Phil / Pol / Val 207
Global Justice

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(WITH THANKS TO MICHAEL BLAKE)
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Plan for the week

1. International law and domestic law
2. International institutions
   1. The United Nations
   2. The Council of Europe and the European Union
   3. The International Criminal Court
3. The Case Against American Unilateralism: Mayerfeld
4. An Alternative to American Unilateralism, The International Criminal Court: Mayerfeld and Blake
5. The Case for American Unilateralism: Kagan
Domestic Law and International Law

Notice a few things about the **domestic legal system:**

1. We know what counts as a law, and what doesn’t.
2. The process by which the law is created gives us some reason to think it’s morally legitimate.
3. The law is effectively enforced.

What is called “international law” is more problematic on all three counts.
Sources of international law

- What makes something a norm of international law? See the statute of the International Court of Justice:
  1. International treaties;
  2. international custom, as evidence of a general practice accepted as law;
  3. the general principles of law recognized by civilized nations;
  4. “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”
Authority of international law

- What makes a norm binding on a state is the fact that it describes what states usually do.
- States can avoid being bound by norms by refusing their consent.
- The only exception are *jus cogens* norms such as the prohibitions on genocide, slavery, and torture.
Enforcement of international law

• Enforcement is through state action; the same parties that are the subjects of law are also those who enforce it
• This is unlike the case of domestic law
• This means that powerful states may sometimes be able to ignore international law with something like impunity. For example, the U.S. policy on “enhanced interrogation techniques” that included water boarding.
International law and international treaties

- The most central norms are the customs of states, and the consent of states.
- These two allow states to agree with one another to coordinate their behavior in certain ways: they can use treaties to change their obligations.
- They may agree to do or not do certain things: the International Covenant on Civil and Political Rights, say.
- They may agree to set up bodies with the power to adjudicate disputes, or set norms that shall be followed: the World Trade Organization, say.
The United Nations

- The most central international body, set up by treaty after the end of World War II.
The United Nations and international law

- Declarations of the Security Council are legally binding; declarations of the General Assembly are not.
- The United Nations seeks to avoid war, by centralizing the decision to go to war. Article 42 allows the Security Council to authorize the use of force.
- Article 51, though, allows member states the “inherent right of individual or collective self-defence.”
The Security Council and the Great Powers

- The five Great Powers (China, France, Russia, UK, USA) have veto rights over non-procedural issues.
- The temporary members (Argentina, Australia, Chad, Chile, Jordan, Lithuania, Luxembourg, Nigeria, South Korea, Rwanda) do not.
- The Security Council can authorize the use of force.
In practice, the United Nations is limited in its ability to control the actions of the United States:

- The UN depends heavily on the U.S. for funding (22%, in 2006)
- The U.S. can ignore the commands of the UN with something very close to impunity.
  - See the U.S. decision to withdraw from the compulsory jurisdiction of the International Court of Justice in *Nicaragua v. United States* (1986)
  - The U.S. simply announced that it was withdrawing its consent to be bound by the Court, and has after that vetoed any Security Council attempt to enforce the judgment.
The European Union

- A union of 27 states, that is formally a treaty body but which has created powerful supra-national institutions:
  - European Parliament
  - European Currency Union
  - Schengen area, within which free movement is guaranteed
- In some senses it is still a treaty body; explicit consent of the member states is the justification for all these institutions
- In other senses, it is something like a federal state.
- Other European institutions cover different groupings – such as the states covered by the European Court of Human Rights
- Winner of the Nobel Peace Prize, 2012
International Criminal Court

- Created by treaty under the authority of the United Nations
- Legally independent of the United Nations
- First attempt to make a permanent international court of justice – following Nuremberg tribunals (1946) and ICTY / ICTR (1996)
- Noteworthy because (a) first criminal tribunal that is permanent and (b) one of the only places in which international law deals with individual persons.
In his article, Kagan Said:

A. “America is the young gun and Europe is the old sheriff.”

B. “Real Americans don’t eat French fries.”

C. “Americans lead the charge and Europeans follow.”

D. “Americans are from Mars and Europeans are from Venus.”
Which Category?

A. Did not read the Kagan article
B. Read the Kagan article and got the previous question RIGHT
C. Read the Kagan article but got the previous question WRONG
Jamie Mayerfeld

- University of Washington
- Political Science and Law, Societies, and Justice
- Specializing in global justice and international institutions
- Author of *Suffering and Moral Responsibility.*
Effective International Institutions

Mayerfeld’s main theses:
For international treaties to be effective, they need two institutional elements:

- An impartial procedure of adjudication
- Effective enforcement

Mayerfeld contrasts the European Union and the US on the use of torture since 9/11/2001, to illustrate the difference such institutions can make.
The United States and Torture

- The United States has signed the UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Punishment or Treatment (1984), but with many reservations.
- One of the reservations states that these agreements are not “self-executing,” which means they have no status as law in US courts.
- US decisions to engage in “enhanced interrogation techniques” are not subject to any impartial judicial review.
- Pres. Bush declared that “we don’t torture.” However, he defined “torture” in a way that excluded only intentionally causing irreversible physical harm.
“Enhanced Interrogation Techniques”

- water-boarding
- sleep deprivation
- stress positions
- throwing prisoners headfirst into walls
- confinement in coffin-sized boxes.
The European Response

- European integration created a network of legal institutions above the national level, some of which have been granted enormous power.
- The 47 members of the Council of Europe (broader than the European Union) are subject to the European Court of Human Rights, which enforces the European Convention on Human Rights.
- The European response to 9/11 has been far from perfect, but there are striking differences with the US response.
“Unlike the United States, Europe
(1) abstained from adding loopholes to the international legal prohibition of torture and ill-treatment;
(2) established judicial oversight of its international human rights commitments;
(3) adopted an international inspection regime by the Committee for the Prevention of Torture (CPT) to monitor compliance with the international prohibition of torture and ill-treatment; and
(4) committed itself firmly to the criminalization of torture and other war crimes”(Mayerfeld, p. 113).
“Since 9/11, British courts have used the HRA to
\begin{itemize}
  \item limit detention without trial of terrorist suspects,
  \item prohibit the use in judicial proceedings of evidence obtained by torture,
  \item require government investigation of ill-treatment by British armed forces in Iraq, and
  \item block the deportation of terrorist suspects to countries where they run a significant risk of torture"
\end{itemize}
(Mayerfeld, p. 122).
Mayerfeld’s Conclusions

• “Participation in a strong international human rights regime grants other countries the power to judge the adequacy of one's record. One's policies must satisfy a higher standard of justification, because they are judged by other countries not sharing one's biases and blind spots (at least not to the same extent). But the other countries cannot judge in an arbitrary or capricious manner, since the standards they apply to others will be applied to themselves” (pp. 127-128).

• “Mutual oversight and collective decision making, when sincerely undertaken in the service of human rights, can raise the standard of minimally acceptable behavior and generate improved means of enforcement” (p. 128).

• “To reject participation in a strong international human rights regime is to make oneself judge in one's own case” (p. 128).
The Problem Is a Lack of Institutions

- Europe’s set of human rights treaties were important in preventing European states from engaging in torture after 9/11
- The United States failed, and their failure was due in part to their refusal to be so bound
If the U.S. Had Been Subject to an International Court, Would the US Have Used Waterboarding?

A. Yes
B. No

81% Yes
19% No
Do treaties make a difference?

- Oona Hathaway argues that signing on to a treaty is more likely to lead to *more* torture, rather than less: she argues this is where the evidence goes.

- This might be plausible, if only because of moral balancing; we give ourselves permissions to be bad in one area of life, when we’re convinced we’ve earned points in another.
Treaties Need Enforcement

- All this assumes that the treaties are merely verbal; but we ought to arm our treaties with teeth (including punishments and inspections.) Surely that would work!
- What would an effective international institution that combined impartial judicial review with enforcement power look like?
What It Would Not Be:
UN Human Rights Council

- Successor to the UN Commission on Human Rights (once chaired by Muammar Gaddafi of Libya)
- Past and present members include: Saudi Arabia, Pakistan, China, Russia, Nigeria, Uganda, Ethiopia, and Congo.
- An effective international human rights institution would be limited to parties who actually respect human rights.
The International Criminal Court (ICC)

- Statute creating the ICC has 139 Signatories and 122 Ratifications.
- Court's jurisdiction covers acts on or after 7/1/2002.
- Court has jurisdiction over acts that are committed by a citizen of a ratifying state or that occur in the territory of a ratifying state. (Also, the U.N. Security Council can initiate a prosecution.) Jurisdiction is prospective, not retroactive.
Mandate of the International Criminal Court

- Prosecution of individuals for
  - Genocide
  - Crimes against humanity
  - War crimes
  - *Aggression (could become effective in 2017)

Is Your Clicker ID 5D2CC8?

A. Yes  
B. No
ICC Procedures

- Judges elected by state parties (one state, one vote)
- Pre-Trial Judges (typically, but not always, in groups of three) determine whether to commence an investigation and oversee pretrial proceedings.
- Trial Judges in groups of three conduct trials and determine guilt or innocence.
- A group of five appeals judges hears and decides appeals.
Key Difference Between ICC and UN Human Rights Council

- Membership in the ICC self-selects for rights-respecting democracies and self-selects against dictatorships. Why?
- All state parties to the ICC subject themselves to persecution under the ICC statute.
- Are all the world’s democracies state parties to the ICC?
122 State Parties to the ICC Statute (in Green)
US Response to ICC

- Threatened to withhold support for all peacekeeping operations unless UN granted the US an exemption from ICC jurisdiction. Exemption approved in July 2002; renewed in July 2003; not renewed in 2004. Why not?

- American Servicemembers' Protection Act of 2002: Bars U.S. participation in peacekeeping operations in countries that have ratified the ICC; cuts off military aid to countries that have ratified the ICC unless they promise not to apply the law to US citizens; and authorizes military action to "extract" US service members taken into the court's custody.

SEC. 2008. AUTHORITY TO FREE MEMBERS OF THE ARMED FORCES OF THE UNITED STATES AND CERTAIN OTHER PERSONS DETAINED OR IMPRISONED BY OR ON BEHALF OF THE INTERNATIONAL CRIMINAL COURT.

a. AUTHORITY- The President is authorized to use all means necessary and appropriate to bring about the release of any person described in subsection (b) who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.
Is the ICC Anti-Democratic?

- Is judicial review itself an anti-democratic institution?
- What is a democracy?
- If democracy is identified with unlimited majority rule, then it becomes a kind of tyranny—a tyranny of the majority.
- To be legitimate, democracies must protect minority rights, especially human rights. Thus, judicial review is an essential part of a legitimate democracy.

Mayerfeld’s main claim: The protection of human rights is an essential element of a legitimate democracy. The ICC helps to protect and promote legitimate democracy.
Mayerfeld on the ICC as a Pre-Commitment Device

- *Potential* human rights violators must be persuaded *in advance* (before they commit any atrocities), that they will be punished and will not receive amnesty.
- For the threat to be credible, there must be power to back it up.
How the Pre-Commitment Strategy Works

“Under the rules of the Court, prosecution of human rights atrocities is left to national governments; however, the Court will take action when national governments prove unwilling or unable to mount such prosecutions themselves. This allows democracies to say to would-be tyrants, terrorists, and warlords: we will prosecute you for your crimes, and if by any chance we should lose our nerve or our capacity to do so, we have empowered an international court to act on our behalf. Like Ulysses tied to the mast, such democracies steel themselves against future unwise temptations, thereby disarming their enemies in advance. To borrow the jargon of social science, they adopt a democratic ‘precommitment’ strategy” (Mayerfeld, pp. 149-150).
“As such strategies go, however, this is a remarkably dramatic one. It is astonishing that [122] countries have voluntarily agreed to make their own leaders vulnerable to prosecution and punishment before an international court. This is an unprecedented development in world history—one that challenges longstanding assumptions about the behavior of states” (Mayerfeld, p. 150).
“The call by some human rights advocates for prompt universal ratification of the ICC seems politically unwise. Better for the Court to grow slowly with its integrity intact, than to absorb a large non-democratic membership that could undermine it from the inside. A genuine commitment to human rights should precede ICC membership; membership cannot be the ticket to such a commitment. The European Court of Human Rights (ECHR) provides an instructive model. . . . It was a necessary condition of [the ECR’s development] that the Court’s parent organization, the Council of Europe, restricted membership to countries exhibiting a genuine commitment to democracy” (Mayerfeld, p. 152).
The Need for an Impartial Judge and the Problem of Judging Our Own Case

- We are subject to enormous corruption (think here of Stephen Gardiner) when we act as judges in our own case; we redefine, use selective evidence, and deploy all the tricks we can to make our chosen conclusions fit.

- External criminal procedure will prevent this from taking place, by insisting upon well-qualified judges who have no interest in the outcome of the proceedings. (Recall the ICC provisions for judicial panels at every stage—pre-trial, trial, and appeal.)
What We Can Conclude About Institutional Design?

- Good institutional design requires that democracies be subject to judicial review to avoid tyranny of a majority.
- The judicial review should be conducted by an institution made up of parties who are committed to democracy and human rights.
- The legal standards should be the same for all parties.
- The standards should be applied in an impartial manner.
- The ICC is just this kind of institution.
Blake’s surprising answer is that, in some cases, when there is no effective state or other protector of rights, the answer is “No.”

Is he denying that perpetrators of genocide deserve to be punished? The answer is “No.”

His claim is that even if perpetrators of genocide deserve to be punished, only certain agents have the moral right to punish them.
Blake argues that not everyone has the right to punish. For example, Bill Gates doesn’t have the right to purchase mercenaries to wade into Africa and punish Joseph Kony – however much Kony deserves to be punished.
In your opinion, does Bill Gates Have the Right to Use Mercenaries to Stop a Genocide?*

A. Yes  
B. No

56% Yes  
44% No
In Your Opinion, Does Bill Gates Have the Right to Hold a Trial and Punish Those Convicted of Genocide?

A. Yes
B. No

88% Yes
12% No
What is the Basis of the Right to Punish?

- “The right to punish arises from the status of the punishing agent as protective agent for the victim of the crime” (Blake, pp. 208-209).
- “An entity does not have a right to punish offenses unless either (1) the punishing agent exists as a protective agent for the victims of the crime, and so is engaged in systematic efforts to prevent the violation of the rights of the victim, or (2) the punishing agent punishes on behalf of such a protective agent, and is confident that another protective agent exists for the purposes of defending the rights of the victim and is attempting to protect these rights” (Blake, p. 209).
- “The right to punish comes only at the price of some level of effective protection and prevention; punishment without such protection is punishment without right” (Blake, p. 211).
Blake’s Conclusion about Yugoslavia Applies to Any Situation in Which a State Has Disintegrated

- “The lack of a clear mandate to forcibly prevent atrocities, and the lack of effective personnel and equipment to fulfill that mandate” makes subsequent punishment unjustified.
- “My argument, in sum, has been that an agency which presumes to punish must accept the burdens of this role, and that these burdens require that agency to be able to assert, with some degree of plausibility, that it has ensured a minimal level of protection from violence is in place. . . . Punishment without such protection is, perhaps, a salve for the Western conscience, but it is not a legitimate form of legal punishment” (Blake, p. 212).
According to Blake, what must we do, in order to have the right to punish?

- **Police** services and **judicial** services are inextricably linked; we do not have the right to exercise judicial power, when we fail to provide police power.
- We failed – in both Yugoslavia and Rwanda – to provide enough military force to effectively stop the genocide.
In His Article, Blake Argues:*

A. Those who perpetrate genocide don’t deserve punishment.

B. Bill Gates does not have the right to hire mercenaries to stop a genocide in progress.

C. Only the UN has the right to punish genocide.

D. Only an entity that provides protection against genocide has the right to punish those who perpetrate genocide.
In a case in which there is no entity to provide police protection, does the UN have a right to try and punish those who are found guilty of genocide?

A. Yes
B. No
Blake’s Second Thoughts

- If we’ve failed in our duty to stop, perhaps we should do something we don’t have a right to do.
- If Mayerfeld is right about the ICC, it might eventually become something extremely beneficial to the world – perhaps we should worry more about that, and less about keeping our hands clean!
Robert Kagan

- Senior fellow at Brookings Institution
- Foreign policy advisor in both Republican and Democratic Administrations
- His article is a defense of American unilateralism, made shortly before the invasion of Iraq.
“Americans are from Mars and Europeans are from Venus” (Kagan, p. 3).

- Strong vs weak
- Military force vs. diplomacy
- Unilateralism vs. multi-lateralism
- Individual sovereignty vs. transnationally enforceable law
“In an anarchic world, small powers always fear they will be victims. Great powers, on the other hand, often fear rules that may constrain them more than they fear the anarchy in which their power brings security and prosperity” (Kagan, p. 11).

Europeans are not increasing their power. Their tactics, like their goal, are the tactics of the weak . . . they want to control the behemoth by appealing to its conscience” (p. 11).
“Europeans have stepped out of the Hobbesian world of anarchy into the Kantian world of perpetual peace” (Kagan, p. 16).

“Diplomacy, negotiations, patience, the forging of economic ties, political engagement, the use of inducements rather than sanctions, the taking of small steps and tempering ambitions for success – these were the tools of Franco-German rapprochement and hence the tools that made European integration possible” (Kagan, p. 17).

“In Europe ‘the rule of law has replaced the crude interplay of power . . . power politics have lost their influence’“ (Kagan, quoting Prodi, p. 18).
How Should the US Respond?

- “The new Europe is indeed a blessed miracle and a reason for enormous celebration” (Kagan, p. 22).
- Why does he say this?
- “Europe's evolution, to its present state occurred under the mantle of the U.S. security guarantee and could not have occurred without it” (Kagan, p. 23).
- Kantian paradise. America made Kant’s vision of “perpetual peace” possible. This is an important realization.
Americans “have no experience of successful supranational governance; little to make them place their faith in international law and international institutions, much as they might wish to; and even less to let them travel, with the Europeans, beyond power. Americans, as good children of the Enlightenment, still believe in the perfectibility of man, and they retain hope for the perfectibility of the world. But they remain realists in the limited sense that they still believe in the necessity of power in a world that remains far from perfection. Such law as there may be to regulate international behavior, they believe, exists because a power like the United States defends it by force of arms. In other words, just as Europeans claim, Americans can still sometimes see themselves in heroic terms - as Gary Cooper at high noon. They will defend the townspeople, whether the townspeople want then to or not” (Kagan, p. 26).
An Irony in Kagan’s Argument for Unilateralism: Its Effects Can Help Us Appreciate the Virtues of Multilateralism

- It was used to justify the 2003 fundamentally unilateral invasion of Iraq by the US, based, in part, on “evidence” that Saddam Hussein possessed weapons of mass destruction extracted under torture and, in part, on other intelligence “evidence” that was interpreted so as to maximally support an invasion. (There were no WMD.)
- It is the same kind of argument used to justify the executive power to order the use of “enhanced interrogation techniques” whenever the President determined them to be necessary, regardless of any international treaties.
- These very effects are examples of the way that bias influences the outcome when we are the judges in our own case.
A World in Which Strength is a Weakness and Weakness is a Strength?

- The development of human rights has been a history of the weak triumphing over the strong.
- The movements of non-violent resistance of the 20th century (e.g., Mohandas Gandhi, Martin Luther King, Jr., and Nelson Mandela) have magnified this phenomenon.
- Those who have power inevitably abuse it. When there is a relatively free press to report on the abuses and an audience that can act to support the weaker party, the more powerful party can find itself at a disadvantage.
- In a world of rights-respecting democracies, military power might be a disadvantage rather than an advantage.
- We don’t yet live in that world, but Europe may be an example of what such a world would be like.
Should the US Act Unilaterally as the “Sheriff” of the World?

A. Yes
B. No
Should the US Ratify the ICC Statute?

A. Yes
B. No

0% 0%