THE PRUDENT PEACE

LAW AS FOREIGN POLICY

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PREFACE

The central perception articulated in this book, that of the role of law as prudent foreign policy, is one which I have been mulling since the closing months of World War II. The events of the intervening years, often viewed differently, have confirmed the perception, filled out its rationale and implications, and added a sense of urgency. This tentative hypothesis of 1945 became for me a matter of conviction and concern.

The idea of writing this book began to take shape a dozen or more years ago. My final commitment to it came with the adoption of a sabbatical policy by my law firm in 1975. Although most of the research and organization was completed before my departure, my six month sabbatical in 1978 provided the indispensable opportunity for writing and research, as a graduate researcher at University College, Oxford, at Harvard's International Legal Studies Library, and at our summer house in Maine.

This book owes much to the contributions others have made in a variety of ways, and I must acknowledge my indebtedness to all of them: to Francis E. Ackerman for his invaluable assistance in research and for helping in our discussions to shape the argument; to Daniel R. Coquillette for his encouragment and for leading me to University College and Oxford; to University College for making me feel a part of that fine community of scholars and opening the resources of Oxford University to me; to my law firm for recognizing through its sabbatical

policy the diversity of the interests that make demands on the lives of busy lawyers; to those many friends, associates, and scholars who gave their time to read the manuscript for their encouragement and helpful suggestions; to Sonya Abbott and to my secretary, Anne Keller, for dedication beyond the call of duty in preparing, correcting, and revising the manuscript; and finally to my wife, Lydia, for encouragement, for many hours listening and reacting, and for patient indulgence of the countless evenings, weekends, and vacation days absorbed in my concentration of this task.

John A. Perkins

INTRODUCTION

The Challenge

Faith that law provides the path to peace stands badly shaken in our uneasy world. We have lived through dangerous times since 1945. The crises, the shocks, the frustrations, the continued covert maneuvering for advantage even during the official calm of détente, have all inevitably and rightly taught us to approach international affairs with a realistic intelligence, wary of wishful solutions. But we will have misread the lessons of the postwar era and failed to understand the nature and function of law, if we conclude it is the course of realism to reject law. The case for law rests no less on practical and political logic than on moral grounds, and the cogency of those considerations has become in fact even clearer during the postwar years.

This book argues that law *is* the path of realism. The prevailing attitudes about law have been focused on the wrong questions. The issue we should be considering is not the feasibility of law as a system of enforceable restraints but the necessity of law as a strategy for the resolution of conflict. The issue is not whether international law is or in the forseeable future can be enforceable but whether a foreign policy that is not based on law can be fully effective in serving the national interest. Instead of asking whether we can afford to take a chance on law we should be observing that in the real world we cannot escape it. We can make the most of it or we can reluctantly adjust to its

restraints without realizing its constructive potential. It is one or the other.

The questions that need to be asked examine the potential and the prudence of law as policy. It has become imperative to ask these questions, as events increasingly make clear that power and wealth alone do not assure either respect or influence. In a world where it seems to many that to allow foreign policy to be guided by legal principle is becoming a more and more difficult choice, it is not only relevant but urgent to ask: Why in so many areas of the world does the United States seem to be unable, despite its power and wealth, to exert an effective influence even on developments that are vital to its security?

The role of law in foreign policy has been misconceived. Many have visualized that law must come to reality through conversion of the world to a belief in an ideal of law as the basis for peace or by the willingness of nations generally to submit to adjudication the disputes in which peace hangs in the balance. Many believe the path to law lies in the creation of some supranational institution with the authority to impose a rule of law. Such approaches to law miss the force of the case for law as practical and realistic foreign policy. Law that does not make sense in these terms cannot determine the actions of nations on important issues in our time. If the world is to move toward the rule of law, it is because law can provide a sound course of policy, sound for the world in which we live, a policy which can build the future out of the present. That is what this book is all about—law as foreign policy.

The lesson of our difficult times is not to reject law but rather to understand its role in our kind of world and to recognize the nature of the challenge this presents. Most of us in the Western world probably acknowledge at least the theoretical validity of law as the basis for the resolution of conflict. In this sense most of us undoubtedly believe in the rule of law. This apparent agreement hides, however, a fundamental difference of understanding. The rule of law in international relations is often conceived as an alternative to a world in which nations have to reckon with the realities of power. By this view, under a regime of law we can put concerns with the balance of power behind us. For others a balance of power of some kind is the indispensable premise for law. Unchecked power will be abused—in international affairs as in all other human affairs.

Events have instructed us. There were many in 1945 who believed that World War II had set the stage for a new era, one in which power politics could be relegated to history and a regime of law could become a reality. The Iron Curtain and the Cold War quickly shattered these

dreams, just as disillusionment had earlier destroyed the high hopes of many after World War I that the world was ready to substitute law for power. The naïveté of the belief that the rule of law can simply replace the concerns of power has been made plain to everyone.

Unfortunately, the notion that we can shape our policy by law on any terms has become an innocent victim of these same events. This is perhaps understandable. The times have not encouraged us to contemplate a central role for law in foreign policy. The role of power has had to be our ever present concern. We have come to think of the strategy of peace in terms of containment, of credibiility and dominoes, of nuclear deterrence and second strike capability, of power blocs and alliances. The calculus of power is all too clearly an essential part of the strategy of peace. But we make a great mistake if we allow these concerns with power to obscure the necessary role of law in our foreign policy.

Yet this is precisely what has happened. A pervasive cynicism reigns. The world has lost confidence that any nation, including the United States, is prepared to respect law in matters it regards as vital. A profound skepticism as to the realistic role of law affects international lawyers and foreign policy leaders no less than the general public.

While the frustration is understandable, we must not let the frustration blind us to the nature of the challenge. As we shall see, the balance of power must realistically be seen, not as an alternative to law, but as a part of the structure of law, supporting law and supported by it. What the experience of the postwar years teaches is that the rule of law that we need and must seek is one that comes to terms with the realities of power and politics. It must realistically recognize the security concerns that are inherent in a world of independent nation states. The challenge to those who guide foreign policy is to chart a course to a just and secure peace under a rule of law that takes account of the realities of power and contention. This is a task for dedicated but practical-minded men and women who understand the perils of the world in which we live as well as the forces and developments that move the world toward law. This book examines the prospects of that kind of law.

The Roots of Apathy

In presenting the argument for law as policy I hope I have fairly addressed what I take to be the underlying assumptions upon which the current apathy regarding law is based. It seems useful at this point to identify these assumptions.

The first of these assumptions is that law is not addressed to the central concerns of foreign policy. International law is seen as at most imposing some kinds of peripheral restraints on foreign policy, whereas the true concerns of foreign policy are the security and vital interests of the nation. The effective result of this assumption must be that international law can govern only issues that do not really matter and the rule of law in matters of vital interest has to be reserved for some ideal world, presumably where nations no longer have to be concerned about power for their own security.

This assumption reflects the misconceptions that the postwar era has encouraged. It is time to rethink the prevailing assumptions about the role of law in foreign policy. I believe this rethinking will reveal that the fundamental errors of the prevailing assumptions are in failing to see that we cannot escape law, that law, realistically conceived, provides the only viable basis for the resolution of conflict and must, in fact, be seen not as a distant goal but as the essential basis now of an effective foreign policy for the United States.

The second assumption standing in the way of our assigning a central role to law in foreign policy is that the law is insufficiently defined on critical issues to provide a prudent basis for acceptance of law. It is widely perceived that nations twist law to their own ends. All wars are begun under a claim of self-defense. All intervention is justified under some claim of right. It is widely assumed that essential questions remain unresolved, whether, for example, self-determination and non-intervention are principles of law or merely policy goals, and if they are principles of law how and when they apply.

These are important concerns and cannot be dismissed lightly. They are, I believe, at the heart of the issue whether the United States can prudently make a full commitment to law. This book examines issues on which the substantive resolution provided by law may be vital. What emerges is that much of the current cynicism about legal developments is misplaced. While the world has seemed to many to be disintegrating into a chaos in which only power counts, it has in fact been making important progress in the evolution of legal rules appropriate for the resolution of conflict in the real world. Treaties and U.N. resolutions present a clearer and sounder basis of emerging law than is yet generally understood. Some provide more cogent and effective principles of foreign policy than those we tend to adopt in the name of realism. Even many international lawyers seem not to have absorbed the impact of the developments that have already occurred. The delegates at the United Nations working on the firing line have, as is probably often the case,

been ahead of the writers and the theorists. Prudence will dictate stipulations on some doubtful points, but the scope and thrust of legal developments present no bar to a foreign policy commitment to law.

The third assumption paralyzing action toward a commitment to law is that, since most nations are not yet ready to bind themselves to law, there is nothing we can prudently and usefully do alone. The assumption that most nations are not ready to bind themselves to law should be taken as true for purposes of formulating any proposal, for any proposed commitment to be bound by law which has to be joined in by most nations to be made at all would be too fanciful to merit further consideration. But the further assumption that nothing is to be accomplished by a commitment of our foreign policy to the resolution of conflict by law reflects again the assumption that law is not itself a prudent foreign policy. If, as this book will argue, it provides a more cogent and effective foreign policy for the United States than any other, it misses the point to object that most nations are not ready to be bound by law.

When we once understand our stake in law, how law does provide a prudent foreign policy, we can see there is something to be accomplished by an explicit commitment of our policy to law, even if we proceed alone or with one or more like-minded nations. We have to rethink the role of adjudication in this perspective. The relevant question is not whether nations generally are ready to accept adjudication of disputes but whether we can prudently strengthen our own policy by declaring terms on which the United States will be willing to adjudicate disputes that cannot be settled by negotiation.

In short, the answer to the assumption that there is nothing the United States can do alone is the examination this book attempts of the potential and the prudence of law *as* policy.

Ideals and Policy

If we approach the role and the prospects of law purely on a scale of risks and benefits for the United States, we leave an important element out of the equation. One cannot take a true measure of affairs that involve the human spirit by ignoring the ideals that move us as human beings. No realistic appraisal of the prospects of law in international affairs can ignore man's moral commitment to the concept of law.

Some things we do as much because they are right as for any calculation of benefit. I think it is fair to say that this book would not be written, however much law might add to the foreign policy of the

United States from a risk/benefit analysis, without the conviction that law is right, right for us and right for mankind.

This is the source of the power of the idea of law. The only true calculus of the pros and cons of law is a calculus that takes account of the moral power of law.

Think-tank analysis of international relations is a necessary and useful process. But nations move to the power of ideas. Foreign policy in the end has to be something a people believes in.

It is, indeed, a part of the disillusionment and frustration of our perception of international relations that we want to believe in something better. Near the end of our involvement in the Vietnam war President Kingman Brewster of Yale accurately, I think, assessed the unfulfilled spirit of America. "In addition to a renewal of a belief in what we are and might be for ourselves as a society, we—like the Athenians—also badly need to feel that we have a role in the world which is not just meanly self-serving. We yearn for some belief that our nation has a significance for mankind generally which can be measured by some scale larger than our own survival and well-being."[1] One cannot realistically consider the role and the prospects for law without such a sense of our national purpose and commitment.

This book is written to demonstrate that we can move aggressively now to implement our belief in law, that it is the best foreign policy for the United States, that it is a policy which realistic, practical-minded, responsible men and women can and must support. Part one examines how the conflict solving strategy of law is already interwoven in U.S. foreign policy and argues that an effective foreign policy for the United States has to be grounded in law. Part two tests the idea that emerging law may provide rules suitable for a realistic foreign policy and evaluates the viability of the key principles of the emerging law. Part three considers what prudent initiative toward law might be taken by the United States, unilaterally if need be, and sets forth a proposal to provide direction and momentum for the forces that can move the world toward law. Part four attempts to define the kind of choice the United States now has to face.

CONTENTS

Part One

THE ROLE OF LAW IN FOREIGN POLICY

One

THE RELEVANCE OF LAW

Our habits of thinking about law are largely conditioned by our relationship to the internal laws of the nation. We see these as rules imposed by authority that forbid us to do certain things or require us to do certain things. Most of us do not have occasion to stop to think why these restraints and requirements take the form of laws of general application.

Most of us tend to think of international law in a similar way, although there is no comparable legislative authority enacting international law. The impact of international law is seen as imposing certain restraints to be observed in the conduct of foreign policy. We do not ordinarily think of international law as itself a foreign policy, and rarely if ever as the central core of foreign policy.

We see the rule of law as a goal and look toward some future time when the system of restraints by international law can be sufficiently developed to make the rule of law a reality. Our habits of thought condition us to see law only as a reliable system of restraints. This seems to leave relatively little place for law in foreign affairs of nations in the world as it is. For most Americans foreign policy in our time and for