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Reading Quicksilver: A Response to Pierre d'Argent

DAVID A. WESTBROOK†

My friend Pierre d'Argent's essay in this volume, *Which Law Through Which War: Law Through War Revisited*, refers to and builds on an earlier work of mine (a work which owes a great deal to Pierre, a fact he modestly underplays), as refracted through years of subsequent discussion on the relationships of laws to wars. In such an ongoing conversation, published texts—relatively formal, and addressed to third parties—are delivered out of a context that the reader must surmise, like a theatergoer who has arrived late, to find the actors already embroiled. So a brief response, and a bit of guidance for Pierre's readers, seems in order.

First, however, I must acknowledge that Pierre's reading of my essay is very generous (I am tempted to say Pierre has read very well, and so he is merely accurate—ah vanity). More seriously, my "Law Through War" was an effort to articulate liberalism militant, and in so doing, to take a stance toward international law markedly different from the positions so boringly well established within the academy. Pierre has brilliantly extended this enterprise both substantively and with regard to subsequent wars in Afghanistan and Iraq—he understands the consequences of liberalism militant for public international law better than I do.

Pierre's writing is difficult in part because he often self-consciously contradicts himself. His work exhibits a beautiful tension between a desire to maintain a classical, very continental, view of international law, in which law is a formally coherent system of restraints on the exercise of political power, and a critical (or poetic) stance in which law is seen as the articulation of commitments—the American lawyer might recall Holmes' "felt necessities"—that are themselves often inchoate, the terrain that "Law Through

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War" tried to excavate. It is not at all clear that the commitments of our time, ranging from our understanding of globalization to political identity to the literally hegemonic power of the United States can be more than awkwardly formalized through the Westphalian conceptual structure that undergirds the public international law tradition. As a result, public international law is a profoundly vexed discourse. Pierre knows this (it is my role in our conversations to argue along these lines), and so, for all the creativity of his thought, he is fighting an essentially defensive battle: Pierre is trying to defend the 19th and 20th century project of using international law to civilize politics, a project which lately seems more difficult than ever before. But unlike most international legalists, he does not resort to utopian formalism and therapeutic denunciation, nor does he despair altogether in order to espouse a vulgar "realism." For me at least, his effort has the nobility of the rearguard action.

From this perspective, it is intellectually dramatic, startling, to read Pierre arguing that international law is only indirectly about the prohibition of war. Using law to prevent war is what members of the international law community—people in many different countries who understood themselves as part of an idealistic and progressive movement—thought they were about at least since the U.S. and Great Britain submitted their dispute over the *Alabama* to arbitration. But Pierre powerfully argues that war is not the central concern of the Westphalian order of essentially liberal relations among (when possible) liberal states that produces public international law. Instead, Pierre argues, the constitutional law of the Westphalian order is the expansion, replication and preservation of the structure of that order itself. War tends to disrupt the order, and therefore, generally speaking, is prohibited. Acknowledging that peace is not the core aspiration of public international law may constitute the "beginning of the maturity" of the system; the passage to maturity is the subordination of youth's ideals to pragmatic concerns for self-preservation. Pierre may well be right, but it remains to be seen whether the international law community can sustain such a chastened view of its purpose.

Pierre's diction is so well-mannered that the reader may not notice just how substantial a break with the orthodox view this essay represents. It is of course true that

international law has never been completely opposed to war. War has been justified within public international law, by various notions of just war, in accordance with the U.N. Charter (under articles 2(4) and 51), or sometimes outside the Charter (notably the NATO bombing of Kosovo in 1999), but at least in the 20th century the international legal system as a whole has been universally understood to be constituted by the desire for peace. The U.N. itself was established to save the world "from the scourge of war," in the words of its Charter. In "Law Through War" I argued that the willingness of international legalists to go to war in Kosovo, Rwanda, and elsewhere, with or without the Charter, bespoke something darker if perhaps morally justifiable: the prosecution of politics through war entailed a distinction between civilized and barbarian that well meaning people in advanced countries would be hesitant to articulate. The willingness of many elites to go to war in Dafur is a contemporary example. But even here, the purpose of war would be "to prepare people for [peaceful] politics." In this view, international law aspires to peace, even as it authorizes war.

But maybe my view is too sunny. Spurred by the U.S. led wars in Afghanistan and especially Iraq, Pierre asks an even more uncomfortable question: what about wars, such as the U.S. war in Iraq, which are understood to be both illegal and not justified by some larger commitment. What then? Pierre finds—and the evidence supports him—that the resolution of procedurally illegal wars that have substantive outcomes in accordance with the core commitments of the system (an expansive view of territorial sovereignty and self determination) will be treated as legal. In short, a state may win both an illegal war and a legal peace, as the Security Council itself appears to have acknowledged, in calling for support of the new regime in Iraq. The international response to the U.S. victory in Iraq demonstrates that what we had thought was the fundamental rule of international law has been watered down almost beyond recognition. War is not prohibited absolutely; war is not allowed only in special situations, such as self-defense and genocide; war is strongly discouraged because it tends to disrupt the liberal order, the post colonial map. But a peace that preserves or even extends the liberal order

will be accepted, even if this state of affairs was brought about by an illegal war. It is quite a disappointment.¹

Acknowledging that procedurally illegal wars that produce outcomes in accordance with the substantive commitments of the Westphalian system will be ratified ("digested") by the system, and ultimately acknowledged as legitimate, places the law of war, especially the international legal process for going to war, under great stress. Specifically, why is Security Council authorization for the use of force necessary, if a war that respects territorial sovereignty and self determination, both very broadly construed, will ultimately be accepted by the international community? Rephrased, from an American legal realist perspective, the question of legality can only be decided on the basis of outcomes: remedies, not mere words, demonstrate what a society believes to be legal and illegal. Although Pierre explicitly rejects this perspective, by the time he has derided the technicality of Security Council procedure, and noted that circumvention of that procedure does not preclude the legality of a war's outcomes, it is not clear what the importance of Security Council procedure for authorizing war is.

Confronted with this problem, Pierre argues professionally, from the perspective of public international law. And from this professional perspective the question is not very hard: procedural legality must mean in accordance with the legal processes established by public international law, which themselves reflect the liberal order. If there must be war, it should be in accordance with the procedures of the liberal order, especially the Charter. Yes, of course, but what else could an international lawyer argue?

While easily defensible, Pierre's defense of established international legal process is painfully insufficient, as his conclusion indicates. The problem is that international legal process is a liberal articulation of the relations among states. But as "Law Through War" emphasized, our wars tend to be at the edges of the liberal order, not within it. Wars are now rarely organized by states, and relations

1. As Pierre suggests *en passant*, it could be argued that the outcomes of the invasion of Iraq were recognized as legal by the Security Council and the rest of the world demonstrates U.S. hegemony, rather than a heretofore unrecognized character of the Westphalian system. There is much more to be said on both sides of this proposition, but again, Pierre is fighting a rearguard action.

among the parties cannot sensibly be characterized in the institutional terms on which contract, treaty, and hence the liberal order, depend. Failed states, violent ethnic groups, the Palestinian/Israeli conflict, and most dramatically, bin Laden's war are hardly the actions of states, nor do the parties strive for liberal virtues. Nor are the control of Iraq under the sanctions regime established after the first Gulf War, the U.S. response to terrorism after 9/11, or U.S. hegemony more generally to be understood primarily in terms of negotiations among sovereign equals. Thus, while I believe Pierre is correct that our wars may be justified *ex post* in terms of the Westphalian structure they establish, contemporary decisions to go to war, and hence our understanding of the law of war, can hardly if at all be understood in such terms. As I understand this conversation, now well into its second decade, the topic has become what, if anything, do our laws—our felt necessities—have to say about our wars, violence which, while organized, is not organized in such ways that we may talk seriously about the breach of otherwise liberal relations among states.

