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INTERNATIONAL LAW, MORALITY, AND THE NATIONAL INTEREST: COMMENTS FOR A NEW JOURNAL

Covey T. Oliver*

About thirty-five years ago, as George F. Kennan recalls in the lead article of the 1985-86 winter issue of *Foreign Affairs*,¹ he provided a negative assessment of United States foreign policy from 1900 to 1950.² At the end of his 1951 book, Kennan sought a unifying explanation of the faults that he had found in a half century of American statesmanship. Running "like a red skein" through these faults, he suggested, was a "legalistic-moralistic" orientation³ that distorted an accurate perception of national interest and impeded the pursuit of "normal" (and preferably secret) bilateral diplomacy. The portion of his charge related to the role of international law provoked responses from various "legalists," including Professor Myres S. McDougal⁴ and me.⁵ We were both in the process of shifting from other subject matter⁶ to international law.

But while international lawyers fought back, scholars and practitioners of international relations, as a professional group, had very little to say about the matter. The exception, of course, was Hans Morgenthau⁷ and the other proponents of Central European *realpolitik*, who made Kennan their own without much attention to his submerged moralism⁸

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1. Kennan, *Morality and Foreign Policy*, 64 FOREIGN AFF. 205, 205 (1985-86).

2. See generally G. KENNAN, AMERICAN DIPLOMACY 1900-1950 (1951).

3. *Id.* at 95.

4. McDougal, *Law and Power*, 46 AM. J. INT'L L. 102, 105-07 (1952).

5. Oliver, *Reflections on Two Recent Developments Affecting the Function of Law in the International Community*, 30 TEX. L. REV. 815, 823-34 (1951-52).

6. This shift was one away from real property for both of us to international law.

7. See generally H. MORGENTHAU, POLITICS AMONG NATIONS (1948); Morgenthau, *Diplomacy*, 55 YALE L.J. 1067, 1080 (1946).

8. G. KENNAN, REALITIES OF AMERICAN FOREIGN POLICY 10-13 (1954). To me, many of Kennan's writings reveal an inarticulated moralism. While I was serving as an Assistant Secretary of State in the late sixties, I heard him declare on one occasion that the United States has so declined in morality in Vietnam as to have lost any claim to leadership credibility.

Morgenthau, also, became an undisguised *moraliste* as to Vietnam; see also H. MORGENTHAU, VIETNAM AND THE UNITED STATES 20 (1965). Reflecting on the necessity of measures tantamount to "genocide" required to win a guerilla conflict such as Vietnam, Morgenthau concluded: "War, the wanton killing of human [b]eings, can

or potential differences in the calculus of national interest. Meanwhile, in a second small book a few years later, Kennan, noting the fire he had drawn from lawyers, relented to the extent of finding a minimalist "almost feminine" utility for law in foreign relations and acknowledged the value of international law in those areas of international life "not concerned with such things as vital interest and military security."⁹ Where the national interest was truly affected, however, Kennan cautioned against overstraining the capabilities of international law "beyond its scope of relevance"¹⁰ and suggested as an example that "[f]ew people are ever going to have an abstract devotion to the principles of international legality capable of competing with the impulses from which wars are apt to arise."¹¹

In his latest article in *Foreign Affairs*, Ambassador Kennan proposes to rearticulate and clarify his views on the proper conduct of American foreign policy. Disturbingly noteworthy, is the fact that the current essay, after a first sentence reference to the 1951 writing,¹² *does not even mention law at all*, but only addresses the appropriate role of morality in international relations.

Perhaps the minimalist place which Kennan assigned to the law in his amended indictment was his final appraisal of the subject. I fear, however, that the dropping of law from the recent piece means that he now gives law zero influence, unless as some species of misguided morality. The characterization of law as morality is not encouraging to those of us who perceive law as comprising a normative system linked to order and authority.¹³

In fairness, if Kennan gives law a zero status today, he is more justified by events than he was at the time of his earlier writings. He would be accurately reflecting the de-emphasis on the legal element in the foreign relations of the United States that has been taking place over time, but increasingly during the past five years. The public and media perceptions of international law as a viable system for normative, pub-

only be justified by a transcendent end; that makes a war just. There is no such end and there is no justice here. The policy-makers who are so concerned about our collective and their personal prestige might take a moment to reflect on the kind of country America will be when it emerges from so senseless, hopeless, and brutalizing a war." *Id.*

9. G. KENNAN, REALITIES OF AMERICAN FOREIGN POLICY 38 (1954).

10. *Id.* at 39.

11. *Id.* at 36.

12. Kennan, *Morality and Foreign Policy*, 64 FOREIGN AFF. 205, 205 (1985-86).

13. J. AUSTIN, LECTURE V, in 1 LECTURES ON JURISPRUDENCE 167, 182-83 (R. Campbell ed. 1911). As a class, international lawyers are always sensitive to John Austin's jibe that because "law" between nations is merely set by "general opinion" or "moral sanctions," it is law "improperly so called." *Id.*

lic order have declined significantly. A few years ago, for example, as President of the American Society of International Law, I felt it necessary to speak to other international lawyers on "The Problem of Public Inattention to International Law,"¹⁴ a topic that many of those in our specialized field would prefer to ignore.

The poor estate of international public law today is in large part the result of developments outside of the law with which the post World War II legal arrangements were not designed to cope: the growth of nuclear weaponry, the proliferation of new states, and the rising demands for individual and group improvements in civil and economic matters. Certain attitudes of the international legal community itself, however, have also exacerbated the present situation.

I find my criticism of thirty-five years ago still valid but of new, exponential negative effect. It is possible to identify three distinct characteristics which have each contributed to the decline of international law as a factor of weight in foreign relations. The elements are (i) evasive systemic complacency, (ii) lack of discipline as to separating law from preferences, and (iii) misarrangement of priorities as to targets for rehabilitation or expansion of legal order. Here, to explain details only briefly:

(i) A gulf exists between international legal scholars in their closets on the one hand and real world needs and challenges as to legal order on the other. It was already at absurd widths at the time of the exchanges thirty-five years ago, as my piece then showed.¹⁵ The problem has grown more serious, as concentrations on structural solutions and process methodologies have flowered since 1951.¹⁶ Even some of the first textbooks on international law have come to reflect more the doctrinal predilections of editors than the corpus juris itself.

(ii) Scholars and practitioners have demonstrated an astonishing lack of discipline in delineating between actual law and personal preference. In a time which is generally not ripe for rapid legal evolution, this has resulted in very broad and unscientific contentions as to what consti-

14. Unpublished luncheon address to the International Law Weekend, sponsored by the American Branch of the International Law Association, November 1982.

The Executive Council of the American Society of International Law makes efforts to call greater media and public attention to subject matter covered at the annual meetings of the Society and to assist those inquiring about the legal aspects of international events to reach experts for opinions. The Society itself does not generally take positions on such issues.

15. Oliver, *Reflections on Two Recent Developments Affecting the Function of Law in the International Community*, 30 TEX. L. REV. 815, 841-42 (1951-52).

16. Oliver, *The Future of Idealism in International Law: Structuralism, Humanism, and Survivalism*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 1207, 1208-13 (R. MacDonald & D. Johnston eds. 1983).

tutes the *lex lata* of international law. Some recent assertions as to the content of customary international law, for example, are demonstrably untenable. On occasion, innovative advocates in the United States have actually induced not very expert municipal magistrates to reach startling conclusions as to rules of international law, finding some that in objective world terms simply do not exist. At the same time, the very fact that these dubious propositions are put forth damages the reputation of even that modest and inadequate body of international law which has evolved.¹⁷ Sometimes the assertions made are so extreme and so energetically presented as to raise serious questions about the standards of professional responsibility, of the asserters, or at least as to the proponents' inability to distinguish between the validly arguable and the frivolous.

(iii) Scholars and practitioners have misarranged their priorities in exclusively targeting selected areas for their attention. While the central core of the post-World War II system for legal order has been crumbling, most international legal specialists have focused elsewhere, largely for understandable reasons of professional self-interest and *amour propre*. Admittedly, international legal studies is a wide field

17. See Oliver, *Legal Remedies and Sanctions*, in INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 61, 68-70 (R. Lillich ed. 1983) (noting overstatement of customary international law by divested owners of nationalized property who have sought to claim that the act of nationalization is null in domestic suits against purchasers for value from the nationalizing state overstate customary international law).

Similarly, in the human rights area, see *Filartiga v. Peña-Irala*, 630 F.2d 876, 884-90 (2d Cir. 1980) (permitting a foreign national who under color of official authority allegedly perpetrated acts of torture in his country against a fellow national to be sued in United States District Court under the provisions of the Alien Tort Statute, 28 U.S.C. § 1350 (1981), which allows the bringing of a "civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"). *But cf. Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-20 (D.C. Cir. 1984) (*per curiam*) (Bork, J., concurring), *cert. denied*, 105 S. Ct. 1354 (1985) (reading § 1350 narrowly and arguing that the doctrine of separation of powers should be seen to limit the effect of the statute to violations of international law actionable in 1789 or violations explicitly providing a private right of action. Finding, however, that the "law of nations" in 1789 did not provide for a private right of action).

An extreme instance of over-extension by well-meaning activists is *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 259 (D.D.C. 1985) (holding that the United States court had subject matter jurisdiction under § 1350 and the Foreign Sovereign Immunities Act where the Soviet Union allegedly seized Swedish diplomat Raoul Wallenberg in Budapest in 1945 and has since detained him). As the U.S.S.R. did not choose to appear, the default judgment is not reviewable by the D.C. Circuit, which under *Tel-Oren, supra*, would probably reverse. See generally RESTATEMENT (REVISED) FOREIGN RELATIONS LAW OF THE UNITED STATES, Tentative Final Draft No. 6, (April 12, 1985) Ch. 1, Introductory Note, and §§ 101-03 (supporting the view that rules of customary international law require good faith estimates of what the International Court of Justice would say they are).

and does require internal specialization. Some areas of specialization do hold out greater possibilities for progress and success and are therefore more attractive and more satisfying to some international lawyers than others. Certain aspects of international law governing trade or human rights come to mind in this vein. But achievements, real or believed, in these specialties should not exclude action-linked concern about and attention to the fundamental needs of world public order. The major priority today must be for the international legal community to focus on the basic problems of world societal will-to-peace and order. Secondly then, there ought to be emphasis as well on particular specialties that have enjoyed some degree of success in the recent past.

Out of impatience, ignorance, backwardness, or chauvinistic malevolence, the wielders of power in the world community—who have certainly not been the international lawyers as such—have gone a long way toward dismantling the grand design for world order that was put into place after World War II. That design envisioned a network of regional and international fora for the coordination of activities undertaken in compliance with certain universally accepted principles. In recent times, particularly, we have seen in American foreign policy operations a persistent unilateralism that is absolutely inconsistent with the attempts at collaborative decision-making that the order systems formally in place require.

The Soviet Union, of course, has turned out almost never to have loyally supported the post-1945 system, while with devilish cleverness it has avoided worldwide condemnation for its social misconduct and violations of legal norms both at home and abroad. For many years, through energetic multilateral and bilateral diplomacy, the democratic and inherently humanistic United States managed to meet and counter Soviet threats and influence. But the United States no longer seems to try very seriously to present its true (and inherently attractive) face in international affairs. Recently, reflecting to a degree the ideological fixation of a far right Administration, the United States, instead of competing with the Soviet Union by maintaining marked contrasts, has copied it in superpower unilateralism, ideological determinism, armed displays, and ever broader characterizations of "national interests," chiefly as to "security."

The last of these brings us back to Kennan's current essay. What is the national interest of the United States, or of any other state not bent upon expansionistic hegemony? How strong are the voices today that would insist that the existence of an effective world order system (at the reasonable price of loyalty to its rules) is actually a high-ranking, if not superior, national interest of the United States? What degree of

national interest value should be given to leading the world to peace and democracy through a political morality of liberty and a social morality of greater equalities amongst peoples? Why would such a value be recognized? National interest? Morality? Both?

Several careful readings of Kennan's essay lead me to the conclusion that while he is not prepared to admit moral (query: legal?) considerations into the calculus of *governmental* national interest, he does develop a moral principle somewhat indirectly which dictates honesty and non-interventionism vis-a-vis other countries. Three excerpts seem relevant to the above conclusion.

In the first excerpt, Kennan offers a classical definition of national interest that Frederick the Great could easily agree with, as well as the pre-Vietnam Morgenthau,¹⁸ et al.: "The interests of the national society for which government has to concern itself are basically those of its military security, the integrity of its political life and the well-being of its people."¹⁹ In a second quote Kennan addresses the proper role of morality in United States foreign policy:

When we talk about the application of moral standards to foreign policy, therefore, we are not talking about compliance with some clear and generally accepted international code of behavior. If the policies and actions of the U.S. government are to be made to conform to moral standards, *those standards are going to have to be America's own, founded on traditional American principles of justice and propriety. When others fail to conform to those principles, and when their failure to conform has an adverse effect on American interests, as distinct from political tastes, we have every right to complain, and, if necessary, to take retaliatory action.*²⁰

This quote more than hints that Kennan rejects any internationalization of morality or law and that he flatly supports unilateral retaliation (necessarily a type of intervention) if America's "moral standards" are departed from and the national interest is thereby affected.

The political costs of such patently illegal action under existing international arrangements seemingly are not taken into account, except possibly by indirection in a third excerpt:

The above are only a few random reflections on the great question to which this paper is addressed. But they would seem to suggest, in their entirety, the outlines of an American foreign policy *to which moral standards could be more suitably and naturally applied than to that policy which we are conducting today. This would be a policy founded on recognition of the national interest, reasonably*

18. See generally H. MORGENTHAU, POLITICS AMONG NATIONS (1948); Morgenthau, *Diplomacy*, 55 YALE L.J. 1067 (1946).

19. Kennan, *Morality and Foreign Policy*, 64 FOREIGN AFF. 205, 206 (1985-86).

20. *Id.* at 208 (emphasis added, except for the word "interests").

conceived, as the legitimate motivation for a large portion of the nation's behavior, and prepared to pursue that interest without either moral pretension or apology.²¹

In this final excerpt, Kennan implicitly draws a national interest line between himself and the Reagan Administration as to unspecified events: Grenada? Nicaragua? Withdrawal *in medias res* from the World Court proceeding? Battleship bombardment of the hills behind Beirut? Aerial attacks on Libya? What are these moral standards that "could be more suitably and naturally applied"?²² I fear that even after thirty-five years, Kennan still finds most of what he would call acceptable morality in the discipline of classic, non-exhortatory, no-whistle-blowing-as-to-illegality, old-fashioned bilateral diplomacy.

The major defect in his reasoning lies in the calculus of the national interest. This is especially true of the insufficient weight given to the reputation in the eye of history of a major country that is currently letting both law and morality fall out of its foreign policy on covert ideological and trumpeted national security grounds.

Mindful of Kennan's still tremendous influence on foreign affairs thinking, including that of the younger generation now in various conditioning phases,²³ the problems left open by his current restatement of his older position need to be aired. But even in criticism, I feel that he does offer some wise counsels of moderation—whether he thinks them moral or not—in an epoch of "gun-ho"²⁴ visceralists of the *genus Kirkpatrickenia* and penny-ante players of power politics on the ground in Central America even though the high-stakes table is elsewhere.

For the workers on and readers of a new journal of international law, I offer an alternative perception to Kennan's assumption. If I have read accurately between the lines of his *Foreign Affairs* essay, he makes the assumption that the 1945 international politico-legal system is too dead even to mention. My view is that, as in Kipling's poem *If*, rebuilding is in order—and it is not necessarily or best to be done by "worn out hands."²⁵

Before rebuilding can begin, we must first have realistic and accurate appraisals of the losses suffered. Then we must inquire why the failures

21. *Id.* at 217 (emphasis added).

22. See *supra* note 21 and accompanying text.

23. See Kennan, *Morality and Foreign Policy*, 64 FOREIGN AFF. 205, 217 (1985-86) (in opening his present discussion of morality and foreign policy, Kennan refers to demands, particularly from the younger generation, that he should make clearer his views on the relationship of moral considerations to American foreign policy).

24. A grim pun, not a printer's error!

25. Kipling, *If*, in RUDYARD KIPLING'S VERSE 645 (1919).

occurred. What were the unforeseen stresses? Can they be met by rebuilding or do they require scrapping the old and going to something new?

Of course, Kennan might say, why bother to either rebuild or to make a new start? Why not leave the world the way it is, a world that in fact is essentially unchanged as to diplomacy, law, and international politics from the world of two centuries before the present?

It might be fair, were this question to be asked to respond: can the species reasonably be expected to survive in any state of civilization if we do not do something soon? Kennan, the author of the Containment Policy²⁶ does not look upon the steadily intensifying threats to survival—now moving rapidly from superpower nuclear adventurism, through the dreadful risks of nuclear proliferation amongst rogue states, to the new horrors resulting from organized violence by overtly non-governmental groups.

If we recognize the risk of non-survival of the species, is it not fair to ask, what then is needed for survival? Threat-related order-structure, rather than an at-the-instant protective response seems essential. Creating legal structure is no problem, so long as one does not think that creating structures to deal with problems ends them. But something more is needed than the instinct for survival and the capacity to create paper arrangements. It is the will to save mankind from itself. This calls for a degree of idealism far beyond Ambassador Kennan's implicit ideal of proper and honest diplomacy. It calls for nothing less than a *planetary societal morality*. Perhaps Kennan dropped law from his recent essay because he assumed correctly that living, enduring law must be based on an underlying morality, one that, except for some limited expansion, he still rejects today.

The slide to imminent threat of total destruction has been so steep that it is not certain that "mutually assured survival" is even possible. If the urgency and the stark need for it can be made a first charge on humans, then a legal system designed to ensure survival might come just in time, provided the nation-state system does not obstruct too much. Such non-obstruction by states urgently requires the conceptualization of state "national interest" to include survival of people and

26. See X, *The Sources of Soviet Conduct*, 25 FOREIGN AFF. 566-82 (1947) (the so-called "X-Article" which formed the basis of the containment policy, which was written by George Kennan under the pseudonym "X"); see also G. KENNAN, MEMOIRS 1925-1950 547-59 (1967) (describing the "X-Article" and its beginning as a telegraphic message from Moscow on 22 February 1946); U.S. DEP'T OF STATE, 4 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1944 902-14 (1966) (further elaborating upon the containment policy originating in the "X-Article").

moral support of moderate, threat-effective public order.

A seriously disturbing aspect of Kennan's latest foreign affairs advice is that he, though more moderate than the present Administration in his general diplomatic approach, is in the end a unilateralist²⁷ once the national interest balance has been struck. An experienced diplomatist, he makes no reference to the possibility that America should weigh the maintenance and strengthening of its democratic leadership of the free world in the calculus of the national interest. Nor does he suggest that at the cost of patience, absorbing adverse rhetoric on occasion, and following the ordained rituals of international legal procedure,²⁸ America might once again, even if only for reasons of national interest, become the hope, friendly mentor, and respected model for the developing nations of the planet.

27. Kennan, *Morality and Foreign Policy*, 64 FOREIGN AFF. 205, 217 (1985-86).

28. I admit that sometimes such observance is only for "juridical cover" and not the result of genuine loyalty to principle, but surely a diplomatist should not boggle at that! There is a saying in Spanish, of some merit for diplomacy: "*En muchos casos el como se hacen las cosas es mas importante que las cosas mismas.*" [In many situations, how things are done is more important than the things themselves.]