances simply cannot ignore the legal consequences of their actions as they once might.

Conclusion

These trends are manifest and cannot be denied. While the ardent academic 'realist' may well find comfort in the old arguments of Hans Morgenthau about the role and function of law in the international system, those with professional familiarity with contemporary legal processes are less inclined to endorse them. Indeed, the law appears to be developing a mind of its own. If this trend continues the development of the law will have less to do with the influence of political power, and more to do with the power inherent to the legal process itself.

It is wise to retain a healthy scepticism as to the value of prediction. Nevertheless, trends are clearly in evidence. Some will react positively; others negatively. Here one simply acknowledges what is happening and, accepting the world as it is rather than how it ought to be,

watches with interest the interaction of law and power. A shift from a US dominated unipolar world to something more closely approximating to the multi-polarity essential for a traditional balance of power may well produce an environment even more conducive to the sorts of developments hinted at above. The influence of international law is growing.

NB: The views expressed in this paper are entirely and solely those of the author and do not necessarily reflect the views of the GCSP.

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[1] See for example: N. Deller, A. Makhijani and J. Burroughs (Eds.), *Rule of Power or Rule of Law?*, New York, Apex Press, 2003; J. Murphy, *The United States and the Rule of Law in International Affairs*, Cambridge, Cambridge University Press, 2004; J. Paust, *Beyond the Law: The Bush Administrations Unlawful Responses in the "War" on Terror*, Cambridge, Cambridge University Press, 2007; P Sands, *Lawless World: The Whistle-Blowing Account of how Bush and Blair are taking the Law into their own Hands*, London, Penguin Books, 2005; and H. Bruff, *Bad Advice: Bush's Lawyers in the War on Terror*, Lawrence, Kansas, University of Kansas Press, 2009.
[2] See Thucydides, *The History of the Peloponnesian War*, New York, Penguin Classics, 1972, on the Melian Dialogue at pp.400-408.
[3] As Morgenthau famously observed, "Where there is (no) balance of power, there is no international law", H. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 5th Edition, New York, Alfred Knopf, 1978, p. 282.
[4] See P. Bobbitt, *The Shield of Achilles: War, Peace and the Course of History*, London, Allen Lane, 2002.
[5] See author's summary of this trend in S. Haines, "International Law and the Use of Force", in T. Salmon and M. Imber, *Issues in International Relations*, 2nd Edition, London, Routledge, 2008, pp.89-106, at pp.89-92.
[6] Such rights had been recognized in the domestic law of some liberal states long before this but had had very limited influence at the international level.
[7] For an expansion of the author's views on the Responsibility to protect see S. Haines, "The Influence of Operation Allied Force on the development of the *jus in bello*", *International Affairs*, Vol.85, No.3, May 2009, pp.477-490.
[8] See A.-M. Slaughter, *A New World Order*, Princeton, Princeton University Press, 2002 at Chapter 2, pp.65-103 "Judges: Constructing a Global Legal System".
[9] International Court of Justice, *Barcelona Traction Light and Power Company, Limited, Second Phase, ICJ Reports 1970,* at p.32, para.33.

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