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DOES INTERNATIONAL LAW MATTER?

REMARKS BY DAVID D. CARON*

“Does international law matter?” That such a skeptical question is posed is troubling. The question of whether international law matters echoes older questions we have debated, but it is also new and has a particularly American flavor. It is American both in the sense that we have very high expectations that international law, like all of law, should matter and in the sense that we are disappointed with it when it does not stop a terrorist or a war. It is troubling in that there are senior officials in this administration who have asserted, and would assert again, that international law does not matter. So I stress at the outset that this question is not merely an audience teaser. It is a serious and deeply troubling question and one posed particularly for America at this time. I offer a partial reply in five parts.

I.

How do we assess whether something matters? Erich Kahler tells us that something possesses meaning only in relation to something else,¹ so when we ask whether international law matters, we must connect international law to something else. To do this we need to ask what we mean by international law, to whom it is supposed to matter, and over what period of time we are going to assess whether it mattered.

Thus, are we talking about international law generally, or are we talking about particular rules or institutions? This is important because we can barely speak of whether international law matters without knowing what particular substantive rule of international law is involved. Does a particular rule of international law simply confirm what states do or does it attempt to pull behavior in a slightly different direction? That the content of the rule is crucial is a fundamental methodological lesson of studies of compliance and, I would assert, central to understanding whether a part of international law matters.

To whom? On what scale are we asking this question? Does it matter to the United States in the form of the Secretary of Defense? Does it matter to a Mexican national sitting on death row? Does it matter to a U.S. investor in Argentina? Does it matter to a thousand workers the competitiveness of whose work will be affected by a WTO decision?

Over what period of time are we to assess whether international law matters? For example, even if all of the Mexican nationals named in the current proceeding before the International Court of Justice were executed, does it matter to some other foreigner that this case, and the ones before it, have directly led the Departments of State and Justice to work with the several states to educate thousands of law enforcement officers?

Many essays over the years arguing that international law does matter have basically drawn on such examples as I have just given. In essence, their answer is that one need only look around oneself to see the myriad ways in which international law matters every day. I agree with that assessment and that partly explains why a view fundamentally at odds with this reality is troubling for me.

II.

I turn to identify what I see as at least two current indictments of international law.

First, there is the harsh world critique: If international law matters at all, it is only when it does not matter. Under this view, when things matter, as in the case of national security, the

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¹ ERICH KAHLER, *THE MEANING OF HISTORY* 13–24 (1964).

only important factors are (1) intelligence that can be acted on and (2) the swift and robust use of force.²

Second, the institutions of international law, particularly the United Nations, do not matter, or should not matter. On this view, the American experiment with multilateralism is over, the United Nations is not and should not be relevant. It is at best a noble naïve American experiment that has failed and it is no longer in the interests of the United States.

Let me stress that these critical statements exist only at the edge of the envelope in particularly difficult and political areas like security and the use of force. One could (and some do) rest on the point already made that international law matters daily on a wide range of issues to a wide range of actors. One could rest, but I do not cede the territory at the edge of the envelope.

Let us turn to these two critiques.

III.

Is it correct that international law does not matter when what is involved is important? The critic would contend, for example, that international law related to the use of force does not matter to those considering its use. Assuming that the content of international law did not allow one to address important security situations, this would be, on its face, a serious critique. But this critique is argued even more forcefully in that it does not turn on the existence of a possibly permissive law; instead, it argues more generally that the law does not apply.

I concede that international law itself does not step in and somehow stop a terrorist bomber. Nor does it stop a state actor from using force when that state is intent on doing so. I would add, however, that neither does domestic law step in and somehow stop a killer from pulling a trigger. In this sense, it may be that this critique reveals as much about the critic's view of law generally as it does about international law.

But, the critic would respond, if a war were to rage in Africa, can you seriously contend that international law would matter? I refer you to the first decision of the Ethiopian Eritrean Claims Commission, the so-called POW decision.³ You will find there were violations of the laws of war; there is in particular a significant amount of discussion about such specific violations as the provision of shoes to prisoners. But what is striking, and has been confirmed to me by three individuals involved, is how much the laws of war were actually complied with in that brutal conflict, how much international humanitarian law mattered.

It is true that international law did not stop Saddam Hussein from invading Kuwait in August of 1990, but it made possible a resolution condemning that invasion the very same afternoon. International law shapes the way the many nations of the world digest an event; it shapes the way an event is discussed: which arguments are in and which are out. Iraq could offer no permissible justificatory argument.

² If you lack the former, the latter may suffice. For an example of this view, see Ken Adelman's public statement comparing the Bush administration to Othello:

The administration could begin gathering and reconciling the facts on all these issues over the next weeks, months, or even years. This would put America at dire risk. Or President Bush and his national security team can do what Othello and his team did in Venice on their crises—get the big picture, push the details aside, and use force to confront the danger and to protect their people. Myself? I stand with Othello on this one.

All Things Considered (National Public Radio Broadcast, Oct. 16, 2003), available at <<http://www.npr.org/programs/atc/transcripts/2002/aug/020826.adelman.html>>.

³ Available at <<http://www.pca-cpa.org/ENGLISH/RPC/EECC>>.

It is true that international law did not stop the U.S.-led action in Iraq of last year, but then again it is unclear what could have stopped that action. Yet though it did not formally stop the invasion, it has shaped much of what has followed, from the types and ways in which weapons were used to the status of the Coalition Provisional Authority ("CPA") as an occupying power, the relationship of the CPA to the Iraqi Governing Council, and the power of the CPA to sell the oil of Iraq. Participants in the sometimes deadlocked meetings between the U.S. Departments of State and Defense have told me that international law played a crucial deciding factor in such situations.

As Austin wrote, law is like a hedgerow, not something that blocks conduct but something that channels its form and direction. I concede that an illegal act of will at any given moment implicitly signals that law does not matter. That does not mean, however, that law does not exist and that it will not matter in the next moment.

IV.

As to the view that multilateralism has failed, I refer to a study we did at Berkeley of the United States and multilateralism over the first two years of the Bush administration.⁴ What did we find?

First, although Iraq has come to dominate discussions, to focus on only that event is to lose sight of the range of the issues that have arisen in the last several years

Second, the move away from multilateralism existed before the current administration.

But, third, the current administration's position vis-à-vis multilateralism is qualitatively different from previous ones. Some editorials or articles merely suggest that the administration change its tone. If that was the only difference I would not be so concerned. But there has also emerged a deeper and wider lack of engagement, manifest, for example, in an absence at negotiations.

Fourth, the study group did not find evidence of "learning" by the administration by the middle of the President's term, though that conclusion likely needs to be revisited as we see the United States work more with the United Nations on Iraq. I am not suggesting that this administration has had some sea change in its affection for multilateralism, but rather that its ideological tendency to exclude the UN has come to be seen rightly as a very costly belief. Let me remind you that the UN-authorized 1990 Gulf War cost the United States approximately seventy billion dollars, but the United States was reimbursed for all of those costs by Germany, Japan, and the Gulf States. The cost of the present war is, to the best of the public's knowledge, in the range of one-hundred-sixty-five billion dollars, and it is borne solely by the U.S. taxpayer.

In terms of tonight's question two observations are crucial.

First, and this is truly critical, we often associate the willingness to use force with the realist school of international relations. A realist will tell you that it is hard to be a realist. Realism rests on the premise that general and unspecified deep convictions can, and often do, blind one to what is in the national interest. To see what is in the national interest requires a flexible and piercing mind not clouded by romanticism or the linguistic categories of the day. The irony is that the dogmatically antimultilateralist members of this administration appear to be as guilty of woolly thinking as the internationalists against whom they purport to do battle.

Second, it is true the UN and multilateralism have tremendous problems to overcome, but the lesson of the last three years has been that it is foolish to think that these institutions will

⁴ *Between Empire and Community: The United States and Multilateralism 2001–2003: A Mid-Term Assessment*, 21 BERKELEY J. INT'L L. 395–877 (2003) (featuring an introduction and 16 studies).

go away or that the United States will not require their assistance. Most troubling to me, the period after 9/11 was a lost opportunity in which the United States could have remade multilateralism. International law grows in spurts and often in response to international catastrophic events. The same people who view the UN as a failed experiment could have used the sympathy and global support that existed after 9/11 not only to justify acting in a primarily unilateralist manner, but also to fundamentally rebuild and strengthen multilateral institutions. The opportunity to *engage* multilaterally will present itself again with a future administration; it cannot be said when the opportunity to *transform* multilateralism will arise again.

V.

Does international law matter? I acknowledge that power matters. And I accept Professor Henkin's view that law and power are linked in a complex dance with one another.⁵ I put it to you, however, that if we speak about what really matters, nothing is more important than law and international law.

How can this be, replies the critic? What matters are the realities of the world, and they are harsh realities, often not admitting of good faith. Those realities do not listen to international law but to power. With the caveats already stated, I accept the demands of the present.

But I simultaneously am reminded of the observation that humans as a species are hardwired, driven by their nature, to wander in a very narrow band of time. It is only with prodigious efforts that we can recall the recent past or plan for a virtually certain future. Yet if we open our sense of time, what are the harsh realities? Buried during the Cold War, and wrangled with in the 90s, what are the realities perhaps receding from our thoughts again?

I will not list them all. (Not because there would be a gnashing of teeth; no, unfortunately, we have all become dulled by their horrifying ubiquity.) Let me give only one: The population of the world is 6.2 billion, it grows by eighty million a year, and that increment is as small as it is in large part because AIDS continues to ravage Africa. Five billion of these 6.2 billion people live, I should say exist, below the world's poverty line. Five thousand million people. To paraphrase Senator Dirksen, a thousand million people here, a thousand million people there, and soon you are talking real suffering.

For these realities, for these billions, the swift and robust use of force, even if coupled with usable intelligence, offers no solution, no hope. It offers only reaction. The need to use force in the present is often evidence of a failure in the past.

Law is a message from the past; it will be our message to the future. It is the bridge between today and better futures. The message is not foreordained; its content is a contested area, often won through reason. The message can be ambiguous, but it has its own rules about what is or is not a part of the message.

We have a duty to this message. It may be that the message is both complicated and contested, but the value of sending the message should not be in question.

The swift and robust use of force of course affects the future, but we do not know how it will do so, and it is difficult to modify once launched. Law is a presence in a future argument stating the belief that—all things being equal—one outcome, rather than another seemingly convenient one, is the best choice.

There is no legacy to unfettered power. The logic of such power not only admits that those in the future can, it encourages those who come later to, jettison everything this administration has done. Power at one's discretion is a world trapped in a repetition of fury and hubris. All of civilization is an attempt to get past that situation.

⁵ Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS 21–22 (1989 IV).