INTERNATIONAL LAW: A TOOLBOX FOR THE STATESMAN

ROGER FISHER*

The contemporary international scene poses a challenge not just to international law, and not just to international lawyers, but to those of us who teach international law as well. The world is looking less to international law than it was a generation ago. Right after World War II and the founding of the United Nations, we talked about having a world under international law and about achieving peace through law. Fewer and fewer statesmen talk like that today. The states and statesmen appear to ignore international law. The United States responds to a Mayaguez incident without even mentioning its United Nations obligation to exhaust peaceful approaches before resorting to force. Israel supports military elements in southern Lebanon that oppose the United Nations. The International Court of Justice, which our newly elected Judge, Richard Baxter, is about to join, is practically without business. Disputes are argued in political terms and yet at the same time, as Dean Rusk pointed out, there has never been a greater need for a scheme of law. We have new problems; the world is becoming increasingly interdependent and increasingly complex.

Faced with this challenge, what do we international law professors do? We sit, it seems to me, like monks in a monastery holding our precious rules and saying that sooner or later the world is bound to come to its senses. When statesmen finally see that the world doesn't work without law, we will have the law intact for them. We tend to say, "Naughty, naughty. You broke a rule here; you broke a rule there. You really ought to try to exercise more restraint."

Now this can be seen as a typical dispute between academics on the one side and active politicians on the other. We say, "International law is important. You are legally bound by it." Mr. Kis-

* Professor of Law, Harvard University. The ideas presented in this lecture are developed more fully in Professor Fisher's recent book, *Points of Choice: International Cases and the Role of Law* (Oxford Univ. Press 1978).

singer, or someone of his point of view, will say, "Who is going to sue me? Who says there is international law and who is around to enforce it?" *We* look at international problems from a legal point of view from within the legal system. *They* look at problems from a policy point of view from within the political system. In this dispute, as in others, the first thing to do is to see the problem as they see it.

In any dispute, whether its an international dispute or a dispute of another kind, the first task is to put ourselves in their shoes. Let us look at the problem the way a statesman sees it. If we want national decisions to be affected by international law, we need to understand national perceptions and a statesman's interests. If we want to educate or influence statesmen, the starting point is their present perceptions. A government official, a statesman, is likely to see international law in the first place as irrelevant and secondly as a purported (and ineffective) restraint on what he is supposed to do. We are coming around and saying, "No, no, no, no." The perception of the politician is that he or she deals with the real world of today, of guerillas, of nuclear missiles, of armed mobs, of tanks, of covert operations, of Vietnams, of Rhodesias, of Chinas, superpower conflicts, confrontations, and South Africas. He must take into account vital national interests. Among these concerns he believes he should pay little or no attention to what some international law professor may say is wrong with what he did. For a statesman caught up in the Iranian crisis of today, what some professor may write in the *American Journal of International Law* next year is not very important. Many of you heard Dean Acheson say that in the Cuban missile crisis law was wholly irrelevant and that what Quincy Wright would say next quarter in his article criticizing what the United States had done was to be given short shrift.

What do we say to answer that perception? Will all our talk about legal duty persuade them to abandon the world of *realpolitik* for the academic concerns of law professors? I think not. International law will affect what decisionmakers do to the extent that it is functional for them — to the extent that it helps them identify their goals and accomplish them. Instead of looking at international law as a restraint, it seems to me that we have to look at it as a way of serving the interests of those who are trying to serve the public interest of their nations. We have to show them that it will help them do their job and do it better. To convince our students of the relevance of international law, we have to convince them that at critical

points of choice international law helps provide wiser and more effective decisions. Properly seen from the statesman's point of view, international law is not an academic restraint but, as I suggested in the title of these remarks, a boxful of helpful tools.

What are statesmen's objectives which international law helps accomplish? A statesman is like a poker player who has arrived in New Guinea and is playing a game of poker but is not quite sure of the local rules of the game. Like any poker player, he has three kinds of interests. His first interest, of which he is most aware, is to win the hand. He wants to prevail in the immediate situation. He wants what he wants when he wants it. He wants victory. Whatever the dispute is about, he wants to have his way.

The second kind of objective that a poker player has, and shares with a statesman, is the objective of being in a good position for the next hand. He wants to be able to influence future events. He wants to have a stack of chips on hand and a reputation — perhaps a reputation for not bluffing and for standing by what he says. He wants power.

The third thing that a poker player wants is to have nobody kick over the table. All of his winnings and all of his reputation will not amount to much if there is a gun battle and the poker table is upset. He wants peace. Each statesman has these three identifiable interests in victory, power, and peace, or in winning, in influence, and in some form of order.

Those interests are there, and they exist all the time. There is no way in which one interest can always be put above another. You cannot say that I am interested only in peace, or only in victory. The two have to be reconciled. I am reminded of the time when I was in the Solicitor General's office arguing cases for the Government and had won several in a row. At one point, I went in to see Oscar Davis, who was then the first assistant to the Solicitor General, and I asked, "Did you see this morning that two more cases came down that I argued?" He made a crack, which I have long since forgotten, but I have not forgotten what he then said: "We don't want to win all the cases." I said, "What?" He said, "We don't want to win every case. Did you ever think what would happen if the government won every case in the Supreme Court? The entire concept of government under law would be down the drain. Everything we care about would be gone. This would be a dictatorship, a totalitarian society in which the government always wins. Respect for the judiciary would be gone. Prosecutors would

run amuck. It would be a disaster if we won every case." And I said, "Oscar, what am I doing up there?" He replied, "We want to win each case, but not every case."

The international statesman has the same dilemma. He wants to win each dispute, but he knows that no other player will stay in a game in which one player wins all the time. The OAS is meaningless if the United States can use it purely as a rubber stamp with everyone raising their hand and voting aye. The United Nations is worthless if any one state wins all the time. Winning doesn't amount to anything. It loses all significance.

Those three objectives — the objective of winning each hand but not every hand, the objective of being in a good position, and the objective of having an orderly game, we can pursue in three different ways. Internationally, we can do some things by self-help. We do it ourselves. Such was the conquest of Germany in World War II. When we use self-help, we do not care about the minds of others, we simply impose a physical result. But in foreign affairs there is little we can do that way. Foreign affairs are primarily other people's affairs. They, not we, make the decisions. So in most cases we have to work through their minds. This we can do either by education, that is, by altering their knowledge, attitudes, or perceptions (such as Voice of America programs, or by our own conduct) or by influence, that is, by producing specific decisions at a particular time. Now it turns out that law is a rather effective way of exerting influence. It is also a way of altering people's perceptions. The United States fails to conquer Mexico not because of the Mexican army but because we accept the notion that it is not ours. It is theirs. If we thought it was ours we might feel quite differently about it. What if the Russians thought Alaska was still legally theirs? A good legal case, citing current international law that a dictator cannot permanently alienate the natural resources of a state, might be made that the Czar was not empowered to sell Alaska for seven million dollars, and therefore it still belongs to the Russian people. A good legal case would have enormous political consequences in affecting what the Soviets wanted. Law is a way of affecting what people want.

Law is also an effective way of exerting influence on particular decisions. It is the primary way in which a government influences its own citizens. By our structuring of the law, and by other legal techniques, a government can go beyond its borders and influence others as well. Experience with domestic law shows us how to

make international law relevant. Instead of saying "You can't do this and you can't do that," we say, "You have got your problems; you want to have an orderly world; you want to have some power; you want to have some victories. We have the tools to help you get them. We have a most influential way to help you get what you want."

The first way law affects these three goals of victory, power, and peace is in helping us formulate our goals. Law helps people understand what they really want in their enlightened self interest. In his treatise on power politics, Georg Schwarzenberger writes: "It is the task of the expert to advise the statesman on how a political objective can be most rationally and effectively attained . . . . He oversteps his function when he tries to prove that the goal is undesirable."[1] I disagree. I think that one of the most useful tasks that a professional can perform is to help a client reexamine what he thinks he wants and to help him develop goals that more accurately reflect his enlightened self-interest. I think that one of the key things that international law can do for national actors and others in the international community is to serve their interests by helping them formulate their goals as well as by helping them attain them. Goals are to be formulated, not found. We should never accept the notion that you simply scan your mind and say, "What I want is this and I will go for it." The surest way to fail is to formulate an unattainable goal. The first important step toward success is to select a goal that is conceivably attainable.

The concept of law provides not only part of an international orderly world but also a model of what it is that a statesman really ought to want. Our job is to alter the statesman's perception of what he really wants, and then to help him get it. In some companies, the general counsel is seen only as a terrible nag who comes around and says, "No, no; you can't do this; you can't do that." Those companies generally do not do very well, and the lawyers do not do very well either. There are other companies where they call a lawyer in and say, "Look. We think we want to do this. Does that sound like a good idea? If so, how do we do it? Let's work out a way to do it. Help us from beginning to end." I think you will find in a successful multinational corporation that lawyers are in there at the beginning helping to formulate objectives, to decide whether they want a merger, whether they want to set up an office

1. G. SCHWARZENBERGER, POWER POLITICS 22 (3d ed. 1964).

here or there. Law is taken into account in the planning stage of selecting a goal as well as in the implementing stage of attaining it.

The statesman thinks he wants to call in an international lawyer and say, "Look, we have a crisis in Iran. What should we do tomorrow?" He thinks he wants a crisis-reaction system. He wants to wait until a problem is in the in-box before reacting. A crisis is a crisis because of high stakes, great uncertainty, and a short time within which to act. What the statesman really wants, I would try to convince him, is a functioning system for coping with disputes before they become crises. We should not wait until there is a raging epidemic and then say, "Doctor, what do I do?" The way to avoid epidemics is to inoculate people in advance; to have a system. Internationally, we also want a system. We would like something in place so that when a problem comes up our statesman, like the lieutenant in *Casablanca*, can, in a very relaxed voice, say, "Round up the usual suspects." He knows exactly what is going to happen. There is a routine way for dealing with it. When a ship like the *Mayaguez* is seized, our statesman should not have to say, "This is an international crisis testing my will." Rather he can say, "Make the usual reports through the usual channels and let's see what happens. Keep the case small. We have a procedure for dealing with it."

Law not only tells us that our peace objective is a system, law tells us something about that system. The law about governments is not criminal law. Criminal law does not work with respect to governments. In the United States we have a central government with many subordinate governments. These subordinate governments, like the states of California, Nebraska, and Mississippi, frequently violate our most fundamental law. They pass unconstitutional statutes. No one has ever suggested that we ought to bomb Mississippi when it violates the Constitution, or that we ought to have a Nuremberg trial for the Congressmen who voted for breaches of our most fundamental law. No. The law of governments is a kind of cease-and-desist type of law. It says we will forget about yesterday but don't do it anymore. We rarely even try to collect damages. The first time someone sued a state successfully in this country, the eleventh amendment was promptly adopted to see that states could not be sued for damages. We use essentially a civil injunctive model. It treats all violations as disputes. We produce a determination which is forward-looking, usually prohibitory, and highly legitimate.

As international lawyers, we have to convince our clients that we are here not to say that they are being naughty but to remind them that what they really want is a system that can handle problems and make little disputes out of what might be big disputes. We want to keep the hands small so that when we lose some we lose small ones and so that there is no crisis over what is going on.

International law not only helps a statesman understand and formulate his objective of peace as being an orderly world, it helps him attain it. As we lawyers have learned, one builds a system one step at a time. Rome was not built in a day and it is unlikely that we will sit down and draft a great new scheme for the world. A legal approach can be a case-by-case approach. We should try to turn each hand, each dispute, into a way of improving the international system.

If we have a dispute with the Soviets, because they are fishing too close to the New England shore, we could say, "Here is a confrontation between East and West." Better, we can say, "There seems to be a problem here. What would be a good rule for this situation that would serve our interests, be tolerable to others, and might work as a norm?" We identify the conduct we want. We identify an appropriate general rule. We draft in our minds some kind of a norm. We figure out ways of establishing that norm as one to be respected. Shall we do it by tacit agreement, or perhaps by a unilateral declaration of a 200-mile economic zone? By taking a lawmaking approach, we can turn a little problem into an excuse for improving the normative system. We can then do those things which will tend to cause initial respect for the rules as well as those which provide a system to cope with disputes and apparent violations.

To improve the international system it helps to treat unmet needs as reflecting a problem in the legal system. We can try to meet our legitimate needs as well as the needs of others. As we look at terrorism, environmental problems, the Middle East, the Arab-Israeli conflict, a lawyer's approach is to deal with disorder in an orderly way. We cannot expect to end disorder. Our domestic experience has taught us that criminal law does not end crime; contract law does not stop broken contracts; tort law does not stop auto accidents. Law is not a way of ending problems, it is an orderly way of dealing with them. We should not suggest that once we have a world of law there will be no problems. We have to expect a

world of disputes, conflicts, disorders, and human frailties to continue. We want to try to create norms and a process for dealing with this disorder in an orderly way.

A legal approach is not only helpful for attaining what we perceive to be a statesman's most important goal, that is, peace in an orderly world — the goal of not having the table kicked over. A legal approach also provides crucial tools for helping a statesman attain those things which he usually thinks even more interesting: the shorter term goals of power and victory. National power depends on many things, among them military power, legitimate authority, and reputation. Taking a legal approach can have a major effect on each of those three. Again it helps to consider both the objectives and how to attain them.

Our military capability is terribly handicapped by the fact that our weapons designers have not had sufficient legal input. We end up with hardware which is unusable in most situations. City police departments have discovered that they do not want a nuclear bomb in police headquarters to prevent crime. They want rubber bullets, tear gas, police lines, loudspeakers, a way to stop traffic, and a way to put a barricade across a street. At the time of the *Mayaguez* incident in 1975, the Cambodians were taking what we assumed to be the crew in a fishing boat toward the mainland. We had the *Coral Sea* and aircraft all around. We could fly over the fishing boat at a thousand miles an hour. We could have blown the boat out of the water. But we had no way of talking with it. We had no way of stopping it without killing everyone on board. We had no kind of inflatable hawser that we could drop in front of it. We had all those great unusable weapons but no practical power, not even the power to communicate. Why don't we have a portable hotline? The Cambodians were dying to tell us that they had decided to release the crew. We were dying to know where the crew was. They would have been happy to tell us that the crew was not on the island we were about to attack.

I gave a lecture on the *Mayaguez* and the total failure of communication to the Naval War College. A Commander at the back said, "Professor, I was the communications officer on board the *Coral Sea* at the time, and we had perfect communication. We were in touch with the White House every minute of the time." I replied that if the White House had been the enemy that would have been fine, but that we were trying to influence other people, and we had no way of communicating with them. If lawyers

thought more about how we could use our force legally, with no more force than necessary, we would have more power. We should have weapons with which we could maintain a border whether it be a barbed wire fence or whatever. We should have the capability to engage in close reconnaisance during a cease fire, as in the Sinai in 1973. We might have marked the Israeli and Egyptian tanks with some kind of paint and had photographs of where they were.

Not only should the acquisition of military power be informed by international legal considerations, our very objective in any future military confrontation is likely to be a legal objective — a promise. If war breaks out in Europe, involving NATO and the East Europeans, no one expects that our goal will be to conquer the Soviet Union, acre by acre. Certainly no one expects that the Soviet Union seeks to conquer the United States. Presumably we would be using force to try to influence somebody to make a legal decision — some kind of a cease-fire agreement. International lawyers could begin right now. They could sit down with some Soviets and work out standard cease-fire agreements that we might want in a crisis. Someone could pick up the hotline and say, "What about Draft *A*? or *C*?" We will be way ahead of the game. Knowing what decision we would be trying for is of crucial importance.

A nation can also affect its power by worrying in advance about its legal authority. The Turks had more power to affect the Cyprus situation, because in the 1960 Treaty they acquired the legal authority to intervene. The United States had more power in the Cuban missile crisis because of the Organization of American States and its resolution. We would have had even more power if, a year or two ahead of that, we had had the OAS adopt some rules about a nuclear-free zone in Latin America. The British may have lost the Suez Canal to Nasser because of their failure to make advance arrangements about their legal authority. Nasser was able to get away with the Canal in part because he had a very good legal case. During the whole time between 1888 and 1956, when the British army was occupying Egypt in various forms, the British government never bothered to convert their military power into the legal authority to determine what should happen when the ninety-nine year lease expired. My theory is that when the British government was running Egypt, as they did from 1888 to 1922, they could have established legal arrangements which would have said that upon the termination of the franchise of the Universal Suez Canal Company, future procedures would, for example, be decided by ar-

bitration. Such provisions would have altered Nasser's ability unilaterally to take the Canal.

In Guantanamo we made the opposite mistake. We kept our legal position ahead of our real interests and we became stuck with a highly expensive base in a communist country where we depend every day on hundreds of workers coming and going. It is of no particular use. We are stuck with the problem because of the lack of advance planning. We have too many legal rights. Our legal rights exceed our political interests. And we now face political difficulties in giving them up. Our power in a given situation can be affected by arrangements made in advance with respect to authority.

Our reputation for adhering to international law, for caring about human rights, for doing things of that kind, can also have a significant effect.

Law can help us formulate victory objectives. In the Suez crisis, the United Kingdom formulated the objective of toppling Nasser, a goal which they had no legal right to pursue. They largely failed because they had bitten off more than they could chew — more than they had a right to. In the Cuban missile crisis, we were equally interested in toppling Castro, but wisely did not choose that as our objective. We limited our objective to one to which we could plausibly claim we had a legal right under the OAS resolution. By narrowing it down to one that we could legally pursue, we increased the chance of attaining it. In fact, in the Cuban missile crisis, President Kennedy said that we had two objectives: the missiles out and on-the-ground inspection. As it turned out, the Soviets had no legal authority to give us on-the-ground inspection. Kennedy quickly yielded that point and accepted overflights as adequate. So by limiting his goal to one to which he had a fairly plausible case, he greatly increased the chance of attaining it. I have argued with some Egyptian friends that if Nasser had only been smart he could have closed the Gulf of Aqaba in May of 1967 without having a war. When they challenged me and asked how he could have done that, I tried to draft a hypothetical proclamation that he might have issued, along the following lines:

> Whereas, in response to alleged provocations from Syria, the Government of Israel is apparently threatening to take military action against Syria,
>
> Whereas, this reaction is not justified, but in any event under the United Nations Charter a state is not permitted to en-

gage in retaliation for past misdeeds but can use military force only for self defense and only to respond to immediate threats;

Whereas, in the view of Egypt, Syria is not now a threat to Israel;

Whereas, Israel is presently importing petroleum through the Gulf of Aqaba;

Whereas the Straits of Tiran lie wholly within the sovereign territory of Egypt;

Whereas it would be a violation of international law for Egypt knowingly to allow its sovereign territory to be used for activities in support of an illegal armed attack against Syria;

Whereas Egypt fully recognizes the right of innocent passage through international waterways in times of peace when such passage is not being used to support the military capability of a country threatening an armed attack;

And *Therefore*, accepting its responsibility to the Charter and to comply with the Security Council in any decision it makes;

Egypt hereby declares a verification zone in the Straits of Tiran and decides to stop all ships that have supplies that could be used to attack Syria. Ships will be detained or sent back. We will accept the review of the International Court of Justice for any decisions which are deemed to be improper in any way and will accept the decisions of the Security Council.

Now if Nasser, instead of making a filabustering speech including the statement that the Israeli flag was not to be allowed to fly through the Straits of Tiran, had given a lawyer twenty-four hours to work out grounds, he could have demonstrated political power by acting quite nearly lawfully. If he had accepted the review of the International Court of Justice, it would have been very hard for Israel to say that his illegal act justified war. He would have enhanced his power by using law to limit his objectives and to justify his actions.

The Group of 77 now could probably stop all United States deep seabed mining with a good resolution by the General Assembly. If they simply said that pending agreement on a treaty, anyone who steals from the common heritage of mankind without having agreed to turn over to the United Nations fifty percent of the proceeds (or whatever some reasonable figure might be) shall be treated as a thief. A resolution could say that the General Assembly recommends that all countries treat this as stolen property; that they do their best to prevent it being taken; that if they capture any of these nickel nodules and sell them in the marketplace, they can

reimburse themselves for their costs, keep half the proceeds for their trouble, and turn over the balance to the United Nations. Now a simple resolution recommending such action would so increase the political risks of deep seabed mining that no one would go into it. It is hard enough right now. If any investor in deep seabed mining knew that any country in the world could hijack his supplies, claim to be acting for the United Nations, and keep half the profits for themselves, no investor would put up the money.

Law is a powerful tool that can be used by big countries and little ones. The way to sell international law is going to be to show people how it can help them attain their ends.

Finally, the most crucial question is how law can help someone pursue all three objectives simultaneously. That is, how do you pursue victory, power, and peace all at the same time? The only way to do that is to operate under law, to pursue victory within legal restraints and by lawful procedures. The best political strategy turns out to be a legal strategy.

Multinational corporations have learned how useful lawyers can be, but it takes lawyers who see their job as promoting the legitimate interests of the client, not one who sees his job as lecturing clients about what they should *not* do. International law, substantive and procedural, is a means for each state to define and attain its true objectives and legitimate interests. When we lawyers look at international law as a toolbox for enlightened statesmen, statesmen will be more likely to put international law to good use.

Thank you.

Q. Is law really as important as you suggest?

A. I am not saying that law is the only thing in the world — there is economics, there are tanks, there are guns. What I am saying is that the question is not how much does law matter, but how? Not, is economics more important than law? Is military force more important than psychology? Those are poor questions. If I asked you why you were here today—is it economic, meteorological, geographic, legal considerations—what were they? It is a silly question. But the question is, How do we use economic considerations to get you here? I give you a ticket. How do we use comfort considerations? We have a nice place to stay. How do we use social considerations? We have good people here, intellectuals, good

company. We are learning how to use the techniques of each discipline to bring about results. I am saying that law is best thought of not as a brake but as a way of accomplishing objectives. If we think of law as simply a restraint, saying you cannot do this and you cannot do that, law will have less impact. If we see law as a tool, law will earn for itself a larger role. We will have more settled by legal debate and less by guns.

Q. Are you saying that if a statesman pays more attention to law he will do better, even if he "wins" less? What are his real interests?

A. The interest is in process rather than in result. You have me basically correct. What I am saying is that law can help people reformulate their objectives. It helps us understand that what we want is a system for dealing with crisis rather than to win every crisis. In a crisis, most statesmen want to win. They think they want what they want when they want it.

Q. Is there a downside to the use of law?

A. Yes, there is a downside. I think we have to worry about making things too rigid, too right-and-wrong.

Q. As I see your position, you are saying that if one side can say there is a certain morality to his position, he gains the respect of the whole community and strengthens his position.

A. My first point is even simpler. Confronted with a highly political world, we should look at law as a method for formulating and attaining our objectives and not just as a restraint on what people can do. Then I say that a rule, to be an effective way of affecting others, must look legitimate to them. It must have some legitimacy in the eyes of those whom we are trying to influence, not just our own. And that is essentially what law does. Law tries to say, here is a norm which we can all respect. If we take our original goals and formulate them in terms of norms that we can lay on the table for general acceptance, we will be likely to make others behave a little better. Whereas if we use guns, demands, and charges, without the legitimacy and morality that the legal notion makes us use, we will be less effective.