4 Non-state actors from the perspective of the policy-oriented school

Power, law, actors and the view from New Haven

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1 Inducements to act

An Actor wants others to do what he desires. State actors want other states to act or refrain from acting in a specified way. Assume actor A wants B to do X. A has at least five available strategies. A can say to B:

1 'Do X and you will be better off.' This can be called *prudence.*
2 'Do X because it is the right thing to do.' This is *morality.*
3 'Do X and I will pay you.' We can call this *seduction.*
4 'Do X or I will harm you.' This is *power.*
5 'Do X because it is the law.' This is *law.*

We see that (1) and (2) are complementary: in (1), A appeals to B's selfishness, in (2) to B's altruism. Both (1) and (2) use only Aristotelian rhetoric; there are no transactions between A and B. We see that (3) and (4) are also complementary, but now a transaction is introduced between A and B that was missing in the first two examples. In (3) A gives B something B wants (for example, money), while in (4) A takes something away from B (B's health, his property, or whatever B values).

In this array, some factors can overlap. Legal positivists say, for example, that while morality and law can overlap, there is no necessary overlap between them: a given rule of law can itself be evil. Strong adherents of natural law would disagree with the positivists and say that an evil law cannot be 'law'. Sometimes law can overlap with power: consider income tax. Law can also overlap with seduction: an income tax rebate just before an election. It is only the state's power that induces us to pay taxes; people do not pay them for reasons of prudence or morality (seduction is ruled out because the state would have to pay at least as much to the taxpayer as the taxes due in order to induce the taxpayer to pay the tax). Yet it is hard to say (as the New Haven school seems to say) that law necessarily overlaps with power.

Law and *Power* seem forever locked in an uneasy symbiosis. Law would like to be a check on Power, but Law needs Power to enforce its commands. Ideally, Law would like to control Power so that Power is never used except to punish violators of the law. But Law, being itself just ideas, has no power to control Power. They are of two worlds: Law is a product of our minds, while Power is the kinetic and potential energy in the palpable world of forces and matter.

Power would like to control Law so that it can conserve its energy, relying upon Law to achieve stability and docility.

To be sure, there have been brilliant insights in the historical record that seemed to breathe a kind of self-enforcing physicality or power into Law. Abraham Lincoln in his Cooper Union address in 1860, a time when the idea of war against the better-trained soldiers of the South appeared to be folly, said 'Let us have faith that right makes might' – a transformative idea at a turning point in history.[1] Cicero and Aristotle exalted a Natural Law that tamed a person's grosser instincts with 'right reason.' Vitoria's concept of the Just War held that the army that had justice on its side deserved to win. Diderot, in his famous Encyclopedia, argued that legal principles stand firm even when they are violated. A thief may use cunning and physical force to steal a valuable object, but once it is in his possession he relies upon the law of private property to deter others from stealing the valuable object from him.

But if we are on the verge of convincing ourselves that the pen is mightier than the sword, we need a cold shower of realism. Ideas are useless on the battlefield in fighting an enemy. Words are mere playthings to a dictator commanding his troops. Ideas are ink-marks on paper that burns quickly.

2 Realism is seductive

Our subject is international relations. We ask whether Law or Power produce better insights or explanations of why states behave the way they do toward one another. Prior to the 1920s, the study of international relations was called 'political economy.' There was little attempt to identify a Legal perspective or a Power perspective: the study of political economy easily shifted from Law to Power and back to Law depending on the subject-matter. A state was a sovereign legal entity, international arbitration was an important legal method capable of settling inter-state disputes, treaties were an even more important set of contracts that constrained power. Whether Power or Law was dominant depended on what chapter you were reading. But after 1920 with the powerlessness of the League of Nations, disillusionment from the World War, and the failure of Woodrow Wilson's Fourteen Points, an anti-legalist mood took over the government departments of the major universities. Many of the departments changed their name to 'Political Science,' a name that had a great deal of influence

in nudging its professors toward the Political side and away from the Legal. Politics meant power. The emphasis on power was called Realism. The idea took over that realism, not law-speak, was the key to understanding international relations. Two influential books helped drive Law out of the subject-matter of international relations: E.H. Carr's *The Twenty Years Crisis*[2] and Hans Morgenthau's text *Politics Among Nations.*[3] Unlike Carr, who had little training in international law, Morgenthau had practiced international law in Vienna and knew whereof he spoke. But World War II disillusioned him; he saw morality and legality giving misleading signals to the Allies. In his book Morgenthau persuaded students who knew little about international law, save what Morgenthau told them, that it served only as a distraction from the real game of power politics.

Students eagerly embraced the new realism. Who, after all, did not want to be a realist? Realism did not require reading tedious legal texts, such as treaties and charters. It dispensed with peripheral players, such as non-state actors and non-governmental organizations. There were only states existing in a field of anarchy. States selfishly competed with each other in the international arena. In that competition, Power could help you win, Law could seduce you into losing.

3 Ambiguity is a power tool

When a legal rule is ambiguous, there is room for Power to step in and resolve the ambiguity. Advocates of power politics prefer ambiguous laws to clear laws.

Lawyers, however, are uncomfortable with ambiguous rules. They have an innate desire to straighten out the rules. Yet, in any given case or controversy, the side that is disadvantaged by a rule strives to increase its ambiguity.[4]

4 Power, realism, and New Haven

Harold D. Lasswell, a political scientist at the University of Chicago, was an eminent realist and student of political power. The striking title of one of his books was *Politics: Who Gets What, When, How.*[5] Yet he was dissatisfied with Power as the exclusive key to politics. He felt that Law could not entirely be left out of the picture. Perhaps this dissatisfaction was an important factor in his decision to move eastward to take up a faculty position at Yale University. On the Yale Law School faculty at the time was Myres S. McDougal, a natural complement to Lasswell because of his dissatisfaction with Law as the exclusive key to human behavior. In 1938 Lasswell and McDougal began co-teaching seminars and became thoroughly acquainted with each other's ideas. Their positions were complementary: Lasswell wanted to add Law to Power; McDougal wanted Power to make international law relevant. Yet they both knew that Law-plus-Power would

simply be a retrogressive move back to the political economy of decades past. They needed an approach that would allow mixing the immiscible. They decided to invent a new language to accomplish this feat. David Kennedy perceives that the New Haven school folded law into policy by focusing on law in the interstices of power, as an instrument of government, as a compliance program and management tool. In other words, Law as a management system and a vocabulary for policy-making. The word 'policy' is crucial to this vision – a blending of Law and Power. Myres McDougal formulated this vision most explicitly at mid-century. Law as a vocabulary for world public order – at once a scheme of values, an institutional structure, and a disciplinary sensibility for policy-making and management.[6]

Thus law blends into power: New Haven speaks not of rules but of policies; it sees law as patterns of control. Yet when most lawyers and most judges want to make legal arguments, they try to separate law from power. Accordingly there is a tension between the Yale approach of intermingling and blending law and power, and the lawyer's or judge's approach of separating out the law and dealing with it exclusively, leaving power behind to take care of itself. A striking example is found in the *Tehran Hostages* Case.[7] Iran argued, in terms reminiscent of the view from New Haven, that the narrow legal question framed by the United States – whether Iran's actions in detaining American diplomatic and consular personnel violated treaties of diplomatic protection – could be separated from the much larger, intertwining political dispute between the two countries. Iran's letter to the Court of December 9, 1979 continued:

> The problem involved in the conflict between Iran and the United States is thus not one of the interpretation and the application of the treaties upon which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements. Consequently, the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United American Government, in particular the coup d'etat of 1953 stirred up and carried out by the CIA, the overthrow of the lawful national government of Dr. Mossadegh, the restoration of the Shah and of his regime which was under the control of American interests, and all the social, economic, cultural and political consequences of the direct interventions in our internal affairs, as States in Iran.[8]

Thus Iran is arguing that the case is non-justiciable because it is only an intertwined part of the larger conflict between Iran and the United States. A familiar summary of the New Haven viewpoint about international law seems to say the same thing: 'International law is most realistically observed, not as a mere rigid set of rules but as the whole process of

authoritative decision in which patterns of authority and patterns of control are appropriately conjoined.'[9]

Yet, the diplomatic treaties referred to in the letter by Iran consist, of course, of rigid rules – at least, rules expressed in words upon which both sides could agree. But if Iran and Yale are right, these words cannot be lifted and separated from their political context without modifying, distorting, or even destroying their meaning.

The judges of the ICJ were not impressed. They opined:

> Legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a Court; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes.[10]

In practical terms, the Court must lift the legal issues out of the political context and deal with them separately. This form of deconstruction is precisely the opposite of what the New Haven school adjures us to do. The New Haven school is constructivist: it regards international law as so embedded in the political context as to make it impossible to deal with separately.

It follows that New Haven and Iran would agree that to lift the legal issues out of their political context is to distort the legal issues and to misunderstand the political context. The Court's reply is one of confession and avoidance: all legal issues are necessarily distorted by their political context. Since there is no such thing as a non-political legal issue in international law, legal issues constitute law *given* the necessary distortion.

5 Descriptivism is deceptive

New Haven's descriptivism appears to derive from Hegel who introduced to Western thought the viewpoint that 'things' do not exist as separate items but rather should be defined in terms of how they relate to each other and to everything else in the world.[11] If law is a Hegelian 'thesis' and power is its 'antithesis,' then the reality that we observe is their 'synthesis,' and not their isolated ghosts. Hegelianism is an anti-Aristotelian way of describing the world. It fuses law and power together in a way that would please any New Havenite.

Conceding that New Haven's descriptivist view of international relations can invoke Hegelianism as a justification, nevertheless we must ask how

the actor is helped by descriptivism. After all, the actor (and we, if we are activists, are the actors) wants to *change* the relations among states in order to achieve a better world – 'better' in the sense of more peaceful, more stable, more respectful of human rights, more ecosystem-preserving, more life-sustaining, and more conducive to human flourishing. Changing the world is quite different from neutrally observing it unfold inexorably as the clash of thesis and antithesis.

The actor and the Observer are opposites. The Observer may be a historian, a newscaster, or a reporter for the world media. The Observer's goal may be no higher than to 'tell it like it is.' Observers are happy if their descriptions are accurate. Hegelianism gives the Observer a deeper insight into reality. New Haven descriptivism, in particular, sees ambiguities between law and power in such a way as seemingly to capture the fluidity and intermingling of their interactions in the world arena. Thus if a head of state claims that international law gives his state the right to manufacture its own nuclear arsenal, our Reporter can describe the reality of his claim, in the language previously quoted, as a process of authoritative decision in which patterns of authority and patterns of control are appropriately conjoined.[12] For students schooled in the New Haven worldview, this way of describing international law better captures reality than the classical formalism of the question 'is it legal for a non-nuclear state to acquire or manufacture its own nuclear capability?'

Even the actor may reject the classical formulation of the nuclear-capability question, although for different reasons. The actor would rephrase the question as follows: 'do nearly all states believe – and if so, how strongly – that it would be illegal for a non-nuclear state to acquire its own nuclear capability?' To the actor, international law is not a *Ding an sich* but rather can be unpacked as a psychological assessment about the motivations and phenomenology of state officials.

Descriptivism deceives because it cannot take into account the free will – the teleology, to be more precise – of the actor. Since law is a product of the human mind, it too cannot be encompassed. Law has to be 'seen' from our internal viewpoint. It elicits in us a sense of duty, obligation, and compliance with its words, even if its words tell us to do things that we would prefer not to do. In the arena of international relations, law shapes the landscape. The landscape, of course, is not physically changed; it is a mental construct.[13] Since we see what our minds tell us to see, the phenomenological view of the actor is more accurate in capturing the reality of international relations than is the static-patterned view from New Haven.

6 When law is commingled with power

Power is distributed unevenly across the states of the world. International law, by contrast, regards all states as equal. Since power distribution is a

brute fact about the world, it follows that if you mix power and law the result may be – paraphrasing the immortal phraseology of George Orwell's *Animal Farm* – that all states are equal under the law, but some states are more equal than others.

Professor Reisman can be quite blunt about some states being more equal than others. In explaining the New Haven viewpoint at an annual meeting of the American Society of International Law, he said to an audience packed with visitors from abroad: 'The notion of law as a body of rules, existing independently of decision-makers and unchanged by their actions, is a necessary part of the intellectual and ideological equipment of the political inferior.'[14]

7 Law motivates

When we look into the minds of state actors to see what motivates them – and we can only do this by looking into our own minds and assuming that other minds are similar to ours – we find something quite different from New Haven descriptivism. The mind of a state actor is filled with thoughts of how to act on the basis of what is given: how to act to improve the actor's own chances of survival, advancement, wealth, and flourishing; how to improve these chances by identifying with the state and by coordinating actions such that what is good for the state is good for him; how to change, modify, and alter the present reality. Thus, to the actor, the idea that law is a pattern of authority and control is fuzzy. The actor instead must look upon law as a tool – a crowbar that can raise the groundwork of reality or a sledgehammer that can nail it down, depending on the actor's motivation either to change the status quo or to reinforce it.[15] As evolved creatures, we actors have to make our way in the world in order to survive. The proof that our ancestors did an outstanding job of it is that we are here.

We know a lot about law as a tool because our listeners seem receptive to law's message. A legislature that enacts a law can expect the public to follow it (or to expend energy to circumvent it). Law thus introduces a new variable into our description of international relations, a variable (like X or Y in mathematics) that cannot be captured by a constant (C or K). The constant is the present distribution of power. The New Haven school would try to capture law by making it a constant in the distribution of power – a constant called a 'pattern of authority and control.'

Earlier it was suggested that the New Haven school needed to invent a new language to mix the immiscible. To invent new words would be to cheapen the concepts by jargonizing them. What was left was to invent new images that appeared to be talking about one thing while in fact talking about its opposite. Here is perhaps the most famous articulation of the New Haven approach in which McDougal uses the *language* of variables while conveying to the reader the *meaning* of constants:

> Throughout the centuries of its development one may observe the regime of the high seas as not a static body of absolute rules but rather a living, growing, customary law, grounded in the claims, practices and sanctioning expectations of nation-states, and changing as the demands and expectations of decision-makers are changed by the exigencies of new social and economic interests, by the imperatives of an ever-developing technology and by other continually evolving conditions in the world arena. From the perspective of realistic description, the public order of the high seas is not a mere body of rules, but a whole decision-making process, including both a structure of authorized decision-makers and a body of highly flexible inherited prescriptions: it is a continuous process of interaction in which the decision-makers of individual nation-states unilaterally put forward claims of the most diverse and conflicting character to the use of the world's seas, and in which other decision-makers, external to the demanding nation-state and including both national and international officials, weigh and appraise these conflicting claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them.[16]

Professor McDougal's prose resembles the waves of an ocean, rising and falling but eventually canceling each other out. What, for example, is the 'structure of authorized decision-makers' that is buried within the paragraph? Where can it be found? How can a fluid process even have a structure? How can new claimants to a use of the high seas ever convince a 'structure of authorized decision-makers' to give up their vested interests and allow new claims to come in and change the entire process? If our claims are dependent for authorization upon authorized decision-makers, then we do not have customary international law at all – we have a medieval guild.

This is not to say that law cannot be manipulated. Built upon rhetoric, it can be shaped by rhetoric. Not so Power. The actor cannot will a change in the configuration of power. A state has a given quantum of power; its power cannot be increased by the sheer will of the head of state. To be sure, power can be redeployed; but it cannot be strengthened by force of will or persuasive argument.[17] By contrast, law can be strengthened by the force of power when power is used to enforce the rules of law.

The New Haven school correctly reminds us that international law is an admixture of law and power. Yet the quotation from Professor McDougal presents a static picture (or series of pictures) of a moving and changing object. A better analogy would be that of a motion-picture film. The pictures projected on the screen appear to be in motion, but in fact they are on a movable reel of static pictures. McDougal's view is like the reel: a series of individual unchanging pictures. (One is tempted to call his view 'reelism.') To the extent that the Yale view derives from Hegel, we are

reminded of Hegel's view of the State 'marching through history.' Yet even Hegel's image is falsely dynamic: a State may accrete its power through time, but where is it going? What will it do if it ever gets there? Hegel's image is more like a wave marching across the ocean. The wave, in fact, does not move laterally across the ocean; it only moves up and down. We just see the appearance of waves in motion because of their synchronicity, as in a cinema marquee we see lights that appear to be moving that are only switching on and off.

8 The international arena: ten axioms

We are now in a position of being able to fill out our reconceptualization of the international legal arena:

1 Power is distributed unevenly (there are big states and small states).
2 Law is distributed evenly (states are equal under the law).
3 Both Power and Law are tools that enable actors to achieve their goals.
4 Power is inert; it has no teleology.
5 Law is not inert because it is constantly in a Darwinian struggle to preserve itself through time. Law's teleology is to survive.
6 *Power*: an actor is in complete control of the weapon he uses.
7 *Law*: an actor to some extent controls the law he uses, but the law to some extent controls him.
8 *Stability and Power*: Hyman Minsky famously said, 'stability is always destabilizing.' Power-holders become complacent and they underestimate risks. Think of the Roman Empire at the height of its power.
9 *Stability and Law*: legal stability increases stabilization. Law is subject to reinforcement: if a rule of law is violated and the violator is punished, greater stabilization results than if the rule had not been violated in the first place.
10 Power gets used up; law gets stronger the more it is used.

9 Can international law assimilate human rights?

Power will always remain in the international arena as a check on some other state's power. The United States, for example, uses its power not to increase its territory but to prevent other states or groups from using their own power and, of course, for defensive purposes. This use of power is important, but it now works mostly in the margins. The international arena is increasingly characterized by legal disputes and decreasingly by power disputes.

So long as legal disputes are surrogates for power disputes, the state-based system of international law remains intact. States are comfortable under international law either in their role as aggregates of power or as

claimants in legal disputes. The real threat to the state-based system of international law comes from the human rights revolution.

This latter assertion may strike many readers as exceeding strange. For those human rights advocates who believe in the primacy of the person – as contrasted with those who favor human rights so long as states remain firmly in control – the primacy of the person entails the non-primacy of the state. Yet for 4000 years, states have enjoyed the top position as both subjects and objects of international law. International law began and still remains a law of nations. The question for our era is whether human rights can drive a wedge into this cosy arrangement among states.

A human right, to be worthy of the name, must be opposable to all states. What kind of a right is ownership of property if it is only enforceable against foreign states but not against one's own state? What kind of a freedom is it against arbitrary incarceration if one's own state need not respect it? States often espouse the human rights claims of their nationals against foreign states, especially because co-nationals get riled up at the foreign state. Political leaders might win the next election with a sufficient show of concern and protest on behalf of an individual citizen maltreated by a foreign government. But when a citizen is maltreated by his own government, other citizens tend to look the other way, and certainly foreigners do not care at all. In sum, people who travel abroad usually get help from their own government if a foreign government violates their human rights. But how many people travel abroad? The overwhelming majority of people on earth have never ventured beyond their own state's borders. Thus from a purely quantitative point of view, human rights enforcement is, at best, rare.

If this quantitative viewpoint is disconcerting, the qualitative case is a disaster. For how can there be such a concept as a human right if it does not apply against *all* governments? If the right of a person is higher than the right of a state, then even the person's home state should defer to that right.

A few years ago it was claimed that education and television were the greatest forces in history for bringing about a rapid decline in prejudice and a feeling of bonding with foreigners. Now we must add the cell phone, already the most ubiquitous product ever invented. The more people talk with each other over the phone, the greater the total empathy in the world. The forthcoming hand-held picture phone can only accelerate this irreversible process of human contact. States and governments cannot stop these macro-cultural developments. Or to put it another way, contrary to Orwell's *Nineteen Eighty-Four* the increase in technology coincides with a decline in the power of states over people!

But it is not only technology that is enabling the progress of human rights. Add to this the vastly increasing initiatives taken by non-state actors in the international arena that are putting governments on the defensive. NGOs of all kinds are usurping the role of state representatives in the everyday practice of global diplomacy.

Should we therefore be optimistic in contemplating the near future of human rights? Or pessimistic that progress – *if measured by the right under international law to make a judicially enforceable claim against one's own government for a human rights violation* – has hardly budged in 4000 years?

Notes

1 New York, February 27, 1860.
2 E.H. Carr, *The Twenty Years Crisis: 1919–1939*, 1939, New York: Palgrave Macmillan, republished in 2001 (M. Cox ed.).
3 H. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, New York: Alfred A. Knopf, 1948.
4 Indeed, the side that is disadvantaged by the rule has a slightly better than 50–50 chance of ambiguating it (an increase of positive entropy), as I have argued in A. D'Amato, 'Legal Uncertainty,' 71 *California Law Review* (1983) 1.
5 H.D. Lasswell, *Who Gets What, When, How*, New York: McGraw-Hill, 1935.
6 D. Kenney, 'Closing Remarks: Speaking to Power,' Madison, WI, March 6, 2004, online, available at: http://www.law.harvard.edu/faculty/dkennedy/publications/lawtopower.pdf (accessed 7 August 2010).
7 *Diplomatic and Consular Staff in Tehran*, 1980 ICJ Rep. 3.
8 Ibid. at 19.
9 E. Suzuki, 'The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence,' 1 *Yale Studies in World Public Order* 1, (1974) 30.
10 *Diplomatic and Consular Staff in Tehran*, *supra* Note 7, at p. 20.
11 For further development of this interpretation of Hegel, see A. D'Amato, 'Toward a Reconciliation of Positivism and Naturalism: A Cybernetic Approach to a Problem of Jurisprudence,' 14 *Western Ontario Law Review* (1975) 171, pp. 172–3.
12 Suzuki (1974), *supra* Note 9.
13 The fitness landscape in Boolean network space is a useful analogy. See S.A. Kauffman, *The Origins of Order*, Oxford: Oxford University Press, 1993, 214–18.
14 W.M. Reisman, 'The View from the New Haven School of International Law,' 86 *ASIL Proceedings* (1992) 118.
15 Although words are a lawyer's stock in trade, there can be occasions when any use of words at all can imperil a situation. There are times when it is better to say nothing than to say something. A perhaps controversial example comes from a current email debate I am having with Professor Richard Falk, who takes the position that the United States should have a declaratory no-first-use-policy to 'back away from the ambiguities of present threat/use doctrine in relations among states.' My reply is that law-words do not necessarily remove ambiguity; they often feed it. 'The very ambiguities of the present threat/use doctrine,' I wrote, 'can be what has given us an uneasy but spectacular stability since 1945.' At the time of writing this chapter, Professor Falk is preparing a response. The lines are drawn!
16 Myres S. McDougal and Associates, *Studies in World Public Order*, New Haven, CT: Yale University Press, 1960, p. 773.
17 Japan learned this lesson after it adopted Admiral Isoruko Yamamoto's plan to attack Pearl Harbor in 1941. Yamamoto had been a student in the United States and observed its vast military capability: at war-production levels, the United States could (and did) outstrip Japanese armament and materiel production by a factor of ten to one. Accordingly, in advocating his plan to the Japanese hierarchy, Yamamoto argued that, soon after the 'surprise strategic

attack,' Japan should sue for peace. He expected that Japan could 'run wild' for six months with the US Pacific Fleet decimated, but then Japan would gradually and inevitably lose the war. His prognostication was accurate. But the Japanese hierarchy, flush with the gains from Pearl Harbor and the subsequent conquest of most of Southeast Asia while the United States was powerless to intervene, swept aside the Admiral's cautionary advice and took an enormous gamble. But the conquest of Japan was inevitable. The war was won by American superiority in war production – even without counting the atomic bombs. No matter how many times Japan redeployed its forces, it could not possibly overcome such a disparity in power.