Chapter 18

THEORIES ABOUT INTERNATIONAL LAW

Section A. Some Samples of Theoretical Outlooks.
Section B. Monism & Dualism.
Section C. Principles, Practice and Legitimacy.

1. ***Is theory influential on outcomes under international law and on its development?*** If you have taken these materials in the order in which we have arranged them, your study of this chapter comes after you have had experience with many of the major aspects of law in the international system. You will have begun to form your own ideas about the similarities and differences between the law you have studied here and the public law you study in other courses. For example: putting to one side the difference between the United States Supreme Court and the International Court of Justice as to authorization to decide, do you find these courts acting similarly or in sharply different ways in similar types of cases, i.e. where the Supreme Court is sitting in judgment upon the conflicting interests of two or more states of the Union.

We have put the theory material this far along for three reasons: (a) we wanted you to begin to grope toward theory on your own as you went along; (b) we wanted you to see from case study that so far as professional methodology and involvement go, international law calls upon the same range of skills as other systems of law do; (c) we wanted to avoid raising too many doubts and prospects before you had become more experienced in the subject matter.

Although underdeveloped, the international legal system has engendered extensive theoretical discussion. Why so much doctrine for so few rules and effective institutions to apply them? Is it because the scholars who have committed themselves to this field are creating theories and schools, casting their expectations and preferences as law simply because they have so little in the way of real law stuff to deal with? Do the materials which follow suggest that scholars are theorizing about reality or their dreams? Are they promoting the development of the law?

2. ***Critical independence is indispensable.*** International public law, more so than other bodies of law, tends to be presented in discrete doctrinal packages. Schools abound. Learned people encourage disciples. Deviation becomes intellectual heresy. Those who do not agree are dolts. Also, international law is often appealed to by advocates highly interested in particular outcomes. This is done either because international law is highly amorphous and hence susceptible to a wide range of assertion or because it becomes an argument of last resort. Sometimes these groups of distorters, the didactic scholars and the argumentative activists, combine forces. As a result there is claimed for

the international legal system a competence, a completeness and a virtue that it may not in fact possess. In this field the rule of caveat emptor is quite important for shoppers of doctrine.

In methodology, international public law traditionally has been somewhat old-fashioned by the most modern techniques of some domestic systems. It is too often highly exegetic, rigorously logical (even when there are errors in the logic), antiseptic and remote. Quantification technique as to events, things and attitudes of social groups barely exists. Even the schools that claim for themselves the utmost in realistic modernity are hardly scientific in any sense of association with modern scientific and engineering technology. Major propositions are largely supported by secondary authorities. In large part, perhaps, the generally backward methodological standard reflects the reality that, after all, the international legal system exists by consensus, and the world does not yet have a consensus as to what law is and how it should be used.

3. ***Basic jurisprudential problems.*** International law shares with domestic law certain basic problems. These are the relationship of law to justice, the essential nature of law, and the judicial process in relationship to other types of decision-making.

Beyond these, international law throws into issue other fundamental questions:

(1) Is international law law in terms of a generally accepted concept of law, whatever that concept is?

(2) If international law is law in some sense or other, what is its relationship to other congeries of law, such as natural law, critical legal theory, feminist jurisprudence, national law, international organizations law, regional systems law?

(3) Do international and domestic law form two separate legal systems (dualism) or are they each a part of one monolithic system (monism)?

4. ***Philosophy, for what purpose considered?*** What follows is intended to assist you in the development of your philosophic outlook about the legal element in the international system. This includes the development of cognition of both what international law is and what it ought to be or become. You will have been doing these cerebrations, subliminally perhaps, as you have gone through the preceding chapters. Your instructor may have chosen to begin with this part or to go to it immediately after Chapter 1. Our preferences as to sequence are stated in the preface to the first edition, but we recognize that it is more traditional to begin with subject matter of the sort here dealt with.

The history, nature and sources of international law are sometimes coupled as parts of a single item of information. In this book sources are dealt with in Chapter 1 and elsewhere. History and nature are very closely linked by a number of thinkers about international law, especially those writing up to World War II. For others, mainly contemporary scholars, history is not seen as having much to do with nature.

5. ***The origins of international law.*** What a majority of modern writers regard as international law began to differentiate from a universalistic public law in the West about 600 years ago. Politically, after the Roman city-state that became an empire withered away, segments of the old imperium began to see themselves as entities, not as mere extensions of a king's domain. These discrete new entities, despite Louis XIV's famous statement of identity between himself and the state, were incorporeal and distinct from any monarch. Certainly by the time of Ferdinand and Isabella—and probably at least one hundred years earlier—the nation-state as we know it today (territory, population, government) was in being in the West.

These entities soon evolved standards of conduct toward each other beyond the rules of etiquette between monarchs. Some of these were and still are standards of political propriety, such as diplomatic protocol, principles of international relations and comity. Other standards of conduct—always minimum ones—came to be thought of as creating rights and obligations for states, analogous to the rules (or norms) that states themselves imposed on persons within their jurisdiction, not as whim or caprice but as law. Specifically, the part of Roman law that pertained in the hey-day of Roman authority to controversies between non-Romans, the jus gentium, became a term used yesterday, and in some measure still, to refer to "customary international law."

The international law of today does not show distinct linkages to ancient Oriental and African practices. Even the modern descendants of very old Oriental cultures accept international law as the product of Western evolution. Ignorance and neglect in the West of the history of law and related institutions in the East constitute the most likely explanation of this omission. Scholars in some of the modern states that have evolved from the Oriental historical matrix sometimes chide the West for this inattention and threaten (usually mildly) to set the matter aright sometime. New states in Africa sometimes are heard in similar vein.

This fact makes the existing international legal system somewhat vulnerable to attacks on its universality by states not present at its creation. More often, however, the states that are not satisfied with the existing order attack specific rules or principles, not the system. Classical, scholarly Marxists, and many who are non-Marxist, deprecate the system of customary international law because it seems to them unavoidably to state, as law, rules and principles fostering the interests of the power elites asserting them. The socialist states of the former Second World, however, came in practice to accept the system and many of its most conventional rules and principles, while selectively seeking to deny status as law to other rules and principles because they are contradictory to national preferences including, but not limited to, ideological ones.

6. ***Naturalists, positivists, the "new wave", and eclectics.*** In the West international law was systematized by more or less scholarly writers (publicists), not power-wielding officials. The excerpt from Stone, *supra,* a modern publicist, refers to some of these. Vitoria (1480–1546) and Suarez (1548–1617) perceived that beyond individual states

there was a community of states governed as to their interactions by international rules. These rules were to be found by rational derivation from basic moral principles of divine origin. These Spaniards' concepts developed into a school of natural law, paralleling for international law an earlier jurisprudence about domestic secular law.

The school of scholastic naturalism was resisted by writers who recognized a legal community but said that its rules came either in whole or in part from state practice, not from God. Gentilis (1552–1608) seems to have been the first to dare say there was more earthliness than theology behind international law. Hugo Grotius (the latinized version of a Dutch name) was born in 1583, and if systematized international law has a single historical beginning it is in his De Jure Belli Ac Pacis, printed in 1625. Grotius served once as Sweden's ambassador, an interesting practice not long continued by states; and as a representative of fishing and sea-trading national interests he gave us, inter alia, the principle of the freedom of the seas as customary international law. Grotius is also type-cast as the first eclectic, because he accepted not only positive law—state practice—as a source of international law, but also natural law. But the natural law of Grotius was more secular than that of the Spanish scholastics, for it was based upon man's rationality—"the dictate of right reason"—rather than upon revelation, exegesis, and deduction of God's will.

A second school of naturalism, secular and rationalist, evolved and had some influence on the early recognition and reception of international law by courts in the United States. Thus, in finding vessels engaged in the slave trade subject to seizure by American privateers, Justice Story, on circuit, wrote:

> "* * * I think it may unequivocally be affirmed, that every doctrine that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations; and unless it be relaxed or waived by the consent of nations, which may be evidenced by their general practice and customs, it may be enforced by a court of justice * * *." United States v. The Schooner La Jeune Eugenie, 26 F.Cas. 832, 846 (U.S.Cir.Ct., 1st Cir., 1822) (No. 15,551).

But at the Supreme Court commitment to positivism prevailed in a philosophically indistinguishable slave trade situation. Marshall let the slavers keep their "property" [sic]: "* * * This, [slavery], which was the usage of all, could not be pronounced repugnant to the law of nations * * *." The Antelope, 23 U.S. (10 Wheat.) 66 at 120 (1825). Why? The "usage of all [States]" is otherwise and controls. Generally speaking adherence to natural law, especially if of the second or rationalist variety, tends to be a form of idealism about law. Positivism tends to emphasize conduct-phenomenology, e.g. how many states accept that "x" is law, just or unjust?

The role of the writers. Idealism tends to transform into law decision-makers' preferences and down-grade the element of states' volition in accepting a rule or principle as one of law. There has long

been in international law a pronounced emphasis on the distinction between the law that is and what ought to be the law. But in some legal philosophies about international law it is harder to discern the line of difference than in others, especially if the publicist is an eclectic, or policy-oriented.

Some modern American writers, for example, devote themselves to telling us how to make better systems, stressing structural and procedural arrangements as if these were the basic need or problem. Others, self-characterized as American philosophic neo-realists, are really so idealistic as to assume that American values are common goal values on the planet and that law is not normative but an argumentative variable in the power process by which authorized decisionmakers—lawyers, judges, diplomats, politicians—put these goal values into effect with authoritativeness. Others, just as seriously argue for deconstruction of the whole system. Recently theorists, including those who concentrate in feminist philosophy and critical legal theory, have begun to approach the subject of international law from different perspectives, some challenging the very nature and operation of international law. Perhaps at the central core are those who are essentially mild positivists—in the tradition of American pragmatism—who try to find out what the great weight of acceptance by states shows and to emphasize the norms stated in obligatory form in international agreements.

The writers—and now in the United States, the Restaters—have had, and continue to have, great influence on what judges—and even foreign offices—do in relationship to international law. In civil law countries, where doctrine, i.e. scholarly writing, is the primary influence on jurisprudence, i.e. case law, this is normal. In the common law world it is not normal for domestic law, but it is for international law. For today the judges' perceptions of customary international law are not their own but those of the writer or school they have chosen to follow, rejecting others. And the writers, as we have seen, vary widely in what they perceive. This is the basis of their power and their responsibility. Advocacy in any arena, national or international, as to what the relevant international law rule is requires the advocate to be very familiar with the literature, both that which can help his cause and that which might destroy it.

7. ***Some questions and issues for you to come back to.*** With the above guide, and with questions in mind such as those to follow, evaluate the messages of the excerpts from writings below. Is the writer an idealist or is he reality-oriented? In the historic scheme of differentiation, what label do you give the writer? To your mind does the writer help or hurt the cause of legal order in the world community? Why?

What is international law to you now? Is its existence considered by you to be proved, disproved or not proved? Do you see an identity or a difference between international law and law in the international system? Is international law merely an aspect of a science of international relations? If not, where do you draw lines between principles of international relations and principles of international law? On which side of a line do these fall: self-determination of peoples, nonintervention, equality of states, use of economic force? Can the "rules of international law" be ignored? Would Hitler have had one answer before and another after WWII? What would Saddam Hussein's answer be today? How about the leaders of the various factions in Bosnia. What do you think? Are these matters of pure power or is law involved? If so, how? As to the existence or not of international law, should it suffice to note, as then Professor (later judge of the International Court of Justice) Jessup did in 1940, that foreign ministries have legal staffs, that diplomatic correspondence is full of assertion and counterassertion as to the international law issues involved in a controversy, that this has been true for at least three centuries, and that, by inference, there are jobs of international lawyering? See Jessup, *The Reality of International Law*, 18 For.Aff. 244 (1940).

SECTION A. SOME SAMPLES OF THEORETICAL OUTLOOKS

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1 AUSTIN, JURISPRUDENCE 177, 189 (1861)

* * * Speaking with greater precision, international law, or the law obtaining between nations, regards the conduct of sovereigns considered as related to one another.

And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.

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* * * But if perfect or complete independence be of the essence of sovereign power, there is not in fact the human power to which the epithet sovereign will apply with propriety. Every government, let it be never so powerful, renders occasional obedience to commands of other governments. Every government defers frequently to those opinions and sentiments which are styled international law. And every government defers habitually to the opinions and sentiments of its own subjects. If it be not in a habit of obedience to the commands of a determinate party, a government has all the independence which a government can possibly enjoy.

PHILLIPSON, INTRODUCTION TO GENTILI, DE JURE BELLI LIBRI TRES (2 TRANS., CARNEGIE ENDOWMENT, 1933) 22A *

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5. Conception of the Law of Nations—Society of States—Civil Basis—Membership of the Society. The law of nations, designated by Gentili ius gentium (the customary expression adapted from Roman Law) is that law which all nations or the greater part of them—"maior parsorbis"—agree upon. It is the law of the society or community of states, of the "Societas gentium". This is a concise and simple description, whereby the ambiguous Roman term is made to refer explicitly to international relations. It is not, of course, an exact definition, as it involves, though unavoidably, a tautologism. Indeed, no satisfactory definition had hitherto been formulated. Grotius adopts substantially the conception of Gentili, when he says that the law of nations (ius gentium) is that law which has received obligatory force from the will of all nations or of many; whilst Vattel, like Gentili, verges on tautology in his statement that the law of nations (droit des gens) is the science of the rights and obligations which exist between nations. Some writers emphasize in their definitions the origin of the law of nations, others the nature of the subject-matter, and others again lay stress on those concerned in and bound by it. * * *

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* * * Very frequently we find that Gentili appeals to the ius naturae in order to test the validity of a particular doctrine or the legitimacy of a certain practice; but usually he disregards the current vague metaphysico-legal significance of that term, and interprets it in the sense of humanity, justice, and the best common sense of mankind. And throughout his exposition he insists on the positive juridical sanction quite as much as on the considerations of ethics or on the behests of divine law, and he is careful to discriminate between the work and objects of theologians and the sphere and functions of jurists.

The pioneer work of Gentili was in harmony with the larger movement of the sixteenth century which witnessed a transformation of society, the establishment of a new spirit and wider outlook, the decline of theocracy, and the rise of the modern State. The political conceptions of the Middle Ages, which identified civil and ecclesiastical authority, were derived on the one hand from Greek and Roman doctrines, and on the other from Hebrew and Christian teaching. Towards the end of the thirteenth century the temporal supremacy of the papacy began to be seriously opposed, especially in France, and its decline was further hastened on by the great schism. The conciliar movement of the fifteenth century spread the theory that sovereign power was of the nature of a trust. The Renaissance and the Reformation, two sides of

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the same great intellectual and moral awakening, revived humanism, scientific curiosity, established a spirit of independence, political as well as spiritual, and a desire to find a more rational basis than the arbitrary theocratic for human society, and substituted civil for clerical authority, a society of territorial States resting on law and juridical sanction for a theocratic confederation subject to canon law. * * *

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2 WOLFF, CLASSICS OF INTERNATIONAL LAW CARNEGIE ENDOWMENT 11, 19 (1934) *

§ 7.—Of the society established by nature among nations. Nature herself has established society among all nations and binds them to preserve society. For nature herself has established society among men and binds them to preserve it. Therefore, since this obligation, as coming from the law of nature, is necessary and immutable, it cannot be changed for the reason that nations have united into a state. Therefore society, which nature has established among individuals, still exists among nations and consequently, after states have been established in accordance with the law of nature and nations have arisen thereby, nature herself also must be said to have established society among all nations and bound them to preserve society.

* * *

§ 25.—Of the positive law of nations. That is called the positive law of nations which takes its origin from the will of nations. Therefore since it is plainly evident that the voluntary, the stipulative, and the customary law of nations take their origin from the will of nations, all that law is the positive law of nations. And since furthermore it is plain that the voluntary law of nations rests on the presumed consent of nations, the stipulative upon the express consent, the customary upon the tacit consent, since moreover in no other way is it conceived that a certain law can spring from the will of nations, the positive law of nations is either voluntary or stipulative or customary.

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STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT LIII (1954) **

* * * Is there an international law? In what sense, if any, are its rules binding? To whom are such rules (insofar they exist and bind) directed? Can international law be said to be the law of a society or a community? Nor have the new approaches yielded even substantially new answers to the old questions. John Austin's denial of the *legal* force of international law lacked, no doubt, the temperateness of Professor Corbett or the passionate cynicism of a Lundstedt; but there is little now said that he did not foreshadow a century ago. Today, as centuries ago, those who champion the cause of international law as "law", find its source of validity either in natural law, as did Vitoria and Suàrez, or in positive enactment, as did Gentili and Zouche, or in a mixture of the two as in Grotius. Even Kelsen's reduction of the relations between international law and international society to the identity of *legal order* and *legal community,* while apparently resolving a traditional perplexity into a mere verbal illusion, has proved to be a new evasion rather than a new solution. Its identification of the international legal order with the international legal community is achieved only by excluding from the notion of "society" the very reference to the world of existence which was the essential source of the exorcised perplexity. * * *

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So, too, it may be striking that modern theories as opposed in temper as to those of Professors Lauterpacht, Lundstedt and Messner converge by different paths on the importance of recognising the role of the individual in international law. But these questions of the "Aye" or "No" of the international status of individuals are in themselves as old as the natural law of a Suàrez or a Grotius: and mere theory is unlikely to advance them further. What theory rather requires is a fuller understanding of the mediating, distorting or obstructing operation of State entities on human relations.

Such fuller new inquiries do not lend themselves to quick answers, nor at all to armchair answers. The need for long and arduous field research within the most inaccessible and dangerously controversial area of human relations is (it is believed) a basic reason for the modern stalemate in juristic thought concerning international law. If such needed inquiries are shunned, then theory is thrown back on such barren questions as whether the actual self-subordination of States to wider international association, functionally limited, warrants the use of the term "community" to describe such an international association. And since the degrees of such self-subordination are potentially infinite in number, ranging from the most transient association on the battlefield by way of a truce for burying the dead, through the intimate organic association (on paper) of a United Nations Organization, to the intimacy in fact of a successful federation such as that of the United States or the Commonwealth of Australia, such inquiries are as interminable as they are barren.

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Insofar, therefore, as we are concerned with a "living" or "operative" international law, with "law in action" as distinct from "the books", the continuance of armchair debate whether international law is "law", will not advance understanding. Nor does it really advance matters to interpret "law in action", as do Dr. Schwarzenberger and others, to mean the law enounced or applied by tribunals or competent State organs, as distinct from the writings of publicists. So far as concerns the effects of international law *on men,* and *of men on law,* the law of tribunals and State organs may still be "law in the books" rather than "law in action". Nor has Professor Corbett's search for international "law in action", despite its courage and vigour, really faced the preliminary question, what "international law in action" may mean. It is, in the present view, impossible to study "law in action" without relating the law not merely to the supposed interests and conduct of States, but also (and above all) to those of the men and women of particular times and places. And if this be so, then it becomes apparent that the task of assessing the effect on human interests and human conduct of the interposition of State entities between the great aggregations of mankind, is an inescapable preliminary.

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It is at least probable, that the magic circle of the unsolved classical problems will not be broken until we cease to assume that the categories, conceptions, and methods of municipal law are sufficient, or even necessarily relevant, either for testing the validity of international law or for understanding its actual operation. Certainly our plight seems to cry out for insights which the classical problems, even when clothed in twentieth century philosophical garb, fail to yield. Such an escape from the classical magic circle might also release intellectual energy for tasks more fruitful than those which now engage them.

KELSEN, THE PURE THEORY OF LAW [a]

51 Law Quarterly Review 517 (1935).*

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28. The law, or the legal order, is a system of legal norms. The first question we have to answer, therefore, is this: What constitutes the unity in diversity of legal norms? Why does a particular legal norm belong to a particular legal order? A multiplicity of norms constitutes a unity, a system, an order, when validity can be traced back to its final source in a single norm. This basic norm constitutes the unity in diversity of all the norms which make up the system. That a norm belongs to a particular order is only to be determined by tracing back its validity to the basic norm constituting the order. According to the

a. The late Professor Albert A. Ehrenzweig, one time a student of Kelsen, always said the correct translation is "the theory of pure law."

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nature of the basic norm, i.e. the sovereign principle of validity, we may distinguish two different kinds of orders, or normative systems. In the first such system the norms are valid by virtue of their content, which has a directly evident quality compelling recognition. * * *

29. With legal norms the case is different. These are not valid by virtue of their content. Any content whatsoever can be legal; there is no human behaviour which could not function as the content of a legal norm. A norm becomes a legal norm only because it has been constituted in a particular fashion, born of a definite procedure and a definite rule. Law is valid only as positive law, that is, statute (constituted) law. Therefore the basic norm of law can only be the fundamental rule, according to which the legal norms are to be produced; it is the fundamental condition of law-making. The individual norms of the legal system are not to be derived from the basic norm by a process of logical deduction. They must be constituted by an act of will, not deduced by an act of thought. If we trace back a single legal norm to its source in the basic norm, we do so by showing that the procedure by which it was set up conformed to the requirements of the basic norm. Thus, if we ask why a particular act of compulsion—the fact, for instance, that one man has deprived another of his freedom by imprisoning him—is an act of law and belongs to a particular legal order, the answer is, that this act was prescribed by a certain individual norm, a judicial decision. If we ask, further, why this individual norm is valid, the answer is, that it was constituted according to the penal statute book. If we inquire as to the validity of the penal statute book, we are confronted by the State's constitution, which has prescribed rules and procedure for the creation of the penal statute book by a competent authority. If, further, we ask as to the validity of the constitution, on which repose all the laws and the acts which they have sanctioned, we come probably to a still older constitution and finally to an historically original one, set up by some single usurper or by some kind of corporate body. It is the fundamental presupposition of our recognition of the legal order founded on this constitution that which the original authors declared to be their will should be regarded as valid norm. Compulsion is to be exercised according to the method and conditions prescribed by the first constitutional authority, or its delegated power. This is the schematic formulation of the basic norm of a legal order.

30. The Pure Theory of Law operates with this basic norm as with an hypothesis. Presupposed that it is valid, then the legal order which rests on it is valid also. Only under this presupposition can we systematize as law (i.e. arrange as a system of norms) the empirical material which presents itself for legal recognition. On the composition of this material (acts) will depend also on the particular content of the basic norm. This norm is only an expression for the necessary presupposition of all positivistic constructions of legal material. In formulating the basic norm, the Pure Theory of Law in no way considers itself as inaugurating a new scientific method of jurisprudence. It is only trying to make conscious in the minds of jurists what they are doing when, in seeking to understand their subject, they reject a validity founded on natural law, yet affirm the positive law, not as a mere factual assembly

of motives, but as a valid order, as norm. With the theory of the basic norm, the Pure Theory of Law is only trying to elucidate, by an analysis of the actual procedure, the transcendental-logical conditions of the historic methods of positive legal knowledge.

31. Just as the nature of law, and of the community which it constitutes, stands most clearly revealed when its very existence is threatened, so the significance of the basic norm emerges most clearly when the legal order undergoes not legal change, but revolution or substitution. In an hitherto monarchic State a number of men attempt to overthrow by force the legitimate monarchic government and to set up a republican form in its place. If in this they are successful, that is, the old government ceases and the new begins to be effective, in that the behaviour of the men and women, for whom the order claims to be valid, conforms in the main no longer to the old but to the new order, then this latter is operated as a legal order, the acts which it performs are declared legal, the conditions which it proscribes, illegal. A new basic norm is presupposed—no longer that which delegated legislative authority to the monarch, but one which delegates such authority to the revolutionary government. Had the attempt been a failure, had the new order, that is, remained ineffective, in that behaviour did not conform to it, then the acts of the new government become not constitutional but criminal (high treason), not legislation but delict, and this on the ground of the validity of the old order, which presupposed a basic norm delegating legislative power to the monarch.

If we ask what, then, determines the content of the basic norm, we find, on analysing judicial decisions back to their first premises, the following answer: The content of the basic norm is determined by the condition of fact out of which the order emerges, given that to the order there corresponds, amongst the human beings to whom it refers, a substantial measure of actual behaviour.

This gives us the content of a positive legal norm. (It is not, of course, a norm of a State's legal order, but a norm of international law, which, as a legal order superior to that of the individual States, legally determines their sphere of jurisdiction.) * * *

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DeVISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 404 (1968) *

It was doubtless inevitable that a long period of war on a world scale and of unexampled political tensions should have a profound influence on the direction of thought in the field of international law. The descriptive methods of voluntarist positivism in vogue at the beginning of the century, like those derived exclusively from formal logic, are

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everywhere in retreat. Contemporary legal thought is intensely alive to the need of a new set of values in the foundations of positive international law. From now on it refuses to see in that law merely a technical order without moral inspiration or teleological direction.

The legal thought of today seeks in the direct observation of international life a new field of study. This is not a matter, as there is a tendency to say, of reconstructing international law on a foundation of sociology, but of scrutinizing the *raison d'être* of norms, restoring the contract between the normative apparatus and the underlying realities, and thus sifting through a more broadly informed criticism the rules and practices of international law perceived in the living process of application. In this renewed study the man of law will confront without methodological prejudice realities which at times are ill-adapted to his formal categories. He will not forget, however, that the observation of international life, though it never consists in the mere collection of raw facts, provides only the data for legal elaboration; that legal elaboration has its proper function, which is to select from these data only those which are adapted to social ends and which a complex of characteristics (external prominence, generality, regularity) makes fit material for his particular technique. So understood, enquiries into international relations promise to be fruitful. Properly conducted, they will have a vivifying influence; they will re-establish international law in the plenitude of its ends and its efficacity.

Even now this new orientation is apparent on the plane of doctrinal studies. We can find it again in the jurisprudence of the International Court of Justice, in the work of codification going on under the auspices of the United Nations, in the creative effort of international organizations. Everywhere is felt the need to reinvigorate legal technique, to free it from prefabricated categories by associating it more closely with the study of a social milieu in accelerated evolution.

From this realization flow new demands. One is fundamental and moral; in a crisis of human values it insists upon respect for these at the heart of every organized society. There are others, more contingent in character, because tied to the present forms of the distribution of power among nations: such is that demand of effectivity which we have so often encountered and which, in a still primitive order of relations, has a more prominent place than anywhere else.

The study of power, both in its distribution and in its action, has had a large part in our discussion. The reason is that, more than any other, it reveals the tensions and the convergences that characterize the present relations between the political fact and the law. Belonging as it does both to the internal and to the international order, the action of the State is at the center of international relations and is for the moment their most salient feature. It compels the man of law to penetrate beyond the formal manifestations of power into its intimate springs and to do his share towards endowing power with an organization adapted to the common international good.

The problem of the future is that of the transformations of power. There are many signs that the structure of international relations is on the eve of profound changes. Territory, which since the end of the middle ages has provided the firmest base for these relations and ensured their stability, has no longer the same significance. It is all too clear that the existence of atomic weapons, of long-range rockets of increasing accuracy, rob frontiers of their traditional role as bulwarks of power and security. It is not less evident that some of the pacific activities of States cannot go on without more or less serious repercussions in neighboring countries. Consequently some scientific and technological operations (nuclear experiments, diversion and pollution of waters) call for international regulation. Similarly, an economy of international dimensions can no longer conform to political and legal conceptions allied with a configuration of close-walled national units. Association, even integration, are the new forms of power-distribution that force themselves upon States in search of wider markets.

Some of these structural transformations are partially in effect and in course of development. Others are scarcely visible on the horizon. The man of law owes it to himself to watch them; he will go surety for them only in so far as they seem to him factors of progress. No more than any other form of organization do federal structures have value in themselves: like the others they may become the instrument of political or economic antagonisms that divide peoples. The redistribution of power can be efficacious only when based upon solid realities; it can be beneficent only if it guarantees order and peace.

KAPLAN AND KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW 5 (1961) *

No one can observe the international political system without being aware that order does exist, and that this order is related in important ways to formal and authoritative rules, that is, to a body of law and to a process of law-government. These rules are sustained by the genuine interests which nations have in restraining certain forms of international conduct, even though these constraints must apply to their own conduct as well as to that of other states. To understand the substance and limits of such constraining rules, it is necessary to examine the interests which support them in the international system, the means by which they are made effective, and the functions they perform. * * *

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International Law as "Law:" Sometimes international law is viewed as a rather strange breed of law to which the term "law" is applied only by courtesy if at all. A number of great legal philosophers—Hobbes, Pufendorf, Bentham, and Austin are examples—have all doubted the legal character of international law, and the charges and counter charges which pervade the international community today seem to provide empirical support for their view. Clearly some definitions of law would exclude international law. Disputes, for example, are not routinely decided by an international judiciary, and there exists no coercive agency of formal international status which can effectively enforce the law. Rules do not emanate from any single "sovereign." Indeed, the legal order is not primarily vertical, or hierarchical, as it normally is in domestic government. Rather it is structured horizontally, composed predominantly of formally equal centers of legal authority called "states." We have only the beginnings of supranational authority in the United Nations and in various regional organizations.

* * *

Now, in spite of the differences in terminology and the fact that a critic may get considerable political mileage from invoking the accusation that international law has been flouted, processes in the international and domestic arenas are in some respects comparable. The particular decision disposes of the case and enters into the body of available precedent, whether that decision is persuasive or not. The focus of critical attention is to undercut its status as a norm to be invoked by others in similar circumstances, and it is to this end that some continue to call it a violation of international law. The more arbitrary it can be made to appear, the more radical the innovation, the more it can be related to selfish objectives of a particular state, and the more it offends widely shared and deeply felt values, the less persuasive it will be as precedent for others.

* * *

Doubts about a law-system which lacks judge and sheriff have, we think misleadingly, been frequently expressed as a theory of international law which describes it as a "voluntary" system based on the "consent" of "sovereign" states. It does not require much insight into law-politics to see a parallel between this theory and the consent theory of domestic government. Whatever the moral appeal of the consent theory at both levels (it represents a dislike for coercion), states "consent" to international prescriptions in the same sense that individuals "consent" to existing laws. They recognize the general need for a system of order, they regard the bulk of existing regulation as either desirable or at least tolerable, and they accept what remains because they have to—because they lack the ability to change it. The more intolerable a regulation is, the more pressure there is to seek a change by any means possible.

The point is not, of course, that legal institutions in the international community are adequate to contemporary affairs. Obviously they are not. But these institutions, such as they are, exist and contribute to international order. They will continue until some political combination

has the capability to create new institutions more consonant with order and, we can at least hope, with a decent regard for human values. This creative process is presently taking place, on both a universal scale (the United Nations complex) and, perhaps more successfully, in a variety of regional and functional organizations such as NATO and the European Communities.

The authors recognize the merits of criticisms that distinguished observers such as George Kennan have made regarding too great a reliance upon legal processes. American foreign policy has often been formulated without sufficient attention to the role of force and of national interests. We do not wish to encourage naiveté of the sort he describes as "legal idealism," a reliance upon abstract rules that are institutionally unsupported. We concede that nations often do act in partisan ways in support of immediate political objectives. But we contend that much of international conduct is doctrinally consonant with normative standards, even though inconsistent with particular immediate interests, and that long-term self-interest can and does provide political support for internationally lawful conduct.

* * *

Question. At this stage of your study are you willing to accept international law as law? Why or why not? In retrospect, does Chapter 1 have a positive, negative, or neutral influence on your attitude? If you do not consider at this point that international law is law, what is the minimum required to make it law?

* * *

SCHACTER, PHILIP JESSUP'S LIFE AND IDEAS

80 American Journal of International Law 878, 890 (1986).*

Jessup's Ideas on International Law

In his long, productive life, Jessup expressed himself on virtually all of the major issues of contemporary international law. He did so mainly in articles, lectures and AJIL editorials, many of which were collected and published in books. He never produced a comprehensive treatise or a grand theory. Typically, he addressed specific current issues and that led him often into fundamentals. He felt impelled to rebut the skeptics who questioned the reality of international law and the nationalists who construed the country's interests in a narrow way. Jessup's responses to them were essentially pragmatic. He stressed the essential role of rules in the day-to-day business of world affairs; he pointed to the costs of disorder and conflict in the absence of law; he sought to show how law furthered the shared interests of states. In the same vein, he dealt with the meaning of rules and concepts, pointing out always how the issues bore on the interests of the governments and peoples concerned.

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His concern with the function of rules is evident particularly in his judicial opinions such as those in Barcelona Traction and the North Sea Continental Shelf Cases and in his writings on state responsibility.

Jessup's practicality led him to make numerous suggestions to improve the process of conflict resolution and the efficacy of international law. He did not disdain small, concrete proposals involving procedural changes or institutional arrangements. Broadly speaking, he was an incrementalist and he tended to be skeptical of grand projects to change the existing order. Experience rather than theory was his guide. * * *

However, his pragmatism was also imbued with a distinct teleological element. Like Elihu Root, his early mentor, Jessup saw the main trends of international society as part of an evolutionary development toward a more organized and effective legal order. The main features of that order could be briefly summarized as follows: recognition of the interest of the international community; protection of the basic rights of individuals; the prohibition of armed force except in self-defense; recourse to judicial procedures or conciliation for dispute settlement; the extension of international regulation and administration in areas of interdependence, global and regional. For Jessup, these ends appeared almost axiomatic. They described the direction in which the world had to move in its enlightened self-interest. The optimism of an earlier age and Jessup's own buoyant spirit are reflected in this outlook.

Jessup's theoretical assumptions were implicit in his analysis of specific issues. They could be characterized as a sophisticated blend of positivism, idealism and pragmatism. He was always careful to distinguish positive law—the *lex lata*—from proposed or predicted future law. At the same time, he was mindful that positive law included principles and concepts that expressed basic values and that these "received ideals" were authoritative guides in construing and extending existing rules. In this manner, his approach transcended strict positivism. It is well exemplified in The Modern Law of Nations. Concepts as general as the freedom of the seas, pacta sunt servanda, sovereign equality, the obligations of peaceful settlement, self-determination, equitable sharing, are among those persuasively used to infuse values into concrete decisions. Like a good practitioner, Jessup believed a stronger case for a new rule can be made by linking it to an established principle. He was also aware that broadly stated policies in legal instruments must be construed with regard to the consensus of the community on which their authority ultimately depends. The fact that social ends are plural and often conflict impressed him with the necessity for balancing competing considerations in reaching particular decisions.

* * *

Related to Jessup's conception of the international community was his notion of "transnational law," a term he did not invent but which was developed and popularized in his Storrs lectures of 1956. With that notion, Jessup sought to show the growing legal complexity of an interdependent world. The international legal realm could no longer be compartmentalized in its two classic divisions of public international law, applicable only to relations among states, and private international law,

governing choice of law and enforcement of national judgments in cases involving nationals of two or more states. The legal rules and process applicable to situations that cut across national lines must now be sought in both public and private international law and, to a significant degree, in new bodies of law that do not fit into either traditional division. As examples of the latter, Jessup cited the growing areas of European Community law, maritime law, international administrative law, war crimes, the law of economic development and the rules applicable to multinational enterprises.

* * *

McDOUGAL, LASSWELL, REISMAN, THEORIES ABOUT INTERNATIONAL LAW: PROLOGUE TO A CONFIGURATIVE JURISPRUDENCE

8 Virginia Journal of International Law 188, 195 (1968).*

* * * The indispensable function of jurisprudence is to delimit a frame of reference appropriate to the study of the interrelations of law and community process and to specify in detail the intellectual tasks by which such study can be made and applied to the solution of the exigent problems it reveals. A jurisprudence of international law which would be relevant to the needs both of specialists in decision and of all who would understand and affect the processes in which they live must, accordingly, comprise a configurative approach, having at least three major characteristics:

1. It must be contextual, i.e., it must perceive all features of the social process of immediate concern in relation to the manifold of events comprising the relevant whole.
2. It must be problem-oriented.
3. It must be multi-method.

A jurisprudence aspiring to relevance must be contextual because the comprehensiveness and realism with which an observer conceives his major focus of attention—how he locates law in the community which it affects and is affected by—will determine how he conceives every detailed part of his study, his framing of problems, and his choice of tools for inquiry. It is only by a configurative examination of the larger context that an observer can be assured of extending his inquiry to all relevant variables and of being able to appraise the aggregate consequences of alternatives in decision. A relevant jurisprudence must be problem-oriented if it is to facilitate performance of the various intellectual tasks which confront all who are interested in the study of the interrelations of law and society, to avoid sterile inquiry into meaningless questions, and to contribute as creatively as possible to our institutions of public order in ways that promise to extricate us from the continuing destructive anarchy of our times. A relevant jurisprudence

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must be multi-method in order to promote mastery over all the necessary intellectual skills, to encourage the employment of strategies in the management of both authority and control, and to insure rationality of choice among alternatives in recommendation and decision.

It may require emphasis that a contextual, problem-oriented, multi-method jurisprudence of international law must provide for the systematic and disciplined performance of a series of distinguishable, but interrelated intellectual tasks. The appropriate specification of a comprehensive set of intellectual tasks, or skills, is important because it is the range of tasks performed, as well as the quality of performance which determines the relevance of inquiry for policy. The most deliberate attempts to clarify general community policy which do not at the same time systematically pursue other tasks, such as the description of past trends in decision and the analysis of factors affecting decision, may achieve only Utopian exercises. The description of past trends in decision, which is not guided by policy priorities and explicitly related to social processes, affords a most meager basis for drawing upon the wisdom of the past. The scientific study of factors affecting decision, which is not oriented by reference to problems in basic community policy, may be of no more than incidental relevance, despite enormous cost. The effort to predict future trends in decision by the mere extrapolation of past trends, without considering whether the factors that affect decision will remain the same, may produce destructive illusion rather than genuine forecast. In confusion about the character of, and appropriate procedures for, the different relevant intellectual tasks, the creativity in the invention and evaluation of policy alternatives, which is indispensable to rational decision, may be lost. The more specific intellectual tasks, for which a policy-relevant jurisprudence must make provision in theory and procedures, must thus include at least:

1. Clarification of the goals of decision;
2. Description of the trends toward or away from the realization of these goals;
3. Analysis of the constellation of conditioning factors that appear to have affected past decision;
4. Projection of probable future developments, assuming no influence by the observer;
5. Formulation of particular alternatives and strategies that contribute, at minimum net cost and risk, to the realization of preferred goals.

Adequate and sufficiently detailed performance of these various tasks in reference to the past, present and future of the various relevant social and decision processes of the world community must obviously require a comprehensive analytic framework which can bring into view the principal features of decision. A "conventional" analysis in terms of government organs and of the technical doctrines employed by officials, an effective technique for certain problems, is on the whole, inappropriate for the study of international decision. Conventional usage must yield to "functional" analysis if comprehensive and realistic orientation

is to be achieved. No dependable relationship exists between a structure that is called "governmental" in a particular body politic and the facts of authority and control on the global scale. Analysts of comparative government are well aware of the discrepancy between convention and functional fact for the understanding of the legal and political process at the national or sub-national level, since it is not unusual to discover, for example, that the authority formally provided in a written constitutional charter may be ignored, or totally redefined by unwritten practice. Similarly, when the international arena is examined, the presumed congruence of formal and actual authority of intergovernmental organizations may or may not be sustained by the concurrence of expectations necessary to justify a claim of actual constitutive authority. On a wide range of matters, the principal nation-states may—and do—continue to perceive one another as unilaterally making the critical decisions, for which they accept, and reciprocally enforce, a substantial measure of responsibility.

The comprehensive analytic framework required must, accordingly, include a conceptual technique for delineating the relevant aspects for power and policy of any interpersonal interaction. This technique may be sought by first locating the decision—that is, choosing the phase at which a sequence of interactions appears to culminate in choices enforced by sanctions and deprivation or indulgence. The culminating phase may be organized or unorganized; for example, it may be a formal agreement or a fight, a vote or a combination of unilateral assertion and passive acquiescence. The questions that must be raised in an appropriate phase analysis cover the outcome, pre-outcome and post-outcome dimensions of the whole sequence:

1. Who acted or participated in roles of varying significance in the process which culminated in the decision? (*Participants*)
2. What were the significant perspectives of the participants? With whom were they identified? What value demands were they pursuing, with what expectations? (*Perspectives*)
3. Where and under what conditions were the participants interacting? (*Situations*)
4. What effective means for the achievement of their objectives were at the disposal of the different participants? (*Base Values*)
5. In what manner were these means or base values manipulated? (*Strategies*)
6. What was the immediate result—value allocation—of the process of interaction? (*Outcomes*)
7. What are the effects, of differing duration, of the outcome and process? (*Effects*)

It would, thus, appear that the goal criteria appropriate for the creation of a relevant jurisprudence of international law are entirely comparable to those which experience has demonstrated to be appropriate for national law. For the better appraisal of the potential contributions to a viable jurisprudence of our vast legacy of inherited theories

about international law, it may be helpful to make more fully explicit certain goal criteria fashioned after those recommended today as appropriate for a jurisprudence of national law.

Questions about configurative jurisprudence. The founders of the Yale School of thought about international law have had influence on scholars and teachers, many of them their former students, both in the United States and to some extent abroad. The questions which follow are intended to focus your attention on your personal conception of international law.

What is the ideal professional training and experience for a decision-maker using configurative jurisprudence? Is law training in such jurisprudence enough? Is configurative jurisprudence advocated as a process or as a value-selection system? Or both? Is the lawyer's role expected to be the dominant one in the decision-making process? If so, is this in conformity with reality, considering that the vast majority of decisions about international law are made as a part of the foreign policy process in governments where, unlike in the United States, lawyers are treated as experts whose role is only to advise?

Jessup, whose views are discussed above, was a professor of international law, an ambassador, an undersecretary of state, and a judge on the International Court of Justice. The protagonists of configurative jurisprudence have not had much experience in non-legal roles in government operations. Do the different experience backgrounds of these lawyers and of Jessup give evidence of having influenced their respective philosophic outlooks about international law?

In other writings, the above three Yale School authors develop some fundamental attitudes that are identifiable in the excerpt under reference here. These include: (i) a rejection of norm-identification-application as the basic function of legal science and an emphasis on policy-choice processes; (ii) the ascription of a relatively low value to the ideal of universality as a goal of international law (such a goal would operate as a limiter of choice); (iii) strong emphasis in policy science of identifying and reinforcing by decision what are denominated as "common goal values", the most fundamental of which is that of human dignity. Are the above parts congruent, or are there inherent contradictions?

OLIVER, THE FUTURE OF IDEALISM IN INTERNATIONAL LAW: STRUCTURALISM, HUMANISM, AND SURVIVALISM

The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory 1207, 1208 (Macdonald & Johnston eds. 1983).*

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2. Idealism and the State of International Law Today

The thesis here is a simple one drawn from many examples in recent political and social history. When a situation or system decays—loses its effectiveness—it either dies or requires unusual social energy to revive it. Such unusual social energy requires mobilization of Purpose and Will. Such mobilization in our species requires an ethical, ennobling component. This component is Idealism, in some form.

It is all too evident that international law is in serious need of resuscitation today, not only in actual effectiveness but in the very expectation of its being able to be effective. Full proof of the degree of decline need not be offered here but the main point must be driven home, largely because it is so often denied or rejected by Idealists who, consciously or in a Freudian subconsciousness, will not face the facts that the *realpolitikers* are always willing to overstate. The truth of the matter is that, as every government international lawyer comes to realize, international legal structures and international legal rules are not in the practice of states treated as superior and ineluctable but as talking, arguing, and negotiating variables. It is always useful for a state to maintain credible "juridical cover" and to avoid—most but not all states think so—becoming an international scoff-law. The point here is not that law is a "variable in the power process" but that the value of fidelity to legal order is not an absolute value in international relations.

* * *

In any closed social system (a society), major value choices are political in their inception and legal order follows along to put these choices into effect. American international lawyers often tend to reverse this sequence, at least in terms of their own sense of mission, importance, and assumed competence (both in the jurisdictional and the capacity meanings). On the whole, United States academic international law scholars tend to expect to lead too much as to the value-choice process, rather than being willing to be technicians-after-the-fact of choice. As a result, their legalistic prescriptions for good (improvement, change, better structure, better principles) make less than expected impact on the politicians, national and international, who are ultimately in charge of making the choices (exercises of will and purpose). Thus in today's world we have significant segments of international legal scholarship that are often blind to the deterioration of international law, erroneously confident of competence to fashion the key to growth of what in fact is a semi-moribund science, this to the exclusion of all other cures, and thus widely divergent and combative as to essentials and priorities.

* * *

5. Survivalism: Idealistic or Inescapably Realistic?

Earlier references in this paper have indicated that notions of an irreducible minimum of structural and normative legal order are not widely professed within the academic branch of specialization in international law nor explicitly articulated by official spokespersons for the international legal outlooks of states. It is not difficult to understand

these reticences. To too many among the scholars, the facts of degradation in international legal order and the seriousness of the ensuing crisis have simply not penetrated individual universes of perception, busy as each is with cherished projects, determined activism, and the like, from which each derives a degree of optimism that shuts off the unsatisfactory or the unthinkable. Scholars who are also sensitive teachers find it necessary to assure students that what they are studying is real and significant, either or both for the future as well as for now. Some of these also engage in deliberate self-encouragement that understates reality.

Practitioners of international law do not often have time for wide-sweeping reflection, and foreign offices are not given to philosophic disquisitions of an evaluative or programmatic nature. Practitioners tend to live from incident to incident, from crisis to crisis. * * * Another reason that a bed-rock minima approach has not widely appealed is the fear or belief that an imprecise line divides such outlooks from non-expectant, anti-legal *realpolitik*. * * *

A final reason is that a program for an international law of survival brings one immediately to fundamental needs that so far law has failed to regulate: the use of force in fact to achieve national goals; the insufficiency and impotence of legal controls over the first use, in any posture, of nuclear, chemical and bacteriological weapons (and what of laser/maser?); compulsory peaceful settlement of disputes by legal processes and substantive rules; some degree of obligatory sharing of planetary resources on the basis of need, ability to assist, and managerial competence; abolishment of the rule of vested rights to the first exploiter of earth's remaining non-appropriated areas, the moon and other celestial bodies; the provision of more and more assured means for individuals to complain internationally against states, particularly the one to which, willy nilly, they owe "allegiance." In all these instances, there is so far a marked lack of Will–Purpose among states and people who influence states for genuine achievement. Yet without the development first of Will–Purpose in these areas, it is not assured that many of the specific activities in which legal idealists engage will bring effective improvement in planetary conditions. Under these circumstances, the most basic question becomes: how is Will–Purpose to be generated as to a particular line of action through legal structure and normative regulation thereunder? The ultimate pessimist will say, "only after cataclysm." A somewhat more expectant realist will express the hope that, at the very verge of destruction, awareness will come in the nick of time and the whole experience will breed a resolution to ensure a system under which the imminent catastrophy cannot threaten again.

There is some slight evidence that some would risk neither cataclysm nor the brink but wish to revive attention to the fundamentals as a place to begin to build order anew. Expectation and determination (effective Idealism) will become essential to such revival, for there is much frustration and pessimism to be combatted. * * *

In as much as the basic necessity is to develop Will–Purpose, it is desirable to start with the fundamentals, hard to solve though they may

be, for it is the vast, planetary mind that must be reached, and there is wider truth in Dr. Johnson's observation as to concentrating the mind than the mere certainty of being hanged in the morning. The notion held by many peoples that they and the states over them are unable to influence outcomes as to the fundamentals—or some of them—needs response, including raising the question whether significant segments of the developing world are acting responsibly in focusing on certain issues of importance to them to the disregard of those of a planetary dimension.

Survivalism is ensuring survival. But it cannot be achieved, as in a lifeboat, by non-idealistic realism. It requires an Idealism about which it will be more difficult to be idealistic than many would like, thus making the task of commitment harder and perhaps less rewarding in terms of personal professional success. The Idealism required ought to be widely communicated in acceptable form for effectiveness outside professional circles. Not all academic international lawyers need be involved, but more than presently are should be. Professional international practitioners ought all to be involved, and the academics and the practitioners ought to improve their collaborations with each other and with other relevant professional groups. Perhaps it is the Idealism of a Sancho Panza not a Quixote that is needed. One recalls that Sancho not only said the windmills were not monsters but that he eventually became an acceptable governor of the island!

The first needs are not the only ones; they only must be met before others can be assured.

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1. ***Questions about "norms".*** Are law persons (scholars, judges, practitioners) qualified, strictly on the basis of their professional training, to work well in "non-rule" situations?

The "Yale School", represented by the excerpts beginning on p. 1405 rejects norm-oriented approaches to legal participation in decision-making. But it articulates principles. What is the difference between a principle and, in Kelsenian terms, a norm?

Kelsen says that legal science is qualified to identify norms, scale them as to authoritativeness, interpret them, and apply them, but that it is not qualified to deal with value choices that lie outside the legal order. Do you agree or disagree? Do lawyers as a class self-limit their qualifications to norm-oriented processes?

In the United States, can it plausibly be argued that the lawyer class is qualified to deal professionally and competently with domestic value choices? With foreign affairs value choices?

2. ***General legal philosophy and legal philosophy about international law.*** General theories about law have had and are having influences on outlooks about international law. Notions of divine and secular natural law are at home in international law. So would be sociological jurisprudence if chief protagonists of the various schools of sociological jurisprudence (Savigny, Pound, et al.) had been concerned very much about international law. In a very broad and inexact sense,

the Yale School adapts old-fashioned sociological jurisprudence to the international arena. The logical positivists too, beginning with that nemesis for international law, John Austin, have given it their attention. Kelsenian philosophy about international law is inherently positivistic in origin and outlook. In fact, a good case can be made that international legal positivism has had a definite influence on general legal philosophy.

The neo-realism movement in American jurisprudence of the twenties and thirties did, especially through Professor Walter Wheeler Cook of Yale, bring private international law into its ambit of attention; but the legal philosophers of this sector did not focus on international public law to any significant degree. Their attention was captured by the judicial process within the United States and the need for sharper analyses, in part through sharper nomenclature, in stating and using American law. Their influence on international public law, nonetheless, has come through limited degrees of adoption of their outlooks by American international legal thinkers. Just as American neo-realism has not died, but has been absorbed into American thinking about internal law, it has come into American methodology about international law, especially as to Hohfeldian nomenclature. (It is very useful in the analysis of international legal situations to know the difference between a right, a privilege, and a power, for instance—or a duty as differentiated from a liability.) Less influential on American international legal philosophy has been the neo-realists' focus on the fact that judges sometimes consciously, more often unconsciously, mask the true reasons for their decisions behind rationalistic use of precedents and analogistic rationales. The reason for this invites fascinating speculations. Perhaps the fact that international law is not wholly American has something to do with it. However, recent criticisms of the judicial stances and methodologies of members of the International Court of Justice in connection with Nicaragua v. United States may also mark a wider willingness to address the matter.

Recently, a new wave of skeptical examination of law and the realities of power, the Critical Legal Studies movement, has aroused contention, and even furor, by its views about internal American law and international law. The Critical Legal Studies movement although still far from making its way into American law outlooks in the way the older neo-realism has. In many ways, international law is a more vulnerable target for the movement's attacks than internal law, because international law has fewer committed defenders and is structurally more vulnerable. For instance, one element of the less than cohesive Critical Legal Studies movement is "deconstruction", a process borrowed from literary criticism, which focuses on texts and analyzes them to show inherently self-cancelling internal contradictions. International law, alas, for a good deconstructor, would be an easy target! On the other hand, the movement is very suspicious of the masking of naked power behind law.

CRITICAL LEGAL STUDIES AND FEMINIST APPROACHES TO INTERNATIONAL LAW

Law, in a broad sense, is indeterminate. Proponents of critical legal studies argue * * * that every legal problem accommodates more than one viable solution and that policy determines the choice of which solution is adopted. Thus, politics forms the major component of law. Is this insight new or original? Like in the realm of literary criticism, the analytical method of deconstruction is utilized to study law.

KRAMER, LEGAL THEORY, POLITICAL THEORY, AND DECONSTRUCTION

238–239; 254–255 (1991).

Deconstructive theory, as a result of anticipating countercritiques and noting its own problems of incoherence, will position itself to seize on problems of incoherence that ravage countercritiques. Its power is made perfect in weakness, its own weakness. Because all critiques become implicated in what they censure, and because careful deconstructionist writing will have stayed keenly alert to both the general dissemination of paradoxes by transference and the specific maelstroms of many of its own paradoxes, our anticipating the countercritiques by helping them with their work may be the most adroit way to gain some leverage in deconstructing countercritiques. Complacent parries will highlight their own weak spots by fastening upon weak spots that have been highlighted in a deconstructionist discourse. At that point, where a deliberate nondefense has become the best defense, battles will be less over (in)coherency and elegiac than over competing ways in which incoherence can articulate itself. * * *

* * *

* * * [a]rguments will be framed in a vocabulary of 'struggles', 'tactics', 'disruption', and 'subversion' rather than 'truth' * * * Critical and legal force at a particular juncture, not illusive veracity, is the touchstone that guides our choices * * * [a] process of choosing that is based on strategic factors will partake of no fewer problems than a logocentric pursuit of Truth. In a process of either broad type, we shall have to undergo a fatal disquietude * * * Critical power and tactical adroitness must serve as one's leading goals, but the game in which one is strategizing will go on endlessly. One must try—always with a considerable degree of failure to attend carefully to the blindness that will be entailed by each one of one's insights * * *. [What must be] constantly kept in mind is a near-paralyzing tentativeness.

KENNEDY, A NEW STREAM OF INTERNATIONAL LAW SCHOLARSHIP

7 Wis.L.Rev. 1 (1988). *

* * *

My project * * * [is], quite literally, to redraw some rather familiar territory, returning to some of the most basic materials of public international law to describe them in a somewhat novel way. Overall, my aspiration is to begin releasing the discipline of public international law from a constellation of images of law, politics and the state which seemed characteristic of the field as late as 1980. My sense is that some aspects of my method may seem strange at first. Let me finish * * * with a few precautions and clarifications which may be helpful. * * * Think of a traditional piece of contemporary international law scholarship. It might contain one or more of three types of argument: theoretical or historical justification, doctrinal description or elaboration, and programmatic or institutional recommendations.

The theoretical and historical work, whether developed to support or criticize particular doctrinal and institutional analyses, works to support the project of the field as a whole—indeed, takes that project for granted to resolve the problems it sets forth for the scholar. In seeking to displace this set of problems, I have taken a somewhat different approach to questions in history and theory. I have not looked to them as sources for the authority or wisdom or content for international law doctrine. Rather, I have looked at the discipline's history, and its sense of history, for clues to its general argumentative practice. In other words, I have treated stories about history and theories about "international law" and "sovereignty" as if they were simply doctrines.

Doctrinal work, moreover, whether supportive or critical of particular doctrinal interpretations, generally begins with a sense both of doctrine's independent coherence and of doctrine's authoritative origin in history or theory and normative bite in the culture of sovereign behavior. Doctrine, as normally considered in international law scholarship, gets its energy and motivation from its origin in sovereign accord, in history, or in theory. And it has its effects outside the realm of law, in practice or thought. I have not considered doctrine in this way. I do not analyze the relationship between international legal materials and their political and interpretive milieu. I am not concerned about the context within which arguments are made and doctrines developed.

I focus rather upon the relationships among doctrines and arguments and upon their recurring rhetorical structure. I trace the references which one doctrine makes to another and the repetitions which characterize doctrinal materials widely dispersed through the field as a whole. Setting aside issues of origin and meaning to discuss international law internally, as a self-sufficient rhetoric, encourages an often implausible attribution of moods, desires and affect to the rhetoric of law. I often will speak as if one doctrine "sought independence" from

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another or "seemed uneasy" about its coherence. It might be useful to think of this project as a look at public international law from the *inside*.

Programmatic and institutional scholarship in the international field is generally preoccupied either with establishing an institutional form—with the doctrinal pragmatics of constitutional structure—or with implementing the resolution of doctrine and the wisdom of theory in the terrain of inter-sovereign activity. Scholars worry about capturing the functional relationship between institutions and states and the details of institutional design on paper. The discipline considers problems of situated and practical management rather than normative authority and application. But I do not follow this invitation to harness modernity's tone to the realm of institutional life. My work on international institutions treats the patterns of constitutional establishment and implementation as histories and doctrines. I am concerned to understand institutional life, even the professional life of the international legal scholar, as the enactment of a set of rhetorical maneuvers, as the living forth of doctrine and historiography.

Taken together, this methodological reformulation seeks to unify the historical, theoretical, doctrinal and institutional projects of the discipline. My method is to begin by focusing on argumentative patterns—patterns of contradiction and resolution, of difference and homology—which are reasserted in the materials of international law history, doctrine, and institutional structure. The project thus begins with a certain unsettling of the stability of differences both within and among the materials about international legal history, doctrine and institutions. Within the legal world I describe, stability—between what are now simply terms in a debate—needs to be explained solely *within* the debate itself. This means, for example, that sociological explanations of doctrine will be set aside in favor of accounts anchored solely within the materials of doctrine. It also means that the sociological contexts of international law—its institutions and history—need be reconceptualized in rhetorical terms. To do so, I have sought to develop close, anthropology-like accounts of the relations in particular bureaucratic settings of doctrine and institutional structure.

* * * I will seek a single optic—a single structural pattern which could be followed throughout the discipline. In this sense perhaps my effort will be too linear, too logical, and indeed, I am somewhat dissatisfied with the structural repetitiveness, the flat logical demeanor of my results. Perhaps it is only a way to begin the project of redrawing the discipline.

Later, * * *, it may be useful to think more systematically about ways to reinvigorate the project's specificity—by discussing its relationship to the margins of legal culture, to women, to the religious, to the impoverished, to the violent, to the sexual. One way of understanding this critical move to substance is as an attempt to reawaken—or capture, or, less kindly, exploit—the exotic margins of establishment culture. Indeed, the central contemporary reorientation of the relationship between law and politics—the claim that law is a restatement of its imaginary relationship to society—has been developed by bringing the

margin (society) into the core of law, rather than trying to stabilize and relate one to the other.

I want to question the stability of both, and I think this desire might be responsible for political difficulties much contemporary critical legal scholarship has encountered with the left, the right and the center of legal academia. Without anchor, my vision might be pursued equally well by pushing law to the limit ("completing" the project of liberalism, finally enforcing rights, etc.) or by pushing society to the limit ("deconstructing" and historicizing liberalism, disaggregating rights, completing the project of the market). In this, of course, it refers us back to our image of law's origin and to the procedures of social transaction.

Nevertheless, most recently, I have been working to anchor this effort in a broader margin, for it seems that the entire rhetorical apparatus I have been contemplating—all of law and society—however fuzzy and uncertain, exists within and against another set of margins—a margin composed of things thought of as perversion, faith, eros, terror, chaos, tyranny, war, etc. These things are excluded from, distanced from international public culture exactly as society or political economy seemed to be distanced from law. They are treated as at once frightening and fascinating. And most importantly, they are treated as *real* things, capable of signification within public culture. * * *, I will reach out to these margins along what might be thought of as a rhetorical final frontier. * * *

Thinking about things this way suggests that we approach international law, institutions and even the state somewhat differently. When thinking about international law, we can set aside the obsession with its authority and independence. We can ease off the desire to demonstrate and enhance international law's normative drive and enforceability. To the extent "rights"—more rights, new rights, rights enforcement—has been the mechanism by which we imagine international law able to touch sovereign power, they might come to seem less central, less compelling, simply less interesting. The law of force would not be interesting as a system of weaponry rights, but as a vocabulary for state violence. The law of asylum would not be interesting as a struggle for the rights of refugees, but as a language of exclusion and difference.

ONUF, BOOK REVIEW: INTERNATIONAL LEGAL STRUCTURE

By David Kennedy, 83 A.J.I.L. 630 (1989).*

David Kennedy has undertaken a remarkable project—nothing less than a reconsideration of the development of international legal doctrine over several centuries.

* * *

What now can we say about the era after 1980, Kennedy's own? Obviously, it must depart from, or self-consciously repudiate, the hallmarks of modernity. If modern authors disappear from their texts, it is because they want readers to think of those texts as transparent media. Thus, he argues, "Modern theory builds space for complacency in an expansive humility." After modernity, against this complacency, must come acknowledgment that texts are decisive. Modern texts work on behalf of proceduralized authority by employing the rhetorical strategy of self-effacement. Against this strategy must come a rhetoric of challenge and exposure.

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The problem for a rhetoric against modernity is to find its proper voice. The voice of rectitude is primitive—too passionate for a modern, knowing world. The scornful voice is self-defeating, the voice of revolutionary abandonment unconvincing, the nostalgic voice meretricious, the Aquarian voice naive. The late modern voice of accommodation to criticism is escapist. Kennedy's own voice is unsure; his reticence lacks the "self-assurance" he finds in modernity's "theoretical structure of false humility." Kennedy's sensitivity to rhetoric effectively denies him a proper voice with which to confront modernity and launch a new era. Instead, he occupies a vantage point after modernity from which to look back on past eras. This is his stance in *International Legal Structure.* His long view permits him to see the structure of each era. More specifically, because these are eras in the development of doctrine, his focus is "upon the relationships among doctrines and arguments and upon their recurring rhetorical structure". "Structure" does not refer to some meta-textual, orienting feature of social reality, as the term usually connotes. Kennedy's interest is not "the relationship between international legal materials and their political and interpretive milieu". Nor is it "the meaning and distinctiveness of public international law doctrine". If rhetorical structure is all that counts, then we may be forgiven the inference that it alone grants law and society their meaning and distinctiveness. For Kennedy to say as much would be a greater challenge to modernity's smug conceits than he ever permits himself.

* * *

Feminist philosophers and lawyers have begun to approach international law from their own various perspectives. See Chapter 10 for feminist approaches to international human rights law. Consider the following overviews and perspectives.

KAREN ENGLE, INTERNATIONAL HUMAN RIGHTS AND FEMINISM: WHEN DISCOURSES MEET

13 Mich.J.I.L. 517, 518–21 (1982). *

In recent years, legal scholars have been embroiled in an intense debate about rights that has touched almost every area of domestic law. Controversy about the role and utility of rights discourse has been

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especially fierce in areas generally identified with popular struggles, such as civil rights for minorities and women.

Surprisingly, international law has not been a target of rights critics. Even international human rights law, with its near total reliance on rights discourse and its intimate relationship with nongovernmental organizations and popular struggles, has remained largely untouched by the rights debate.

In this article, I bring some of the issues identified and discussed in domestic law into public international law, through an analysis of that area of human rights law pertaining to women. Although I am inspired by the domestic debate, my purpose here is not specifically to critique or defend rights. Rather, I explore the various ways that advocates of international women's rights have deployed, and at the same time critiqued, existing rights frameworks in order to achieve change for women. In doing so, I analyze the multiple roles that rights discourse plays in the advocacy of women's rights internationally.

The literature on women's human rights is a particularly rich site for an analysis of rights discourse deployment, because in this literature two different, and sometimes competing, models of rights converge. Although it might seem that international human rights law would naturally incorporate women's rights, since women are human, women's rights advocates have suggested that such incorporation cannot be assumed. While some maintain that women's rights are already included in international human rights law, others argue that the international human rights régime will have to change before it can take women into account. In either case, women's rights discourse is generally positioned at the periphery of human rights discourse, both challenging and defending the dominant human rights model as it attempts to fit its causes into that model. In this arena, filled with rights enumeration and rights talk, possibilities for conflicts between competing rights ensue. Examining how different women's rights advocates deal with those potential conflicts sheds light both on international rights discourse and on feminist approaches to law.

* * *

Feminists form one of the groups that has attempted to expand human rights, urging it to better encompass women's rights. Through their work, they have not only identified those international legal instruments that include provisions prohibiting sex discrimination, but they have also helped establish international legal instruments that pertain specifically to women's rights. Using the number of such instruments as a measure of progress, it would appear feminists' work has paid off: in 1986, Natalie Hevener identified twenty-two international documents relating to the status of women. Much of the work of women's rights advocates was realized during the United Nations Decade for Women, with the creation of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention). Although that Convention has only been open for signature since 1980, it already has been ratified by as many States as have

ratified the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

As the number of legal instruments has increased, so has the scholarly literature on women's human rights. Before the Women's Convention, only a few works had been written about women's rights, but since then the number of works has skyrocketed.[11] Some of those written since the Women's Convention focus specifically on that Convention, while others deal generally with women's human rights. The Women's Convention, then, has both generated and reflected a renewed interest in women's human rights, as much as it has been the actual subject of discourse.

This article examines in detail much of the literature that has emerged on women's human rights since 1979,[12] identifying three broad approaches taken by women's human rights advocates. I have labeled these approaches doctrinalist, institutionalist, and external critique. Each represents a particular feminist approach to law as well as a specific approach to human rights discourse.

Regardless of the approaches they take, women's human rights advocates confront a difficult task in attempting to secure women's place in the international human rights framework. Explicitly or implicitly, they challenge traditional notions of human rights for failing to take women into account adequately. At the same time, though, they rely on international legal instruments and human rights law and language as vehicles for achieving women's equality. Thus, a tension emerges, an ambivalence about whether and how women's rights can become a part of human rights. This tension manifests itself through the approaches the advocates take.

Two approaches, doctrinal and institutional, work within the field of international human rights and use language internal to that discourse. Their proponents are, for the most part, liberal feminists who generally believe in the effectiveness of human rights legal doctrine and institutions. Advocates who take a third approach pose what I consider external critiques. They approach human rights discourse as feminists, generally radical or cultural feminists, who are troubled by the existence of a system that claims to protect the rights of all human beings while systematically excluding one-half of the human race.

Those taking the first two approaches advocate women's rights by interpreting and sometimes criticizing the existing doctrinal and institutional framework. Doctrinalists generally describe a specific problem

11. For a comprehensive bibliography of works dealing with international law regarding the status of women, see Rebecca J. Cook, Women's International Human Rights: A Bibliography, 24 N.Y.U.J.Int'l L. & Pol'y (forthcoming 1992); Rebecca J. Cook, Bibliography: The International Right to Nondiscrimination on the Basis of Sex, 14 Yale J.Int'l L. 161, 163–81 (1989).

12. The articles and books I examine comprise much of the English language literature in this area that does more than merely describe the provisions of international legal instruments that apply to women. The authors represent a variety of disciplines and several different countries. As I have explored this area I have been surprised by the lack of communication between people writing in this discipline. Few of the authors react to others who have written about similar problems before them.

facing women in some or all parts of the world and then show doctrinally how the problem constitutes an international human rights violation. Institutionalists critically examine international legal institutions that are created to enforce human rights. They study both mainstream human rights institutions and specialized women's institutions to determine whether and how they protect women's human rights.

I consider both of these approaches positivist since they generally rely on international legal doctrine and institutions to make their arguments.[15] Doctrinalists and institutionalists do not see themselves as approaching human rights law with any preconceptions about what rights should be derived from the instruments or enforced by the institutions. Doctrinalists, for example, extract particular rights from documents as if, were it not for the documents, the rights might not exist at all. The positive nature of the work of both groups evinces a general approach to human rights that sees women's rights as a normal part of human rights law and discourse, readily assimilable to the human rights model.

Those who take the third approach, rather than working within human rights discourse in its present form, critique the human rights framework either for being male-defined or -deployed, or for being based on inherently male concepts. These external critics aim to have what they see as women's human rights achieved, regardless of whether those rights exist in positive law. In doing so, they raise difficult questions about whether women's needs and rights can fit into the existing definition and conception of human rights. Thus, they are less likely than doctrinalists and institutionalists to see women's rights as assimilable to the human rights model. The views of external critics range from those who think human rights theory will only be fully consistent after it incorporates women's rights to those who think human rights theory must change and be reconceptualized in order to address successfully women's concerns.

The primary distinction between the first two approaches and the third approach, then, is that the first two assume and act upon the belief that women's rights have and can be assimilated to the human rights structure. The third approach, on the other hand, questions whether assimilation to the structure as it exists is possible. Advocates who take this latter approach tend to believe that the structure itself will have to change in order to accommodate women's rights.

15. I do not use positivism here in the way it is often used in public international law discourse. That is, by calling the approaches positivist, I do not mean to suggest that the advocates see doctrine and institutions as mere products of sovereign consent. To the extent, however, that they believe that international law is authoritative and that States are bound by it, particularly those States that have signed or ratified specific documents, their views are more traditionally positivist.

I primarily use the term positivism to highlight these advocates' use of positive law as the starting point from which they derive rights. I also use positivism to contrast the suggestion that rights only exist by virtue of their embodiment in particular documents with a theory of rights that relies on natural law for its basis. *But see* Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 106–17 (1987) (discussing various meanings of positivism and displaying how in 19th century public international legal discourse—the "golden age of positivism"—those considered positivists commonly relied on naturalist notions and vice versa).

Whether their approach be assimilation or accommodation, all advocates encounter difficulties with making women's rights a part of human rights. Some of the difficulties are with human rights generally, while others are specific to women's rights. The recognition of these difficulties, however, does not lead any of the advocates to abandon human rights law or rhetoric. None of the advocates suggests that including women's rights would fundamentally disrupt the human rights régime. And none openly explores the possibility that women's rights and human rights might be incommensurable.

* * *

FERNANDO R. TESÓN, FEMINISM AND INTERNATIONAL LAW: A REPLY

33 Va.J.Int'l L. 647, 647–57; 664–68; 672; 677–684 (1993).*

* * *

Until recently international law had not undergone a sustained feminist critique. This gap is now slowly being filled; a notable contribution to that effort is a recent article by Hilary Charlesworth, Christine Chinkin, and Shelley Wright.

This Essay presents a reply to the Charlesworth–Chinkin–Wright critique. Although much of this reply engages more general issues in feminist theory, it would be impossible, within the scope of this work, to address every important political, cultural, biological, epistemological, and metaphysical issue raised by the various feminist critiques of traditional jurisprudence. I therefore confine the analysis to arguments directly relevant to international law, focusing on the analogies and contrasts between the differing feminist approaches to international law and the Kantian theory of international law defended in my previous writings.

The feminist critique of international law contains many disparate strands of theory that must be disentangled. A central difficulty with the article by Charlesworth and her associates is that it conflates divergent arguments from very different (and often irreconcilable) camps within feminist theory. The most important such mismatch is between liberal and radical feminism, which coexist in uneasy tension throughout the article. Much of the analysis in this essay is therefore devoted to separating, analyzing, and ultimately evaluating these interwoven but uncongenial threads of feminist thought.

In examining the liberal and radical feminist approaches to international law, as manifested in the Charlesworth article, I distinguish three different levels of criticism. The first level concerns the *processes* of international lawmaking, the second addresses the *content* of international law, and the third attempts to derive a critical theory from the (purported) "nature" or "inherent qualities" of liberal international

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legal institutions. These critiques are treated differently, in complex ways, by radical and liberal feminism. Yet on all three critical dimensions, my conclusion is the same: although *liberal* feminism has important things to say about international law and relations, radical feminism is inconsistent both with the facts and with a view of international law rooted in human rights and respect for persons.

* * *

Liberal, or Kantian, international legal theory is founded on the idea of the individual as rational and autonomous. Liberal theorists regard individuals as capable of rational choices, possessed of inherent dignity, and worthy of respect. Liberal states in international relations, or members of the liberal alliance, are those nation-states with democratically elected officials, where human rights are generally respected. Liberal internationalism assumes a right to democratic governance, and holds that a state may not discriminate against individuals, including women. This principle is, of course, a centerpiece of the international law of human rights. A corollary of the Kantian thesis is that illegitimate governments may not be embraced as members of the liberal alliance.

Liberal feminists rely on liberal principles of domestic and international law to end abuses against women. Very succinctly, liberal feminism is the view that women are unjustly treated, that their rights are violated, and that political reform is needed to improve their situation, thereby allowing them to exercise autonomous choices and enjoy full equal status as free citizens in a liberal democracy. The governing international principles are the imperatives of human rights, nondiscrimination, and equal opportunity for women, as envisioned in articles 1(3), 8, and 55 of the United Nations Charter. When a state discriminates or deprives women of these human rights, it commits an injustice, a violation of international human rights law for which it is responsible.

Radical feminists agree with liberal feminists that the situation of women must be improved. They believe, however, that liberal institutions are themselves but tools of gender oppression, and that women are exploited by men in even the least suspecting ways. Radical feminists believe that existing states are hierarchically structured according to gender, and that gender hierarchy necessarily infects the process of legal reasoning itself. Radical feminists hold that the "actual choices" of women only *seem* to be autonomous and free; in reality they are *socially* determined. Human beings are not, as liberals would have it, separate, rational entities capable of individual decision-making, but rather beings to some degree defined and determined by their social—and particularly gender—relationships. Under radical feminist theory, no woman is truly free, not even in the "freest" of societies.

III. Three Feminist Critiques of International Law

In light of the differences in feminist theory it will be convenient to set forth three feminist critiques of international law, and the central claim associated with each: (A) the *processes* of international lawmaking exclude women; (B) the *content* of international law privileges men to

the detriment of women; and (C) international law, as a patriarchal institution, *inherently* oppresses women, marginalizes their interests, and submerges their experiences and perspectives.

* * *

Feminists criticize the international lawmaking process for depriving women of the access and opportunity to take part in lawmaking in two important ways. First, feminists argue that women are *underrepresented* in international relations, that is, in high positions in international organizations, in diplomatic services, and as heads of state and government. Second, they contend that because of this underrepresentation, the *creation* of international law is reserved almost exclusively to men. Women are thus effectively prevented from participating in the processes of international lawmaking.

Central to the claim of exclusion is the fact that women are underrepresented in international relations. There is no doubt that there are relatively few women heads of state, diplomats, or international organizations officials. Is this state of things, however, an injustice? And how can the statistical underrepresentation (whether or not it is an injustice) be redressed? It is useful, in addressing these issues, to distinguish, first, between legitimate and illegitimate governments, and second, between governments and international organizations.

Let us consider first the case of illegitimate, undemocratic governments. Plainly, it does not make sense to criticize a dictator, say, for not appointing enough women to his government or diplomatic corps. To do so would constitute a contextual *category* mistake: blaming a dictator who has taken and held power by means of torture and murder for not appointing a woman as ambassador to the United Nations is like blaming a burglar ransacking our home at gunpoint for not having asked our permission to use the telephone. The normative context of a burglary is one in which it does not make sense to insist on compliance with the norms of courtesy. Likewise, the normative context of a tyrannical state is one in which it does not make sense to ask the tyrant to appoint more women (or men, or blacks, or Catholics).

In such a case, the government is illegitimate in the first place, so its appointments are morally invalid regardless of the sex of the appointees. If an illegitimate government consists of a group of men systematically excluding women, this is of course an injustice, but it is one that is subordinated to the greater injustice of tyranny, which by definition includes the illegitimacy of origin and the violation of human rights. It is true that discriminating against women aggravates the injustice of tyranny; it therefore makes sense to put pressure on all governments to refrain from sexist practices. The analysis, however, does not work the other way round: tyranny is not cured by the tyrant's celebration of diversity, as it were. Even in cases where human rights abuses (other than exclusion from government) are primarily directed at women, suggesting that what we need is more women as international representatives of dictators is absurd on its face. The only remedy, here as elsewhere, is to get rid of the tyrants and secure human rights.

Put differently, in a tyrannical state the *agency* relationship between people and government, the vertical social contract, has broken down * * *. Therefore, the tyrant cannot legitimately address the question of the sex of his political appointees because he does not represent anybody. The women he decides to appoint to office to achieve gender balance are likewise blighted by the original illegitimacy. A partial reply to the complaint by Charlesworth and her associates about women being underrepresented in international relations, then, is that it is not sensible to start addressing that issue globally without addressing also the issue of democratic legitimacy.

More interesting is the case of full members of the liberal alliance, states with democratically elected officials where human rights are generally respected. Assuming a right to democratic governance, a state may not discriminate against women in their exercise of that right. The governing principle, then, is the imperative of nondiscrimination and equal opportunity for women, along the lines suggested by the pertinent international instruments, themselves inspired in articles 1(3), 8, and 55 of the U.N. Charter. * * *

Radical feminists, however, seem to believe that there is a global injustice even where, as a result of democratic elections held in independent, rights-respecting states, it is mostly men who are elected to government, or if in such states mostly men *traditionally* seek admission to the diplomatic service. An example is the discussion by Charlesworth and her associates of the Women's Convention. They strongly criticize the Convention for assuming that men and women should be treated alike, which is the liberal outlook. The Charlesworth view is that sexism is "a pervasive, structural problem." Further, it is male dominance which lies at the root of the structural problem and which must be addressed as a means to reach the structural issues. But what are the authors' suggestions? If we descend from the abstract slogan that liberal equality is just the men's measure of things, how do they suggest rewriting each of the rights recognized by the Convention to meet their concerns? Take article 7, for example, which directs states to eliminate all discrimination against women in the political and public life of the country. Would a radical feminist's rewriting of this article require states to appoint women, regardless of popular vote? Would it impose a 50% gender quota for elected positions, or force women who do not want to run for office to do so? These are not just rhetorical questions: given the radical feminists' rejection of rights discourse and formal political equality, it is difficult to imagine what a radical list of international women's rights would look like.

* * * [I]nternational law cannot go beyond mandating democratic governance and nondiscrimination in a general way. Local conditions will vary, and in states where women have been previously excluded from politics it may be permissible and desirable to adopt preferential electoral arrangements. Such measures, when properly tailored, do not do violence to the international law principle of nondiscrimination and the right of all citizens to participate in public life. * * *

* * *

In addition to criticizing the processes of international lawmaking, many feminists argue that the content of international law privileges men to the detriment of women. The claim that the content of international law favors the interests of men may incorporate either or both of the following arguments: first, international law rules in general are "gendered" to privilege men; and second, international rules such as sovereign equality and nonintervention protect states, and states are instrumental in disadvantaging or oppressing women. * * *

* * * I find little plausibility in the claim of some feminists that the specific content of international law rules systematically privileges men. Positive international law is a vast and heterogeneous system consisting of principles, rules, and standards of varying degrees of generality, many of a technical nature. Rules such as the principle of territoriality in criminal jurisdiction, or the rule that third states should in principle have access to the surplus of the entire allowable catch of fish in a coastal state's exclusive economic zone are not "thoroughly gendered" but, on the contrary, gender-neutral. It cannot be seriously maintained that such norms operate overtly or covertly to the detriment of women. The same can be said of the great bulk of international legal rules.

* * *

Feminists are correct, however, on their second claim that international law overprotects states and governments. International law, as traditionally understood, is formulated in exaggeratedly statist terms. Statism, the doctrine that state sovereignty is the foundational concept of international law, repudiates the central place accorded to the individual in any liberal normative theory; and, by extension, it often results in ignoring the rights and interests of women within states. This criticism is identical to the one made by the Kantian theory of international law.

* * *

[R]adical feminists also attack liberalism. Insofar as this attack is predicated on the perception that liberal philosophy and the liberal state oppress women, it must be met with a philosophical and political defense of the liberal vision. But if the feminist attack on liberalism is predicated on the belief that statism, as an assumption of international law, is necessarily entailed by liberalism, the answer is simply that this is a mistaken inference. Statism is at odds with liberalism. The human rights theory of international law (certainly the most liberal international legal theory) rejects statism because it protects illegitimate governments and is thus an illiberal theory of international law. The whole point of the liberal theory of international law is to challenge absolute sovereignty as an antiquated, authoritarian doctrine inhospitable to the aspirations of human rights and democratic legitimacy.

Liberal feminism and the Kantian theory of international law join in rejecting statism. Indeed, one of the most valuable contributions of feminist international legal theory is the attempt to disaggregate states, to pierce the sovereignty veil and inquire about real social relations, relations among individuals and between individuals and government

within the state. This is also the thrust of the Kantian theory of international law.

* * *

Both radical and liberal feminists generally agree that the statist orientation of traditional international legal theory tends to the detriment of women. A truly liberal theory of international law, on the Kantian model, rejects statism as impermissibly solicitous of rights violations by states, and unresponsive to the justified claims of all persons, including women, to dignity and equal treatment. The rejection of statism entails scrutiny not only of the official acts of states, but also of their complicity and even omissions in the protection of human rights. The notion that liberalism entails statism is therefore misconceived; the logic of liberal internationalism requires that international law limit absolute sovereignty to improve the situation of women, insofar as women remain deprived of equal respect and dignity.

* * *

[Radical feminists claim] that international law is inherently oppressive of women. Some feminists argue that because current international law derives from European, male, liberal legalism, its very form and structure are inherently patriarchal and oppressive.

[Several] radical feminists argue that states are inherently patriarchal entities—again, bothering little with distinctions between liberal and illiberal governments. Perhaps radical feminists believe that the governments of liberal democracies are, to paraphrase Marx, mere committees to handle the interests of men. If an interest of men were to secure the continuing oppression of women, and if the state were now and forever a property of men, then the international law principles of sovereign equality and nonintervention would indeed operate systematically to the detriment of women. Of course, under these assumptions no truly legitimate state or government currently exists; all appear in this light as simply men's devices to perpetuate their domination of women. Under this view, states are patriarchal entities; governments (even formally democratic ones) represent the male élites of those entities; and international law abets this tyranny by securing the sovereignty of states. These assertions hold true—equally true—for all states.

It is significant, in this regard, that Charlesworth and her associates do not emphasize violations of women's rights by particular governments, even though in many countries women are *officially* discriminated against, and sometimes even horribly mutilated with official endorsement or complicity. This omission is related, I believe, to the inherent oppressiveness thesis. Identifying and opposing egregious human rights practices simply holds less *philosophic* interest for the radical feminist than unmasking patriarchal oppression as a pervasive (albeit often "invisible") evil. * * * Their obsession with male dominance leads [these] radical feminists to the grotesque proposition that the oppression of women is as serious in liberal democracies as in those societies that institutionally victimize and exclude women. For feminists to try to improve the condition of women in even the freest societies is a commendable goal, since liberal democracies are not free of sexist practices. This is very different, however, from claiming that liberal democracies and tyrannical states are morally equivalent in the way they treat women. Such an assertion not only perverts the facts; it does a disservice to the women's cause.

The sweeping radical thesis that states are inherently oppressive is not only politically counterproductive, but also philosophically untenable. The assertion that a social arrangement is unjust or oppressive is contingent; it depends not only on the theory of justice that is presupposed, but on the facts as well. "Oppression" does not follow from the definition of "state"; it is not therefore inherent in the social organization we know as the modern state. Oppression may be defined as occurring when an individual or a group unjustly prevents others from exercising choices, and this may or may not occur in a particular case. Viewing oppressiveness as a necessary rather than contingent property of states is undoubtedly an epistemological convenience for the radical; there is no need to bother with scrutinizing the political practices of *actual* states. Unfortunately, the product of this sort of inquiry can be nothing more than nominalism: metaphysics in, metaphysics out.

* * *

The inherent oppressiveness thesis is connected with a radical notion of social determinism; that notion, too, admits of no degree or gradation, and lies beyond dispute. For at least some radical feminists there may be a possible *future* world in which women will be emancisocieties (the Western liberal democracies) where most choices by women are apparently autonomous in the liberal sense, radical feminists insist either that such choices are not really autonomous because women have been socialized to make them, or that there is no such thing as autonomy anyway. Indeed, even consensual sexual intercourse is regarded by some of them as oppressive. Accordingly, every social fact is interpreted in the light of this premise, which is itself immune to challenge. Like Marxists before them, radical feminists see their theory of gender oppression and hierarchy confirmed in every single social event, for the good reason that no single fact counts as a counterexample. No improvement in women's condition counts. * * *

So the sweeping definition of the state as inherently oppressive of women is, in my view, factually false because there are or could be states where women are not oppressed, and morally irresponsible because it trivializes tyranny. States come in many moral shapes. In some states women are oppressed; in some others blacks are oppressed; whites are persecuted in a few; in yet other states members of a particular religion, speakers of a certain language, or foreigners may be mistreated; and in some states almost everyone is oppressed. The radical feminist's insistence on the inherent oppression of women by the state succeeds only in blurring the distinction between freedom and tyranny, * * *

* * * Radical feminists align liberal autonomy with a conception of the family as a Dantésque place where the physically stronger husband victimizes weaker family members. Calling wife abuse an instance of

"family autonomy" is as offensive as calling Saddam Hussein's genocide of the Kurds [or the Marsh Arabs] an instance of Iraqi "self-determination." Family autonomy is the least liberal part of the "liberal" theory that radical feminists believe they are challenging. * * * Genuine liberal theory refuses to tolerate a private domain in which the strong can victimize the weak with impunity.

* * *

Radical feminists * * * ignore, disparage, or assume away the actual choices of women when it is convenient for them to do so; for example, the choice of some women to stay in the home. Because radical feminists believe homemakers' choices to be degrading, they conclude that those are not real choices, but are rather forced by socialization. Leaving aside the disdain for family, motherhood, and heterosexuality associated with this claim, the form of argument itself is highly suspect. One cannot just pick those choices that one approves of ideologically as being "real" choices, and discount those that do not fit our preferred utopia as merely "apparent." From a Kantian standpoint, there is an imperative to respect people's rational, autonomous choices. If the individual's autonomy has been impaired by coercion or fraud, then of course it will not be a real choice in the Kantian sense. Absent coercion or fraud, however, the choice of a homemaker to devote herself to the family ought to be valued and honored.

* * *

IV. Conclusion: Defending the Liberal Vision

Legal theory has been much enriched by feminist jurisprudence. Feminists have succeeded in drawing attention to areas where uncritically received legal theories and doctrines have resulted in injustices to women. International law should be no exception, and the contribution of Charlesworth and her associates will rightly force international lawyers to re-examine features of the international legal system that embody, actually or potentially, unjust treatment of women.

Much of the radical critique is commendably compatible with a committed liberal feminism. For example, radical feminists are correct to urge international organizations to try to achieve gender balance in their internal appointments. Radical feminists are also right in challenging statism and a notion of "family autonomy" that countenances state complicity or inaction in the face of mistreatment of women by private individuals. Privacy and state sovereignty must be wedded to democratic legitimacy and respect for individual human rights, including the rights of women. All of these goals are easily justified under the Kantian theory of international law.

Yet the basic assumptions of the radical feminist critique are untenable and must be rejected with the same energy and conviction that we reserve for the rejection of other illiberal theories and practices. Radical feminism exists at a remove from international reality because it exempts itself, by philosophical fiat, from critical examination and empirical verification. It wrongly assumes that *oppression* belongs to a category of thought accessible to pure philosophic speculation, and thus renders scrutiny of real human rights practices superfluous. Perhaps most ominously, radicalism "unprivileges" the imperatives of objectivity, placing the demands of intellectual integrity and responsible political dialogue on a normative par with other, more political agendas.

When we move from the philosophical domain to global political realities, there is even more reason to resist the radical feminist agenda. Radical feminists have joined other radicals in attacking liberalism; indeed, their whole case rests upon the supposed bankruptcy of liberal society, on the moral inadequacy of the kind of civil society mandated by the Kantian theory of international law. But is the oppression of women correlated to liberal practices? The answer is, emphatically, "no." The feminist claim that male domination is an inherent part of liberal discourse and that liberal institutions are therefore inevitably oppressive of women is both politically counterproductive and patently false.

The truth is that the situation of women is immeasurably better in liberal societies, Western or non-Western. The most sexist societies, in contrast, are those informed and controlled by *illiberal* theories and institutions. These societies are much more exclusive of women than liberal societies (and most of the Western societies are liberal). Thus, naive assertions such as that "decisionmaking processes in [non-Western] societies are every bit *as exclusive* of women as in Western societies" merely reflect the warped starting premise that free societies and tyrannical ones are, in some "deep" reality, morally equivalent. As we have seen, this sort of "depth" only obscures. The failure to reckon with the facts on record by those claiming to be concerned with the plight of women amounts to serious moral irresponsibility.

The situation of women in liberal societies plainly reveals that liberalism has not yet fulfilled its promise to women of equal dignity. Liberalism is an ideal only partially realized, and its progress can at times seem painfully slow. Yet notwithstanding its imperfections, liberalism remains the most humane and progressively transformative system of social organization known to our time. Its aspiration to universal human flourishing is worthy; its principles of respect, equal treatment, and human dignity are sound. The great, pervasive injustices of the present arise not from liberalism, but from illiberal alternatives, and, sometimes, from the lack of resolve to press the liberal vision to its ultimate resolution. Those who would dispirit that resolve, even while wrapped in banners of liberation, deserve our most wary and searching scrutiny.

SECTION B. MONISM & DUALISM

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1 O'CONNELL, INTERNATIONAL LAW 38 (2D ED. 1970) *

The Theory of the Relationship: Monism and Dualism

Almost every case in a municipal court in which a rule of international law is asserted to govern the decision raises the problem of the

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relationship of international law and municipal law; and in many cases before international tribunals it must also be disposed of when deciding the jurisdictional competence of a State to affect alien interests through its own internal legal order.

There are four possible attitudes towards the question:

(a) That international law has primacy over municipal law in both international and municipal decisions. This is the *monist* theory.

(b) That international law has primacy over municipal law in international decisions, and municipal law has primacy over international law in municipal decisions. This is the *dualist* theory.

(c) That municipal law has primacy over international law in both international and municipal decisions. This is a species of monism in reverse.

(d) That there should be no supposition of conflict between international law and municipal law.

(a) Monism

The monist position is an emanation of Kantian philosophy which favours a unitary conception of law. According to this view, since the capacities of States derive from the idea of law, the jurisdiction to exercise these capacities is granted by the law. It follows that the law to which jurisdictional reference must be made is independent of sovereignty and determinative of its limits. If a State exceeds the limits, its acts are invalid. This argument concedes to international law a broader and more fundamental competence than to municipal law. However, it tends to sidestep the point made by the dualists, namely, that a municipal court may be instructed to apply municipal law and not international law, and hence has no jurisdiction (using the term as descriptive of the capacity in municipal law to decide a case) to declare the relevant municipal law invalid. Hence, the characterisation of the jurisdictional excess as "invalid," or even merely "illegal" (if there is any difference between the terms), is of no meaning internally within the municipal law of the acting State. To this objection, the monist has only one answer, that this conflict of duties, owing to a defect in organisation, has been wrongly resolved.

* * *

(b) Dualism

The dualist position is associated with Hegelianism and has governed the judicial attitudes of States where this philosophy has prevailed. The common starting point is the proposition that law is an act of sovereign will, municipal law being differentiated from international law in that it is a manifestation of this will internally directed, as distinct from participation in a collective act of will by which the sovereign undertakes obligations with respect to other sovereigns. This results in a dualism of legal origin, of subjects and of subject matters. International law and municipal law are two quite different spheres of legal action, and theoretically there should be no point of conflict between them. Municipal law addresses itself to the subjects of sovereigns, international law to the sovereigns themselves. If the sovereign by an act of municipal law exceeds his competence in international law it does not follow that municipal law is void; it merely follows that the sovereign has violated international law. Anzilotti has explained the relationship between the dualist thesis and the alleged incapacity of the individual in international law as follows:

> A rule of international law is by its very nature absolutely unable to bind individuals, i.e., to confer upon them rights and duties. It is created by the collective will of States with the view of regulating their mutual relations; obviously it cannot therefore refer to an altogether different sphere of relations. If several States were to attempt the creation of rules regulating private relations, such an attempt, by the very nature of things, would not be a rule of international law, but a rule of uniform municipal law common to several States.

(c) Inverted monism

The theory that municipal law is in its nature superior to international law has never found favour in international tribunals, and is no more than an abstract possibility. It is associated with Bergbohm, whose almost pathological resentment against natural law led to an exaggerated emphasis on the State will. Unlike Austin, who would deny even the term "law" to international law and thereby avoid a potential collision of two systems, Bergbohm allows for international law as a manifestation of the "auto limitation" of the sovereign will. The State is superior to and antecedent to the international community, and remains the only law-making entity. Unlike Triepel, who would distinguish the State will as internally manifested from the State will as externally manifested, Bergbohm allows for only one manifestation, and international law is thus a derivation from municipal law.

(d) The theory of harmonisation

According to this view, neither the monist nor the dualist position can be accepted as sound. Each attempts to provide an answer, derived from a single theoretical premise, to two quite different questions. The first question is whether international law is "law" in the same sense as municipal law, i.e., whether both systems are concordant expressions of a unique metaphysical reality. The second question is whether a given tribunal is required by its constitution to apply a rule of international law or municipal law, or vice versa, or authorised to accord primacy to the one over the other. The resemblance between the two questions is only apparent; the lack of jurisdiction in a given tribunal to accord primacy to international law in the event of a conflict between it and municipal law has no relevance to the question whether municipal law does or does not derive its competence from the same basic juridical reality as international law. In some federal systems of law, a State court may be required to apply state legislation which a federal court would declare unconstitutional. The norms of reference are different but the systems are concordant.

The starting point in any legal order is man himself, considered in relation to his fellow man. Law, it has often been said, is life, and life is law. The individual does not live his life exclusively in the legal order of the State any more than he lives it exclusively in the international order. He falls within both jurisdictions because his life is lived in both. Here again, the comparison with a federal system is instructive. It follows that a monistic solution to the problem of the relationship of international law and municipal law fails because it would treat the one system as a derivation of the other, ignoring the physical, metaphysical and social realities which in fact detach them. The world has not yet reached that state of organisation where there is only one civitas maxima delegating specific jurisdiction to regional administrations.

But a dualist solution is equally deficient because it ignores the all-prevailing reality of the universum of human experience. States are the formal instruments of will for the crystallisation of law, but the impulse to the law derives from human behavior and has a human goal. Positive international law is not pure whim, but an expression of needs and convictions. If it were otherwise, international law and municipal law would be competitive regimes ill-suited to the solution of human problems. The correct position is that international law and municipal law are concordant bodies of doctrine, each autonomous in the sense that it is directed to a specific, and, to some extent, an exclusive area of human conduct, but harmonious in that in their totality the several rules aim at a basic human good.

Questions about monism and dualism. What do you think about this: are these terms descriptive merely of what a particular state does with international law in its own courts and agencies, or do they have direct relevance to the fundamental question whether international law is law? Review Chapters 1 and 14 and take a position as to whether the United States is properly classifiable as evidencing a monist or a dualist state philosophy. If a federal state has in its constitution a provision that rules of customary international law prevail over state of the union law and constitutions, is that federal state necessarily monist? If any state, federal or unitary, has in its constitution a provision that rules of customary international law prevail over any national law, is that state necessarily monist?

SECTION C. PRINCIPLES, PRACTICE AND LEGITIMACY

A final question on theory. What do you see as the greatest need for the effectiveness of the international legal system today? Acceptance? Structure? Rule, scope and precision? Methodology? Essentiality? Commonality of values? Other?

FRANCK, LEGITIMACY IN THE INTERNATIONAL SYSTEM

82 A.J.I.L. 705 (1988) [a]

The surprising thing about international law is that nations ever obey its strictures or carry out its mandates. This observation is made not to register optimism that the half-empty glass is also half full, but to draw attention to a pregnant phenomenon: that most states observe systemic rules much of the time in their relations with other states. That they should do so is much more interesting than, say, the fact that most citizens usually obey their nation's laws, because the international system is organized in a voluntarist fashion, supported by so little coercive authority. This unenforced rule system can obligate states to profess, if not always to manifest, a significant level of day-to-day compliance even, at times, when that is not in their short-term self-interest. The element or paradox attracts our attention and challenges us to investigate it, perhaps in the hope of discovering a theory that can illuminate more generally the occurrence of voluntary normative compliance and even yield a prescription for enhancing aspects of world order. * * *

Legitimacy is used here to mean that quality of a rule *which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process.* Right process includes the notion of valid sources but also encompasses literary, socio-anthropological and philosophical insights. The elements of right process that will be discussed below are identified as affecting decisively the degree to which any rule is perceived as legitimate. * * *

A series of events connected with the role of the U.S. Navy in protecting U.S.-flagged vessels in the Persian Gulf serves to illustrate the paradoxical phenomenon of uncoerced compliance in a situation where the rule conflicts with perceived self-interest. Early in 1988, the Department of Defense became aware of a ship approaching the gulf with a load of Chinese-made Silkworm missiles en route to Iran. The Department believed the successful delivery of these potent weapons would increase materially the danger to both protected and protecting U.S. ships in the region. It therefore argued for permission to intercept the delivery. The Department of State countered that such a search and seizure on the high seas, under the universally recognized rules of war and neutrality, would constitute aggressive blockade, an act tantamount to a declaration of war against Iran. [If] the delivery ship and its cargo of missiles were allowed to pass. Deference to systemic rules had won out over tactical advantage in the internal struggle for control of U.S. policy.

Why should this have been so? In the absence of a world government and a global coercive power to enforce its laws, why did the U.S. Government, with its evident power to do as it wished, choose to "play

a. Reprinted by permission, American Society of International Law). Much of this material also appears in Franck, The Power of Legitimacy Among Nations (New York, 1990).

by the rules" despite the considerable short-term strategic advantage to be gained by seizing the Silkworms before they could be delivered? Why did preeminent American power defer to the rules of the sanctionless system? At least part of the answer to this question, quietly given by the State Department to the Department of Defense, is that the international rules of neutrality have attained a high degree of recognized legitimacy and must not be violated lightly. Specifically, they are well understood, enjoy a long pedigree and are part of a consistent framework of rules—the *jus in bello*—governing and restraining the use of force in conflicts. To violate a set of rules of such widely recognized legitimacy, the State Department argued, would transform the U.S. posture in the gulf from that of a neutral to one of belligerency. That could end Washington's role as an honest broker seeking to promote peace negotiations. It would also undermine the carefully crafted historic "rules of the game" applicable to wars, rules that are widely perceived to be in the interest of all states. * * *

Four elements—the indicators of rule legitimacy in the community of states—are identified and studied in this essay. They are *determinacy, symbolic validation, coherence* and *adherence* (to a normative hierarchy). To the extent rules exhibit these properties, they appear to exert a strong pull on states to comply with their commands. To the extent these elements are not present, rules seem to be easier to avoid by a state tempted to pursue its short-term self-interest. This is not to say that the legitimacy of a rule can be deduced solely by counting how often it is obeyed or disobeyed. While its legitimacy may exert a powerful pull on state conduct, yet other pulls may be stronger in a particular circumstance. The chance to take a quick, decisive advantage may overcome the counterpull of even a highly legitimate rule. In such circumstances, legitimacy is indicated not by obedience, but by the discomfort disobedience induces in the violator. (Student demonstrations sometimes are a sensitive indicator of such discomfort.) The variable to watch is not compliance but the strength of the compliance pull, whether or not the rule achieves actual compliance in any one case.

Each rule has an inherent pull power that is independent of the circumstances in which it is exerted, and that varies from rule to rule. This pull power is its index of legitimacy. For example, the rule that makes it improper for one state to infiltrate spies into another state in the guise of diplomats is formally acknowledged by almost every state, yet it enjoys so low a degree of legitimacy as to exert virtually no pull towards compliance. As Schachter observes, "some 'laws,' though enacted properly, have so low a degree of probable compliance that they are treated as 'dead letters' and * * * some treaties, while properly concluded, are considered 'scraps of paper.'" By way of contrast, we have noted, the rules pertaining to belligerency and neutrality actually exerted a very high level of pull on Washington in connection with the Silkworm missile shipment in the Persian Gulf.

Perhaps the most self-evident of all characteristics making for legitimacy is textual *determinacy*. What is meant by this is the ability of the text to convey a clear message, to appear transparent in the sense that one can see through the language to the meaning. Obviously, rules

with a readily ascertainable meaning have a better chance than those that do not to regulate the conduct of those to whom the rule is addressed or exert a compliance pull on their policymaking process. Those addressed will know precisely what is expected of them, which is a necessary first step towards compliance.

To illustrate the point, compare two textual formulations defining the boundary of the underwater continental shelf. The 1958 Convention places the shelf at "a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas." The 1982 Convention on the Law of the Sea, on the other hand, is far more detailed and specific. It defines the shelf as "the natural prolongation of * * * land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured," but takes into account such specific factors as "the thickness of sedimentary rocks" and imposes an outermost limit that "shall not exceed 100 nautical miles from the 2,500 meter isoba," which, in turn, is a line connecting the points where the waters are 2,500 meters deep. The 1982 standard, despite its complexity, is far more determinate than the elastic standard in the 1958 Convention, which, in a sense, established no rule at all. Back in 1958, the parties simply covered their differences and uncertainties with a formula, whose content was left in abeyance pending further work by negotiators, courts, and administrators and by the evolution of customary state practice. The vagueness of the rule did permit a flexible response to further advances in technology, a benefit inherent in indeterminacy.

Indeterminacy, however, has costs. Indeterminate normative standards not only make it harder to know what conformity is expected, but also make it easier to justify noncompliance. Put conversely, the more determinate the standard, the more difficult it is to resist the pull of the rule to compliance and to justify noncompliance. Since few persons or states wish to be perceived as acting in obvious violation of a generally recognized rule of conduct, they may try to resolve the conflicts between the demands of a rule and their desire not to be fettered, by "interpreting" the rule permissively. A determinate rule is less elastic and thus less amenable to such evasive strategy than an indeterminate one. * * *

To summarize: the legitimacy of a rule is affected by its degree of determinacy. Its determinacy depends upon the clarity with which it is able to communicate its intent and to shape that intent into a specific situational command. This, in turn, can depend upon the literary structure of the rule, its ability to avoid *reductio ad absurdum* and the availability of a process for resolving ambiguities in its application. * * *

As determinacy is the linguistic or literary-structural component of legitimacy, so *symbolic validation, ritual* and *pedigree* provide its cultural and anthropological dimension. As with determinacy, so here, the legitimacy of the rule—its ability to exert pull to compliance and to command voluntary obedience—is to be examined in the light of its

ability to communicate. In this instance, however, what is to be communicated is not so much content as *authority:* the authority of a rule, the authority of the originator of a validating communication and, at times, the authority bestowed on the recipient of the communication. The communication of authority, moreover, is symbolic rather than literal. We shall refer to these symbolically validating communications as cues.

All ritual is a form of symbolic validation, but the converse is not necessarily true. *Pedigree* is a different subset of cues that seek to enhance the compliance pull of rules or rule-making institutions by emphasizing their historical origins, their cultural or anthropological deep-rootedness. * * * Professor Schachter has observed that a body of rules produced by the UN legislative drafting body, the International Law Commission, will be more readily accepted by the nations "after [the Commission] has devoted a long period in careful study and consideration of precedent and practice." Moreover, the authority will be greater if the product is labeled *codification* —that is, the interpolation of rules from deep-rooted evidence of state practice—"than if it were presented as a 'development' (that is, as new law)," even though the Commission (as a subsidiary of the General Assembly) is equally empowered by the UN Charter to promote "the progressive development of international law and its codification." The compliance pull of a rule is enhanced by a demonstrable lineage. A new rule will have greater difficulty finding compliance, and even evidence of its good sense may not fully compensate for its lack of breeding. Nevertheless, a new rule may be taken more seriously if it arrives on the scene under the aegis of a particularly venerable sponsor such as a widely ratified multilateral convention, or a virtually unanimous decision of the International Court of Justice. * * *

* * * Symbols of pedigree and rituals are firmly imbedded in state diplomatic practice. The titles ("ambassador extraordinary and plenipotentiary"), prerogatives and immunities of ambassadors, consuls and others functioning in a representative capacity are among the oldest of symbols and rites associated with the conduct of international relations. The sending state, by the rituals of accreditation, endows its diplomats with pedigree. They become, in time-honored tradition, a symbolic reification of the nation ("full powers" or *plenipotentiary*), a role that is ritually endorsed by the receiving state's ceremony accepting the envoy's credentials. These ceremonies, incidentally, are as old as they are elaborate and are performed with as remarkably faithful uniformity in Communist citadels as in royal palaces. Once accredited and received, an ambassador *is* the embodiment of the nation. The status of ambassador, once conferred, carries with it inherent rights and duties that do not depend on the qualities of the person, or on the condition of relations between the sending and receiving states, or on the relative might of the sending state. To insult or harm this envoy, no matter how grievous the provocation, is to attack the sending state. Moreover, when an envoy, acting officially, agrees to something, the envoy's state is bound, usually even if the envoy acted without proper authorization. The host state normally is entitled to rely on the word of an ambassador as if his or her state were speaking.

The venerable ritual practices of diplomacy are almost universally observed, and the rules that govern diplomacy are widely recognized as imbued with a high degree of legitimacy, being both descriptive and predictive of nearly invariable state conduct and reflecting a strong sense of historically endowed obligation. When the rules are violated—as they have been by Iran and Libya in recent years—the international community tends to respond by rallying around the rule, as the Security Council and the International Court of Justice demonstrated when the Iranian regime encouraged the occupation of the U.S. Embassy in Tehran. Violations of the elaborate rules pertaining to embassies and immunities usually lead the victim state to terminate its diplomatic relations with the offender. The offended state—as Britain demonstrated after the St. James Square shooting—usually takes care not to retaliate by means that the rules do not permit.

Both determinacy and symbolic validation are connected to a further variable: coherence. The effect of incoherence on symbolic validation can be illustrated by reference to diplomatic practices pertaining to the ritual validation of governments and states. The most important act of pedigreeing in the international system is the deep-rooted, traditional act that endows a new government, or a new state, with symbolic status. When the endowing is done by individual governments, it is known as *recognition.* The symbolic conferral of status is also performed collectively through a global organization like the United Nations when the members vote to admit a new nation to membership, or when the General Assembly votes to accept the credentials of the delegates representing a new government.

These two forms of validation are important because they enhance the status of the validated entity; that is, the new state or government acquires legitimacy, which, in turn, carries entitlements and obligations equal to those of other such entities. Such symbolic validation cannot alter the empirically observable reality of power disparity among states and governments, nor, properly understood, does it give off that cue. It does, however, purport to restrict what powerful states legitimately may do with their advantage over the weak. It is a cue that prompts the Soviets, however reluctantly, to do a lot of explaining when they invade Afghanistan. The pedigreed statehood of Afghanistan, together with the determinacy of the rules against intervention by one state in the internal affairs of another, then combine to render those Soviet explanations essentially unacceptable, global scorn evidencing the inelastic determinacy of the applicable rules. * * *

To summarize: coherence, and thus legitimacy, must be understood in part as defined by factors derived from a notion of community. Rules become coherent when they are applied so as to preclude capricious checkerboarding. They preclude caprice when they are applied consistently or, if inconsistently applied, when they make distinctions based on underlying general principles that connect with an ascertainable purpose of the rules and with similar distinctions made throughout the rule system. The resultant skein of underlying principles is an aspect of community, which, in turn, confirms the status of the states that constitute the community. Validated membership in the community

accords equal capacity for rights and obligations derived from its legitimate rule system.

By focusing on the connections between specific rules and general underlying principles, we have emphasized the horizontal aspect of our central notion of a community of legitimate rules. However, there are vertical aspects of this community that have even more significant impact on the legitimacy of rules. * * *

* * * A rule * * * is more likely to obligate if it is made within the procedural and institutional framework of an organized community than if it is strictly an ad hoc agreement between parties in the state of nature. The same rule is still more likely to obligate if it is made within the hierarchically structured procedural and constitutional framework of a sophisticated community rather than in a primitive community lacking such secondary rules about rules. * * * Of course, there *are* lawmaking institutions in the system. One has but to visit a highly structured multinational negotiation such as the decade-long Law of the Sea Conference of the 1970s to see a kind of incipient legislature at work. The Security Council, the decision-making bodies of the World Bank and, perhaps, the UN General Assembly also somewhat resemble the cabinets and legislatures of national governments, even if they are not so highly disciplined and empowered as the British Parliament, the French National Assembly or even the U.S. Congress. Moreover, there *are* courts in the international system: not only the International Court of Justice, the European Community Court and the regional human rights tribunals, but also a very active network of quasi-judicial committees and commissions, as well as arbitral tribunals established under such auspices as the Algiers agreement ending the Iran hostage crisis. Arbitrators regularly settle investment disputes under the auspices and procedures of the World Bank and the International Chamber of Commerce. Treaties and contracts create jurisdiction for these tribunals and establish rules of evidence and procedure.

The international system thus appears on close examination to be a more developed community than critics sometimes allege. It has an extensive network of horizontally coherent rules, rule-making institutions, and judicial and quasi-judicial bodies to apply the rules impartially. Many of the rules are sufficiently determinate for states to know what is required for compliance and most states obey them most of the time. Those that do not, tend to feel guilty and to lie about their conduct rather than defy the rules openly. The system also has means for changing, adapting and repealing rules.

Most nations, most of the time, are both rule conscious and rule abiding. Why this is so, rather than that it is so, is also relevant to an understanding of the degree to which an international community has developed in practice. This silent majority's sense of obligation derives primarily not from explicit consent to specific treaties or custom, but from *status*. Obligation is perceived to be owed *to a community of states as a necessary reciprocal incident of membership in the community.* Moreover, that community is defined by secondary rules of process as well as by primary rules of obligation: states perceive themselves to be

participants in a structured process of continual interaction that is governed by secondary rules of process (sometimes called rules of recognition), of which the UN Charter is but the most obvious example. The Charter is a set of rules, but it is also about how rules are to be made by the various institutions established by the Charter and by the subsidiaries those institutions have created, such as the International Law and Human Rights Commissions. * * *

In the world of nations, each of these described conditions of a sophisticated community is observable today, even though imperfectly. This does not mean that its rules will never be disobeyed. It does mean, however, that it is usually possible to distinguish rule compliance from rule violation, and a valid rule or ruling from an invalid one. It also means that it is not necessary to await the millennium of Austinian-type world government to proceed with constructing—perfecting—a system of rules and institutions that will exhibit a powerful pull to compliance and a self-enforcing degree of legitimacy.

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