Is Anything "Left" in International Law?

By Thomas M. Franck*

There is a certain lack of resonance, in my field of international law, to the political concepts of "right" and "left". Within this discursive void, we may find a tale of some more general importance to lawyers and others concerned with the role of norms in the making of social policy.

To me, the "right" is that grouping in the political spectrum which cleaves most urgently to traditional institutions, rules and values. It is the party of the conservators. The "left," by way of contrast, is the party of radical social change, of revaluation of received wisdom, and of traditional laws and institutions.

To the right, the term "old" has a valuable cachet; to the left it does not.

To the left, "because this is the way we've always done things" is not an explanation validating a policy; to the right it is a hefty source of validation.

Unfortunately, this way of understanding the difference between left and right leads to some very peculiar results when one tries to apply it to the contemporary ideological landscape of international law.

For example, it is the far right-wing of American politics, the one currently in ostensible control of American foreign policy, which rejects the idea that international treaties can be binding on the world's only superpower. This is so, they say, because the binding power of a treaty depends, always, upon our sovereign will to be bound at any given moment. A sovereign can no more bind itself *in futuro*, runs the argument, than can Britain's parliament. This is the view expressed by John Bolton, our former Undersecretary of State, recently nominated as Ambassador to the United Nations.[1] Others have not hawked the same perspective quite so expansively, but have chosen, instead, to treat selected treaties, even though consented to by two-thirds of the Senate and ratified by the President, as non-binding. The President himself has declared that "America will never seek a permission slip to defend the security of our people"[2] even though the U.N. Charter—the world's most widely ratified treaty—does, in fact, require us to get such a permission slip from the Security Council unless we have been, or are about to be, attacked.[3]

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[1] John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America's Perspective,* 41 Va. J. Int'l L. 186 (2000).

[2] State of the Union address, Jan. 20, 2004. The N.Y. Times, Jan. 21, 2004, at A1.

[3] U.N. Charter, art. 2(4) prohibits recourse to force except, under art. 51, when a nation has been subject to an armed attack. In actual practice, this has been interpreted to mean that a nation may have recourse to armed force without a permission slip when it has been attacked or is about to be attacked. This formulation is essentially a restatement of the *Caroline* doctrine, which limits

The effect of such a declaration by the president to Congress is not merely to let the U.S. slip the surly bonds of international law, but to invite others with similar capacity and inclination to do likewise. Thus, Russian Foreign Minister Sergei B. Ivanov, early in December 2004, told members of the Moscow diplomatic corps that his country now felt free to use preventive strikes against any terrorist target in the world, adding: "We will not be telling anyone where and when we will strike."[4] America, which used to take pride in promoting adherence to agreed norms of international law,[5] has begun to lead the way back to the Thucydidean world that existed before treaties began seriously to try to limit states' recourse to military force, a world in which "the strong do as they will and the weak do as they must."[6]

This currently pervasive contempt for international law is not limited to a belligerent public assertion of the right to unleash war when it suits the ruler's definition of the national interest. The new Attorney General has also described the Geneva Conventions pertaining to the rights of prisoners of war as quaint and obsolete.[7] Against all textual commitment to the contrary, the administration's lawyers have opined that torture of prisoners is permissible up to the threshold of organ failure or fatal injury.[8] Fundamental to the right's dismissive view of treaty law is the arrogant belief that, because states are not equal,[9] a legal regime in which the parties pretend to equality of rights and obligations need not be taken seriously.

The right's radicalism is not just limited to rejecting the established, two-thousand year old doctrine establishing the binding nature of treaties: *pacta sunt servanda.*[10] Although

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the right of anticipatory use of force to situations where no alternative is available. This right, and its limit, has recently been confirmed by the High Level Panel appointed by the Secretary General to elucidate the law and institutional processes of the U.N. system in the light of current political, social and scientific developments. See: *A more secure world: Our shared responsibility.* Report of the High Level Panel on Threats, Challenges and Change 63, para. 188 (2004).

[4] The New York Times, Dec. 11, 2004, p.A9.

[5] "Even in the stark, high politics of the Cuban missile crisis, State Department lawyers argued that the United States could not lawfully react unilaterally, since the Soviet emplacement of missiles in Cuba did not amount to an 'armed attack' sufficient to trigger the right of self-defense under Article 51 of the UN Charter." Abram Chayes and Antonia Handler Chayes, *The New Sovereignty*, 9 (1995).

[6] Thucydides, *The Peloponnesian War* 331 (412 B.C.E.) (Crawley trans., 1951)

[7] Alberto Gonzales, *Memorandum for the President: Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban* at 2 (Jan. 25, 2002).

[8] Jay Bybee & John Yoo, U.S. Department of Justice, Office of Legal Counsel, *Memorandum for Alberto Gonzales: Standards of Conduct for Interrogation Under 18 U.S.C. ss. 2340-2340A* at 13 (Aug. 1, 22002).

[9] See: Michael J. Glennon, *Limits of Law, Perogatives of Power* 147-155 (2001).

[10] For a discussion of the conceptual origins of the rule that treaties are binding, see: Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law, 9th ed.*, 1206 (1992). For a definitive

the executive branch has taken no position on the matter as yet, its most vigorous supporters in academia have launched a campaign to have the courts reject the Supreme Court's landmark decision in *Missouri v. Holland.*[11]

That doctrine sanctified the right of Congress to legislate in bona fide implementation of a treaty even if the subject matter, absent a treaty, would fall within the jurisdiction of the states. The effect of reversing that decision would be to eviscerate the Constitution's understanding that treaties are the supreme law of the land[12] and to make it effectively impossible for the United States to enter into a vast array of international agreements. Even more radically, such repeal of *Missouri* would violently upset the federal balance of power, which is based on the requirement that treaties be entered into only with the consent of two-thirds of the Senate,[13] the body of the government in which all states are represented equally. In place of the balance of power between the United States and the federated states, the revisionists would ensure that any one state, by refusing to implement the commitments made in a treaty, would be able to make the reciprocal benefits of the treaty unavailable to all Americans.[14] The result would be to cripple the treaty power, even when consented to by more than two-thirds of the states' representatives in the U.S. Senate.

What the newly-empowered radical right is advocating and beginning to implement amounts to a doctrine of illimitable sovereignty. It is not merely an admonition that the United States should not enter into a particular treaty, but a rejection of the idea that American sovereignty can, in any legal sense, be subject to legal limits or constraint. To those of the far right, treaties are obstacles to American supremacy, to its ability to do whatever it pleases. Since almost all international law today is treaty-based, this amounts to a rejection of almost all international law as inapplicable to this country. It is a far cry from Harvard Professor Louis Sohn and ABA president Charles Rhyne's dynamic vision, in the mid-twentieth century, of world peace through law.[15] Yet this is the extreme view

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restatement of the rule, see: *Vienna Convention on the Law of Treaties*, 8 I.L.M. 679 (1969) (entered into force Jan. 27, 1980).

[11] 252 U.S. 416 (1920); See: Edward T. Swaine, 103 Colum. L. Rev. 403 (2003); Curtis A. Bradley, *The Treaty Power and American Federalism,* 97 Mich. L. Rev. 390 (1998).

[12] U.S. Constitution, Article VI, stipulates that "all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land...."

[13] Ibid., Article II, Sec. 2, cl.2.

[14] For example, if one state refused to implement provisions guaranteeing treaty-based property rights to aliens, no American, of whatever state, could claim the benefit or protection of reciprocal rights within the jurisdiction of that alien's nation. Vienna Convention on the Law of Treaties, id., Art.60 (2) provides that a "material breach of a multilateral treaty by one of the parties entitles (b) a party specially affected by the breach to suspend the operation of the treaty in whole or in part...." Thus each of the U.S. states would have a right of treaty nullification by noncompliance, resulting in a very radical transformation of American federalism.

[15] Rhyne's movement was inspired by Grenville Clark and Louis B. Sohn, *World Peace Through*

of American exceptionalism[16] that is now being propagated by governmental action and even in academic discourse, where it is meeting little opposition.

Notably, Senator John Kerry, when running for the presidency, repeatedly passed up the opportunity to assert, against President Bush's taunts, that, in entering into a treaty, the nation was exercising its sovereign right to limit its sovereignty in return for others limiting theirs, and that such an obligation both gives America important new rights (for example, to search for terrorist weapons in foreign ships on the open seas) and, concomitantly, imposes a duty to carry out agreed obligations. The radical right recognizes no such concomitance between rights and obligations, not in a community of states that have been created manifestly unequal. This is a radical view, sailing under the colors of conservatism, which is not respectful of historical legal traditions, dishonors well-established and legitimate institutions, and rejects long-asserted American values.

To restate the point, the new conservatives are not conservators. Sadly, the only other instance that comes readily to mind of the political right generating such a radical rejection of international law is to be found in the annals of Nazi Germany, where many of the same radically exceptionalist views were expressed by international lawyers in the thrall of that regime's claim to lead a nation of *übermenschen* to whom the old laws did not apply.[17]

If radical revisionism in international law—the rejection of the most fundamental principles of the system honored, if sometimes in the breach, at least since the era of Hugo Grotius[18]—is now the hallmark of the right, where does that position the left? It seems almost entirely mute.

It is not surprising that this should be so. The approved tactic of a sizeable portion of the American left is to deconstruct laws, legal regimes, and legal institutions, not to conserve them. This has been the posture of the critical left for so long that it is deeply uncomfortable doing anything else. If one has been saying for years that the United Nations is an institution corrupted by the dominance of the rich over the poor and that international tribunals are fraternities of elitist lawyers steeped in oppressive values, how is one to argue with Bush Administration lawyers who think it quaint to assert the Geneva Conventions as an obstacle to a little productive torture of prisoners? Or how is one to assert the U.N. Charter's norms and values restraining the use of force if one has been attacking the democratic deficit of a system that purports to invest power in manifestly unrepresentative institutions? Or how is one to defend the binding authority of international law

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World Law (1958).

[16] Harold Hongju Koh, *On American Exceptionalism,* 55 Stan. L. Rev. 1479 (2003).

[17] See: Mathias Schmoekel, *Die Gossraumtheorie: Ein Beitrag zur Geschichte der Volkerrechtswissenschaft im Dritten Reich* (1994). For a discussion of Carl Schmitt and his theories rejecting the "cosmopolitan Jewish" notion of an international law that could bind Germany, see: Martti Koskenniemi, *The Gentle Civilizer of Nations*, 413-22 (2001).

[18] Hugo Grotius, *De Jure Belli ac Pacis,* (Whewell Transl. 1863) (1631).

if one has been insisting that the law and its institutions are but thinly-disguised stagings of raw political theater?

Yet to refuse to reevaluate the left's deconstructive strategy is likely to prove disastrous for what we should recognize, before it is too late, as our highest priorities. The American left's stance towards their country's methodical dismantling of respect for international legality is all too reminiscent of the British strategy for the defense of Singapore before the Second World War. Certain that their huge naval base could only be challenged from the open sea, the colonial commanders hardened the island's gun batteries to face south. When, early in 1942, the Japanese actually arrived by land, from the north across Malaya, Singapore's defenders, their weapons pointed the wrong way, had little choice but to surrender.[19] A similar miscalculation may now be overtaking international law's left wing. Their skills so honed to deconstruct the law, they seem incapable of defending it. Yet surely there is a time to deconstruct and a time to conserve.[20] The time to conserve is when far-rightists have taken over the task of deconstruction, abandoning their traditional role.

This is not simply a matter of filling an empty slot in the legal landscape. History has taught us that deconstruction by the right has an entirely different purpose from deconstruction as practiced by the left—at least, by the non-totalitarian left. When the right attacks the law and its institutions, it is not to expose fallacies and improve performance. Rather, it is to brush aside law's impediment to the exercise of unfettered power. That is what is happening, right now, in international law. In the face of this new challenge from the far right, the correct tactic of the American left ought to be to defend embattled international institutions and law, with a vigor not at all debilitated by the law's imperfections and without abandoning the search for better legal processes and institutional values. Of course, there have always been voices on the American left seeking to strengthen and reform international law and its institutions. These voices, however, have tended to be at odds with, and largely drowned out by, the left's skepticism towards all established instruments of law. Such division within the left has left it largely impotent in the face of a newly radical right's attack on all institutions capable of curbing the superpower and its *übermenschen*.

Let's think about it: might not a united left, tactically more adept at figuring out what really matters, have saved Weimar?

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[19] The Japanese crossed the Strait of Johore and landed on the island of Singapore on Feb. 7, 1942 and the entire garrison of almost 100,000 troops surrendered one week later.

[20] It has long been obvious to the left that international institutions need to introduce direct elections into international decision-making and to provide key international institutions with a direct form of tax-based revenue. The campaign for greater fairness in the allocation of resources and responsibilities must go on. Cf. Thomas Franck, *Fairness in International Law and Institutions* (1995).