



FRENCH STUDIES IN INTERNATIONAL LAW

International Law, Power, Security and Justice

Essays on International Law and Relations

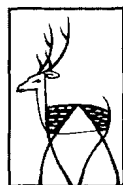
Serge Sur

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With Foreword by Michael Glennon

Serge Sur



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Series Editor's Preface

This Series aims to contribute to the dissemination in English of the works of the most eminent international law scholars writing in French. Because these works have not yet been published in English, this scholarship is inaccessible to a great number of potential readers who, due to the language barrier, cannot become acquainted with or discuss it. This is highly regrettable, as it limits the debate on international law to works in English—the *lingua franca* of our contemporary world—and thus primarily to Anglophone scholars.

The publication of these works in English therefore seeks to create the conditions for genuine debate among Francophone and Anglophone international law scholars across the globe, a debate that should ideally be based on the work of both. *Learning* of the others' theories through translation is in fact the first essential step towards *acknowledging* the contributions and differences of each. Knowledge and acknowledgement lead to understanding the core of irreducibility, as well as truth, in each legal culture's international law doctrine, its traditions and distinct ideas, as well as each author's way of thinking. They should make it possible to avoid the all-too-frequent misunderstanding of each other's position on international law that results from simple ignorance of each other's work. Between the Francophone and Anglophone worlds, the rule is still too often mutual, even courteous indifference or ignorance, dialogue the exception.

Emmanuelle Jouannet

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Foreword

The essays in this book address the relationship among the age-old competitors for the soul of the international order—law, power, security and justice. It is fitting that the twisted web of their influence be untangled by the Director of the *Centre Thucydide*: it was of course Thucydides, first and most famously, who took on these vexing issues in his *History of the Peloponnesian Wars*. Most pertinent therein is perhaps the Melian dialogue, which is familiar to every student of international relations (but not, alas, to every law student, which reflects law's shortcomings in addressing problems that are well-known to specialists in international relations).

The dialogue recorded or, more accurately, attempted to reconstruct the negotiations between the hapless Melians and generals of the Athenian forces that had laid siege to their city. In so doing it raised questions that have subsequently troubled readers for twenty-five centuries. In it, the Athenians are willing to talk only about interests, not about right. They undertake to convince the Melians that the two sides are possessed of a common interest—namely, that the Melians should surrender. The Athenian view is not, as commonly assumed, that might is right, far less that might *should* constitute right; a metaphysical discussion of abstract right and wrong is in fact of no interest to the generals, and they give short shrift to the Melian effort to inject their gods' values into the negotiations. Rather, the Athenian point is simply that each side should behave rationally, avoiding 'specious pretences' and the supposed commands of any pertinent gods (the gods representing a stand-in for contemporary notions of law and justice). Rationality, the generals suggest, is a function of power. 'You and everybody else,' they tell the Melians, 'having the same power as we have, would do the same as we do.' From this, generations of realists have identified Thucydides as the intellectual godfather of the seminal descriptive proposition that states are rational actors and act only to advance their own interests.

It is accurate to take the Melian dialog as descriptive rather than prescriptive. Critics of realism often assume the contrary, believing that Thucydides argues implicitly that morality is a function of power. But Thucydides injects no opinion with respect to the moral dimension of what he describes. Had he done so the likelihood is that he would have been aghast at what transpired, judging at least from other parts of the *History*

in which he expresses views that are unequivocally humanitarian, such as his commentary concerning the Civil War in Corcyra in 427. 'Love of power,' he there opined, was the cause of 'all the evils' that the Greek city states encountered. That 'the strong do what they can, and the weak suffer what they must' is simply an observation about the way the world works, not a normative statement about the way it should work.

Perhaps, however, Thucydides does implicitly espouse in the Melian dialogue the view that states are rational actors. But what would that mean? Did the Melians act rationally? At first blush it would seem that their choice was disastrously irrational, given after all that as a consequence of their choice, all the Melian men were slaughtered and their women and children condemned to slavery. Yet the truth is that it is impossible to know whether the Melians acted rationally because it is impossible to know what interest they sought to advance: if the interest were survival, of course they were indeed irrational, but if their objective was to vindicate values of honour, courage or devotion to principle, then perhaps martyrdom was altogether rational. Rationality assesses only whether means match ends. It does not prescribe ends; it does not tell us what we should 'want to want', in Holmes's phrase. Because we can seldom get into the heads of decision-makers and identify all the values and interests, conscious and unconscious, that they seek to vindicate with a given action or policy, it is impossible to know whether a given act or policy is rational. To put it differently and to extend the point, the proposition that states act rationally to advance their interests is not falsifiable, because it is normally not feasible to produce a counterexample that demonstrates what a state might do or did in fact do that was at odds with its interests, fully understood.

If obstacles to analysing the effects of rationality in international relations and law are thus considerable, efforts to analyse the effect of power are even more daunting. Power—the ability of a state to get what it wants, relative to the ability of other states to get what they want—is not quantifiable. There exists no scale in the sky to measure how many pounds the most muscular nation can bench-press. Sometimes power within one realm translates into power within another; as Paul Kennedy demonstrated in *The Rise and Fall of Great Powers* (1987), military power depends heavily upon economic power. Yet a nation can be powerful in one realm, as Japan and Switzerland are economically, but weak in other ways—as those countries are militarily. Power calculations furthermore fall within the shadow of the future. The Melians tried without success to make the case to the Athenian generals that a nation can fritter away its power by short-sightedly establishing a precedent that can later be used against it (as the United States is accused of having done through the profligate use of armed force over recent decades). But the weight of negative precedent is always speculative when no court sits to apply it.

Hence it is fruitlessly debated whether the United States as a world power is today in a state of decline. Compare the arguments of Joseph Joffe ('The

Default Power' (2009) *Foreign Affairs*) with that of Leslie Gelb in *Power Rules* (2009). Each makes a persuasive case. Gelb argues that it is; Joffe argues that it is not. But each relies on different indicia of power, and because there exists no agreed-upon formula that specifies which indicium controls, the two ships pass in the night. The difficulty is compounded when we remind ourselves that power is relative—that the same assessments must be made not only concerning the state in question but with respect to potential power competitors as well.

Power nonetheless is widely believed to distort perceptions of justice. Justice, about which the Athenian generals seemed so oblivious, generates unwavering certitude in others—but varies dramatically in its commands from culture to culture. Hence humanity has sought to reduce its core dictates to universal principles of law. Yet under the gravitational pull of power, international law, for all its supposed uniformity, repeatedly surprises, rather in the manner that a visitor strolling about Paris is sometimes struck by the haphazardness of its street plan. Narrow, serpentine streets form a maze of lanes and back alleys hiding quaint old patisseries, bistros and boulangeries behind its broad avenues and grand boulevards. These little surprises, one learns, are the result of the superimposition of a later template over an earlier one, as the street plan that emerged spontaneously over a period of eight hundred years was overlaid with a supposedly more logical matrix drawn up during mid-nineteenth-century urban renovations.

A visitor's first walk through international law brings similar surprises. Centuries of rules derived from natural law have been overlaid by an incomplete positivist template forged by competing centres of power, with the result that one is repeatedly surprised to stumble upon juridical vestiges of earlier times when one expects to make one's way along rational, newly-built legalist thoroughfares. Poking through the modern framework of international rules made from common consent and agreement are medieval rules that supposedly derive from eternal principles of good and evil. Security, demanding as it is of predictability, cannot realistically rest wholly upon such a framework.

In the essays that follow, Serge Sur navigates the thoroughfares and byways of international law as confidently as he does those of his native Paris. He writes with a breadth of perspective but also with precision, with erudition but also with accessibility. He brings to international law the insights of a realist, but a realist who knows that power alone cannot provide solutions to humanity's twenty-first-century problems. International law must be more than a fashion; it must be taken seriously, he argues, if for no other reason than that it affects governmental decision-making. These essays take international law seriously. Let us hope that governmental decision-makers take them seriously.

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Part I

States

Power as a Regulator of International Relations*

THOUGH OFTEN INVOKED, power is rarely analysed anymore. That interstate relations are dominated by power is a trivial idea. Formulas such as 'it is all simply a question of power politics' are known all too well. Still, though a simplistic formula, it nevertheless assimilates two different notions: power and the use of force, or even the use of force and violence. Either way, such a construction always seems to lead more or less to the justification of one or the other, or even both. Furthermore, even if it is taken as a given that interstate relations are dominated by power, how can one pretend that power is regulatory when, as a product of anarchy, the absence of a pre-established order, it seems to lead to overall disorder? On this point the question of the regulatory role of power is besieged by a panoply of critics with different motivations.

Criticism of power comes on either a moral or a political level first. Its role is rejected with moral disgust, stemming from a kind of ethic purity that eschews justifications for policies of force and condemns their abhorrent nature. Further, as is often the case in countries whose power is in decline or that find themselves in a position of relative weakness, there will be reluctance to justify a notion that by definition risks their own wellbeing. As such, the preference is for international relations to be dominated by rationality, which can be assimilated with a debate of ideas searching, in all instances, for solutions conforming to an abstract interest held by the international society as a whole. Out of such collective debate and the confrontation of such a gamut of interests would come a rallying cry in the name of a common interest among states. Such idealism, by definition, would prove illusory in each instance, nothing more than extreme points of view when confronted with a measure of objectivity. While it is possible to disapprove of the power game and in some cases to deplore its effects, this should not lead to an attempt to deny its concrete influence.

Two objections can be presented to the varying positions that are critical of power. The first, theoretical in scope, argues against using power as a

* Previously published as 'La régulation des relations interétatiques par la puissance' in S Sur, *Relations internationales*, Domat—Politique, 4th edn (Paris, Montchrestien, 2006) 237–61.

defining characteristic. This notion itself is impossible to grasp with precision. In the end, one can only invoke it *a posteriori*, according to what it produces, as a justification of events or configurations that have ill-defined or fluctuating compositions, which makes them, in turn, impossible to forecast. When referring to a group of complex data, any attempts to baptise it under a sort of conceptual umbrella would be just as futile. The fall of Nazi Germany, the collapse of the USSR, or the relative decline of Western Europe, emanating from different types of phenomena, could all be artificially connected to failures or evolutions of power. Similar to the soporific quality of opium, a catch-all term would disguise the real emptiness of such a definition. Moreover, it would be inaccurate to say either that the only motive or even the dominating aim of states is the indefinite growth of their power—which would indicate a quasi-mechanical functioning of states—or that such a phenomenon would be the subjective drive to their international behaviour. Many other considerations would intervene and complicate such an attempt at bringing the notion back to a single source or catch-all conceptual framework.

The second objection calls into question power's regulatory dimension. If power truly dominates, it would be deregulatory. Its use lies on a state of nature that is arbitrary and anarchic, beyond all rational structure, leading to an indefinite succession of unforeseeable and mobile configurations. Far from being a by-product of it, all regulation would entail a reduction of power's role and thus would develop by the way in which it limits rather than expands power.

It is true that power is a complex notion that is full of contradictions. Still, the above objections are not all that must be considered. It is the lack of power that is disorganising, while power in itself is cohesive and organising. On the condition that one specifies the sense in which it is used, the concept provides an essential descriptive factor—descriptive and not illustrative, since there can never be a complete explanation. It certainly does not explain, as it is rather power that must be explained; but it clarifies by regrouping converging aspects under one homogeneous term and dynamic (as discussed in section I below). It is beneficial in this respect to state its principal characters clearly (section II) before showing in any way expressions of power that are translated by the way states manage it (section III).

I. Definition

We can understand the term power in multiple ways, abstract or technical. A dictionary definition, for example, may devote three pages to the term, but it will be more a series of particular illustrations than a general definition. One learns thus that it is a word used in philosophy, mathematics, mineralogy and even various games. The more general sense is provided by definition number 1: 'the right or act by which one commands others,

authority' and definition number 10: 'the power to do something'. It is beneficial here to adhere to a definition that fulfils the needs of the exercise. It must be sufficiently large to cover the range of different behaviours encountered in international relations. It must cover the whole of the answers to the simple question: who can do what? It must also be precise enough to be distinguished from the neighbouring notions with which power is often unduly confused.

A. Components

In this essay, power is defined as a capacity—capacity to do; capacity to make someone do; capacity to prevent someone from doing; capacity to refuse to do. These different terms merit a degree of explanation, as does the chosen arrangement of the terms themselves.

i. Analysis

a. Capacity

Capacity refers to an aptitude or a potential for action that is translated by concrete manifestations but unexhausted by any of them, retaining the same potential even after being employed. For example, legislative power defines the possibility for a legislator to adopt successive laws and to endow them with a determined authority. Each of these laws contains the capacity to be so endowed, but this capacity does not identify with any of these laws in particular; moreover a capacity of external intervention supposes the ability to project power, but it could also be destroyed during such an attempt at power projection. Concretely, this capacity contains varying degrees of differentiation and can progressively be affected by its use, such that the capacity to renew power or to resist being worn down—something essential to all material activity—is an element of power.

b. Capacity to Do

The capacity to do designates the possibility to act by oneself and to master all elements of one's actions. A state is hence supposed to be able to maintain public order within its territory by its own means and freely impose its own legislation.

c. Capacity to Make Someone Do

The capacity to make someone do (compellence) implies that one acts through others; for example, in a given situation one might use the action of another state for one's own profit. The United Kingdom during its imperial era, attached as it was to a principle of economisation of means, often looked to promote its interests through the assistance of willing partners. In the Crimean War (1855–56), for example, it was often joked that the

English were ready to fight until the last Frenchman fell (or also ‘The French provide the bodies, the English the matériel’), which alludes to the fact that, though mainly fought by Napoleon III’s France, this war conformed first and foremost with British Mediterranean interests.

Making someone do, or compellence, can therefore be a skilful management of power. However, it can also be a sign of weakness that invokes the dialectic of the master and the slave: the first is dependent on the second to achieve his aims. Thus the UN Security Council, which does not possess its own means of action, remains dependent on the assistance of states, which limits its power considerably.

d. Capacity to Prevent Someone from Doing

The capacity to prevent someone from doing refers to a negative ability—in other words, deterrence. Nuclear deterrence, which forbids other states from certain behaviours with respect to those in possession of nuclear weapons, is a contemporary example; the ‘veto right’ given to the permanent members of the Security Council is yet another. Deterrence does not allow, contrary to the previous capacities, the ability to reach a positive result but rather only impedes the capacity of others to act.

e. Capacity to Refuse to Do

As for the capacity to refuse to do, it allows for the resistance to pressures and to retain a latent or passive power: not to intervene in a conflict, not to be a party to a treaty or to refuse to recognise a given situation—for example, Western countries did not recognise the 1940 annexation of the Baltic republics by the USSR.

ii. Arrangement

a. Range and Gradation of Capacities

If we regroup the different capacities listed above, we can observe first that they are not mutually exclusive but instead define a range of means that can be used according to circumstances. One can also bring them together two by two; to do and to compel are positive capacities, while deterrence and refusal are negative aptitudes. On another level, to do and refuse to do are opposed on one side, and to compel and to deter the other. The first couple of options imply self-control, the freedom to determine one’s own behaviour. The second supposes a capacity of action for another, that one incites to act or on the contrary that prevents one from doing.

b. Gradation between the Diverse Aptitudes

The capacity to do, since it does not entail any degree of dependence on others, is the highest option in the exercise of power. Then, to make someone do is the point at which the participation of others is indispensable (or

perceived as such). Take for example, the USSR's 1956 unilateral intervention into Hungary to suppress an insurrection against the local communist regime. In contrast, in 1968 it deemed the participation of other countries in the Warsaw Pact indispensable to intervene in Czechoslovakia—though due more to diplomatic than military reasons. Or also, unable to face the United States directly, it pushed other countries to conflict, as in the case of North Korea in 1950. As for the United States, in 2003, they thought they could handle the Iraqi affair alone, but what followed demonstrated the contrary.

To prevent someone from doing is a lesser power and usually exerted only when there is no other option. Deterrence does not allow one to win a war outright but rather only to avoid it. In 1980, for example, although Western pressure prevented a Soviet military intervention in Poland, it subsequently could not counter the political intervention carried out by the Jaruzelski regime. While the capacity to prevent someone from doing is a lesser power, it is hardly negligible, as attested by nuclear deterrence or the role of the veto in the UN Security Council.

To refuse to do constitutes the lowest rung on the hierarchy of power. It is sometimes merely symbolic, as in the refusal of recognition, but not necessarily. For example, the USSR in 1990–91 was no longer able to sustain its veto position, which would have paralysed the action of the Security Council in the face of the occupation and the annexation of Kuwait by Iraq. It no longer had capacity to prevent someone from doing. It could, however, refuse military participation and abstain from the action of the coalition. One can ask oneself if a country such as France, whose hesitation was visible, could have for its part refused to take part in the conflict, particularly due to its concern to protect and demonstrate its responsibility as a permanent Security Council member. In 2003, however, it was unable to prevent unilateral intervention against Iraq but was able to refuse to participate in it.

iii. Objects and Orientation of Power

This four-part classification is not the only hierarchy that one can suggest for forms of power. Another rests for example on the objects to which power is applied. In this regard power over things, power over minds and power over values can be distinguished.

The power over things refers to material capacities, on the concrete availability of means of physical action or the faculty of producing them. It is the most visible element of power and tends to near itself to force. It implies the material means to carry out, the realisation of, the prevention of or the refusal to carry out certain actions.

The power over minds supposes knowledge, understanding and discovery, but it also includes influence, persuasion and conversion—for example, the power to realise a technological breakthrough, to propose an organising