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Reviewing Tom Farer, Confronting Global Terrorism and American Neoconservatives: The Framework of a Grand Strategy

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circumstances,” or that they “face a potential loss of freedom through some form of confinement, enforced servitude, or the like,” the court affirmed the finding of no past persecution.⁷³

The court’s reasoning in *Vicente-Elias* seems to stem from the fear of “opening the floodgates” that Foster describes, rather than proper legal analysis, as nothing in *T—Z—* limits “severe economic deprivation” to situations where the government takes away an existing asset or employment, rather than actions or policies preventing someone from obtaining such assets or employment in the first place. Thus, while the court purported to apply the standard in *T—Z—*, it actually parsed the standard in such a way as to require a higher threshold of harm.

So far, no circuit court has explicitly addressed whether the standard in *T—Z—* is valid, but it may well be challenged in future cases as imposing a higher standard for economic harm than generally required. In *Vicente-Elias*, the Tenth Circuit specifically noted assuming, without deciding, that the standard in *T—Z—* is valid.⁷⁴ Moreover, in *Kadri v. Mukasey*, where the First Circuit remanded pursuant to *T—Z—* a case involving a Muslim Indonesian who could not work as a doctor because of his sexual orientation, the court noted that it did not need to address whether the BIA’s new standard in *T—Z—* “survives *Chevron* review.”⁷⁵

Foster’s book comes at a critical time, not only because of increasing acceptance of the connection between refugee law and human rights law and significant developments in the current understanding of economic and social rights, but also because more asylum applicants are articulating the aspects of their claims involving socioeconomic deprivation. All jurisdictions, including the United States, now recognize that socioeconomic harm can rise to the level of persecution, but inconsis-

tencies and insecurities still obstruct attempts at coherent analysis. It is hoped that Foster’s meticulous research, sober reasoning, and original analysis will encourage further scholarship on these pressing issues and will lead to a more sophisticated understanding of both the refugee definition and the substantive content of economic and social rights. The proper adjudication of socioeconomic claims will likely play a vital role in challenging the lingering, dominant orthodoxy of civil and political rights, help coalesce the relationship between human rights and refugee law, and promote the development of refugee law, with some coherency, as a body of law.

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BOOK REVIEWS

Confronting Global Terrorism and American Neoconservatism: The Framework of a Liberal Grand Strategy. By Tom Farer. Oxford, New York: Oxford University Press, 2008. Pp. x, 257. £50, cloth; \$29.95, £16.50, paper.

It is happening again. A Democratic president is pilloried by the hawkish right for being inexperienced, soft, and blindly idealistic as regards national security and foreign policy. This reprise of our familiar political theater suggests that Barack Obama’s 2008 presidential victory did not close the book on the “neocons.” In fact, the political repudiation of neoconservatism at the ballot box has never been a guarantee of its decline. After all, neoconservatives made quite a lot of noise from the sidelines during the waning years of the Clinton presidency, rattling their sabers ever more loudly over Saddam Hussein’s Iraq. And just as the political exile of neoconservatives in the 1990s did not signal their retreat, their ubiquity in present policy debates—and the conviction with which they press their critiques—is proof that neoconservatism is with us still. Neoconservatism’s muscular and righteous vision of America’s historic power

⁷³ *Id.* at 1091–92.

⁷⁴ *Id.* at 1089 n.3.

⁷⁵ *Kadri v. Mukasey*, 543 F.3d 16, 22 (1st Cir. 2008) (noting that Kadri “may be able to sustain a claim for economic persecution”). The majority of the BIA had disagreed with the immigration judge’s finding that Kadri has suffered past persecution based on economic deprivation. *Id.* at 21.

and historical purpose continues to hold a great many Americans in its thrall.

In ways that become clear as one reads through *Confronting Global Terrorism and American Neo-conservatism: The Framework of a Liberal Grand Strategy*, neoconservatism might be seen as having much in common with the global terrorism that has been center stage since the terrorist attacks of September 11, 2001. In a daring gambit, Tom Farer—dean of the Graduate School of International Studies at the University of Denver—suggests that both draw on illiberal values, that both resort to inhumane strategies, and that both ultimately depend on an “envenomed” epistemology (p. 6). If neoconservatives fail to make a comeback—and if the Obama administration is remotely successful in undoing what many see as the damage done by eight years of neoconservative policies—then Farer and some others like him,¹ having carefully scrutinized neoconservatism’s theoretical underpinnings and the record of its implementation, will deserve some of the credit. In any event, as is apparent from President Obama’s early security and foreign policy initiatives, Farer’s book is attuned to the administration’s plans for change in these fields. The thoughtful, detailed program outlined in the closing chapter—the “grand strategy” of the book’s subtitle—is reflected in a number of Obama’s policies. For example, the president’s speeches in Turkey and Egypt this year clearly sought to “dramatically [signal] respect for the great body of Islamic believers” (p. 246). Similarly, Obama’s commitment to withdraw U.S. forces from Iraq, to close the Guantánamo Bay prison, and to end torture hold out the promise of deeds and not mere words: recognition that “a country like a single human being communicates principally by what it does, not what it says” (p. 248).

In a forthright foreword that is representative of Farer’s refreshing, colloquial tone and style (no doubt owing in part to the book’s first iteration as a series of lectures held at the European University Institute in Fiesole, Italy), Farer offers the reader an alternative map of the book that departs from the linear progression established by the ordinary

succession of chapters. The alternative map is presented to address the author’s self-effacing concern that the amount of detail in some of the middle chapters might turn the “general reader’s canter into a diversionary slog” (p. viii). Thus, Farer suggests reading selectively in chapters 2 and 3, and taking in the concluding chapter 6 ahead of chapters 4 and 5. None of this is necessary. In fact, the foreword’s playful proposal highlights two of the book’s mere handful of shortcomings. First, and directly contrary to the concern that Farer expresses in the foreword, the book could have benefited from *more* detail and depth. I will return to this point later, but it suffices to note that an adequate treatment of each of his vast subjects (liberalism, global terrorism, and neoconservatism) might have merited a single volume or more. To be sure, writing about all three was an inescapable part of Farer’s broader normative project—namely, a juxtaposition of global terrorism and neoconservatism to expose the illiberalism that they have in common. But writing about all three in such a condensed project necessarily risked simplifying each. Second, the almost postmodern character of the foreword’s proposal—that the book might better be read out of order—underscores the defiantly modern character of Farer’s project, which is a paean to liberalism qua international law that does not take into account the recent, seminal insights of critical and discourse theorists into international law’s (il)legitimacy and troubling power orientations. These potential deficiencies notwithstanding, Farer’s *Confronting Global Terrorism and American Neo-conservatism* is a lively, illuminating, and important contribution.

Unlike much that passes for American legal scholarship, Farer’s book is thoughtfully systematic. Chapter 1, for example, begins by presenting the book’s provocative thesis in a handful of pages. The most direct—and therefore, in effect, unsettling—summary of that thesis might be that the popular narrative about terrorism and the West’s reaction to it largely ignores the ideological similarities that American neoconservatives share with Islamic fundamentalist terrorists. “[M]ilitant Christian and Jewish groups within the West, *jihadists* in their own right,” Farer explains, “share

¹ See, e.g., MARY ELLEN O’CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW* (2008).

Al Qaeda's hostility to the liberal culture of tolerance, skepticism and individualism and yearn, like their bearded counterparts, for a restoration of traditional hierarchies, restraints, and uncontested beliefs" (p. 3) And, should the book's cover image (a photo credited to "AP/Lapresse" that features a patrolling American soldier in the foreground and what appears to be an Iraqi child clutching her head in a pose eerily reminiscent of Munch's *Scream* in the background) have left the reader in any doubt about who Farer has in mind for this blunt criticism, he concludes that these neoconservatives are "[s]trongly represented now in the Republican Party and the Bush Administration and increasingly influential in the mass media" (*id.*).

The rest of chapter 1 is given over to Farer's summary definitions of the book's working concepts—treatments that chiefly serve to fix the author's ideological position on what are necessarily contested and nuanced topics. The book's central concepts—terrorism and neoconservatism—get slightly fuller, but still summary, definitional treatment.² The definition of "human rights" also is truncated, largely conflating the theoretically rich concept with the broader debate over international law's bindingness (pp. 11–15). Strangely, in this context there is no citation to the work of Eric Posner and Jack Goldsmith or to their many critics.³ Instead, Farer seems content here—and else-

where in the book—to support his position with citations to formalistic evidence of positive law, including treaties and UN resolutions. The potentially troubling circularity of defining and theorizing human rights law by reference to human rights law goes unremarked. Farer's definition of "liberalism," his cherished foil to the rigid fundamentalism of both Islamic terrorism and neoconservatism, gets a mere five pages. "Liberalism, as I interpret it," Farer explains, "stems . . . from the normative premise that the good society is one that enables each individual to shape continuously a personal identity and a life plan in light of his or her understanding of the meaning and value and possibilities of human existence" (p. 6). He resolves the potential conflict between this vision and humankind's social embeddedness with a single sentence supported by two Dworkin citations: "[L]iberalism as I conceive it, contains within itself a tension between individual rights and communal interests but with a refutable presumption in favor of individual rights and a core zone where individual rights trump communal interests" (p. 8). As Farer moves forward in the book, he seamlessly substitutes international law as a proxy for liberalism. This substitution has two problematic consequences that I discuss in the concluding paragraphs of this review.

In each of the following chapters, Farer presents surveys of the ways in which international law frames particular subjects: *jus ad bellum* (chapter 2); *jus in bello* and torture (chapter 3); and an abstract (chapter 4) and case-specific (chapter 5, which deals with the Israeli-Palestinian conflict) consideration of democracy, self-determination, and minority rights. These chapters are the book's genius. In contrast to the crowding in chapter 1—where sweeping subjects push against each other without enough space—these later chapters allow Farer to develop the issues and his argument more fully. His command of the history and

² My own inexperience with research and commentary on Islamic terrorism renders me unable to say very much about Farer's survey of that subject—except to note that fifteen pages of definitional material, much of which is given over to the British experience of decolonization in India, strikes me as selective and summary. I am somewhat more familiar with the literature concerned with the roots of, and contemporary debate over, neoconservative theory. Farer largely bases his definitional treatment of the school on contemporary commentary in the popular media. The reader looks in vain for a citation to Carl Schmitt or Leo Strauss or even Jeremy Rabkin. Sergio Dellavalle has written a more substantive, independent treatment of neoconservatism. See Sergio Dellavalle, *The Necessity of International Law Against the A-Normativity of Neo-conservative Thought*, in *PROGRESS IN INTERNATIONAL LAW* 95 (Russell A. Miller & Rebecca M. Bratspies eds., 2008).

³ JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); see also Detlev Vagts, *International Relations Looks at Customary International Law: A Traditionalist's Defence*, 15 *EUR. J. INT'L L.* 1031 (2004); Andrew T. Guzman, *The*

Promise of International Law, 92 *VA. L. REV.* 533 (2006); Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 *HARV. L. REV.* 1404 (2006); Anne van Aaken, *To Do Away with International Law? Some Limits to the "Limits of International Law,"* 17 *EUR. J. INT'L LAW* 289 (2006); Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 *TEX. L. REV.* 1265 (2006).

received doctrine of international law is impressive, as is his grasp of the facts that run through the many cases and case studies with which he engages. The reader is the beneficiary of Farer's lifelong work with international law and in international institutions. He proves himself to be one of our best and most conversant scholars by writing with economy and grace about subjects as confounding as the principle of self-determination or the Palestinian/Israeli conflict. For compact treatments of the matters covered in these chapters, Farer's book is a revelation.

One criticism of these chapters might be that Farer risks subordinating his voice by extensively relying on, referring to, or orienting his work in relation to others. For example, his consideration of "Legal and Legitimate Use of Force" in chapter 2 (pp. 67–74) ultimately finds considerable congruence with the report produced by the UN secretary-general's High Level Panel on Threats, Challenges and Change. In his abstract treatment of "Terrorism, Communalism and Democracy" in Chapter 4, Farer keys his concluding remarks to the work of Jacob Levy (pp. 149–52), Michael Walzer (pp. 152–57), and Will Kymlicka (pp. 157–67). In chapter 5, entitled "The Iconic Conflict Between Israelis and Palestinians," Farer leans heavily on the work of Benny Morris for his concluding argument that the Israeli treatment of Palestinians has the moral and legal character of South Africa's thoroughly repudiated, repressive apartheid regime (pp. 202–12).

For all their independent merit, however, these substantive chapters lose the thread of the argument that global terrorism and neoconservatism form an illiberal axis—which was the most intriguing and distinctive possibility of Farer's project. As I hinted earlier, Farer stumbles here largely because of problems that arise from the uncritical equivalence he draws between international law and liberalism.

First, Farer's insistence on using international law as a benchmark for liberalism undermines his grand thesis because it prevents him from giving global terrorism equal time. International law's eroding, but stubborn, focus on states as subjects makes it difficult to prove the liberal case against the terrorists by reference to their disregard for

international law.⁴ I might still be persuaded by Farer's thesis that states pursuing neoconservative policies and nonstate practitioners of terrorism constitute equal threats to cherished liberal values like individuality and tolerance if such an argument were suitably advanced by evidence of Islamic fundamentalism's illiberal orientation as measured by moral, philosophical, or theoretical standards. But terrorism and state-driven neoconservative policies simply do not pose the same, direct challenges to the existing, state-centric legal regimes governing matters like the use of force, the conduct of hostilities, or claims for self-determination. These areas—with particular focus on the Bush administration's neoconservative policies and Israel's hard-line strategies—are the affairs of state to which Farer gives his primary attention in these substantive chapters. As a consequence, despite the bold juxtaposition that Farer implies in summary terms in chapter 1, the balance of the book loses track of its intended aim of illuminating the shared illiberality of neoconservatism and global terrorism. Instead, because of Farer's focus on international law, the book becomes a concentrated critique of Bush's neoconservatism. To be sure, that critique is well delivered. The book is a fervent and convincing argument for neoconservatism's myriad departures from, and incompatibility with, the norms of international law. But the terrorists slip out of sight, and the book drifts into shallower, more crowded waters than those suggested by Farer's more theoretically promising and distinctive thesis.

Second, what if Farer is mistaken in the view that international law constitutes a rarefied expression of liberalism's commitment to individual dignity and rationalism? What if Farer's unwavering embrace of international law reflects a species of the fundamentalist formalism that causes him so much concern as he considers neoconservatism

⁴ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 57–58 (6th ed. 2003) ("It is states and organizations (if appropriate conditions exist) which represent the normal types of legal person on the international plane. . . . [And] it is as well to remember the primacy of states as subjects of law."). *But see* Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law*, 4 EUR. J. INT'L L. 447, 453 (1993).

and global terrorism? As to the former question, a rich body of literature, neglected by Farer, has fundamentally challenged the well-worn foundational assumption that international law unquestioningly stands in for liberalism and progress. These commentators point to international law's facilitation of European colonialism in the name of enlightenment values.⁵ Human rights law and the law of war, on which Farer so extensively relies in his liberal critique of neoconservatism's inhumane and militaristic tactics, also has come in for this kind of scrutiny.⁶ More fundamentally, these critics doubt that international law can be Farer's convenient and clean solution to complex and confounding issues like those implicated by the claims and actions of neoconservatives and terrorists. They understand, instead, that in its elusive structures and contingent vocabulary, international law is an argument, a tool, for the advancement of unarticulated, often unexamined, interests.⁷ Farer's strong confidence in liberalism—as embedded in the defined catalog of international norms that he so effectively deploys against the Bush administration's neoconservative policies and Israel's hard-line strategies—might be susceptible to the critique that he levels against Fukuyama's substantive triumphalism (p. 1) and Islamic terrorism's fundamentalism (pp. 15–28). Proceduralists have argued that substantialism of any stripe is an invitation to the assertion of pathologies like power and wealth at the expense of the highest liberal value: rationality.⁸

Proving the illiberal parallelism of neoconservatism and fundamentalist Islamic terrorism would have been quite a blow—if Farer had landed it squarely. And in view of his commanding perfor-

mance in *Confronting Global Terrorism and American Neo-conservatism*, I am convinced that he could deliver on that grander thesis. In the meantime we have this convincing and accessible political-legal salvo against a well-documented slate of neoconservative policies. For that much we can be grateful indeed.

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The Law of Command Responsibility. By Guénaél Mettraux. Oxford, New York: Oxford University Press, 2009. Pp. xxiii, 307. \$120, £60.

The international law of command responsibility has won renewed prominence after languishing ever since its origin in the post–World War II war crimes trials. That resurgence derives from the cases in the ad hoc international criminal courts, particularly the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), and from its codification in Article 28 of the Statute of the International Criminal Court. Thus it is valuable to have Mettraux's impressive book, *The Law of Command Responsibility*. It derives from his Oxford doctoral thesis supervised by Christopher Greenwood. It benefits from the author's experience on the staff of the ICTY and from his practice before it.¹ His prose is clear and compact, and his coverage is comprehensive.² The volume will be particularly useful for lawyers staffing tribunals not having the institutional memory of the ICTY or ICTR.

At the outset it is important to understand what the concept of command responsibility includes—and what it does not. It does not cover cases in which a commander orders or assists in the commission of atrocities. Then a commander is a principal in the underlying crime or an aider

⁵ See, e.g., MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS* 3, 98–178 (2002); ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 1–12 (2004); S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 3–7 (2004).

⁶ See, e.g., DAVID KENNEDY, *THE DARK SIDES OF VIRTUE* (2004); DAVID KENNEDY, *OF WAR AND LAW* (2006).

⁷ See KENNEDY, *OF WAR AND LAW*, *supra* note 6; MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA* (Cambridge University Press 2005) (1989).

⁸ See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (William Rehg trans., 1998).

¹ He has written elsewhere on international criminal tribunals. See, in particular, his *International Crimes and the Ad Hoc Tribunals* (2005), reviewed at 100 AJIL 993 (2006) by Dermot Groome.

² One editorial quibble: there is a tendency to misspell German words such as “Gesellschaft” (p. 67 n.127), “Vorgesetztenverantwortlichkeit” (p. 81 n.184), “Geburtstag” (p. 86 n.210), “Zeitschrift” (p. 294), and “Bemerkungen” (*id.*).