Law, Ethics, and Public Policy: The International Scene

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A recent PBS-TV broadcast exemplifies the type of problem with which I am concerned in this essay. In the series entitled "The Constitution: That Delicate Balance," a very distinguished panel of Americans, including a former president of the United States, present and former members of the Congress, former Cabinet members, and retired military advisers, discussed covert action as a component of U.S. foreign policy. This discussion continued for a full twenty minutes before anyone even suggested that ethical considerations were applicable in any discussion of possible covert action by the United States Government (and this suggestion came from Tom Wicker of the New York Times, later seconded by Senator Christopher Dodd). And I do not remember that anyone mentioned the possible applicability of International Law!

There is a real and present danger that the foreign policy of the United States is being decided upon and implemented without serious consideration being given by the policy-makers to International Law or ethical restraints. This is not necessarily a new question, as Cardinal Joseph Bernardin notes in the introductory essay reprinted in this volume.1

While I would not go so far as to assert that the observance of International Law and commonly accepted ethical restraints will automatically result in "good" public policy, I do believe that we can achieve the quality of public policy that will serve well in the long run both the national community and the international community only if we are careful to observe both International Law and ethical limitations on

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the actions of nation-states. When in this essay I speak of "ethical restraints," I refer primarily, although not exclusively, to ethical limitations on the use of force by nation-states. In the Catholic tradition, these ethical limitations are usually presented under the rubric of the Just War Doctrine. The 1983 Pastoral Letter of the Catholic Bishops of the United States on war and peace, entitled, "The Challenge of Peace: God's Promise and our Response," contains an excellent discussion of the Just-War Criteria.

If the foreign policy of the United States is designed and implemented without due regard being given to the applicability of International Law and ethical restraints to any proposed course of action, then I believe that we will not only fail to achieve the real interests of both the United States and the international community, but we will also debase the very values of this constitutional democracy.

But when I reflect on the intervention of the United States Government in Grenada and the "covert" support given by this government to the "Contras" attempting to overthrow the government of Nicaragua, then I must admit to strong (and, I hope, healthy) skepticism concerning the role given to International Law and ethics in the corridors of power today. I am not a party to the inner workings of the government — in the State Department, Defense Department, or National Security Council — but the available evidence suggests to me that considerations of power ("might makes right"), the simplistic notion that the end does justify the means, and more than a hint of the ideology of national security far outweigh considerations of law and ethics in determining United States foreign policy today.

In the case of the U.S. intervention in Grenada, while I have read the vigorous presentation by Professor John Norton Moore, I agree more with the conclusions reached by the nine authors of the article entitled "International Lawlessness in Grenada". They said:

Both the OAS and UN Charters unequivocally condemn the U.S. invasion of Grenada as a gross violation of the most fundamental principles of international law. Just recently, 11 members of the UN Security Council and 108 members of the UN General Assembly, among them sev-

eral staunch U.S. allies, have deplored this invasion for precisely these reasons.4

I further agree with the concern expressed by these authors that U.S. military action in egregious violation of international law sends a strong message to the entire international community that in the opinion of the U.S. Government the traditional rules restricting the use of force no longer apply in settling the myriad of contemporary international disputes. When even the United States flouts international law, the only consequence can be an increasing degree of international violence and chaos that the United States intervention in Grenada did establish a dangerous precedent can readily be understood in light of the fact that the South African Government subsequently cited the United States action in Grenada to justify its own military invasion of Angola.

While the above cited criticism of the United States intervention in Grenada is based upon International Law, the same conclusion follows from a consideration of the ethical restraints applicable to the use of force by national states as summarized in the Just War Doctrine. While other criteria of the Just War Doctrine are also germane, I will mention here only the criterion of "last resort": that is, for resort to the use of armed force to be justified, all peaceful alternatives must have been exhausted.5 But although the Organization of American States is the designated regional organization under the Charter of the United Nations, no attempt was made by the United States to refer the matter of Grenada to the OAS. No attempt was made by the United States to exhaust even this most obvious of peaceful alternatives. I thus conclude that the United States intervention in Grenada contravened the ethical limitations applicable to the use of force by a nation-state.

I believe that the actions of the United States Government with regard to Grenada were in violation of International Law and of the applicable ethical principles, and I further believe that these actions reflected an undesirable public policy — a policy that involves the preferment of military solutions to political solutions and of unilateral action to multilateral cooperation; a policy that contributes to the pervasive

4. Id. at 174.
aura of violence in our world today; a policy that seems to assert that the end justifies the means; and a policy that tacitly encourages other nation-states to act in a similar manner."

For similar reasons, I believe that the so-called ‘covert’ action by the United States Government in financing, directing, and supporting the “Contras” in attempting to overthrow the Nicaraguan Government violates International Law and ethics and constitutes undesirable public policy. In this instance, it not only represents a preferment of military solutions over political solutions and of unilateral action to multilateral cooperation and an assertion that the end justifies the means, but it also has created a “state of siege” mentality within Nicaragua and is used by the Nicaraguan Government to justify some of the very actions that the United States Government most sternly deplores.

With regard to United States actions concerning Nicaragua, Cardinal Bernardin, in his address at the Open Forum of the State Department pointed out that

[We] have been using quite illegitimate measures, as the World Court has plainly said. This raises an important issue of political and moral perspective. If the constitutional tradition of the United States stands for anything, it is respect for the rule of law. This deep domestic tradition has influenced our foreign policy; the United States has spoken and acted often since World War I to build a rule of law internationally precisely because our domestic experience has taught us the value of the law.

Resort to covert action erodes respect for law — even if it is done in the name of freedom. There must be a complementarity of purpose and means in our policy. We lose both moral perspective and purpose when the measures we use undermine a fundamental value like respect for the fragile form of international law which we have in the world.

I am neither blind to the danger nor sympathetic to the imposition of an alien ideology in Central America. We have an obligation to resist this, both for the people of the area and for ourselves. But the means used to oppose such a possibility must be consistent with our constitutional and cultural traditions. Today, the face we show the world in Central America does not reflect the best of either of these
Turning from current and immediate issues in the United States foreign policy, there is a more fundamental area of international concern wherein, I believe, International law and ethics (here used in a broader sense of Catholic social teaching) can be used in crafting a public policy that will be highly beneficial to both the national and the international communities. This can best be introduced by referring to the words of Pope Paul VI in his encyclical *Populorum Progressio* (1967):

Peace cannot be limited to a mere absence of war, the result of an ever precarious balance of forces. No, peace is something that is built up day after day, in the pursuit of an order intended by God, which implies a more perfect form of justice among men and women.

The people themselves have the prime responsibility to work for their own development. But they will not bring this about in isolation. Regional agreements among weak nations for mutual support, understandings of wider scope entered into for their help, more far-reaching agreements to establish programs for closer cooperation among groups of nations — these are the milestones on the road to development that leads to peace.

This institutional collaboration on a world-wide scale requires institutions that will prepare, coordinate and direct it, until finally there is established an order of justice which is universally recognized. 7

Pope Paul VI then brought this passage to a conclusion by raising again the question he had asked rhetorically at the United Nations in 1965: “Who does not see the necessity of thus establishing progressively a world authority, capable of acting effectively in the juridical and political sectors?” 8

The tragedy, of course, is that almost twenty years later we are even further away from the establishment of the world order envisioned by Pope Paul VI in 1965. And regretfully, in my opinion, the United States Government has not only failed to take the lead in attempting to develop the institutions necessary to world order, but has acted, at least in

more recent years, to weaken those international multilateral institutions that do exist. Open disdain has often been the stance toward the United Nations and its allied institutions, and there has been a weakening in support for such multilateral institutions as the World Bank (and most notably for the Bank’s International Development Association which channels development assistance to the poorest of the poor nations).

During the post-World War II years and at least until the late 1960s, many international legal scholars and political scientists concentrated upon the development of proposals for international organizations, institutions, and systems that could lead to a just world order. Regional organizations were proposed and some were put in place. But for reasons about which I can only conjecture, much of that has ended, and today, it would seem that we have lost ground in the task of developing the international or regional or multilateral institutions necessary to a just and peaceful world community. Nevertheless, there is a wealth of materials available for consideration when once again we are ready to take up this task.

“The fundamental premise of world order in Catholic teaching is a theological truth: the unity of the human family — rooted in common creation, destined for the kingdom, and united by moral bonds or rights and duties.”9 This theological truth of the unity of the human family implies a human interdependence. Today we are confronted with the growing political and economic interdependence of the world, but we lack a properly constituted public authority with the capacity to shape this material interdependence in a moral direction. Pope John XXIII concluded in Pacem in Terris that the “moral order itself demands that such a form of public authority be established.”10

I can do no better here than to call attention to the words of the Catholic Bishops of the United States from their pastoral letter on war and peace:

Just as the nation-state was a step in the evolution of government at a time when expanding trade and new weapons technologies made the feudal system inadequate to manage conflicts and provide security, so we are now entering an era of new, global interdependencies requiring global systems of governance to manage the resulting conflicts and

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ensure our common security. Major global problems such as worldwide inflation, trade and payments deficits, competition over scarce resources, hunger, widespread unemployment, global environmental dangers, the growing power of transnational corporations, and the threat of international financial collapse, as well as the danger of world war resulting from these growing tensions — cannot be remedied by a single nation-state approach. They shall require the concerted effort of the whole world community.\textsuperscript{11}

The Bishops concluded: "We are living in a global age with problems and conflicts on a global scale. Either we shall learn to resolve these problems together, or we shall destroy one another. Mutual security and survival require a new vision of the world as one interdependent planet."\textsuperscript{12}

Pope Paul VI realized that many would dismiss the hope for a just world order as "utopian," and he said that such persons may not be "realistic enough, and that they have not perceived the dynamism of a world which desires to live more fraternally — a world which, in spite of its ignorance, its mistakes and even its sins, its relapses into barbarism, and its wanderings far from the road of salvation is, even unawares, taking slow but sure steps toward its Creator."\textsuperscript{13}

I strongly believe that International Law and ethics, International Law and the social teaching of the Catholic Church, have much to contribute toward the shaping of policy for the United States that will lead to a more just world order, that will shape our material interdependence in today's world into moral interdependence.

In this essay, I have expressed my disagreement with certain elements in the United States foreign policy, and I have tried to explain that I believe that these elements which I find to be objectionable stem from the inadequate consideration given by policy-makers to principles of International Law and ethics. If it should be objected that I have said nothing about the policies of other nations, most notably the Soviet Union, then I would wish to note that, as a citizen of the United States, I have both the responsibility and the privilege to critique the policies and actions of the government of my own nation. I have no illusions about the Soviet system of repression and the lack of respect in that system for human

\textsuperscript{11} National Conference of Catholic Bishops, \textit{supra} n.5, at par. 242.
\textsuperscript{12} \textit{Id.}, at par. 244.
\textsuperscript{13} Pope Paul VI, \textit{supra} n.7, at par. 79.
rights, or about Soviet covert operations and pro-revolutionary activities. But in attempting to overcome one's enemy, there is always the dangerous temptation to become like one's enemy. In its relations with the Soviet Union, the United States must avoid the temptation to adopt the tactics and techniques of the Soviet Union and, instead, adhere to and implement its own best ideals. If the United States does adhere to and implement its own best ideals, then considerations of International Law and ethics will be given a major role in the formulation of the foreign policy of the United States.