INTERNATIONAL LAW AND ASSUMPTIONS ABOUT THE STATE SYSTEM

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MOST writers on international relations and international law still examine the relationship between international law and politics in terms of the assumption that law either should or does function only as a coercive restraint on political action. Textbook writers on general international politics like Morgenthau,[1] and Lerche and Said,[2] as well as those scholars who have specialized in international law like J. L. Brierly[3] and Charles De Visscher,[4] make the common assumption that international law should be examined as a system of coercive norms controlling the actions of states. Even two of the newer works, *The Political Foundations of International Law* by Morton A. Kaplan and Nicholas deB. Katzenbach[5] and *Law and Minimum World Public Order* by Myres S. McDougal and Florentino P. Feliciano,[6] in spite of an occasional reference to the non-coercive as-

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[1] Hans J. Morgenthau, *Politics Among Nations* (New York 1961), 275-311. The entire evaluation of the "main problems" of international law is focused on the question of what rules are violated and what rules are not.

[2] Charles O. Lerche, Jr., and Abdul A. Said, *Concepts of International Politics* (Englewood Cliffs, N.J., 1963), 167-87. That the authors have employed the assumption that international law functions as a system of restraint is evident from the title of their chapter which examines international law, "Limitations on State Actions."

[3] J. L. Brierly, *The Law of Nations* (New York 1963), 1. Brierly defines international law as "the body of rules and principles of action which are binding upon civilized states in their relations. . . ."

[4] Charles De Visscher, *Theory and Reality in Public International Law* (Princeton 1957), 99-100.

[5] Morton A. Kaplan and Nicholas deB. Katzenbach, *The Political Foundations of International Law* (New York 1961), 5. In a discussion of how the student should observe international law and politics, the authors write: "To understand the substance and limits of such constraining rules (international law), 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. Only in this way is it possible to predict the areas in which rules operate, the limits of rules as effective constraints, and the factors which underlie normative change." Although the authors are asking an important question—"Why has international law been binding in some cases?"—they still assume that international law functions primarily as a direct restraint on state action. For an excellent review of this book, see Robert W. Tucker, "Resolution," *Journal of Conflict Resolution*, VII (March 1963), 69-75.

[6] Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public*

pects of international law, are developed primarily from the model of international law as a system of restraint. Deriving their conception of the relationship between international law and political action from their ideas on the way law functions in domestic communities, most modern writers look at international law as an instrument of direct control. The assumption that international law is or should be a coercive restraint on state action structures almost every analysis, no matter what the school of thought or the degree of optimism or pessimism about the effectiveness of the international legal system.[7] With an intellectual framework that measures international law primarily in terms of constraint on political action, there is little wonder that skepticism about international law continues to increase while creative work on the level of theory seems to be diminishing.[8]

Therefore, it is desirable to approach the relationship between international law and politics at a different functional level, not because international law does not function at the level of coercive restraint,

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Order (New Haven 1961), 10. The authors suggest that if any progress in conceptualizing the role of international law is to be made, it is necessary to distinguish between the "factual process of international coercion and the process of authoritative decision by which the public order of the world community endeavors to regulate such process of coercion." This suggestion is based on the assumption that international law promotes order primarily through the establishment of restraints on state actions.

[7] There are a few writers who have tried to approach international law from a different vantage point. For a survey of some of the other approaches to international law and politics, see Michael Barkun, "International Norms: An Interdisciplinary Approach," *Background*, VIII (August 1964), 121-29. The survey shows that few "new" approaches to international law have developed beyond the preliminary stages, save perhaps for the writings of F. S. C. Northrop. Northrop's works (e.g., *Philosophical Anthropology and Practical Politics* [New York 1960], 326-30) are particularly significant in their attempt to relate psychological, philosophical, and cultural approaches to the study of law in general, although he has not usually been concerned with the overall relationship of international law to international political action. Not mentioned in Barkun's survey but important in the discussion of international law and politics is Stanley Hoffmann, "International Systems and International Law," in Klaus Knorr and Sidney Verba, eds., *The International System* (Princeton 1961), 205-38. However, Hoffmann's essay is closer in approach to the work by Kaplan and Katzenbach than to the approach developed in this article. Finally, it is also necessary to point to an article by Edward McWhinney, "Soviet and Western International Law and the Cold War in a Nuclear Era of Bipolarity: Inter-Bloc Law in a Nuclear Age," *Canadian Yearbook of International Law*, I (1963), 40-81. Professor McWhinney discusses the relationship between American and Russian structures of action, on the one hand, and their interpretations of international law, on the other. While McWhinney's approach is basically similar to the one proposed in this article in its attempt to relate international law to politics on a conceptual level, his article is focused on a different set of problems, the role of national attitudes in the contemporary era on ideas of international law. Nevertheless, it is a significant contribution to the task of analyzing more clearly the relationship between international law and politics.

[8] See Richard A. Falk, "The Adequacy of Contemporary International Law: Gaps in Legal Thinking," *Virginia Law Review*, L (March 1964), 231-65, for a valuable but highly critical analysis of contemporary international legal theory.

but because it also functions at another level. In order to illustrate a second functional level in the relationship between international law and politics, it is necessary to examine the operation of domestic law. In a domestic society, the legal system as a series of interrelated normative statements does more than direct or control the actions of its members through explicit rules backed by a promise of coercion. Systems of law also act on a more generic and pervasive level by serving as authoritative (i.e., accepted as such by the community) modes of communicating or reflecting the ideals and purposes, the acceptable roles and actions, as well as the very processes of the societies. The legal system functions on the level of the individual's perceptions and attitudes by presenting to him an image of the social system—an image which has both factual and normative aspects and which contributes to social order by building a consensus on procedural as well as on substantive matters. In this sense, law in the domestic situation is a primary tool in the "socialization"[9] of the individual.

International law functions in a similar manner: namely, as an institutional device for communicating to the policy-makers of various states a consensus on the nature of the international system. The purpose of this article is to approach the relationship between international law and politics not as a system of direct restraints on state action, but rather as a system of quasi-authoritative communications to the policy-makers concerning the reasons for state actions and the requisites for international order. It is a "quasi-authoritative" device because the norms of international law represent only an imperfect consensus of the community of states, a consensus which rarely commands complete acceptance but which usually expresses generally held ideas. Given the decentralized nature of law-creation and law-application in the international community, there is no official voice of the states as a collectivity. However, international law taken as a body of generally related norms is the closest thing to such a voice. Therefore, in spite of the degree of uncertainty about the authority of international law, it may still be meaningful to examine international law as a means for expressing the commonly held assumptions about the state system.

The approach advocated in this article has its intellectual antecedents in the sociological school, since it seeks to study international law in relation to international politics. Furthermore, it is similar to that of the sociological school in its assumption that there is or should be a significant degree of symmetry between international law and politics

[9] See Gabriel A. Almond and James S. Coleman, eds., *The Politics of the Developing Areas* (Princeton 1960), 26-31, for an explanation of the concept of socialization.

on the level of intellectual constructs—that is, in the way in which international law has expressed and even shaped ideas about relations between states. It is hoped that this approach will contribute to a greater awareness of the interdependence of international law and conceptions of international politics.

Before analyzing the way in which international law has in the past and continues today to reflect common attitudes about the nature of the state system, let us discuss briefly the three basic assumptions which have generally structured those attitudes.[10] First, it has been assumed that the state is an absolute institutional value and that its security is the one immutable imperative for state action. If there has been one thing of which policy-makers could always be certain, it is that their actions must be designed to preserve their state. Second, it has been assumed that international politics is a struggle for power, and that all states seek to increase their power. Although the forms of power have altered during the evolution of the state system, it has been generally thought that states are motivated by a drive for power, no matter what the stakes. The third basic assumption permeating ideas about the international system has to do with maintaining a minimal system of order among the states. This assumption, symbolized generally by the maxim "Preserve the balance of power," affirms the necessity of forming coalitions to counter any threat to hegemony and of moderating actions in order to avoid an excess of violence that could disrupt the system.

It is necessary at this point to note that an unavoidable tension has existed between the aim of maintaining the state and maximizing power, on the one hand, and of preserving the international system, on the other. The logical extension of either aim would threaten the other, since complete freedom of action by the state would not allow for the limitation imposed by requirements to maintain the system, and a strict regularization of state action inherent in the idea of the system would curtail the state's drive for power. However, the tension

[10] The following discussion of the assumptions of the state system is brief, since students of international politics generally agree that the three assumptions listed have structured most of the actions of states. This agreement is most complete concerning the nature of the "classical" state system. The author is also of the opinion that these assumptions continue to operate today in a somewhat mutated form. (See his unpublished manuscript "The Image of Power Politics: A Cognitive Approach to the Study of International Politics," chaps. 2, 4, 8.) Note also the agreement on the nature of classical ideas about international politics in the following: Ernst B. Haas, "The Balance of Power as a Guide to Policy-Making," *Journal of Politics*, XV (August 1953), 370-97; Morton A. Kaplan, *System and Process in International Politics* (New York 1957), 22-36; and Edward Vose Gulick, *Europe's Classical Balance of Power* (Ithaca, N.Y., 1955).

has remained constant, with neither norm precluding the other except when a given state was in immediate danger of destruction. At those times, the interests of the system have been subordinated to the drive for state survival, but with no apparent long-range effect on the acceptance by policy-makers of either set of interests, despite their possible incompatibility. The prescriptions that states should be moderate, flexible, and vigilant[11] have been a manifestation of the operation of the system. Together, the three basic assumptions about the state system have constituted the conceptual basis from which the policy-makers have planned the actions of their state.

I. Classical International Law and the Image of the State System

Almost every legal aspect of international relations from 1648 to 1914 reinforced and expressed the assumptions of the state system. State practices in regard to treaties, boundaries, neutrality, the occupation of new lands, freedom of the seas, and diplomacy, as well as classical legal doctrines, provide ample illustration of the extent to which the basic assumptions of the state were mirrored in international law.

The essential role of treaties in international law reflected the three assumptions of the state system. First, treaty practices helped to define the nature of statehood. Emanating from the free and unfettered will of states, treaties were the expression of their sovereign prerogatives. Statehood itself was defined in part as the ability to make treaties, and that ability presupposed the equality and independence usually associated with the idea of the state. Moreover, certain definitive treaties, like those written at the Peace of Augsburg (1515) and the Peace of Westphalia (1648), actually made explicit the attributes of statehood. The former treaty affirmed the idea that the Prince had complete control over the internal affairs of the state, while the latter emphasized that states were legally free and equal in their international relationships.[12] Even the actual wording of treaties expressed the classical assumption about the sanctity of the state. Whether in the formal references to the "high contracting parties" or in the more vital statements about the agreement of sovereigns not to interfere with

[11] See Gulick, 34; and for a discussion of the principles of moderation, flexibility, and vigilance, *ibid.*, 11-16.

[12] For the effects of the two treaties, see Charles Petrie, *Diplomatic History, 1713-1939* (London 1949), 111; David Jayne Hill, *A History of Diplomacy in the International Development of Europe* (New York 1924), 603-6; and Arthur Nussbaum, *A Concise History of the Law of Nations* (New York 1961), 116.

the actions of other sovereigns, treaties were clear expressions of the classical idea of the state.[13]

Treaty law also contributed to the evolution of the classical assumption regarding the maintenance of the international system. Both explicitly and implicitly, treaties affirmed the necessity of an international system. Whether or not they contained such phrases as "balance of power," "just equilibrium," "universal and perpetual peace,"[14] "common and public safety and tranquillity,"[15] "public tranquillity on a lasting foundation,"[16] or "safety and interest of Europe,"[17] the most important treaties during the classical period affirmed the desirability of maintaining the international system.[18] Also, many treaties reaffirmed earlier treaty agreements, contributing to the idea that the international system was a continuing, operative unity.[19] Therefore, treaties usually reminded the policy-maker that the maintenance of the international system was a legitimate and necessary objective of state policy.

Finally, treaties affirmed the necessity and, in part, the legality of the drive for power. The constant juggling of territory, alliances, and other aspects of capability was a frequent and rightful subject of treaty law. Treaties implicitly confirmed that power was the dynamic force in relations between states by defining the legal criteria of power and, more important, by providing an institutional means, subscribed to by most of the members of the system, which legalized certain political transactions, such as territorial acquisition and dynastic exchange.

A second state practice which contributed to the classical assumptions about the state system was the legal concept of boundaries. Inherent in the very idea of the boundary were all three assumptions of the classical system. First, the boundary marked off that most discernible of all criteria of a state's existence—territory.[20] A state was sovereign within its territory, and the boundary was essential to the demarcation and protection of that sovereignty. Freedom and

[13] E.g., *The Treaty of Ryswick, 1697* in Andrew Browning, ed., *English History Documents*, VIII (New York 1963), 881-83.

[14] *Treaty of Ryswick*, Article I, in *ibid.*

[15] *Barrier Treaty of 1715*, Article I, in *ibid.*, Vol. X.

[16] *Treaty of Vienna, 1713*, in *ibid.*, Vol. VIII.

[17] *Treaty of Quadruple Alliance, 1815*, in *ibid.*, Vol. XI.

[18] Leo Gross, "The Peace of Westphalia, 1648-1948," *American Journal of International Law*, XLII (January 1948), 20-40.

[19] For a treaty which expressed the necessity of keeping prior obligations, see *Treaty of Aix-la-Chapelle, 1748*, in Browning, ed., Vol. X.

[20] See John H. Herz, *International Politics in the Atomic Age* (New York 1962), 53, for a discussion of the role of territory in the classical state system and the international legal system.

equality necessitated the delineation of a certain area of complete control; the boundary as conceptualized in international law was the institutional means through which that necessity was fulfilled. Second, the boundary was essential for the preservation of the international system.[21] After every war the winning powers set up a new or revised set of boundaries which aided them in maintaining order by redistributing territory. More important, the boundary also provided a criterion by which to assess the intentions of other states. Change of certain essential boundaries signified a mortal threat to the whole system, and signaled the need for a collective response.[22] Finally, the legal concept of boundaries provided a means through which the expansion and contraction of power in the form of territory could be measured. Since the boundary was a legal means of measuring territorial changes, international law in effect reinforced the idea that the struggle for power was an essential and accepted part of international politics. All three assumptions of the state system, therefore, were mirrored in the classical legal concept of boundaries.

Another international legal concept which reflected the assumptions about the state system was the idea of neutrality. The primary importance of neutrality law lay in its relation to the classical emphasis on the preservation of the international system. The practice of neutrality was an essential element in the mitigation of international conflict because it provided a legitimate means of lessening the degree of violence in any given war (by reducing the number of belligerents) and also made those involved in a war aware of the possibility of hostile actions from outside should the conflict weaken the participants too greatly. In short, the legal concept of neutrality implied that the actions of states must remain moderate and flexible in order to preserve the state system.[23]

There were other aspects of international legal practice which substantiated the assumptions of the state system. For instance, since the sixteenth century the law pertaining to the occupation of new lands and to freedom of the high seas constituted a vital aspect of international law, and provided "legitimate" areas in which the struggle for power could take place.

From the outset, most of the non-European areas of the world were

[21] See Hoffmann, 212, 215, for a discussion of the way in which territorial settlements in treaties aided stability within the system. He calls this function part of the law of political framework.

[22] E.g., the English and French attitude toward Belgium.

[23] For a discussion of the role of neutrality in the balance of power system, see McDougal and Feliciano, 391-413.

considered by the great powers to be acceptable arenas for the struggle for power. International legal practice made it easy for states to gain control of land overseas by distinguishing between the laws of occupation and the laws of subjugation. This distinction made it easier for powers to extend control over non-European territorial expanses because it enabled states to "occupy" territory legally without actually controlling it.[24] Through the laws of occupation, international law confirmed the assumption that colonial expansion was part of the struggle for power.

The law of the high seas also contributed to the idea of the struggle for power. The expansion of trade, military power, and territorial domain was, throughout almost the entire history of the state system, greatly dependent upon the free use of the high seas. The laws of the sea were designed so that maximum use could be made of this relatively cheap mode of transportation. Like the laws of occupation of non-European territory, sea law helped to keep the distribution of power among European states in continuous flux.[25]

Therefore, both the laws of the seas and the laws governing the occupation of new lands were instrumental in "legalizing" areas for conflict. Given the assumption that states always maximize their power, a free sea and the easy acquisition of non-European lands provided the fluidity needed for the states to struggle for power. Moreover, both sets of laws removed the area of conflict from the home territory, thus enabling states to increase the scope of their struggle without proportionately increasing its intensity.[26]

A final category of international law which reinforced the assumptions about the state system was the law of diplomacy. The legal rationalization behind the rights and duties of diplomats (i.e., since diplomats represent sovereign states, they owe no allegiance to the receiving state) emphasized the inviolability of the state which was an essential aspect of the classical assumptions.[27] At the same time, the very fact that

[24] L. Oppenheim, in H. Lauterpacht, ed., *International Law* (New York 1948), I, 507.

[25] The attempt to control a "closed sea" was sometimes a bid by a powerful state to freeze the *status quo*—e.g., Portugal's control of the Indian Ocean in the sixteenth and seventeenth centuries (Nussbaum, 111).

[26] Analysts have argued over whether colonialism reduced or exacerbated international antagonism. Without settling the argument, it seems safe to say that the struggle for colonies was a more spectacular and relatively less dangerous system of conflict than was competition for European land.

[27] For the relationship of the assumption of statehood and the functioning of diplomatic immunities, see a discussion of the theoretical underpinnings of diplomatic immunities in Ernest L. Kelsey, "Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities," *American Journal of International Law*, LXXXVIII (January 1962), 92-94.

even semi-hostile states could exchange and maintain ambassadors emphasized that all states were part of a common international system.[28] Finally, the classical functions of a diplomat—to make sure that conditions are not changing to the disadvantage of his state and, if they are, to suggest and even implement policies to rectify the situation—exemplified the rule of constant vigilance necessary in a group of states struggling for power. Therefore, in their own way, the laws of diplomacy expressed all three of the assumptions of the state systems.

The assumptions of the state system were reinforced not only by the legal practices of states but also by the major international legal theories of the classical period. Three general schools of thought developed: the naturalists, the eclectics or Grotians, and the positivists.[29] In each school, there was a major emphasis on both the state and the state system as essential institutional values. Whether it was Pufendorf's insistence on the "natural equality of state,"[30] the Grotians' concept of the sovereign power of state,[31] or Bynkershoek and the nineteenth-century positivists' point that treaties were the prime, if not the only, source of international law,[32] the state was considered by most classical theorists to be the essential institution protected by the legal system. At the same time, almost every classical writer on international law either assumed or argued for the existence of an international system of some kind.[33] Along with Grotians, the naturalists maintained that a system of states existed, since man was a social animal. Vattel, probably the most famous international lawyer in the classical period, asserted that a balance of power and a state system existed.[34] Even the positivists of the nineteenth century assumed that there was an international system of some kind. This is apparent from their emphasis on the balance of power,[35] as well as from their assumption

[28] Morgenthau, 547.

[29] For a discussion of the precise meaning of these classifications, see Nussbaum.

[30] *Ibid.*, 149.

[31] Hugo Grotius, *The Rights of War and Peace*, ed. with notes by A. C. Campbell (Washington 1901), 62.

[32] Cornelius Van Bynkershoek, *De dominio maris dissertatio*, trans. by Ralph Van Deman Mogoffin (New York 1923), 35.

[33] De Visscher, 88. For similar interpretations of classical and pre-twentieth-century theorists, see Walter Schiffer, *The Legal Community of Mankind* (New York 1951), chap. 1; or Percy E. Corbett, *Law and Society in the Relations of States* (New York 1951).

[34] Emeric de Vattel, *The Laws of Nations* (Philadelphia 1867), 412-14.

[35] G. F. Von Martens, *The Law of Nations: Being the Science of National Law, Covenants, Power & Founded upon the Treaties and Custom of Modern Nations in Europe*, trans. by William Cobbett (4th ed., London 1829), 123-24.

that relations between nations could be defined in terms of legal rights and duties.[36]

Therefore, there was a consensus among the classical theorists of international law that international politics had two structural elements: the state, with its rights of freedom and self-preservation; and the system, with its partial effectiveness in maintaining a minimal international order. That the theorists never solved the conflict between the idea of the unfettered sovereign state, on the one hand, and a regulating system of law, on the other, is indicative of a conflict within the assumptions of the state system,[37] but a conflict which neither prevented international lawyers from writing about an international legal order nor kept policy-makers from pursuing each state's objectives without destroying the state system.

Although the norms of classical international law sometimes went unheeded, the body of theory and of state practice which constituted "international law as an institution" nonetheless expressed in a quasi-authoritative manner the three assumptions about international politics. It legalized the existence of states and helped to define the actions necessary for the preservation of each state and of the system as a whole. It reinforced the ideas that vigilance, moderation, and flexibility are necessary for the protection of a system of competing states. And finally, international law established a legalized system of political payoffs by providing a means to register gains and losses without creating a static system. In fact, this last aspect was essential to the classical state system. With international law defining certain relationships (territorial expansion, empire-building, etc.) as legitimate areas for political competition, other areas seemed, at least generally in the classical period, to be removed from the center of the political struggle. By legitimizing the struggle as a form of political competition rather than as universal conflict, international law sanctioned a form of international system that was more than just an anarchic drive for survival.

[36] Almost all of the nineteenth-century positivists assumed that relations between nations were systematized enough to allow for a system of rights and duties. E.g., William Edward Hall, *A Treatise on International Law* (Oxford 1904), 43-59; Henry Wheaton, *Elements of International Law* (Oxford 1936), 75. Wheaton does not discuss duties as such, but when he talks about legal rights he distinguishes between "absolute" and "conditional" rights. According to Wheaton, the "conditional" rights are those resulting from membership in the international legal system. This formulation implies the existence of corresponding duties.

[37] See Von Martens, 123-34, for the intellectual and legal problems growing out of the assumption that states may legally maximize power but that they also have a responsibility "to oppose by alliances and even by force of arms" a series of aggrandizements which threaten the community.

II. Contemporary International Law and the Assumptions of the State System

As a quasi-authoritative system of communicating the assumptions of the state system to policy-makers, contemporary international law no longer presents a clear idea of the nature of international politics. This is in part a result of the tension, within the structure of contemporary international law itself, between the traditional legal concepts and the current practices of states. International law today is in a state of arrested ambiguity—in a condition of unstable equilibrium between the old and the new. As a result, it no longer contributes as it once did to a consensus on the nature of the state system. In fact, it adds to the growing uncertainty and disagreement as to how the international political system itself is evolving. The following discussion will attempt to assess the current developments in international law in terms of the challenges those developments make to the three assumptions of the state system. It is realized that the three assumptions themselves have already undergone change, but our purpose is to show where contemporary international legal practice and theory stand in relation to that change.

THE CHALLENGE TO THE STATE AND THE SYSTEM

The current legal concept of the state is a perfect example of the arrested ambiguity of contemporary international law and of the threat that this condition represents to the assumptions of the state system. On the one hand, most of the traditional forms used to express the idea of statehood are still employed. Treaty-makers and statesmen still write about "respect for territorial integrity," the "right of domestic jurisdiction," and the "sovereign will of the high contracting parties." Moreover, most of the current substantive rights and duties, such as self-defense, legal equality, and territorial jurisdiction, that are based on the assumption that states as units of territory are the irreducible institutional values of the system continue to be central to international legal practice.[38] On the other hand, certain contemporary developments contrast sharply with the traditional territory-oriented conceptions of international law.[39] With the growth of international entities possessing

[38] E.g., Charles G. Fenwick, *International Law* (New York 1952), chap. 11.

[39] For a survey of current challenges to traditional international law, see Wolfgang Friedmann, "The Changing Dimensions of International Law," *Columbia Law Review*, LXII (November 1962), 1147-65. Also, see Richard A. Falk, *The Role of the Domestic Courts in the International Legal Order* (Syracuse 1964), 14-19, for a discussion of the fact that while there is a growing "functional obsolescence" of the state system, the

supranational powers (e.g., ECSC), the legal idea of self-contained units based on territorial control lacks the clear basis in fact that it once enjoyed. Many of the traditional prerogatives of the sovereign state, such as control over fiscal policy,[40] have been transferred in some respects to transnational units. While the development of supranational powers is most pronounced in Europe, there is reason to believe, especially concerning international cooperation on technical matters, that organizations patterned on the European experience might occur elsewhere.

Another significant manifestation of ambiguity in the territorial basis of international law is found in the post-World War II practice of questioning the validity of the laws of other states. The "act of state doctrine" no longer serves as the guideline it once did in directing the national courts of one state to respect the acts promulgated in another.[41] Once based on the assumption of the "inviolability of the sovereign," the "act of state doctrine" today is the source of widespread controversy. The conflicting views of the doctrine are symptomatic of the now ambiguous role of territoriality in questions of jurisdictional and legal power. Although these developments in current legal practice are only now emerging, they nonetheless can be interpreted as a movement away from the strictly and clearly defined legal concept of the state that appeared in classical international law.

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assumptions of the state system continue to operate for psychological and political reasons.

[40] E.g., Articles 3 and 4 of the *Treaty Establishing the European Coal and Steel Community* (April 18, 1951).

[41] For an excellent discussion of the legal and political problems related to the question of the "act of state doctrine" in particular, and of territorial supremacy as a concept in general, see Kenneth S. Carlston, *Law and Organization in World Society* (Urbana, Ill., 1962), 191-93, 266-69. Also, for a discussion of the problem in a larger framework, see Falk, *Role of the Domestic Courts*. Since World War II, states, especially on the European continent, have found increasingly broader bases to invalidate the effect of foreign laws. Traditionally, states have refused to give validity to the laws of other lands for a small number of narrowly constructed reasons (e.g., refusal to enforce penal or revenue laws). Today many states have declared foreign laws invalid for a variety of reasons, the most important being the formulation that the national court cannot give validity to a foreign law that is illegal in terms of international law (see "*The Rose Mary Case*," *International Law Report* [1953], 316ff.), and the most frequent being a broad interpretation of "sense of public order" (see Martin Domke, "Indonesian Nationalization Measures Before Foreign Courts," *American Journal of International Law*, LIV [April 1960], 305-23). The most recent case in American practice, the *Sabbatino* decision (Supplement, *International Legal Materials*, III, No. 2 [March 1964], 391), appears to reaffirm the traditional emphasis on the territorial supremacy of the national legal order in these matters, but is actually ambiguous. On the one hand, the Opinion of the Court applied the "act of state doctrine" in declaring the Cuban law valid, but on the other hand, the Court stated that "international law does not require application of the doctrine."

Other developments in contemporary international law represent, theoretically at least, a challenge to the assumption that the state and its freedom of action are an absolute necessity for the state system. Most noticeable has been the attempt to develop an international organization which would preserve a minimal degree of order. Prior to the League of Nations, there had been attempts to institutionalize certain aspects of international relations, but such attempts either did not apply to the political behavior of states (e.g., the Universal Postal Union) or did not challenge the basic assumptions of the state system (as the very loosely defined Concert of Europe failed to do). As it was formulated in the Covenant and defined by the intellectuals, the League represented a threat to the assumptions of the state system because it sought to settle once and for all the tension between the policy-maker's commitment to preserve his state and his desire to maintain the state system by subordinating his state to it through a formal institution.

Proponents of the League saw it as a means to formalize a system of maintaining international order by committing states in advance to a coalition against any state that resorted to war without fulfilling the requirements of the Covenant. If it had been operative, such a commitment would have represented a total revolution in the legal concept of the state as an independent entity, since it would have abolished the most essential of all sovereign prerogatives, the freedom to employ coercion. However, the ideal purpose of the League, on the one hand, and the aims of politicians and the actual constitutional and operational aspects of the League, on the other, proved to be quite different. Owing to certain legal formulations within the Covenant (Articles 10, 15, 21) and the subsequent application of the principles (e.g., in Manchuria and Ethiopia), the hoped-for subordination of the state to the system was not realized.[42]

Like the League, the United Nations was to replace the state as the paramount institutional value by establishing a constitutional concert of powers. However, it has succeeded only in underscoring the existing tension between the drive to maintain the state and the goal of maintaining the system. In the Charter itself, the tension between the state and the system remains unresolved.[43] Nor does the actual

[42] For a useful discussion of the relationship between the idea of collective security and the assumption of the balance of power system, see Inis L. Claude, *Swords into Plowshares* (New York 1962), 255-60; and Herz, chap. 5. It is necessary to make a distinction between the theory of collective security, which certainly would challenge the basic assumptions of the state system, and its operation, which would not.

[43] Compare Articles 25-51, or paragraphs 2-7 in Article 2, for the contrast between system-oriented and state-oriented norms.

operation of the United Nations provide a very optimistic basis for the hope that tension will be lessened in the future.

In terms of international law, regional organizations constitute a mixed challenge to the traditional relationship between the state and the system. Although certain organizations represent an attempt to transcend the traditional bounds of their constituent members on functional grounds, this does not necessarily mean that those members have rejected the state as a political form. In reality, if regional organizations represent any transformation at all in the structural relationship between the state and the system, they constitute an attempt to create a bigger and better state, an attempt which is not contrary to the traditional assumptions of the state system. In spite of the fact that some organizations are given supranational power and present a challenge in that sense, most of the organizations are as protective of the sovereign rights of the state as is the United Nations Charter (e.g., the OAS Charter) or are not regional organizations at all, but military alliances.[44]

A more serious challenge, but one somewhat related to the challenge by regional organizations, is the changing relation of the individual to the international legal order. In the classical system, international law clearly relegated the individual to the position of an object of the law. Not the individual, but the state had the rights and duties of the international legal order.[45] This legal formulation was in keeping with the classical emphasis on the sanctity of the state. Today, however, the development of the concepts of human rights, international and regional organizations, and the personal responsibility of policy-makers to a higher law not only limit the scope of legally permissible international action but, more important, limit the traditional autonomy of the leaders of the state over internal matters.[46] The idea that the individual rather than the state is the unit of responsibility in the formulation of policy has a long

[44] This is not to say that regional organizations do not represent a challenge to the concept of the state on psychological or social grounds. Obviously, the type of allegiance to a United Europe would be different in kind and degree from the traditional allegiance to a European state. However, in terms of the challenge to the legal concept of the state, regional organizations still adhere to the idea that the constituent members are sovereign in their relationship with states outside the organization.

[45] See Corbett, 53-56, for a discussion of the place of the individual in classical international law.

[46] Most modern writers have noted that the individual no longer stands in relation to international law solely as the object (e.g., Corbett, 133-35, or Friedmann, 1160-62), though they are agreed that, to use Friedmann's words, "the rights of the individual in international law are as yet fragmentary and uncertain."

intellectual tradition;[47] however, it is only recently that the norms associated with that idea have become a part of international law.

Although the role of the individual in international law is small and the chances for its rapid development in the near future slight, it represents a more vital challenge to traditional international law and to the assumptions of the state system than either international or regional organizations. Since the principle of collective responsibility (of the state) rather than individual responsibility has traditionally served as the infrastructure for the rights and duties of states,[48] the development of a place for the individual in the international legal system that would make him personally responsible would completely revolutionize international law. At the same time, by making the individual a higher point of policy reference than the state, the development of the role of the individual represents a challenge to the assumption once reflected in classical international law that the preservation and maximization of state power is an absolute guideline for policy-makers. The evolving place of the individual in the contemporary international legal system, then, is contrary to the traditional tendency of international law to reaffirm the absolute value of the state.

THE CHALLENGE TO THE CONCEPT OF POWER

One of the most significant developments in international law today relates to the assumption that states do and should compete for power. In the classical period, international law, through the legal concepts of neutrality, rules of warfare, occupation of new lands, rules of the high seas, and laws of diplomacy, reinforced the idea that a struggle for power among states was normal and necessary. Today, many of these specific legal norms still apply, but the overall permissible range of the struggle for military power[49] has been limited by the concept of the just war.

The idea of the just war is not new to international law. Most of the classical writers discussed it, but they refused to define the concept in strict legal terms and usually relegated it to the moral or

[47] According to Guido de Ruggiero, *The History of European Liberalism* (Boston 1959), 363-70, the liberal conception of the state has always assumed that the individual was the absolute value, though this idea has not always been operative.

[48] For an excellent discussion of the role of collective responsibility in international law, see Hans Kelsen, *Principles of International Law* (New York 1959), 9-13, 114-48.

[49] Although the military struggle today is considered to be only one aspect of the struggle for power, it is the one most closely related to the problem of order in both the classical and the contemporary system, and therefore the most crucial in the relationship between law and politics.

ethical realm.[50] The nineteenth-century positivists completely abandoned the doctrine with the formulation that "wars between nations must be considered as just on both sides with respect to treatment of enemies, military arrangements, and peace."[51] However, with the increased capability of states to destroy each other, a movement has grown to regulate force by legal means.

This movement developed through the Hague Conventions and the League of Nations and, in some respects, culminated in the Kellogg-Briand Pact of 1928. Today, the just war is a more or less accepted concept in international law. Most authors write, and most policy-makers state, that aggression is illegal and must be met with the sanction of the international community. The portent of this formulation of the assumption regarding power is great since, theoretically at least, it deprives the states of the range of action which they once freely enjoyed in maximizing their power and in protecting themselves. If the only legal justification for war is self-defense, or authorization of action in accordance with the Charter of the United Nations,[52] then a war to preserve the balance of power or to expand in a limited fashion is outlawed. While the traditional formulation of international law provided a broad field upon which the game of power politics could be played, the new formulations concerning the legal use of force significantly limit and, one could argue, make illegal the military aspects of the game of power politics.[53] The freedom to use military power, once an essential characteristic of sovereignty and an integral part of international law, is no longer an accepted international legal norm.

The concept of the just war directly challenges the assumptions of the state system, because it implies that the military struggle for

[50] See D. W. Bowett, *Self-Defense in International Law* (Manchester 1958), 156-57; and Nussbaum, 137, 153-55, 171.

[51] See Nussbaum, 182-83. Also see Ian Brownlie, *International Law and the Use of Force by States* (Oxford 1963), 15-18.

[52] Actually, the range of action provided by the contemporary formulation, especially regarding the authorization in accordance with the United Nations Charter, could be broad and could conceivably take in "balancing" action if the deadlock in the Security Council were broken. The reason for this is the very ambiguous mandate for Security Council action spelled out in the Charter. It is possible under this mandate to call the limited "balancing" action, typical of the eighteenth century, an action taken to counter a "threat to the peace." Nonetheless, given the current stalemate within the Security Council, and the nature of the General Assembly actions to date, it is safe to conclude that contemporary international law has greatly limited the wide-ranging legal capacity that states once had in deciding on the use of force.

[53] See Brownlie, 251-80, for a discussion of the contemporary legal restrictions on the use of force. Also see Kaplan and Katzenbach, 205, for a discussion of the just-war doctrine and its compatibility with the balance of power system.

power is no longer a normal process of international politics. No longer does international law legitimize the gains of war, and no longer do policy-makers look upon war as a rightful tool of national power.[54] This is not to say that states do not use force in their current struggles or that the doctrine of the just war would deter them in a particular case. However, the doctrine does operate on the conceptual level by expressing to the policy-makers the idea that the use of force is no longer an everyday tool of international power politics. In terms of the traditional assumption about the state's natural inclination to maximize power, the contemporary legal commitment to the just-war doctrine represents a profound and historic shift.

III. International Law and the Reality of Contemporary International Politics

Contemporary international legal practice, then, is developing along lines which represent a threat not only to traditional concepts of international law but also to the assumptions of the state system. The sporadic developments in international and regional organizations, the evolving place of the individual in the international legal system, and the doctrine of the just war are manifestations of the transformation occurring today both in the structure of international law and in attitudes about the state system. Actually, of course, the traditional conceptions of international law and the classical assumptions about international politics are not extinct.[55] Rather, there is in both international law and politics a perplexing mixture of past ideas and current developments. The only thing one can be sure of is that behind the traditional legal and political symbols which exist today in a somewhat mutated form, a subtle transformation of some kind is taking place.

It is not possible to evaluate the line of future development of the assumptions about the state system or the international legal expression of those assumptions from the work of contemporary theorists of international law. The most apparent new expressions are those that propose increased formalizations of world legal and political

[54] Certainly, technological developments have been primarily responsible for the rejection of war as a typical tool of international power. In this case, as in most, international legal doctrine mirrors the existing attitudes and helps to reinforce them.

[55] As in the past, international lawyers are still concerned with definitions and applications of concepts of territorial integrity, self-defense, and domestic jurisdiction, and policy-makers are still motivated by the traditional ideas of state security and power. However, the traditional political and legal symbols have been "stretched" to apply to current conditions. For a development of this position see Coplin, chaps. 4 and 8.

processes.[56] On the other hand, much international legal theory today seems to be dedicated to an affirmation of the traditional assumptions of international politics. Political analysts like Hans Morgenthau,[57] E. H. Carr,[58] and George F. Kennan,[59] and legal theorists like Julius Stone,[60] P. E. Corbett,[61] and Charles De Visscher,[62] are predisposed to "bring international law back to reality."

This trend toward being "realistic" occupies the mainstream of current international legal theory,[63] and to identify its exact nature is therefore crucial. Many writers who express this viewpoint seem to fear being labeled as overly "idealistic." They utter frequent warnings that international law cannot restore international politics to order, but, on the contrary, can exist and flourish only after there is a political agreement among states to maintain order. In short, it is assumed

[56] E.g., Arthur Larson, *When Nations Disagree* (Baton Rouge, La., 1961); or Grenville Clark and Louis B. Sohn, *World Peace Through World Law* (Cambridge, Mass., 1960). These theorists and others who fall under this classification are "radical" in the sense that what they suggest is antithetical to the assumptions of the state system as traditionally developed. These writers are not necessarily utopian in their radicalism. This is especially true since adherence today to the traditional assumptions might itself be considered a form of (reactionary) radicalism. However, the radical scholars, in the sense used here, are very scarce, especially among American students of international law. Today there is a very thin line separating the few radical scholars from the more numerous radical polemicists of world government.

[57] Morgenthau writes (277): "To recognize that international law exists is, however, not tantamount to assessing that . . . it is effective in regulating and restraining the struggle for power on the international scene."

[58] E. H. Carr, in *The Twenty Years' Crisis, 1919-1939* (London 1958), 170, writes: "We are exhorted to establish 'the rule of law' . . . and the assumption is made that, by so doing, we shall transfer our differences from the turbulent political atmosphere of self-interest to the purer, serener air of impartial justice." His subsequent analysis is designed to disprove this assumption.

[59] George F. Kennan, *Realities of American Foreign Policy* (Princeton 1954), 16.

[60] Julius Stone, *Legal Control of International Conflict* (New York 1954), introduction.

[61] Corbett, 68-79, 291-92.

[62] De Visscher writes (xiv): "International law cannot gather strength by isolating itself from the political realities with which international relations are everywhere impregnated. It can only do so by taking full account of the place that these realities occupy and measuring the obstacle which they present."

[63] The programs of the last two annual meetings of the American Society of International Law exemplify the way in which the concern for reality (as power) has come to dominate international legal theory. In the 1963 program, the relationship between international law and the use of force was not discussed by international legal theorists but by two well-known writers on the role of conflict in international politics. The 1964 program manifested the same tendency. It centered on the question of compliance with transnational law, a topic treated in a sociopolitical framework by most panelists. This point is not to be taken as a criticism of the two programs, both of which were excellent and very relevant, but as proof of the assertion that the mainstream of contemporary theory of international law is significantly oriented to the role of power.

that international law cannot shape international political reality, but can merely adjust to it. Although there are complaints of too much pessimism in current legal theory,[64] most writers, given the initial predisposition to avoid "idealism," do not heed them.

The desire of contemporary theorists to be "realistic" has been crucial to the relationship between contemporary international law and the assumptions of the state system. In their effort to achieve realism, current theorists have not examined their traditional assumptions about international politics. When they talk about adjusting international law to the realities of power, they usually have in mind the traditional reality of international politics. Today, a large share of the theoretical writing on international law that is designed to adapt law to political reality is in effect applying it to an image of international politics which itself is rapidly becoming outmoded. Much contemporary international legal theory, then, has not contributed to the development of a new consensus on the nature of international politics but instead has reinforced many of the traditional ideas.

In order to understand more fully the relation of international law to world politics, it is necessary to do more than examine law merely as a direct constraint on political action. The changes in the conceptual basis of international law that are manifested in current practice and, to a lesser extent, in current legal theory are symptomatic of a series of social and institutional revolutions that are transforming all of international politics. To conclude that international law must adjust to political reality, therefore, is to miss the point, since international law is part of political reality and serves as an institutional means of developing and reflecting a general consensus on the nature of international reality. In the contemporary period, where the international legal system is relatively decentralized, and international politics is subject to rapid and profound development, it is necessary to avoid a conceptual framework of international law which breeds

[64] Many writers, even realists like Morgenthau (*op.cit.*, 275) and others like McDougal and Feliciano (*op.cit.*, 2-4), decry the modern tendency toward "cynical disenchantment with law," but it is obvious from their subsequent remarks that they are reacting more against the "utopianism" of the past than the cynicism of the present. There have been a few who have attacked the "realist" position on international law (e.g., A. H. Feller, "In Defense of International Law and Morality," *Annals of the Academy of Political and Social Science*, vol. 282 [July 1951], 77-84). However, these attacks have been infrequent and generally ineffective in starting a concerted action to develop more constructive theory. For another evaluation of the "realist" trend, see Covey T. Oliver, "Thoughts on Two Recent Events Affecting the Function of Law in the International Community," in George A. Lipsky, ed., *Law and Politics in the World Community* (Berkeley 1953).

undue pessimism because it demands too much. If international law does not contribute directly and effectively to world order by forcing states to be peaceful, it does prepare the conceptual ground on which that order could be built by shaping attitudes about the nature and promise of international political reality.