

## About the Author

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## Key Points

- ◆ U.S. grand strategy, the calculated relationship between means and large ends, needs to be developed and implemented in an international legal context because of the nature of U.S. society and values, and the overriding requirement to prevent nuclear war.
- ◆ Since World War II, successive administrations have conceived of U.S. alliances, partnerships, arms control agreements, and international actions more generally as grand strategy. A central component of U.S. success has been creating, leading, and sustaining a minimum world order that all states have come to see as representing their core interests.
- ◆ International law cannot be and has never been far from U.S. policymaking because Americans have believed that it is essential to the maintenance of the minimum world order necessary for peace and the prevention of nuclear war insofar as it is possible to achieve these goals.

## Grand Strategy and International Law

by Nicholas Rostow

*Grand strategy* is, or should be, the “calculated relationship of means to large ends.”<sup>1</sup> Interrelated strategic and legal dimensions provide a leitmotif to the modern history of relations among powerful states. States employ an array of means to achieve their large ends—military power, as well as diplomatic, informational, economic/financial, and legal tools and influence. They differ in effectiveness and precision. In the web of interactions that shape contemporary international relations, the legal dimension as a framework and guide to choices is more often overlooked than particular legal instruments that might be invoked in the belief, or more often the hope, that they will serve policy and strategic objectives.

Views of the relevancy and content of international law vary. At one extreme, Dean Acheson famously remarked that “law simply does not deal with such questions of ultimate power—power that comes close to the sources of sovereignty.”<sup>2</sup> At the other end of the spectrum is the view that the effectiveness of the International Criminal Court is the test of the health of international law and legal regimes.<sup>3</sup> The truth does not lie in between: whether or not the International Court of Justice is a success—and defining success depends on one’s perspective (for some, failure would be success)—is not a test of the health of international law.

As grand strategy deals with subjects that touch the sources of sovereignty, is there—can there be—a relationship between law, much less international law, and grand strategy? The answer, of course (despite the skeptics), is yes; it is a different “yes” than advocates of this or that legal or other international institution might intend. At the same time, the nature of the relationship is both complex and straightforward. To unravel it, this essay begins with the general subject, examines the U.S. relationship with international law, and offers some thoughts on U.S. grand strategy now and in the foreseeable future and its connection to international law.

International law reflects the nature of the political system, framing the world as we know it.<sup>4</sup> For the moment, it reflects the strength, values, and purposes of the democracies more than of the dictatorships, although its elements respect the state system without regard to internal management. The legal regime as an effective framework for international politics and authoritative decisions is inseparable from the balance of power. The world, after all, is divided among independent states; there is no global government.

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## **grand strategy and international law are, or should be, natural partners**

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As the system is not hierarchical, international law is not either.<sup>5</sup> Grand strategy operates within the same non-hierarchical system. Grand strategy and international law are, or should be, natural partners. Grand strategists consider power and values. Those are what the “ends and means” language and calculus of strategists involve. Legal concepts of “necessity” and “proportionality” imbue and frame the calculations of strategists. The law represents the pattern of behavior that a society deems right achieved through processes equally deemed right. The result is authoritative decisions infused with legitimacy. The definitions of legitimacy, strategy, and law are similar, although the definition of law is more aspirational in that it speaks in terms of right and wrong rather than in terms of what the great powers agree.<sup>6</sup>

In the present international arena, law and strategy are almost inseparable, especially when the use of force or other coercion is at issue. That is not to say that every use of force or strategy accords with international law. Rather, grand strategy is linked to the fundamental, constitutive norms of the international system because it is developed and implemented within the system even if it is sometimes apparently at odds or in tension with the system. Neither grand strategy nor international law is frozen in time or place. Moreover, neither is autonomous: each develops through interaction among independent states and other actors in the international system. At the same time,

law has the aura of permanence, and strategy seems to be on the move all the time. Neither impression is quite right but each affects how the other is understood.

Let us begin by imagining that we are grand strategists on the Moon, contemplating Earth. With a lunar perspective, we see the Earth as a whole. As we travel from the Moon to Earth, we begin to see a world divided among states, but states having certain common interests that, over time, gave rise to norms of behavior. Norms of behavior constitute important features of law. We encounter international law as the political configuration of the Earth as it comes into relief. Just as the grand strategist must think about large ends—the definition and defense of vital national interests, for example—the relevant international law affecting grand strategy concerns war and peace, not the important legal arrangements that permit a bank account holder to withdraw funds from an ATM machine in New York, Beijing, or Ouagadougou, although they can become significant in the event states impose economic sanctions, seize assets, and engage in other forms of economic coercion.

Every state has an interest in the international legal order. International law limits and shapes grand strategic choices. Democracies require that their strategies be rooted in domestic and international law. Even tyrannies have an interest in law, although they may not profess it or know it. All states, whatever their governmental type, have certain rights; each, therefore, should have an interest in respect for such rights. The United Nations (UN) Charter expresses these rights as involving “matters which are essentially within the domestic jurisdiction of any state,”<sup>7</sup> unless and until the international community working through the UN Security Council determines that the internal so affects the external as to threaten or breach international peace and security or constitute acts of aggression.<sup>8</sup> Technology has made that boundary smaller today than at any previous time. Events inside one country, perhaps too easily, may affect another, even distant, country in a matter of seconds.

Law is a process of authoritative decision. In regard to international law, one looks in vain for a single decision- or lawmaker. By encompassing

different societies and cultures, with different conceptions of justice, mores, and customs, the international system contains numerous actors, values, and centers of authoritative decision for specific purposes. Some processes and decisions have wider application in the international system than others.<sup>9</sup>

Power and the balance of power are inescapable international realities. Thucydides described these twin forces best in the Melian dialogue in which the Athenians assert that “the standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept.”<sup>10</sup> Power and war go hand-in-hand. International organizations represent a stage in historical efforts to minimize the risk of general war by structuring international relations. That effort has paralleled the development of rules fundamental to the existence of the international system. But neither rules nor multilateral institutions have done away with power in human affairs. In my view, therefore, U.S. grand strategy involves keeping the arsenal intact.

## International Law in Relation to Grand Strategy and Vice Versa

The state may well be the most effective warmaking machine the world has ever known.<sup>11</sup> As a result, the international system built on states contains the potential for explosiveness at its core. Managing the risk of explosion is a responsibility of statesmanship conducted within a map drawn by grand strategists in a context shaped by international law.

The international system seems rigid, but in fact it is in motion. Some states are changing in character. Two decades ago, Yugoslavia disappeared. Sudan recently split into two states. Kosovo seems to be independent. Some, such as the Palestinian National Authority, are states coming into being because they already have attributes of statehood. Other states continue to exert power over groups that probably would prefer independence or at least a high degree of autonomy. In addition to independent states, voluntary groupings of states such as the European Union

have acquired state-like characteristics, while their members retain important aspects of independence.

International organizations, such as the United Nations, are supposed to provide structure to international relations and safeguards against the propensity of states to use force. UN members have delegated certain authorities to the United Nations but without creating a world government. The United Nations has acquired additional authorities over time with member consent or at least acquiescence with the result that the UN family of organizations has grown, creating worlds within worlds. This fact adds actors to international affairs and additional complexity to the context within which grand strategy is made.<sup>12</sup> When it spreads itself and its resources too thinly, the United Nations weakens its capacity to maintain peace.

From this brief and incomplete description of the international system, one may see how a classical statement of international law as the “rules and principles of action which are binding upon civilized states in their relations with one another”<sup>13</sup> necessarily is incomplete. For one thing, international law is as comprehensive as domestic law, governing everything from war and peace to the environment, business and finance, and outer space. The classical definition leaves out, among other things, the law governing international organizations; treaties such as those concerning human rights that have made individuals subject to international law in a way not hitherto recognized; nongovernmental organizations, which play important roles in international relations and in the development of international law to which states consent; and the development of new fundamental norms that go beyond the realm of state-to-state relations.<sup>14</sup>

Another traditional starting point for understanding the reach and content of international law is Article 38 of the Statute of the International Court of Justice:

*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions . . . ; (b) international custom as*

*evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the [provision of the statute restricting the binding force of the court's decisions to the parties before it,] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.*<sup>15</sup>

The modest, authoritative reach of international judicial decisions as precedents reflects the lack of a single international decisionmaker or lawmaker. As a result, most international law is treaty-based, binding parties through their consent to be bound. In principle, treaties give the law certainty. The last time I looked, the UN Treaty Series contains 158,000 treaties. In theory, treaties clarify and simplify. What, however, is one to make of 158,000 for 193 countries?<sup>16</sup> The process of complication may dilute the effectiveness of law.

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## **the 1949 Geneva Conventions are binding on all states, whether or not they are parties to them, and all face consequences for violations**

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Useful as the Article 38 definition is for the International Court of Justice, it does not capture the generation and flow of authoritative prescription in the international system. For example, some treaties have become part of customary law. One pertinent example in view of the controversies of the past decade: all UN member states are party to the four 1949 Geneva Conventions. As a result, those Conventions have become customary, not just treaty-based, law. They are binding on all states, whether or not they are parties to them, and all face consequences for violations.<sup>17</sup> They form the core of the law of armed conflict. Another example is the Universal Declaration of Human Rights. A substantial number of decisionmakers and commentators

treat it as having become part of the fundamental law of the international community. Not all states act as if they agree.

States have the power to ignore or violate international law, as Germany did in 1914 when it invaded Belgium, a country whose neutrality Germany had guaranteed. But, as Germany discovered when it lost World War I, such violations may have legal, political, and strategic consequences. Similarly, Germany's and Japan's relations with their respective neighbors remain colored by their aggression and war crimes during World War II. These examples illuminate the enduring impact of war and peace on the subject at hand and how law and strategy have to work together. Wars have driven the international community *to become* an international community. The grand strategist develops designs and options in this context.

With the helpful pressure of progeny such as the United States, Europe and European wars generated the creative drive of the international system and made it a system. More than the Thirty Years' War, the wars of the French Revolution and Napoleon introduced the idea of national and total war. Governments and commentators alike emerged from these conflicts agreeing that war among the great powers was the greatest evil—*summum malum*. Napoleon himself was designated an enemy of peace—a first—and exiled to St. Helena without judicial process as punishment for his aggressions. His fate was not taken to heart by the next pretenders to European hegemony. Had it been, perhaps World Wars I and II would not have happened.

In the wake of Napoleon, European governments conceived the first efforts at structured diplomacy to keep the peace—thus, the Concert of Europe. The Concert did not prevent war among the Great Powers, as the Crimean War and the wars of German unification showed, but it did induce a certain moderation in the conduct of diplomacy and military operations.<sup>18</sup> Nor did the Concert mean that the Great Powers agreed on how states should best be organized. But, on matters of international conflict, the Concert played a usefully moderating role. Engaged early enough in a crisis, the Concert could facilitate agreement and prevent armed conflict among the Great Powers. It

was not always successful. In 1875, for example, the British had to signal to the Germans, outside the Concert system, that it would not tolerate a further diminution in France's status as a great power. The British were responding to a provocative story in a German newspaper. The event was forgotten or rather the Germans dismissed the British army as a significant factor in 1914. The Concert of Europe disappeared in the catastrophe of 1914–1918.<sup>19</sup> World War I, which started in Europe, provided impetus for the formation of the League of Nations; World War II, which started in Asia, produced the United Nations, and the Cold War, fought on every inhabited continent, resulted in the strengthening of the United Nations and the globalization of law.

While Europe can claim most of the credit for originating the contemporary international system and the international law governing war and peace, Europe was not alone. The Americas and Asia participated, and Africa now helps shape our world as well. Colonialism and other European interactions with the larger world expanded the European impact. But the present system truly is global in origin and reach.

Much international law owes its source to World War I. After that war, the international community codified the post-Napoleonic notion that aggression was a crime and agreed that there were such things as crimes against civilization. The few trials in Turkey as a result of the genocide of the Armenians and the few war crimes trials in Europe made this point clearly.<sup>20</sup> The Kellogg-Briand Pact of 1928 outlawing aggressive war did nothing to prevent World War II but helped provide a basis for the Nuremberg and Tokyo trials afterward. This history is the backdrop for the UN Charter and the development of the contemporary law governing the use of force and the law of armed conflict. Its relevance for the grand strategist lies in the process and the result: structures for decisionmaking and heightened political, legal, and strategic consequences for wrong or wrong-headed strategic conceptions and tactical decisions. One feature of the last 40 to 50 years has been the invocation of criminal law in the context of policy disputes. In recent decades, Henry Kissinger, Donald

Rumsfeld, and Israeli generals, among others, have faced criminal law entanglements as a result of national strategies and decisions. Others, such as Argentina's General (and President) Augusto Pinochet, have faced trials as a result of domestic decisions and their vulnerability, unlike, for example, Adolf Hitler or Joseph Stalin or Mao Zedong, to judicial process at home or abroad.<sup>21</sup>

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## **contemporary international norms are fundamental to the international system and to the grand strategist because international law reflects the complexity of the global system**

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Contemporary international norms are fundamental to the international system and to the grand strategist, especially the American grand strategist, because international law reflects experience and the complexity of the global system. International norms seem to resonate with Americans especially, perhaps because of their attitude toward the Constitution, which has been called “the great unifying force and spiritual center of the nation's life.”<sup>22</sup> The drafters of the UN Charter aspired to a document that could achieve a similar status in the world.

The UN Charter sets forth principles for international relations that reflect global historical experience. They recognize the many forms of coercion and accept the reality that the United Nations was not replacing the independent state. These principles are easily summarized:

- ◆ the sovereign equality of all UN members
- ◆ the prohibition of the threat or use of force against the territorial integrity or political independence of any state
- ◆ the right of individual or collective self-defense against an armed attack.<sup>23</sup>

These principles form overriding law for the international system. From them follows the requirement to

settle disputes peacefully and the direction to the UN Organization to see that nonmember states adhere to these principles as necessary to the maintenance of international peace and security.<sup>24</sup> American diplomats were at the center of the conceptual and drafting process that resulted in the UN Charter. Parts of it echo the U.S. Constitution.

The principles were adopted, and the United Nations was created, at the dawn of the atomic age although the drafters of the UN Charter did their work unaware of the atom bomb: they learned of it when the world did. Their work nonetheless was realistic in that it captured the enduring state-based structure of the international system.

For Americans, even if unarticulated by such early post-World War II strategists as George Kennan, the fundamental norms expressed in the UN Charter guided the formation and execution of U.S. grand strategy during the Cold War. They remain significant in this regard today—significant because, for some commentators and officials, guiding principles seem to have fallen by the wayside. One does not have to go far to read that international law does not exist or does not matter if it does exist, at least not to matters of war and peace.<sup>25</sup> A responsibility of grand strategists, concerned as they are with large issues, is to rearticulate principles at the core of grand strategy, lest those they advise be forced to relearn them through more bitter and bloody experience.

## The United States and International Law

For the moment, the United States is the most important single participant in international relations. Therefore, the grand strategist on the ride from the Moon to Earth will seek to understand the sources of U.S. grand strategy.<sup>26</sup> As part of this exercise, the grand strategist will need to consider the U.S. relationship to international law.

The Constitution signals the importance U.S. decisionmakers should attach to law, including international law. For example, it empowers Congress to define and punish offenses against the law of nations and makes treaties part of the supreme law of the land and requires

the President to conclude them only after obtaining the advice and consent of two-thirds of the Senate—always a difficult task.<sup>27</sup> A principal focus of the Constitution, perhaps *the* principal focus, concerns the lawful exercise of power; it is hardly surprising therefore that U.S. foreign policy and grand strategy, developed under the same Constitution, should involve the lawful exercise of power as well. This conclusion is consistent with the Framers' view of the importance of law, particularly in light of the risk that failure of the constitutional experiment could result in the separate states preparing to cut one another's throats.<sup>28</sup> The Framers were realists. They designed a system to prevent tyranny through the inevitable friction among the parts of government.<sup>29</sup> Just as overreaching and lawless politicians at home would not surprise them, so they would not have been surprised that some Presidents would disregard international law.

The U.S. commitment to foreign and national security policies grounded in law, domestic and international, nonetheless is not merely rhetorical; it reflects central ideas about America and significant instincts of Americans. It is part of what has been called American "exceptionalism." One example is that American officials, civilian and military alike, and new immigrants take an oath to the Constitution, not to a flag or a territory (I therefore dislike the name "Homeland Security"). At bottom, we are a people of laws. For this reason, as Justice Stephen Breyer has observed, however disputed the Supreme Court's decision in *Bush v. Gore*,<sup>30</sup> the country went along with it. A second example is that the first question the Chairman of the Joint Chiefs of Staff received from the press during his briefing on the 1989 invasion of Panama was whether the operation was legal. No one was surprised or should have been. Finally, seeking political advantage, Congress and others have been more preoccupied with whether the recent Libyan affair was conducted in a manner consistent with the War Powers Resolution than whether it was effective or prudent. Americans tend to argue about policy and politics in the language of law. The explanation lies in the role of law in American life—or at least the national myth

that Americans act lawfully—and the historical context in which the United States took responsibility for maintaining minimum world order.

The United States grew to maturity in international relations in a period during which, for the most part, the British provided a protective cocoon. In the wake of the wars of the French Revolution and Napoleon, Great Britain and its navy anchored a balance of power within which the United States could pursue its goals. It could expand west, fight the Civil War, industrialize, and watch its economy and population grow without interference. The United States was not passive. But it was not internationalist in any systemic sense. Did it have a strategy during this period much less a grand strategy? George Washington's Farewell Address articulated a strategic goal of freedom of action: "we may choose peace or war, as our interest guided by justice shall counsel." The Farewell Address and Monroe Doctrine seemed to provide the United States with all the grand strategy it needed.

These documents were the sources of the first of the two ideas, isolationism and internationalism, that have competed to dominate American grand strategy. Isolationism reflects a simplified reading of Washington's Farewell Address and his admonition to be wary of foreign entanglements. What he really meant was that the United States has to protect its own interests and should be no one's pawn. World War I ended in the first disastrous American attempt to participate systemically in international affairs. Under President Woodrow Wilson's leadership, the United States tried to shape and participate in global governance.<sup>31</sup> The effort was disastrous, not because American ideas were horribly wrong-headed, but because Americans refused to carry through with them and abandoned Wilson's ideas for maintaining international peace. Perhaps U.S. participation in the League of Nations would not have prevented World War II; U.S. absence from the League meant that the international police department was short-handed.

The attack on Pearl Harbor killed isolationism as a respectable American position. World War II meant that the United States, as the most powerful democracy in the world, had to take responsibility for maintaining

international order and building respect for international rules that could keep the dogs of war at bay and provide space for democracies, ruined by the war, to recover. One had only to recall the images of Hiroshima, Nagasaki, or Bikini Atoll to reinforce the message: nuclear weapons meant that there could be no retreat from the effort to build respect for basic legal principles of international conduct and to construct international institutions to foster and strengthen peace and prosperity. Success would be measured, not only in the number of crises averted but also in the avoidance of nuclear war. This understanding underlay the Cold War division of the world into spheres of influence where two bodies of international law effectively operated. The nuclear reality became perhaps the most important influence on U.S. grand strategy.<sup>32</sup> Concerns about proliferation of nuclear and other highly lethal weapons and fear that proliferation would increase the probabilities of a third, nuclear world war became the central point of U.S. strategy and policies. No administration has trusted nuclear weapons to restrain their possessors. This technological context of international politics helped the United States define its vital national interests, for which it would fight and maintain the means necessary to do so.

U.S. diplomacy and military operations since World War II have taken place as a result of this historical development. Of course, these operations defended an international system that suited American interests. Above all, nuclear weapons exerted hydraulic-quality pressure. They reinforced the need for rules of minimum order, rules the UN Charter articulated and the United States, with or without the formal blessing of the UN Security Council, has defended in the conflicts since World War II: Korea, Vietnam, Iraq in 1991, the Balkans in 1999, and since September 11, 2001, each conflict accompanied by more or more or less controversy. These actions should not obscure the fact that policies of minimum international order, codified in the UN Charter, were the effort of many nations and work for all states. They are neither American nor Chinese, European nor African, but the world's. At the same time, for the past nearly 70 years, these policies

have driven U.S. foreign actions even when the principal actors and decisionmakers did not use the language of the law to explain their thinking and decisions.

## Grand Strategy

Our travelling grand strategist arrives in Washington and is invited to advise the U.S. Government. What is or should be the advice? As a first step in formulating this advice, it is useful to recall first principles:

1. Because of nuclear weapons, peace is the absence of nuclear war.
2. Because of nuclear weapons, the United States may not relapse into isolationism, leaving to unspecified others responsibility for peace.
3. Because of nuclear weapons and because of the kind of people Americans are or like to think of themselves as—people of the law—international law is important to U.S. security and policy because it can strengthen the barriers to international conflict and provide boundaries on those that occur.
4. Because the United States is a democracy, its natural allies are democracies.
5. Because the United States is an island off the Eurasian landmass, it is the natural enemy of would-be hegemonic powers in Europe or Asia.
6. Because, for the moment at least, the United States is the single most important international actor, it is “the critical margin’ required to make any international collaborative effort succeed.”<sup>33</sup> Others may replace the United States in this role. But for the moment none does—not China, not Russia, not India, not Brazil, not the European Union. The recent Libyan enterprise made this point clear to even the heartiest of skeptics.

These points constitute themes for U.S. policy because they reflect abiding interests rooted in historical

experience. They lead naturally to certain conclusions about strategy, diplomacy, and military requirements. For example, the United States needs close diplomatic relationships with the great democracies in Europe and Asia, backed by military capability, to ensure that no power is tempted to follow the example of Napoleon or Hitler or Hirohito. In certain cases—India and Pakistan come to mind—the United States needs energetic diplomacy to prevent rivalries, particularly between nuclear weapons states, from spinning out of control. Why the United States? The risks from inaction, from just assuming that other states will perform this function, are too great.

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### the contemporary grand strategist must take account of contextual realities

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The United States also needs nuclear deterrence capabilities to have the hope of preventing nuclear war. The United States and Russia seem to share the same or much the same perspective on nuclear weapons, with which they have many arms control treaties going back to the days of the Soviet Union and opposition to nuclear proliferation. Do the United States and China have a common understanding about nuclear weapons and proliferation? Over the last couple of decades, China has transformed a deficient military into one capable not only of dominating its own littoral but also of reaching distant continents through long-range delivery systems with nuclear weapons. China’s public doctrine of minimal nuclear deterrent capability remains as it was in Mao’s time. Has it changed in fact during this period of military modernization? Does the United States or international community more broadly understand how to ensure that North Korea refrains from reckless proliferation and nuclear weapons development? Or how to contain Iran’s nuclear weapons aspirations and wish to

dominate its region using proxies? The same holds true for other countries.

In addition, the contemporary grand strategist must take account of contextual realities. Dominating these realities are high-velocity changes in computing, information technology, nanotechnology, biotechnology, robotics, and cognitive technology, and the sociological changes they bring. The law has not been able to keep up with these changes—nor has the grand strategist. It has proved difficult to integrate rapid technological change into strategic thinking. Strategists therefore rely on timeless principles of war and politics and hope they remain relevant in new contexts. Rapid technological change puts particular pressure on defense budgets because the development of new weapons and delivery systems, whether offensive, defensive, or dual-use, takes decades.<sup>34</sup> Costs rise as new technologies need to be incorporated. We are a far cry from the Manhattan Project, development of the Spitfire, or invention of the V1 and V2.

U.S. grand strategists similarly rely on what they hope are still relevant longstanding ideas about U.S. interests and how to defend them. Therefore, the goals of U.S. foreign policy remain what they have been since World War II, that is, the minimization of the risk of great power conflict together with its threat of the use of weapons of mass destruction—nuclear, but also biological and chemical weapons capable of inflicting massive casualties. Consequently, if the United States is not to cede its interest in regional balances of power in Eurasia, it should maintain the ability to project its power to maintain those balances. I understand the need to restore our economic well-being and confidence. The need is particularly acute in this politico-military context. But a choice between needed defenses and economic health is a false choice. Our alliance commitments may one day need to be fulfilled. However exceptional Americans may think their country is, the United States has responsibilities for the hope of controlling nuclear proliferation and preventing nuclear conflict. It cannot escape them.

To enlarge on this point, consider China, another state that thinks of itself as “exceptional.” For millennia, China thought of itself as the center of the world. Only

in recent decades has it talked about itself as a developing power. As it has become an economic behemoth in recent years, it has flexed its political-military muscle. It asserts sovereignty over islands claimed by Japan and Vietnam and indicates no desire for adjudication as a means of peaceful dispute resolution. It claims sovereignty in the South China Sea. All states with coastlines on that sea and all seafaring states disagree with China’s position. So far, no resolution is in sight. China is investing heavily in its armed forces and advanced defense technologies. Yet it has no obvious enemies, nearby or far away. The United States, whose armies fought Chinese soldiers in Korea and Vietnam, has no interest in armed conflict with China. At the same time, it would find Chinese domination of Asia and perhaps more than Asia a threat just as it found Japanese and German imperialism a threat. Will the United States have to choose sides? It would be better to manage the relationship. To do so requires reducing American economic dependence on China and maintaining sufficient military strength to deter would-be hegemonial assertions. The United States should conduct itself so that no power, including

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**international law is a necessary element of maintaining and strengthening international peace and security and preventing nuclear war**

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China, can assume the United States away. As Washington remarked in a less well-known part of his Farewell Address: “Excessive partiality for one foreign nation and excessive dislike of another cause those whom they actuate to see danger only on one side, and serve to veil and even [put in] second [place] the arts of influence on the other.” The time is more than ripe for the “arts of influence” to have their day.

In addition, the United States should maintain and nurture its existing alliances with democracies in Europe

and Asia. Those relationships constitute reserve strength in the sense of Thucydides' analysis of power. They also support the rule of law in international affairs. China in the South China Sea—and elsewhere other states, such as Iran—challenge the rule of law. They must be deterred. But that requires a grand strategy and willingness to maintain defense capabilities. If the United States maintains its capabilities, it will deter would-be aggressors, strengthen international law and order, and help maintain peace.

International law is a necessary element of maintaining and strengthening international peace and security and preventing nuclear war. Skeptics should recall the powerful taboo codified in the Non-Proliferation Treaty of 1968. The Treaty divided the world into nuclear weapons and nonnuclear weapons states. Nonnuclear weapons states undertook not to obtain nuclear weapons in return for a guarantee by the nuclear weapons states against any nuclear threat against states without nuclear weapons. In addition, the nuclear weapons states pledged to work to reduce their arsenals. However real the risk of nuclear proliferation, new nuclear weapons states have to contend with the fact that the international community will not welcome them but coalesce in an effort to understand how to induce the new nuclear weapons state to act responsibly, recognizing that the weapons are not to be used except as a last resort to defend itself, and certainly not as a political stick. Perhaps to reinforce this fact, the 1968 Security Council nuclear weapons states' guarantee of nonnuclear states against nuclear weapons states should be revised and reissued for present circumstances. China should join it. One does not have to reach back as far as Thomas Hobbes or use his graphic language to understand the point that most law, and international law is no different, needs a policeman to enforce it.<sup>35</sup>

The history of the Non-Proliferation Treaty and guarantee to nonnuclear weapons states emphasize another aspect of U.S. grand strategy that often is overlooked. To advance U.S. national interests—such as the prevention of proliferation, struggles against terrorism and transnational crime, and the need to protect the environment—requires

international cooperation. This fact means leveraging global assets and spreading risks and costs. A substantial number of other international problems, including those requiring regional peacekeeping, invite multilateral approaches as well. Multilateralism from this perspective is particularly practical given the diversity of international threats and challenges. While the United States has vital interests it must and will defend alone if necessary, they are few in number: nuclear and conventional deterrence, fulfillment of alliance commitments, and the like.

If we do not put our strategic thinking caps on, our fiscal managers will determine our interests and our strategy. And, in their bones, they approach international affairs, whether political or military, whether diplomatic or strategic, with the words of Hilary Mantel's Thomas Cromwell firmly in mind: "No ruler in the history of the world has ever been able to afford a war. They're not affordable things. No prince ever says, 'This is my budget; so this is the kind of war I can have.' You enter one and it uses up all the money you've got, and then it breaks you and bankrupts you."<sup>36</sup> Grand strategy is too important to be left to chief financial officers—or, one might add, to international lawyers, although I would argue they have much to contribute.

## Conclusion

We live in a world of rapid change. Despite claims to the contrary, certain institutions, such as the state, show resiliency. Accordingly, the law governing their relations with each other must be equally resilient. New challenges emerge in each historical and technological period. Because the law is not ossified, whether domestic or international, policymakers and citizens alike turn to it for help in sorting through competing priorities and challenges. It is instrumental to strategy, and strategists should appreciate this feature of law. That is its strength and the reason why it is important—and why it is a process of authoritative decision through the identification of participants, objectives and values, methods and claims.

Strategists and students of strategy often deny the relationship between law and strategy. Yet the international political system in Europe that emerged from the Roman

Empire developed rules and habits within which grand strategists considered their goals and means for achieving them. It became a system of law in development, as the commentaries of Grotius and his successors showed. In addition, of course, there were specific grand strategic decisions with legal consequences. They built and globalized the present international legal and political regime, which is supposed to serve all states. However exceptional a state may believe itself to be, its stake in this regime is real, as it finds out when its independence is threatened.

Since World War II, international law, broadly understood, has never been far from U.S. policymaking and grand strategy because it has been consistent with U.S. interests in the balance of power in Eurasia and the prevention of another world war. When Iraq invaded and purported to annex Kuwait in 1990, the international community rallied, not out of love for Kuwait, but in order to preserve the bedrock principles of international order, of vital interest to every state, that aggression cannot be allowed to prevail.

Similarly, the North Atlantic Treaty Organization campaign in Kosovo in 1999, carrying out a threat made by President George H.W. Bush in 1992, preserved the postwar arrangements in Europe. President Bush had stated that, while the United States had no vital interest in the outcome of the breakup of Yugoslavia, the use of force against Kosovo could not be tolerated. President Bill Clinton acted on his predecessor's insight because both Presidents understood that a failure to protect Kosovo would allow aggression in the center of Europe to succeed. That the aggression technically did not cross international boundaries did not negate the conclusion that, if tolerated, Europe's post-World War II order would be threatened.

Of course, at various times in the history of the Arab-Israeli conflict, the United States worked to contain conflict. The reason is simple: the goals were to avoid nuclear confrontation and preserve a balance of power that would permit the international system to function according to law as an essential interest of every member of the international system. These goals,

which are both legal and strategic, remain core elements of U.S. grand strategy and foreign policy. They have and should continue to guide us as we make a new grand strategy for our times.

## Notes

<sup>1</sup> John Lewis Gaddis, "What Is Grand Strategy?" Karl Von Der Heyden Distinguished Lecture, Duke University, February 2009, 7, available at <[www.duke.edu/web/agsp/grandstrategypaper.pdf](http://www.duke.edu/web/agsp/grandstrategypaper.pdf)>. I intend this essay to be a foretaste of a short book on the topic. The book will examine a number of subjects, including the different schools of grand strategy and skepticism about international law, that this essay does not.

<sup>2</sup> American Society of International Law, *Law Proceedings* 57, no. 13 (1963), 14.

<sup>3</sup> See "The condition of international law," The Ditchley Foundation, May 20–22, 2010, available at <[www.ditchley.co.uk/page/367/international-law.htm](http://www.ditchley.co.uk/page/367/international-law.htm)>.

<sup>4</sup> Cf. Morton A. Kaplan and Nicholas deB. Katzenbach, *The Political Foundations of International Law* (Hoboken, NJ: Wiley, 1961), 3–4: "Perhaps the purest analytical concept of 'law' is that in which an impartial judge objectively applies a pre-established rule to decide a controversy. And perhaps the purest analytical concept of 'politics' is that in which the stronger influence or interest regulates the social distribution of values. In the real world, however, judges cannot avoid exercising at least some political discretion in the decision of cases. And in any stable political system, the political process is also subject to normative constraints. . . . When we speak of the 'rule of law' or a 'government of laws,' we clearly do not mean the rule of judges or a government of judges. We are talking about the larger, formal process, through which members of the society pursue and realize values in an orderly way."

<sup>5</sup> In the 19<sup>th</sup> century, John Austin argued that law required a hierarchical structure to exist, thus negating the possibility of international law. *Ibid.*, 6.

<sup>6</sup> Henry Kissinger sees *legitimacy* in international relations as "no more than an international agreement about the nature of workable arrangements and about acceptable aims and methods of foreign policy. It implies the acceptance of the framework of the international order by all major powers, at least to the extent that no state is so dissatisfied that, like Germany after the Treaty of Versailles, it expresses its dissatisfaction in a revolutionary foreign policy. . . . Diplomacy in the classic sense, the adjustment of differences through negotiation, is possible only in 'legitimate' international orders." Henry A. Kissinger, *A World Restored: Metternich, Castlereagh, and the Problems of Peace 1812–22* (London: Weidenfeld and Nicolson, 1957), 1–2. See also Kissinger, *Diplomacy* (New York: Simon & Schuster, 1994), 82.

<sup>7</sup> United Nations (UN) Charter, Art. 2, para. 7.

<sup>8</sup> *Ibid.*, Art. 39.

<sup>9</sup> For example, by Article 25 of the UN Charter, states agree to carry out the decisions of the UN Security Council. *Ibid.*, Art. 25. With respect to the judgments and opinions of the International Court of Justice, states "undertake[] to comply with the decision of the International Court of Justice in any case to which it is a party." *Ibid.*, Art. 94, para. 1. No similar requirement binds the entire international community, or even those UN bodies that request and receive advisory opinions of the court. *Ibid.*, Art. 96.

<sup>10</sup> Thucydides, *History of the Peloponnesian War*, trans. Rex Warner (New York: Penguin Classics, 1954), 402. See also Donald Kagan, *The*

*Peace of Nicias and the Sicilian Expedition*, vol. 3, *A New History of the Peloponnesian War* (Ithaca: Cornell University Press, 1991), 149–152.

<sup>11</sup> Cf. Philip Bobbitt, *The Shield of Achilles War, Peace, and the Course of History* (New York: Knopf, 2002).

<sup>12</sup> One of the more insightful observers of UN realities had this to say as a caution: “I found it very difficult and exacting to write about the UN, that complex and unpredictable institution, which is at one and the same time intimately immersed in world events and yet primarily self-contained—truly, a ‘play within the play.’ Pascal, if he had lived in our times, might well have written the definitive book about the United Nations—and perhaps would have concluded that l’ONU a des raisons que la raison ne connaît pas.” Hernane Tavares de Sá, *The Play Within the Play: The Inside Story of the UN* (New York: Knopf, 1966), ix.

<sup>13</sup> J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6<sup>th</sup> ed. (New York: Oxford University Press, 1963), 1.

<sup>14</sup> Traditional definitions simplify the ways in which states consent to be bound by international legal obligations.

<sup>15</sup> International Court of Justice Statute, Art. 38.

<sup>16</sup> Nothing requires a state to join a treaty, and probably no state is party to 158,000 treaties.

<sup>17</sup> Opprobrium, more than prosecutions, has proved a powerful agent for positive change in the wake of U.S. violations of international law in the past decade and before.

<sup>18</sup> This moderation did not extend to the European empires. See Isabel V. Hull, *Absolute Destruction: Military Culture and the Practices of War in Imperial Germany* (Ithaca: Cornell University Press, 2005). It did mean, however, that conflicts among empires in Africa, for example, were not allowed to escalate, as the Fashoda crisis, among others, provides an example.

<sup>19</sup> One might note that the ferocity of the U.S. Civil War showed the direction war was likely to take when the Great Powers again engaged in battle. They seem to have ignored the warning.

<sup>20</sup> Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2001), chapter 4.

<sup>21</sup> These proceedings represent more than victor’s justice and less than the universal application of one law. They might best be understood as steps toward a universal view that does not presently obtain and may never obtain. Yet as Amin Maalouf writes, “It is an unforgivable error to compromise on fundamental principles on the perennial pretext that others are not ready to adopt them. There is no one set of human rights for Europe and another for Africa, Asia, and the Muslim world . . . every time this fundamental truth is overlooked, we betray humanity and we betray ourselves.” *Times Literary Supplement*, January 20, 2012, 13.

<sup>22</sup> Eugene V. Rostow, *The Ideal in Law* (Chicago: University of Chicago Press, 1978), 4. On the powerful mythology of the rule of law, see Paul W. Kahn’s illuminating examination, *The Reign of Law*:

*Marbury v. Madison and the Construction of America* (New Haven: Yale University Press, 1997).

<sup>23</sup> UN Charter, Art. 2, paras. 1 and 4; Art. 51. Article 51 is worth quoting because its construction has been the subject of academic and diplomatic exchanges: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” See, inter alia, Nicholas Rostow, “International Law and the Use of Force: A Plea for Realism,” *Yale Journal of International Law* 34, no. 549 (2009).

<sup>24</sup> UN Charter, Art. 2, para. 6.

<sup>25</sup> One needs to distinguish between the charter that codified overriding and fundamental norms and the organization it created, which has been the subject of much criticism, particularly in the United States.

<sup>26</sup> The reference is to George F. Kennan’s celebrated article, “The Sources of Soviet Conduct,” published under the pseudonym “X” in *Foreign Affairs* in July 1947.

<sup>27</sup> This is not the place to analyze the constitutional meaning of executive agreements or other agreements, which also are treaties for purposes of international law.

<sup>28</sup> Benjamin Franklin, speech at the Conclusion of the Constitutional Convention, September 17, 1787. See Bernard Bailyn, ed., *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle over Ratification*, vol. 1 (New York: Library of America, 1993), 4.

<sup>29</sup> *Myers v. United States*, 272 U.S., 52, 293 (1926) (Brandeis, J., dissenting).

<sup>30</sup> 531 U.S. 98 (2000).

<sup>31</sup> To be contrasted with global government.

<sup>32</sup> Truman made it the central theme of his administration and memoirs. See Harry S. Truman, *Year of Decisions*, vol. 1, *Memoirs* (Garden City, NY: Doubleday, 1955), xi.

<sup>33</sup> W.W. Rostow, *Concept and Controversy: Sixty Years of Taking Ideas to Market* (Austin: University of Texas Press, 2003), 355.

<sup>34</sup> It is interesting to compare the time necessary to produce the revolutionary vessel, the *Monitor*, during the Civil War, with the lead times required for contemporary advanced weaponry. See John Tierney, “A Brief Dry Spell for the U.S.S. Monitor,” *The New York Times*, August 8, 2011, available at <[www.nytimes.com/2011/08/09/science/09monitor.html?pagewanted=all](http://www.nytimes.com/2011/08/09/science/09monitor.html?pagewanted=all)>.

<sup>35</sup> Thomas Hobbes, *Leviathan, 1651* (Menston, West Yorkshire: Scolar P., 1969), chapter XVII: “And covenants, without the sword, are but words and of no strength to secure a man at all.”

<sup>36</sup> Hilary Mantel, *Wolf Hall* (New York: Henry Holt, 2009), 182.

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