

The Decline of Normative Restraint in International Relations

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They are hostile nations

...
the gifts we bring
even in good faith maybe
warp in our hands to
implements, to manoevers

Margaret Atwood

The idea of normative restraint is associated with the acceptance by governments, especially those representing the leading states, of substantive and procedural restrictions on their discretion to wage war, not as a matter of morality, but as a matter of law. The Kellogg-Briand Treaty, the Nuremberg Judgment, and the Charter of the United Nations formalized the renunciation of non-defensive claims to use force to resolve international disputes with other governments.

However, these formal standards provide little assured restraint upon state action. The decline of normative restraint can be seen in the broadening of the definition of self-defense and in the increasing resort to unilateral force by sovereign states. With this decline in the normative restraints embodied in the United Nations Charter, an answer to the question posed by the editors may be more a consideration of aspirational norms than a description of the legal restraints generally operative in state practice. Given these circumstances, this Article addresses the question as to why there is a trend toward the decline of normative restraint with respect to unilateral uses of force, as well as factors that might reverse this trend.

This decline in normative restraint can be partly understood as an inevitable outgrowth of these earlier legal efforts to limit use of force to self-defense. The generality of these legal prohibitions left gray areas, especially the failure to delineate boundaries upon the concept of self-defense. For example, as Derek Bowett and others have argued, the idea of self-defense does not obviously include a force option in alliance set-

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tings under the doctrinal rubric of collective self-defense. Also, the setting of civil strife is not very clearly governed by this fundamental legal regime. It seems possible, on almost any occasion, to present "intervention" as "defensive" or as an instance of "counter-intervention."

The conclusion is that the legal effort to regulate recourse to force in international relations has virtually collapsed in state-to-state relations, including such institutional settings as those provided by the United Nations. Representative expressions of this condition of legal collapse include: the Soviet invasion of Afghanistan in late 1979; the *laissez-faire* approach to the Iran-Iraq War throughout its five years; Israel's discretionary and frequent reliance on retaliatory and preemptive uses of force against its Arab neighbors; and the United States government's blatant reliance on extensive "covert operations" to overthrow the Sandinista government together with its brazen repudiation of the authority of the International Court of Justice (I.C.J.) in the Nicaraguan conflict.

There are some major factors accounting for this collapse of the legal effort to regulate recourse to force. First, the militarization of the modern state has led to an increased concern for security and for an increased influence of military interests, especially in the two superpowers. National security policy eludes constitutional and domestic legal constraints even in countries with a strong *formal* structure of governmental accountability. Thus, it is a reasonable generalization to suggest that if domestic law is suspended, then international law is virtually irrelevant to the policy-forming process; in essence, 1984 may be over, but "1984" dominates relations between state and civil society on the issues of war and peace.

Second, the prestige and capabilities of the political organs of the United Nations, and of regional institutions, have not evolved as either a challenge to, or a restraint upon, "illegal" uses of force. The notion of an international security system has been abandoned in practice, even though the Charter of the United Nations proclaims its possibility and necessity.

Finally, the United States government has altered by 180 degrees its attitude toward the relevance of international law to foreign policy. The Reagan Administration, through its repudiation of the Law of the Sea Treaty and its steady attack on international institutions, has extended an emerging bipartisan dissatisfaction about the flow of international normative attitudes. In the early postwar years when world public opinion and the law were consistently on our side it was easy to support the United Nations and the basic renunciation of non-defensive force; the high point of this stance was the American conduct of the Korean War

under UN flags. With the entry onto the world scene of former colonies from Asia and Africa, the international political environment shifted. The United States government from the early 1960s onward was as committed to the containment of Third World normative grievances as it was to the containment of Soviet power. The result of this dual and often contradictory policy has been a normative vacuum on the international stage as "leadership" from dominant states has degenerated once again into power politics, and warfare is assessed by outcomes (winning and losing) and interests (vital or not), rather than by adherence to and implementation of norms and procedures for peaceful settlement and legal responsibility.

If further documentation of this set of developments is required, it can be found in recent international practice and doctrinal formulations of state policy. The U.S. invasion of Grenada and indirect military harassment of the Sandinista government in Nicaragua is expressive of this new willingness by the United States to self-justify uses of force that it would unconditionally condemn if undertaken by others, uses of force that would almost certainly be condemned in any appraisal conducted by impartial third-party procedures. Soviet behavior in Afghanistan and Eastern Europe, similarly, expresses disregard of normative restraints, including the most basic sovereign rights of countries on its borders. However, the Soviet government, somewhat understandably given the hostile international reception in the early years of its existence, has always regarded the law relating to force as an instrumental tool to be wielded against enemies, or at most a convenient mechanism to stabilize relations for mutual benefit, but not as a serious source of restraint in handling antagonistic aspects of its own foreign relations. Similarly, the Third World, experiencing and perceiving international law mainly as a rationale for colonial subjugation and economic exploitation, was not disposed to respect normative restraints upon its pursuit of interests. The entire experience of recovering sovereignty was too new to be very congenial to a program for its drastic curtailment. Thus, recent United States shifts in policy, toward international law generally and the recourse to using force specifically, are especially significant indicators of the decline in normative restraint.

On a doctrinal level, two recent formulations by the U.S. Secretaries of State and Defense confirm these basic generalizations about the weakening of legal effort to restrain *recourse* to force in international relations. Secretary of State Shultz propounded a new anti-terrorist doctrine in a speech at the Park Avenue Synagogue in New York City on October 25, 1984. In the speech, Shultz claimed a broad discretionary right on behalf

of the United States to use force to combat terrorist threats abroad, including a pre-announced policy to make preemptive strikes in foreign countries: "We will need the flexibility to respond to terrorist attacks in a variety of ways, at times and places of our own choosing. . . . If we are going to respond or preempt effectively, our policies will have to have an element of unpredictability and surprise."¹ There is little place for normative restraint or third-party procedures of review, beyond Mr. Shultz's self-serving and unconvincing rhetoric: "I can assure you that in this Administration our actions will be governed by the rule of law; and the rule of law is congenial to action against terrorists."²

The character of this discretionary and unilateral approach to war now pursued by the United States was most comprehensively discussed in Secretary of Defense Weinberger's talk to the National Press Club on November 28, 1984. The Secretary's remarks were set forth as a doctrine of restraint and even treated in the media as a critical comment on the rather dangerous implication of adopting Shultz's anti-terrorist doctrine. Mr. Weinberger set forth six tests to govern the foreign use of combat force by the United States government:

- (1) Force should be used only for vital interests;
- (2) If used, then it should be dedicated to winning;
- (3) Winning should be clearly defined in relation to political and military objectives;
- (4) The military capabilities required to win should be provided, and adjusted during the course of combat as necessary;
- (5) The whole undertaking should not be attempted without "some reasonable reassurance" of broad backing by the American people and Congress;
- (6) The commitment to force should be a last resort.³

Without belaboring the point, the relevant feature of these tests is their "freedom" from normative restraint. Not even a reference is made to the prohibition in international law on non-defensive uses of force. For instance, "vital interests" might certainly encompass resource and investment issues. The idea of "winning" is restored to respectability, despite its rather menacing implications in the nuclear age and in the teeth of the painful outcomes of the main military confrontations of the Cold War—in Korea and Vietnam. Yet from a legalistic perspective, what is striking is the absence of any "test" to reconcile a proposed use of force with international law requirements, including the commitment to seek peaceful settlement. The United Nations is never mentioned, even to establish

1. N.Y. Times, Oct. 26, 1984, at A12, col. 2.

2. *Id.*

3. N.Y. Times, Nov. 29, 1984, at A1, col. 3.

the context. What emerges, then, is the U.S. government's unilateralist stance on doctrine, as well as practice, toward the use of force, with the main restraint being a domestic popularity poll (most probably, the application of a Vietnam lesson) along with the beneficial endorsement of force as a last resort for U.S. foreign policy. In other parts of the speech Mr. Weinberger makes clear that indirect uses of force (via covert operations as in Central America, or by "friends" and allies) are governed by an even more expansive mandate.⁴

These recent policy statements by U.S. officials are the only explicit formulation of U.S. policy toward the use of force. It is significant, then, to note the absence of any effort to reconcile the commitment to avoid nuclear war while retaining discretion to use nuclear weapons in response to unacceptable behavior by enemies. Unlike other nuclear powers, the United States seeks to keep an adversary guessing as to when nuclear weapons might be introduced into battle (so-called "extended deterrence"). This tactic contrasts with the formal renunciations of first use posited by both the Soviet Union and China (Great Britain, France, and Israel and such other ambiguous nuclear powers as India and South Africa have been silent on their doctrines of use). The extended deterrence policy also conflicts with most normative (legal and moral) interpretations of international law that either amount to unconditional prohibitions or, at most, authorize discriminate and proportional retaliatory uses (that is, second uses). Here again, the Reagan Administration has intensified the trends of its predecessors, rather than striking out in any new direction.

In essence, ever since the use of the atomic bomb at the end of World War II, the United States government has insisted on retaining the nuclear option as an instrument of statecraft, especially in superpower relations. This position reflects an underlying, and probably exaggerated faith that the technological dynamism of the West in the nuclear context is needed to counterbalance the Eurasian geographical position, the mobilized manpower, and the regimentation of civil society possessed by the Soviet Union (whether augmented or diminished by China). This geopolitical calculation has made it impossible to halt the arms race; arms control, at most, channels and alters the pace of innovation. Such a discretionary approach to nuclear weapons has also underscored the refusal of the leading state in the world to subject the most awesome dangers of military power to the restraining effects of a legal regime.

4. *Id.*

This appraisal of normative decline has expressed the existing circumstances in a manner as free from illusion and rhetorical pretension as possible. Does it imply an endorsement of these trends or a renunciation of the effort to bring international law to bear? Not at all. The emphasis here is intended to clarify the extent to which the future of normative restraint depends on the energies of civil society rather than on the good will of governments, even those that represent the liberal democracies. Putting the point differently, it was the energies of civil society that curbed the militarist excesses of royalty in thirteenth-century England and produced the Magna Charta. International law, if it is to be effective in the war/peace area, will develop more in response to pressure from citizens for a lawful foreign policy than as a shift in official stance by the leading governments of the world.

There is not an inconsiderable trend to this effect. The Lawyers' Committee on Nuclear Policy is seeking to gain public support for an American position on nuclear weapons that takes greater account of normative restraint as embodied in international law (as the U.S. Catholic Bishops did in their 1981 pastoral letter with regard to ethics and morality). Various groups of activists have been engaged in non-violent civil disobedience for the purpose of challenging the legality of different elements of nuclear weapons policy and of the role of the CIA in the war being waged against Nicaragua. Defendants in these cases, of which there are now several dozen, place principal reliance on "the Nuremburg obligation" (the right, and possibly, the duty of American citizens to oppose violations of the law of peace by their own government) and on an alleged constitutional guarantee (in article VI, section 2) of a lawful foreign policy. Courts have traditionally been wary of challenging the President in matters of foreign policy, but recently citizen challenges have begun to receive some encouragement, most notably in a Vermont case in which the judge charged a jury that they could accept a necessity defense to criminal trespass if they believed the expert testimony to the effect that official policies in Central America were in violation of international law.⁵

As should be obvious, I believe that consistent and principled adherence to international law serves the interests of the American people at this stage of history, regardless of what other governments might do. That is, violations of international law tend to be self-destructive, as well as destructive of international order. Note that this orientation does not

5. *Vermont v. Keller*, No. 1372-4-84 (Vt. Dist. Ct., Chiltenden Cir., Unit II, CNRC, Nov. 13, 1984).

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embrace an ethic of nonresistance. It does not, on legal or policy grounds, deny the option of governments to use defensive force, nor does it even confine defensive force to a strict reading of Article 51 of the UN Charter (requiring a prior armed attack and an immediate submission of the defensive claim to the Security Council for action and review). The United Nations is currently too weak to bear this burden, and other major states are obviously not inclined to adapt their foreign policies to such a framework of restraint.

And yet, even the self-interpretation of legal restraint could make a difference in several directions: of primary importance is adherence to the minimum standards of legal prohibition applicable to nuclear weaponry, that is, the renunciation of "extended deterrence" and the limitation of the nuclear option to second strike or retaliatory roles. Adherence to the legal prohibitions bearing on respect for the dynamics of self-determination and norms of non-intervention would provide additional restraint. Under this standard, support for rebels in the Afghanistan setting is legally permissible to neutralize Soviet intervention, but is not possible in Central America where such prior illegal intervention is either trivial or nonexistent. However, the government of Nicaragua would still enjoy sovereign rights to obtain military assistance from its friends, especially when faced with a military threat from exile elements. Finally, restraint would be provided through adherence to legal prohibitions on indiscriminate and disproportionate retaliatory uses of force to combat terrorism (in effect, a commitment to deal with terrorism by means other than counter-terrorism).

These steps toward a law-oriented foreign policy would contribute to the safety and security of the American people, as well as to that of the world. The genuine adoption of such a stance by the U.S. government would restore the diplomatic stature of the United States as a world leader. However, it is implausible to expect such perspectives to become influential in policy-making arenas without a surge of citizen activism that carries with it a practical program for making constitutional government effective once again in the context of national security policy. One of the least appreciated features of the post-1945 setting of world affairs is the extent to which the nuclear menace and the global American role have made mobilization for war a permanent and routine feature of American governance, thereby restricting to tactical detail, when it comes to assessing national security policy, the relevance of national elections, of public criticism, and of congressional opposition. In sum, without the restoration of *real* democracy, it is futile to expect international law to play much of a role in restraining foreign policy, considering how

militarized in outlook and posture the U.S. government has become. Finally, this dynamic of militarization produces a much wider authorization for the use of force in international relations than serves either the interests of the American people or expresses their values as embodied in their overall civilizational identity.