

## THE PLACE OF POLICY IN INTERNATIONAL LAW

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While I agree with the way in which Mrs. Higgins depicted the problem of Anglo-American differences in her paper, nevertheless I am inclined to take a position much closer to that which Eli Lauterpacht expressed, but for quite different reasons. In my view, Anglo-American divergences are to some extent themselves a diversion; the attributes that both traditions share are far more significant in the present world context than those which they do not. In this sense, my conception of international law is virtually an antithesis to Mr. Lauterpacht's clearly delineated position. I am critical of those approaches to the discipline of law that seek to avoid a consideration of the relevance of domestic and international power structures. I find it impossible to treat international law exclusively within the realm of the ideas without extending analysis to the realm of power and politics.

I am in some disagreement with the other members of this panel because of their failure to consider directly how policy matters relate to the profession of an international lawyer as it has been practiced within both the national and international community. In this sense I find something slightly precious about a discussion, while the world is aflame, of Anglo-American jurisprudential differences. I agree that clear thinking and clear concepts are important, and may be the most enduring contribution that a meeting of this sort could attempt to make. Nevertheless, I think the real tensions in international legal studies should be defined in either East-West or North-South terms, rather than Anglo-American terms. There is something jurisprudentially provincial, if I can put it that way, about viewing Anglo-American divergences in international legal studies as somehow significant, given the present historical situation. For this reason, I have found it difficult to be responsive to my assigned topic.

In part I think the difficulty concerns the meaning of the word "policy," which in many ways functions as a code word for "politics." As such, to make reference to policy factors becomes a dubious enterprise. Underneath this concern lies the whole relationship between law and politics, a relationship that has tantalized jurists for generations.

The difficulty with the topic also arises—and this is one of my princi-

pal points—from a kind of odd and unappreciated overlap between what I would call “careerist” or “vocational” concerns of international lawyers and the moral imperatives of good citizenship on matters of world affairs. I wish to raise explicitly a question that underlies our deliberations. Should we approach a subject of this sort primarily from a vocational or a jurisprudential perspective?

If we approach it from a vocational perspective, then the kind of legalist approach to international law, so well illustrated by the British members of this panel, is anything but an exclusively English phenomenon, and is an aspect of a larger cultural experience associated most broadly with the alienating consequences of the division of labor in advanced industrial societies throughout the world. This kind of intellectual development has been attacked on political grounds in the United States by Noam Chomsky and others in terms of a rise of a class of university intellectuals subservient to the will and policies of the governing process. Chomsky called these intellectuals the “New Mandarins.” This issue is at the center also of the counter-culture debate in the United States and elsewhere concerning the role of intellectual objectivity and the functioning of reason in relation to institutions that engage in governmental activities.

Putting this point in a more relevant focus, when the question of the place of policy in international law is put in terms of individual careerist considerations, the answer is basically the same in all countries where the government and economic sectors dominate the processes of power, wealth, and prestige: namely, he who wishes to get ahead quickly is best advised under all circumstances to suppress, or at least to disguise the policy element in his analysis, especially to the extent that it deviates from prevailing policies. Such centers of public authority tend to want and expect from international lawyers the role of being functionaries and technicians who provide appropriate legal argumentation to buttress governmental positions. Whether in England or the United States, in other words, the most reliable way to be effective as an international lawyer in a careerist sense is to suppress policy divergencies from official views and carry out a so-called objective analysis of legal issues as if government policy were correct or beneficial, or at any rate, inevitable.

Such careerism is not necessarily bad, if by independent assessment the role of government and other central agencies of power is indeed operating in a beneficial fashion. But if it is not, as I believe to be the case very strongly in the United States at present, and to some extent

also throughout the advanced industrial sector of international society, then such an intellectual posture of technicism encourages an international lawyer to be utilized as a cog in a system that is orientated towards the pursuit of wrongful ends. Such an international lawyer will defend his performance by arguing that it is dictated by canons of vocational objectivity or by alleging that an analysis of legal questions does not imply a stand on political ones, and so on.

Such a rationale of professional life was heavily relied upon by German legal bureaucrats during the Nazi period. It provides an inadequate rationale in my view, not so much intellectually inadequate as humanly and morally. It erodes the civic responsibility of the international lawyer in a period of global danger. It evades duties of responsibility and of citizenship and acquiesces fully in the spirit-destroying consequences of the buildup of large-scale organizations inside and outside of government. In short, such an exclusion of policy from legal analysis tends to make moral cripples of us all.

I have particularly strong feeling about this issue at this point, because it is beginning to be the main line of moral defense of those who have played prominent roles in the U.S. Government or acted as consultants and advisers to the Government during the buildup and execution of the criminal policies that underlie America's involvement in the Indochina War. In this sense I believe deeply in the moral importance of specifying one's vocational role in the light of explicit policy analysis. But I would add that a man who accepts my admonition, almost regardless of the substance of his views, does not fit easily into the bureaucratic operations of the modern state. Such a man cannot be smoothly integrated into the machine of government, because he refuses to relinquish his conscience in the course of carrying out his job. It is to be expected, and should not be at all surprising, that totalitarian systems like the Soviet Union tend to purge government ranks of all independent thinkers regardless of their political orientation. It also follows that the pre-revolutionary Communist intellectuals often become the post-revolutionary enemies of the people because they will not adapt their style to the new demands for bureaucratic conformism.

What I am arguing in essence is that our topic is part of a larger question of whether or under what conditions international lawyers should serve the state, or for that matter, other special-interest clients. Of course one might argue in my terms that a truly subversive approach would be for a progressive international lawyer to conform in intellec-

tual style, but not in substance to prevailing policy. But this generally turns out to be an illusory option because the size and character of the bureaucratic establishment makes it impossible to advance in this way any deviant individual perspective. The example of Kurt Gerstein in Nazi Germany is probably the most spectacular recent confirmation of the inability of an individual to exert a beneficial influence on a bureaucratic structure organized around an unacceptable set of policy goals.

I hope that Professor McDougal, my friend and teacher (I began to say "former teacher," but realize that his impact persists as a present reality) will forgive a personal reference when he learns (which he might feel has not always been the case) that I offer Caesar mainly praise on this occasion. Professor McDougal constitutes the most important instance of the Americanist perspectives that I think arouse the suspicions of many British international lawyers and make it natural to select this topic as a bridge-building exercise. Professor McDougal illustrates my basic point well because the substance of his policy views are regressive enough, in my sense, on the symbolic issues of the day to conform with governmental views in the United States, but his approach remains unacceptable to those within the realms of power because his jurisprudence represents such a radical challenge to established values. To make policy explicit in periods of change and confrontation is to rob law of its mystifying potency. Such an exposure generates subversive tendencies, however unintentionally, that undermine fixed patterns of respect thinking, feeling, and acting. Such an impact is descriptive of Professor McDougal's influence on me and many others in the United States—an influence that cuts far deeper and is more fundamental than whether or not he is for or against American policy in Southeast Asia, or whether or not he happens to favor magnifying still further the prerogatives of the foreign investor.

My point here is that Professor McDougal's work if properly understood is the acme of policy explication and that this almost necessarily has a radicalizing impact that largely disqualifies its adherents from serving the state in a mere professional capacity. The policy voice remains audible in a manner that challenges the division of labor and technician ethos which large-scale organizations, particularly governments and corporations, depend and insist upon. McDougal's emphasis on policy analysis tends to produce international lawyers who cannot be counted upon, and who therefore are potentially dangerous presences within the organizational structure.

Profound as I think this issue of demystification of law and lawyers is, it strikes me as somewhat less important than the double challenge of substance to international lawyers in both of our countries at the present time. In this regard I would substitute for the word "policy" in the title of this panel two vectors of prime substantive concern which it seems to me should condition the inquiry of international lawyers in any part of the world system during this particular historical period.

The first is the exposure and critique of the imperial roles being played by the United States and the Soviet Union within the world system, and the extent to which these imperial roles are destructive of the Charter conception of world order—that is, the conception of world order embodied in the United Nations Charter.

Secondly, international legal inquiry should be conditioned by what I have elsewhere called "the endangered planet crisis" that arises from the obsolescence of the state system, given the emerging problems arising from the interplay of the war system, population pressure, environmental decay, and the depletion of the resources of the earth.

These two concerns create in my judgment a major civilizational imperative that is likely to determine the place of policy in the present and future of international law. In trying to develop this kind of perspective on the role of policy considerations in the work of international lawyers, the following more specific considerations might prove useful.

First of all, policy analysis can play a critical role in assessing the agenda of concerns confronting international lawyers. I would argue that it would be desirable to make this analysis explicit rather than allow it to be a passive reflection of the concerns of established structures of power. As international lawyers we should strive to establish our autonomy to work on the problems that we regard as significant after making an objective appraisal of the conditions that exist in international society.

Secondly, policy analysis could clarify the relevance of international law to each actor's strategy for participating in the world order system. International law has a particular relationship to the foreign policy perspective of a government that depends to a great extent on what the priorities of that particular society happen to be at a given time. It is important to make these priorities explicit to enable governments to pursue their goals in a rational way, and to relate international legal considerations to this pursuit in sensible fashion.

Thirdly, the place of policy should become very central in appraising

the viability of the present statist world system, and should also enter into the formulation of alternative world-order systems that might be brought into being in the future. Such a line of policy concerns also affects the selection of transition tactics and strategies that seek to influence international society in directions that appear to be both desirable and attainable, given the present system of world order.

In essence, I am calling upon international lawyers in both our countries to join in the work of safeguarding the world order system that we have against collapse either through new modes of debilitating imperialism that provoke reactions of desperation or from growing dangers associated with ecological pressures that result from the dynamics of economic and demographic growth in a world of finite boundaries and resources.

To encompass these issues requires the collaboration of international lawyers with social scientists. In our intellectual life within universities as in our work for the government, the division of labor, particularly prevalent forms of academic specialization, inhibits an effective reorientation of the activity of international lawyers and tends to impair our capacity to respond usefully to the great issues of the day.

With this perspective, I know I have slighted as I promised, the question of detailing the differences between British and American approaches to international legal studies, and then going on to defend the position I hold by virtue of the accident of American birth. In general, I think that what has been presented by others on these issues reflects the mainstream debate on this subject. I would summarize my own nationalized view of the place of policy by saying that the British seem less impressed with *Alice in Wonderland* than do we Americans; in essence we feel that law and politics cannot be separated merely by saying they are separate.