THE ROLE OF INTERNATIONAL LAW AND INSTITUTIONS

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Summary

The main role of international law is to promote global peace and prosperity. Ideally, international law and its accompanying institutions act as a balm to smooth over opposing interests that nations may have. Both international law and its institutional setting are clearly embedded with ideology, a cause for serious concern for many nations that feel their own national identities are under attack by growing economic interdependence and encroaching "Western" values.

The aim of this article is to show how international law, together with its institutions, must explicitly state its ideological assumptions then develop a coherent and consistent institutional framework around this ideology. The values underlying international law today are the values of liberalism—the rule of law, capitalism, democracy and an emphasis on human rights. This essay briefly reviews how these liberal legal institutions were created and discuss how a stricter following of the principles of liberalism could contribute to a more secure and prosperous global community.

1. Introduction

There was once a great empire that ruled vast swaths of land, spreading its economic power and culture throughout the known world. The empire tolerated diversity and encouraged pursuits in the arts and sciences, producing the greatest artists and scientists

of its day. One day, the empire found itself under attack by fanatical religious zealots from outside, who wished to transform the entire world into their own vision.

This largely Islamic "empire" stretched from the frontiers of India and China to the Atlantic Ocean, spreading trade and military power throughout much of the known world. It endured for centuries, although for much of its existence it was not a state but a civilization, united by shared ideas and ideals rather than by government. Building on the teachings of Ancient Greece, Rome and Persia, the empire produced fantastic advances in learning, particularly in the areas of mathematics, physics, chemistry, philosophy, astronomy and geography. Neighboring Western Europe was still shrouded in the Dark Ages when Knights of Christ responded to what they perceived to be a divine call to take back Jerusalem and the Holy Land from Islamic and Jewish "infidels" and Orthodox Christian "heretics."

Some commentators have taken the view that history has repeated itself with the terrorist attacks on the United States on September 11, 2001. A liberal regime has been attacked by radical elements of a conservative (anti-modernist) movement. Regardless of the accuracy of the analogy, there can be no question that changing attitudes in the United States and elsewhere will have a profound effect on the development of international law. The attack on the world's last remaining superpower will likely reverberate throughout international law and its institutions.

This article discusses the linkages between international law and global peace and prosperity. It argues that a more coherent international law framework, based on historical principles of liberalism, can do a better job of promoting security and prosperity.

2. History – Toward the Formation of the Nation State

International law has its roots in antiquity as ancient tribes struggled to come to agreement concerning the division of territory and resources. For our purposes, modern international legal structures arose to confront the creation of sovereign nations, developments that are often traced to a treaty created in 1648 among warring European nations. From 1618 to 1648, the Thirty Years War ravaged most of Europe, resulting in the death of an estimated twenty percent of the population of Europe. During this time, many modern nation states were born: Russia, France, Great Britain, Sweden and Spain, among others.

In 1648, these warring states achieved a temporary peace under the Treaty of Westphalia, offering the chance of greater collective security and prosperity. One of the central tenets of the Treaty was that international law should disregard the internal conflicts of a state and that foreign states should only intercede when territorial boundaries had been crossed by invading armies: in other words, state sovereignty was considered to be almost absolute and international intervention into domestic matters was not acceptable. For the next three centuries domestic matters not warranting intervention would include what today we call human rights abuses.

The rise of the nation state was accompanied by a Western philosophy of natural law that asserted that men (or, somewhat later, all people) could only truly be free under the protection of their sovereign. Political philosophers such as Grotius, Pufendorf, Hobbes and Rousseau asserted that the state was an independent entity charged with protecting its citizens and only answerable to international political institutions if the state expressly consented to do so. The state hence began to take on a life of its own.

In particular, the philosophy of John Locke, a father of modern liberalism, articulated a vision of a state where individuals renounced their natural right to perfect freedom in order to enter into a social contract to enjoy even greater prosperity and security:

The only way whereby anyone divests himself of his natural liberty, and puts on the bonds of civil society is by agreeing with other men to join and unite into a community, for their comfortable, safe and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it … And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation to everyone of that society, to submit to the determination of the majority, and to be concluded by it; or else this original compact, whereby he with others incorporates into one society, would signify nothing, and be no compact, if he be left free, and under no other ties, than he was in before in the state of nature (Second Treatise on Civil Government, 1690 ¶¶ 95-97).

Locke wrote these passages after a long period of violent turmoil in England, including a civil war, counter-revolution, restoration and the deposition of the monarchy under the Glorious Revolution of 1688. Locke's philosophy is generally credited with articulating a modern version of liberalism that continues to drive a vision of the appropriate relationship between an individual and the larger community.

Locke wrote that the moral state for mankind was to live in a democracy ruled by the consent of the governed where individuals were entitled to keep the fruit of their labors, providing the foundation for theories surrounding freedom of property and capitalism. If a state did not respect these rights of individual liberty, Locke offered the revolutionary notion that citizens had the moral right to kill their rulers and install a government that respected their natural rights.

To a certain extent, these views were later adopted in the American *Declaration of Independence* of 1776, which asserts "that all men are created equal: that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness." And later in 1789, the French *Declaration of the Right of Man and of the Citizen* maintained that "[t]he purpose of all civil association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property and resistance to oppression."

These values were spread throughout much of the world by Western nations, especially England and France, through colonialism and imperialism. They often supplanted or replaced highly-developed systems of political philosophy already developed within Asia, Africa, Oceania and the Americas. Some of these systems of thought have since

become eclipsed or have been lost altogether, while others are currently enjoying a renaissance.

Liberalism was challenged by World War One, in which European political and economic expansion withered under the destruction of large parts of the continent. Again, the parties retreated to international law—the 1919 Treaty of Versailles—with the hope of creating a lasting peace. The League of Nations was formed as the first global institutional setting designed to thwart the destructive ambitions of nation states. The mandate of the League of Nations went beyond diplomatic peace missions by linking national and international security issues to the promotion of economic development. In practice, the League of Nations never really attained its ambitious mandate partly because the United States was never a member and other powerful nations such as the Soviet Union, Germany and Japan only participated for a short period.

Peace was hence short-lived and the world's nations succumbed to World War II, devastating much of the world and ushering in the Cold War, a protracted ideological/political battle between liberalism and Soviet communism. The post-war era also saw the demise of the great European colonial empires and a subsequent dramatic increase in the number of nation-states in the world and the degree of self-expression available to the inhabitants of those states.

Prior to World War II, international law had been the domain of a profession and a set of governing classes that were almost entirely male and white and mostly European; the embedded ideologies were thus white, male European ideologies. The Cold War era was characterized by conflict between two predominantly white, male European ideologies, but also saw the steady emergence of alternative ideologies, expressed through organized structures such as the Non-Aligned Movement and, perhaps more frequently, by individual nation-states and individual actors. Now that the world has decisively chosen Western liberalism over Soviet communism, the focus has shifted to the integration of non-Western viewpoints and philosophies into the ideological framework of international law. In some cases this proceeds smoothly, and in others it has led to conflict.

Despite the setbacks of the Second World War, the United Nations-sponsored Universal Declaration on Human Rights of 1948 continued to emphasize the values of liberalism as a mechanism to thwart national self-interest through the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [which] is the foundation of freedom, justice and peace in the world."

The United Nations continues to promote these values through a variety of institutions, including the United Nations Educational Scientific and Cultural Organization (UNESCO). UNESCO was established in 1946 with the mandate "to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law, and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion." UNESCO's

mission was later broadened to take into account the recognition that collective rights play an important role in the value systems of many nations.

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Biographical Sketches

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