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## **Lawfare, Wikileaks, and the Rule of Law.**

*"Lawfare" is the idea that international law only exists as a strategem; that states only comply with or create international rules as part of their quest for power; that power, not law or morality or even trade dominates international relations; and that states are rational power maximizers. As such, it is a variant within the (failed) IR Realist theory of international law.*

*This article outlines the tenets of "lawfare" placing "lawfare" in the broader historical context. It then places lawfare into the practical contemporary context. It positions lawfare within a spectrum of ideas and movements opposing globalization such as Wikileaks, Al Qaeda, Occupy Wallstreet, and also Neoconservatism. The article concludes that global liberalism ("Empire") will likely meet and triumph over each of these challenges because liberalism is open textured, sustainable, and self-replicating whereas its opponents are conspiratorial, fragmented, disorganized, lack a mass base, and cannot articulate a comprehensive and compelling alternative vision.*

S. 190

- HFR 12/2012 S. 1 -

### **1 I. Lawfare**

"Lawfare" is the amusing (it would be sad, if it were not so obviously wrong) idea of one faction of the Chinese military, that politics is the continuation of warfare by other means<sup>1</sup> - an inversion of Clausewitz.<sup>2</sup> "Lawfare" is an idea which essentially opposes the idea that the rule of law internationally is even possible, let alone the means to avoid and attenuate conflict to attain justice. So far as I have seen, proponents of "lawfare" have no line on justice, its existence, or its relation to law. This is not to say the law-as-command view<sup>3</sup> could not serve the ends of substantive justice. Mao Zedong struggled mightily as helmsman to steer the ship of state between extremist forces in order to work substantive justice using a command theory cult of personality. Putin, likewise, surely sees himself as the rule of law working to serve justice. Vertical powers are not inevitably unjust and it is obvious to any honest examination that Putin has largely restored the idea of legality to Russia - in marked contrast to the corrupted Yeltsin régime.<sup>4</sup> In any case, the proponents of "lawfare" have not thought out the logical implications of their instrumentalist views sufficiently.

### **2 A. Lawfare and International Law**

The advocates of lawfare raise a common lament: "International law does not exist!" We have long heard the lament that international law is the law of the jungle.<sup>5</sup> That

<sup>1</sup> See, generally, Qiao Liang, Wang Xiangsui, *UNRESTRICTED WARFARE* (1999).

<sup>2</sup> "Wir behaupten dagegen, der Krieg ist nichts als eine Fortsetzung des politischen Verkehrs mit Einmischung anderer Mittel." Karl von Clausewitz, *Vom Kriege*, Vol. 3, 3d. Edn. (1832; 1869).

<sup>3</sup> Here, I am referring to the "vertical power" model of personal government, typical of Soviet dictatorships, but also often appearing in corporatist governments as well. The origin of the command theory of law is found in the British positivist, John Austin. See, John Austin, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832).

<sup>4</sup> David Michael Kotz, Fred Weir, *Russia's Path from Gorbachev to Putin: The Demise of the Soviet System* 267 (2007).

<sup>5</sup> The claim of course recalls Hobbes: "during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every

"the strong do what they can and the weak suffer what they must."<sup>6</sup> But is it really so? In fact, international law does exist, and governs almost all interactions among states and between peoples. Of course, just as international law exists, so also for that very reason there are violations of international law. However, using the fact of murder to argue that criminal law does not exist is both perverse and inaccurate. States enter into binding commitments, which they then observe in order to secure long term cooperation and compliance. Even if Hobbes were right, that the only thing keeping us from killing each other were mutual fear, States do in fact have recourse to a common power to keep them all in awe: Alliances, Confederations, Federations, and now The United Nations – and its nuclear armed security council, one Member of which is The People's Republic of China. Wise rulers reflect carefully before rejecting their own power as law-maker.

S. 191

- HFR 12/2012 S. 2 -

### 3 B. "Lawfare" in Western Thought

Of course, if we merely search the history of western ideas, we can find earlier proponents of lawfare than one faction of the Chinese military. In Plato's *Republic*, Thrasymachus argues that law is naught but force, and that justice is but an excuse.<sup>7</sup> Of course, Thrasymachus is wrong, and a good bit of Plato's *Republic* is devoted to trashing the Thrasymachi of this world. However, we can fast forward a couple of millennia to Leo Strauss,<sup>8</sup> who similarly argues that all politics is force and fraud. Knowingly or not, advocates of lawfare are really saying nothing much new, and while what they are saying is disturbing, part of the reason it is disturbing is it is wrong.

### 4 C. Hegemony

By whomever advanced, the "lawfare" perspective on law and justice is painfully simplistic, ill-considered, and unsustainable. Even an instrumentalist view of international law focused only on hegemony recognizes that part of rulership requires the acquiescence and indeed cooperation of those who are ruled over.<sup>9</sup> The State selects its allies, some of which will be Suzerains,<sup>10</sup> who in turn discipline and command over other states, which may be unfriendly or even our enemy, under the suzerain-hegemony view. But I do not propose a theory of law and rulership as hegemony – the mailed fist in a velvet glove. I simply point out that there are more accurate instrumentalist views of law and the state than "lawfare".<sup>11</sup> Even law as hegemony (force and fear) is incomplete and inaccurate: people do not obey law merely because of the threat of negative consequences.<sup>12</sup> The rule of law, internationally, is much more than a stupid fist in a pretty glove: *it is an orchestra<sup>13</sup> of nations, directed by Reason.<sup>14</sup>*

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*man.*" Hobbes, *LEVIATHAN*, Ch. XIII (emphasis added). The most articulate proponents of the law of the jungle argue that the State is in a relationship toward other states of lawless savagery, the war of all against all. But this is not what we observe in practice. In practice, states enter into *and maintain* binding covenants, treaties, and conventions and demand that other states keep their bonds: *pacta sunt servanda*.

<sup>6</sup> Thucydides, *HISTORY OF THE PELOPONNESIAN WAR*, *Melian Dialogue*, 5.89.

<sup>7</sup> "justice is nothing else than the interest of the stronger." (Thrasymachus). Plato, *REPUBLIC*, Book I.

<sup>8</sup> For a general critique of Strauss see, Shadia Drury, *LEO STRAUSS AND THE AMERICAN RIGHT* (1999).

<sup>9</sup> See, e.g., G. John Ikenberry *AMERICA UNRIVALED: THE FUTURE OF THE BALANCE OF POWER*, 201 (2002).

<sup>10</sup> For an historical account of the medieval contention between sovereignty as an indivisible unique and inseparable absolute attribute of states, only, as opposed to a suzerain relationship of empires, kingdoms, duchies, and knights see Bertrand De Jouvene, *SOVEREIGNTY: AN INQUIRY INTO THE POLITICAL GOOD* 171-173 (1957).

<sup>11</sup> E.g., George Kennan, *American Diplomacy: Sixtieth-Anniversary Expanded Edition* (2012). For a more recent example, Ann-Marie Slaughter, G. Ikenberry, *Forging A World Of Liberty Under Law*, (2012) at <http://www.princeton.edu/~ppns/report/FinalReport.pdf>.

<sup>12</sup> Eric Engle, *Taking the Right Seriously: Hohfeldian Semiotics and Rights Discourse*, 3 *The Crit* 84 (2010). <http://thecritui.com/2010/01/volume-3-issue-1-winter-edition-2010/>.

<sup>13</sup> Makau Mutua, *Human Rights: A Political and Cultural Critique*, 42 (2002).

<sup>14</sup> "That which is true law is right reasoning in accord with the nature of things" ("Est quidem vera lex, recta ratio naturae congruens"). Cicero, *Laws* (I, 10).

S. 192

- HFR 12/2012 S. 3 -

5 **D. Foucault**

Foucault presents an even more accurate view of power-as-instrumentality.<sup>15</sup> Foucault argues that power is a relationship of discipline: that the acquiescence and indeed cooperation of the ruled is not only possible, it is also necessary for rulership. To Foucault, power is an inculcation of self-disciplinary routines into the mind and body of the ruled: the prisoners become each others' jailors. For Foucault, the only way out of the trap of power is through radically personalized self-rule:<sup>16</sup> "neither master nor slave" for Foucault means self-mastery. In that sense (and others), Foucault is a direct intellectual heir to Aristotle, who also argues that self-mastery is the key.<sup>17</sup> For Foucault, power=knowledge:<sup>18</sup> perfect power would be total knowledge, a transparent panopticon.<sup>19</sup> The active cooperation of the dominated, the internalization of knowledge (beliefs, attitudes, values) by the dominated, and the exercise by the dominated of self-discipline and disciplining of peers and subordinates are essential characteristics of power – a self-conscious and self-disciplining network of knowledge. This point, that Man and The State can *escape* from conflict and power through the rule of law and open borders predominate and thus those norms predominate internationally: we have created a world with free movement of goods and capital with much labor mobility not to attain the decadent prosperity of Babylon–Empire. We have created this rule-of-law world with open trade *because that world is better for all than the world of isolated autarchic States bound only by conflicts and doomed thereto by the unity of trade and territory, market and state*. International trade leads to greater prosperity and interdependence than autarchy, making war much less likely. Creation of international tribunals and court-like bodies to adjudicate competing legal claims including basic human rights is a much less destructive and much more rational way to organize international political society than war and self-help reprisals.

6 **II. Wikileaks**

How do these differing ideas of the relationship between networked power-knowledge, justice, law, and the state interact in the real world? Here, I wish to look at Wikileaks as an example of Foucault's theory of knowledge-as-power applied in practice to a network. Network theory<sup>20</sup> argues that networks are more powerful (dominant) than isolated autarchic actors due to productive synergies and improved communications allowing more effective rationalizations and uses of power. The ideal power relationship, according to network theory, is a constantly growing and ever linked network: many nodes, with many linkages, and the number of nodes and linkages growing. Drawing from network theory, Assange/Wikileaks decided to try a disruptive strategy intended to render a network of international relations militarists inoperative.<sup>21</sup> Notice however, that we can really only understand wikileaks as an instance of altruism, of enlightened self interest. The "payoff" for Assange/Wikileaks, other than peer-recognition and whatever that entails (hot chicks, wild parties?) is decidedly not monetary. Wikileaks versus (U.S.) Empire<sup>22</sup> is, like Al Qaeda versus (U.S.) Empire, a strug-

<sup>15</sup> See generally, Michel Foucault, *SURVEILLIR ET PUNIR: LA NAISSANCE DE LA PRISON (DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON)*, (1975).

<sup>16</sup> Michel Foucault, Preface to Gilles Deleuze & Felix Guatarria *ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA* xiii (1983).

<sup>17</sup> Aristotle, *NICOMACHEAN ETHICS*, Ch. XIII.

<sup>18</sup> Michel Foucault, Colin Gordon, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977* (1980).

<sup>19</sup> Jeremy Bentham. *Panopticon*. In Miran Bozovic (ed.), *THE PANOPTICON WRITINGS*, (1995).

<sup>20</sup> See, Annelise Riles, *THE NETWORK INSIDE OUT* (2000).

<sup>21</sup> See Julian Assange, *Wikileaks: The Manifesto* (2010) at <http://www.thecommentfactory.com/exclusive-the-wikileaks-manifesto-by-julian-assange-3342/>.

<sup>22</sup> See Paul Negri, Michael Hardt, *EMPIRE* (2001).

gle between competing networks.<sup>23</sup> Each seeks to disrupt the others' nodes and the linkages between the opponent's nodes. Low intensity conflict seems to be the present and future face of war, as exemplified in terrorist attacks and information warfare. Are the advocates of "lawfare" and Leo Strauss right? Is there no justice? To answer that, we must return to Aristotle.

S. 193

- HFR 12/2012 S. 4 -

### 7 A. Aristotle

Aristotle teaches us the idea of the rule of law. In Aristotelian democracy the rulers take turns governing. That is, among those fit to rule, various factions will inevitably appear, with opposing interests. And yet, the competing factions are bound by a common sense of justice.<sup>24</sup> Because of their affinity of kinship, their commonality of interests, the competing factions can, and in fact do, take turns at holding the reigns of power.<sup>25</sup> Not only does Aristotle posit that "justice is the bond of men in states"<sup>26</sup> in his theory of aristocratic rule, he also establishes the rule-of-law idea. Aristotle describes the Polis as governed by rational principle – the rule of law, not men: "*we do not allow a man to rule, but rational principle, because a man behaves in his own interests and thus becomes a tyrant.*"<sup>27</sup>

- 8 This idea of the rule of law is the core concept of Western democracy. It is the base on which European civilization was built. It is the base on which a peaceful and prosperous world order based on the free movement of goods, capital, services, and labor under the UN, the WTO, the ICJ, and regional international organizations like the EU is being built using functionalist ideas.<sup>28</sup> The idea of open borders and interdependence through trade as key to keeping peace and attaining prosperity, coupled with the rule of law are the two core concepts of Western civilization. One can only hope these great ideas will attract adherence and emulation by other cultures.<sup>29</sup>

S. 194

- HFR 12/2012 S. 5 -

### 9 B. Liberalism and its Discontents

Challengers to liberalism are many. Al Qaeda's tribalist view of extremism and neo-feudalism tries to oppose the ideas of multiculturalism and open borders.<sup>30</sup> In that sense, Al Qaeda's mass base is essentially limited to Islamic countries, and even there is really limited to the undeveloped rural areas as opposed to cosmopolitan urban centers. Consequently, Al Qaeda's challenge will fail, for it cannot attract widespread adherence, whether despite or because of fanaticism; it is no global vision. The shrewd and cunning opportunistic militarism of Leo Strauss and the neoconservatives<sup>31</sup> will likewise fail to attract wide support because it is a conspiratorial theory of history and

<sup>23</sup> Al Qaeda literally means "the database" and is popularly translated as "the base". Pierre-Henri Bunel, *Al Qaeda: The Database*, GlobalResearch.ca, Wayne Madsen Report 20 Nov. 2005 at <http://globalresearch.ca/index.php?context=va&aid=24738>.

<sup>24</sup> "Justice is the bond of men in states". Aristotle, *POLITICS*, Book I, Part 2.

<sup>25</sup> Aristotle, *POLITICS*, Book VII, Chapter 14.

<sup>26</sup> POL [1253a29] (Jowett) ("A social instinct is implanted in all men by nature, and yet he who first founded the state was the greatest of benefactors. For man, when perfected, is the best of animals, but, when separated from law and justice, he is the worst of all; since armed injustice is the more dangerous, and he is equipped at birth with arms, meant to be used by intelligence and virtue, which he may use for the worst ends. Wherefore, if he have not virtue, he is the most unholy and the most savage of animals, and the most full of lust and gluttony. But justice is the bond of men in states, for the administration of justice, which is the determination of what is just, is the principle of order in political society.").

<sup>27</sup> Aristotle, *ETHICS*, Bk. V Ch. 6.

<sup>28</sup> See, e.g., Charles W. Kegley, *WORLD POLITICS: TREND AND TRANSFORMATION*, 178 (12th edn. 2009). Functionalism builds peace piece by piece, focusing on generating neutral expertise in specific fields using specialist institutions such as, e.g., the World Health Organization, The International Labor Organization etc.

<sup>29</sup> For a more pessimistic view of civilization and struggle see, Samuel P. Huntington, *THE CLASH OF CIVILIZATIONS* (1996).

<sup>30</sup> Osama Bin Laden, "Text of Fatwa Urging Jihad Against Americans," *Al Quds Al Arabi* (London), Feb. 23, 1998.

<sup>31</sup> See, *Project for the New American Century*, at <http://www.newamericancentury.org/>.

one which accords no place to justice in its theory of power politics. Elites who assess the neoconservative view quickly conclude it is unsustainable due to dishonesty, distrust, *betrayal*, and inability to articulate or express a vision for a better future.

- 10 Wikileaks, in contrast, is a much more serious challenger to Empire: after all, why should we support the world of commerce, the decadence of mystery-Babylon, and Empire? We should in fact support liberalism's ideas of open borders and free movement of goods, capital, services and workers under the rule of law because trade makes prosperity and peace likelier. For that reason the activists behind various movements like Occupy Wall Street (OWS)<sup>32</sup> likely will be no more effective at opposing globalization than their forebears who were unable succeed a decade earlier in "the battle for Seattle". Moreover, unlike the forces of Empire, OWS and similarly situated activists do not have state power. Nor do activists like OWS have a mass base, unlike Al Qaeda. However, wikileaks and similar international movements at least have the potential to attract a global mass base and even may attract some elite support. Mass movements have seized state power in the past. For an example of past mass-movement which leap-frogged elites in power, one can look to the corporatist Peronistas. Juan Peron went "over the heads" of the Argentinian military clique by taking his case right to the people. The Peronistas obtained state-power on a mass base of industrial workers, including newly enfranchised women.<sup>33</sup> At least potentially, wikileaks or OWS *could* mobilize a mass base, and not merely a regional one limited by culture and language. Chinese advocates of lawfare are likely watching wikileaks, but from an espionage and not a governance perspective. Consequently, they are likely drawing the wrong lessons.

S. 195

- HFR 12/2012 S. 6 -

### 11 C. The Mandate of Heaven

Let us then return to this misplaced Chinese military idea of lawfare. The idea of lawfare, so far as I have seen, fails to situate political conflict within the broader matrix of justice. Sun Tzu himself taught that an essential aspect of war is to have "the mandate of heaven"<sup>34</sup> - the moral right to rule, because one's cause is just.<sup>35</sup> True, the Chinese idea of "the mandate of heaven" can be used ex-post to legitimate what has already gone down. That is, the mandate of heaven can be an after-the-fact conclusion ("obviously they have the mandate of heaven, for they won"), as well as an ex ante claim. As to "heaven", that may indicate Beijing, its leaders or perhaps even the Chinese people.<sup>36</sup> "The mandate of heaven" can also be a metaphor, the cloud one points at to blame the mountain obscuring it. Nonetheless, the idea that the justice of one's cause is a key element to victory *is* a part of classical Chinese military thought. Perhaps I misread the advocates of lawfare, but I certainly am not misreading Sun Tzu. Justice is a key element to military victory, just as it is the key element to rulership.

### 12 III. Conclusion

The struggles, some overt, some covert, between Al Qaeda, Empire, Wikileaks, Chinese Maoists, and other international movements such as OWS swirl about us, dancing in the shadows.<sup>37</sup> Sometimes, they strike fast and furious,<sup>38</sup> like hell-fire,<sup>39</sup> leaving a trail

<sup>32</sup> See, occupywallstreet.org though do ask yourself how likely is a "global revolution" to occur at the very epicenter of globalization and opulence? There is no mass base of exploited Americans for any sort of "revolution".

<sup>33</sup> Frederick Turner, José Enrique Miguens, JUAN PERÓN AND THE RESHAPING OF ARGENTINA, 18-20 (1983).

<sup>34</sup> Peter Paret MAKERS OF MODERN STRATEGY: FROM MACHIAVELLI TO THE NUCLEAR AGE 823 (1986).

<sup>35</sup> He refers specifically to "The Moral Law" as a combat factor in chapter 1. Sun Tzu, THE ART OF WAR, Ch 1, ss. 1.4-6.

<sup>36</sup> Lie Z, *Old Man Moves a Mountain*, (Han Dynasty). Available at: <http://www.chinapage.com/story/oldman.html>.

<sup>37</sup> *ACLU v. DOJ*, No. 10-436, 2011 WL 4005324 (D.D.C. Sept. 9, 2011).

<sup>38</sup> Senator Chuck Grassley (Iowa) "Key Fast and Furious Documents", (2012). At <http://www.grassley.senate.gov/about/Fast-And-Furious.cfm>.

of tears<sup>40</sup> and blood in their wake. To decipher these secret wars we must thread our way through the web of war, The Maze of the minotaur man-beast, following Ariane's golden wisdom.<sup>41</sup> We are in darkness. We seem lost. Yet, there is an exit. It is illuminated by the lamp of knowledge - a magic lantern: the knowledge of *the rule of law as the means to justice to attain the good life of peace and prosperity for all*. Will our fellow travelers take heed? I cannot say. There is an exit. Follow me. I know the way.<sup>42</sup>

*Zitierempfehlung:* Eric Engle, HFR 2012, S. 190 ff.

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<sup>39</sup> Congressman Dennis Kucinich (D-Oh.), *Drones Strikes Create New Enemies*, June 23, 2012. At <http://kucinich.house.gov/news/email/show.aspx?ID=OLTL3DXWQ73XGE4MGP5TCGDAXQ>.

<sup>40</sup> Dee Brown, *BURY MY HEART AT WOUNDED KNEE* (1970).

<sup>41</sup> Claude Vatin, *ARIANE ET DIONYSOS. UN MYTHE DE L'AMOUR CONJUGAL*, (2004); Jan Hildebrand, *EADS arbeitet an neuen Weltraum-Raketen*, *Welt Online*, 23 Dec. 2009. At <http://www.welt.de/wirtschaft/article5626243/EADS-arbeitet-an-neuen-Weltraum-Raketen.html>.

<sup>42</sup> Thomas Bullfinch, *THE AGE OF FABLE*, 158 (2007).