

INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

Edited by **Beth A. Simmons**
and **Richard H. Steinberg**

definition – centralized political systems – of which there were not a large number, exercised uncertain control, and “the authority and power of the central government faded away more and more the further one went from the centre toward the boundary. Thus boundaries between the states were vague, sometimes overlapping.”⁵⁰ Although there were of course complex and particular customs which regulated intercourse among contiguous local societies, “(t)here was no African international system or international society extending over the continent as a whole, and it is doubtful whether such terms can be applied even to particular areas.”⁵¹ Africa scarcely existed even as a politically recognizable, not to mention a diplomatically recognized, international jurisdiction.

* * *

After the middle of the 19th century a new form of international dualism appeared which was connected with European colonial expansion in Asia and Africa: rough equality and diversity was replaced by precise hierarchy and uniformity in the relations between European and non-European countries, with the former in a position of superiority. The determination of sovereignty throughout the world now derived from a Western and specifically liberal concept of a civil state which postulated certain criteria before international personality could be recognized. As previously indicated, these included the standard of “civilization” as well as effective government. Europe had the power and the will to impose this conception on the rest of the world. Even highly credible non-Western states which were never colonized, such as Japan, had to assert their statehood in these terms.⁵² The consequence – and arguably the design – was the establishment of numerous colonial dependencies in those parts of the world, such as Africa, which were not considered to have any positive claim to sovereignty on these grounds and could therefore legitimately and legally be ruled by Europeans. The rules were clearly biased in favor of the “civilized,” who also happened to be the strong.⁵³

⁵⁰ J. Vansina, *Kingdoms of the Savanna* (Madison: University of Wisconsin Press, 1966), pp. 155–56. Also see Lucy Mair, *African Kingdoms* (Oxford: Clarendon Press, 1967), chap. 1.

⁵¹ H. Bull, “European States and African Political Communities,” in Bull and Watson, *International Society*, p. 106.

⁵² See Hidemi Suganami, “Japan’s Entry into International Society,” in Bull and Watson, *International Society*, chap. 12.

⁵³ “[S]trong states accepted the legitimacy of colonialism and weak states would not challenge the status quo.” Puchala and Hopkins, “International Regimes,” p. 75.

For the first time the entire globe was organized in terms of European international law: there was a single regime of world politics of which colonialism was an integral institution. Dualism now consisted of a superior inner circle of sovereign states which were recognized members of the family of nations, and an inferior outer circle of their dependencies in Asia, Africa, and Oceania. Apart from a few notable exceptions, such as Turkey at first and later Japan, the inner circle was composed entirely of European countries and their offspring in the Americas. This dualism confined natural law, when it was not completely disregarded in a post-Austinian era of positive law, exclusively to human relations. There was no longer any generally acknowledged *jus gentium*. The very substantial inequalities along with the obvious cultural differences between the predominantly Western family of nations and the rest of the world – differences also marked by the racial boundary between whites and non-whites – were construed as distinctions of moral and political significance and were reflected by international law.

The latest stage of international dualism was first intimated by Wilsonian liberalism and specifically the League of Nations belief in “the virtue of small states” and “the juridical equality of all states.”⁵⁴ The League did not abandon empirical statehood, however, as indicated by, among other things, the mandates system which was the internationalization of colonialism. That was the result of decolonization and the extension of membership in the community of states and specifically the UN, according to the principle of self-determination, to all dependencies which desired it regardless of any other considerations. This international change was essentially normative and basically entailed abolishing the international legal disabilities imposed on non-Western peoples.

This new dualism is, of course, the current North-South division, which can be defined in jurisprudential as well as political economy terms. It contains two fundamentally different bases of sovereign statehood. The first is the traditional empirical foundation of the competitive states-system which still exists in the developed parts of the world and can be extended only by development and not by constitutional legerdemain. International standing in this familiar sphere is determined primarily by military power and alliances, socioeconomic capabilities and resources, internal unity and legitimacy, science and technology, education and

⁵⁴ See the perennially apposite discussion in Alfred Cobban, *The Nation State and National Self-Determination* (New York: Crowell, 1969), chap. 4.

welfare, and various other familiar constituents of empirical statehood.⁵⁵ ***

The second is the contemporary moral-legal framework of the accommodative juridical regime which has been fashioned for the most marginal parts of the ex-colonial world and particularly Africa, where extreme underdevelopment still prevails and empirical statehood has yet to be solidly established in most cases. States in this sphere survive primarily by negative sovereignty: the right not to be interfered with that is institutionalized in international law.⁵⁶ Reinforcing this negative liberty is the contemporary belief in the inherent equality of all peoples regardless of their empirical capabilities and credibilities as organized political systems. ***

What is fundamentally changed internationally, therefore, is not the distribution of empirical statehood in the world: that is still located in the developed West, *** although shifting perceptibly and in some cases rapidly in the direction of East Asia and a few other substantially developing parts of the Third World. Rather, it is the moral and legal basis of the states-system which has changed in the direction of equality – particularly racial equality.⁵⁷ The revolution of the new states is a revolution primarily of international legitimacy and law. ***

The biases in the constitutive rules of the sovereignty game today favor the weak. “For the first time in human history, international law is not on the side of force and power. The novelty of our time resides in the signal divorce between law and force.”⁵⁸ To this observation of Mohammed Bedjaoui, an Algerian anti-imperialist lawyer and diplomat, one should add that the divorce is also between international legitimacy and national capability, between juridical statehood and empirical statehood. Sovereignty is today the political currency of the weak. *** “It is by insisting upon their privileges of sovereignty that they are able to defend their newly won independence.”⁵⁹ Why was the international enfranchisement of the weak undertaken? Equality is infectious, as Lynn Miller points out, and once empirical requirements on sovereignty are relaxed to admit

⁵⁵ See the brilliant analysis in E. L. Jones, *The European Miracle* (Cambridge: Cambridge University Press, 1981), chaps. 6 and 7.

⁵⁶ See Jackson, “Negative Sovereignty in Sub-Saharan Africa.”

⁵⁷ See R. J. Vincent, “Racial Equality,” in Bull and Watson, *International Society*, chap. 16.

⁵⁸ M. Bedjaoui, “A Third World View of International Organization,” in G. Abi-Saab, ed., *The Concept of International Organization* (Paris: UNESCO, 1981), p. 207.

⁵⁹ H. Bull, “The State’s Positive Role in World Affairs,” *Daedalus, The State* 108 (1979), p. 121.

some new members “the tendency is irresistible to qualify still other members of the society as well” until virtually everyone is a member.⁶⁰ Decolonization was driven by this international moral pressure.

And why in so many cases was juridical statehood necessary as a vehicle of equal sovereignty? It is, of course, impossible to give anything more than a brief answer in passing. Africa, as already indicated, developed very few organized indigenous governments which were recognizable as modern states and even fewer which were demonstrably as capable. Arguably because there is so little useful and relevant political tradition at the level of international society, it was necessary to invent juridical statehood based on colonial boundaries to incorporate the region into the community of states. ***

JURIDICAL STATEHOOD AND INTERNATIONAL THEORY

What are the implications of this dual regime for international theory? If this is indeed a new practice, as I have argued, then its corresponding theory must also be novel to some degree. The question can be addressed in terms of Martin Wight’s theoretical categories of “rationalism,” “realism,” and “revolutionism.”⁶¹ They are tokens for international constitutionalist theory (Grotius), national interest theory (Machiavelli), and universalist community-of-mankind theory (Kant) *** usage as far as possible.⁶² Kant in particular is in important respects a forerunner of the contemporary constructivist variety of rationalism.⁶³

Classical Theory

The classical theory of the states-system is a rationalist-realist theory of collision prevention which has a direct analog in the traditional liberal

⁶⁰ Lynn H. Miller, *Global Order: Values and Power in International Politics* (Boulder and London: Westview Press, 1985), p. 49.

⁶¹ H. Bull, “Martin Wight and the Theory of International Relations,” *British Journal of International Studies* 2 (1976), pp. 104–5.

⁶² See, for example, the conceptual controversies surrounding the notion of “neorealism” in Robert O. Keohane, ed., *Neorealism and Its Critics* (New York: Columbia University Press, 1986), especially the contributions by Richard Ashley, Robert Keohane, and Robert Gilpin.

⁶³ See, for example, Charles R. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979), which draws upon the neo-Kantian philosophy of John Rawls.

theory of politics between individuals and groups within states. Classical liberals are realists as well as rationalists. Political good is that which protects the freedom and property of agents: peace, order, and justice. Realists place the emphasis upon power and deterrence, whereas rationalists underline international law. *** Although Hobbes is in some respects a proponent of absolute government, his civil theory has many earmarks of classical liberalism.⁶⁴ As we know, however, he saw no evidence of an international civil society. Hobbes is a realist. *** He assumes, nevertheless, that not only humans but also states as a result of the social contract have intrinsic value, and he notes how sovereigns in providing for the security of their subjects have “their weapons pointed, and their eyes fixed on one another.”⁶⁵ Positive sovereignty for Hobbes is the source of the good life.

Grotius, the rationalist, is more explicit about the value of a state, which is “a complete association of free men, joined together for the enjoyment of rights and for their common interest.”⁶⁶ States are valuable, according to Hersch Lauterpacht in his definitive essay on Grotius, not because they are “like individuals” but because they are “composed of individual human beings. This is the true meaning of the Grotian analogy of states and individuals.”⁶⁷ *** For the classical rationalists, state presuppose international civil society and they become subjects of the international law they contract with one another. The sovereign is a constitutionalist not only domestically but also internationally.

* * *

For Kant, traditional customary international law, which might produce order and periodical peace, is not enough to achieve perpetual peace, which is “the highest political good.”⁶⁸ It is necessary, therefore, to form a peace union of constitutional or “republican” states. Only such states, owing to their domestic civil character, would subscribe to a universal morality – the categorical imperative based on an international social contract – and refrain from war, which is the greatest

⁶⁴ This is a major feature of Michael Oakeshott’s interpretation of Hobbes. See his *Hobbes on Civil Association* (Oxford: Blackwell, 1975), chap. 1.

⁶⁵ Hobbes, *Leviathan*.

⁶⁶ Hugo Grotius, *De Jure Belli et Pacis Libri*, trans. F. Kelsey (Oxford: Oxford University Press, 1925), vol. 1, chap. 1, section xiv.

⁶⁷ Hersch Lauterpacht, “The Grotian Tradition in International Law,” in Falk, Kratochwil and Mendlovitz, *International Law*, p. 19.

⁶⁸ Immanuel Kant, *Perpetual Peace* (Indianapolis: Bobbs-Merrill/Library of Liberal Arts, 1957), Addendum, p. 59.

political evil. Sovereignty and its built-in hubris would be transcended by a universal community of mankind, and the ultimate political good would finally be realized.⁶⁹ Juridical statehood and the new dualism can profitably be interrogated from each of these theoretical perspectives.

Rationalism

Charles Alexandrowicz and others argue that juridical statehood in some cases is a reversion to natural law practice in international relations.⁷⁰ Nineteenth-century and early twentieth-century positive law was an interregnum in an older Grotian tradition which postulated the universality of the law of nations, self-determination, and non-discrimination in disregard of civilization, religion, race, or color. These principles arguably are "revived in different shape" within the UN legal framework. Alexandrowicz sees this argument as applying to some traditional Asian states but not to most African countries, which are new state entities.

N. L. Wallace-Bruce argues, to the contrary, that colonialism interrupted the sovereignty of traditional African states and placed it "into an eclipse" but did not terminate it. Thus, African independence was also a reversion to sovereignty and not an attempt to create it for the first time.⁷¹ The difficulty with this argument is the fact that in the vast majority of cases sovereignty in Africa has never reverted to anything remotely resembling traditional states. It has been acquired by ex-colonies which were, as indicated, novel and arbitrary European creations. Most African governments consequently have no authority by virtue of succession to traditional states. One cannot therefore argue that juridical statehood has restored and is protecting the traditional political identities and values of the non-Western world which were the historical subjects of natural law prior to Western imperialism. The new sovereignty, as indicated to the contrary, is far more often undermining and even destroying non-Western political tradition than protecting it.⁷²

⁶⁹ *Ibid.*, Second Article, pp. 16–20.

⁷⁰ C. H. Alexandrowicz, "New and Original States: The Issue of Reversion to Sovereignty," *International Affairs* 45 (1969), pp. 465–80, and, by the same author, "The New States and International Law," *Millennium* 3 (1977), pp. 226–33.

⁷¹ N. L. Wallace-Bruce, "Africa and International Law: The Emergence to Statehood," *Journal of Modern African Studies* 23 (1985), pp. 575–602.

⁷² See Walker Connor, "Nation-Building or Nation-Destroying," *World Politics* 24, no. 3 (1972), pp. 319–355.

Instead of postulating the existence of states which already afford the good life to inhabitants, the new Third World sovereignty presupposes that international society can promote state-building. Juridical statehood is more appropriately understood, therefore, as a constructive rather than a restorative rationalism. This is an idealist practice and theory which has little in common with the realist and empiricist tendency of classical rationalism.⁷³ It is a novel twentieth-century and indeed mainly post-World War II international doctrine. It is now part of the conventional wisdom of the international community and is evident, for example, not only in negative sovereignty but also in the positive law of the sea, the principles of UN-CTAD, the Group of 77, international aid, and the North-South dialogue generally.⁷⁴ In short, an unprecedented regime of cooperative international law and action has been created, arguably out of necessity, to generate and accommodate a greatly expanded international society containing numerous quasi-states.

Constructivist rationalism is what Burke would call an "innovation": a revolutionary break with the settled international practices of the past.⁷⁵ In the contemporary international community, unlike that before World War II, membership is gained more by abstract right than by historical and sociological reason. Protection is afforded and assistance provided for what might valuably exist someday but not for what is necessarily of real value today. It is not a small but otherwise complete state which is being protected, in character with Vattel's famous remark that a dwarf is a man, but rather a quasi-state which someday might be developed into a real state. This is Grotius turned on his head: inverted rationalism.⁷⁶

Realism

Juridical statehood, at first glance, presents difficulties of strict realism because it discloses toleration of powerless quasi-states, *** on the grounds of their absolute claim to sovereignty. Is realism not lurking

⁷³ See F. A. Hayek, "Kinds of Rationalism," *Studies in Philosophy, Politics and Economics* (Chicago: University of Chicago Press, 1967), chap. 5.

⁷⁴ See the excellent analysis of these tendencies by Robert A. Mortimer, *The Third World Coalition in International Politics*, 2d ed. (Boulder and London: Westview Press, 1984).

⁷⁵ Edmund Burke, "Letter to a Noble Lord," in F. W. Rafferty, ed., *The Works of Edmund Burke*, vol. VI (Oxford: Oxford University Press, 1928), pp. 46-7.

⁷⁶ It is perhaps a parallel to what Wight identified as "inverted revolutionism," which is the "pacifist stream" of international thought. See Bull, "Martin Wight and the Theory of International Relations," p. 106.

somewhere in the background, however? For example, is juridical statehood not a consequence perhaps of Africa's lack of global significance in the balance of power between East and West? Can realism account for the existence of quasi-states and the contemporary dual international regime? *** The balance of power and other aspects of the competition among real states, which is a game of hardball, are virtually independent of quasi-statehood. Thus, *** United States national security policy could be effective with little real knowledge of Black Africa. This may or may not please Black governments, but their attitude can cause little concern. Such knowledge is incidental more than instrumental to the East-West game of hardball. They are spectators rather than players in that game.

Realists might therefore argue that juridical statehood is an instance of uninterested toleration on the part of the real states of the world. The indifference of the major powers enabled African states to become independent, so the argument goes, and it enables them to continue to exist despite their obvious debilities. "Indifference" belongs to the language of power and interest rather than legitimacy and law. Juridical statehood, by this reasoning, *** is only a facade on power: the quasi-states are states by courtesy only because nothing vital is at stake for those extending the courtesy. Realism is therefore not refuted or even undermined by juridical statehood and the new international dualism.

The argument is persuasive as far as it goes. Once juridical statehood is acquired, however, diplomatic courtesies and niceties are set in motion which support it, exaggerate it, and conceal its lack of real substance and value. A new international community is inaugurated. Quasi-states are dressed in the robes of sovereignty. An international law of self-determination and cooperation is created as well as programs of international aid and other actions for the benefit of the underdeveloped world. A language of global justice and injustice is applied to North-South relations. A new moral-legal regime comes into existence. The Third World states acquire and exercise a political voice in world affairs.⁷⁷ ***

This is the proprietary "reality" which supports juridical statehood. "Propriety," of course, belongs to the language of morality rather than power. It is not about power – certainly not in the classical sense of Machiavelli and Morgenthau. It is about status, equality, respect, dignity, decorum, courtesy, and so forth, which is civil conduct characteristic of the life of clubs: international relations in a community of states. Many Third World states may amount to little of real substance internationally

⁷⁷ See Mortimer, *Third World Coalition*, especially chap. 1.

as yet. They do not have to be substantial, however, because they enjoy a universally recognized categorical right of international existence. Numbers and voices of international democracy can be mobilized and organized to count for something today. *** This is what Bedjaouis is referring to in claiming that international law is no longer on the side of force.

*** The era of gunboat diplomacy, of speaking softly and carrying a big stick, seems decidedly outdated and increasingly inconceivable in the practical relations of the developed and the underdeveloped worlds.⁷⁸ The famous theoretical remark of Thucydides – that “the strong do what they can and the weak suffer what they must” – after many centuries of unquestionable applicability, likewise no longer seems as solidly based.⁷⁹ Arguably this international legitimism at least qualifies realism as a theory of pseudo-states.

This argument is consistent with others that identify normative limits of realism – or neorealism – in international theory.⁸⁰ However, this is certainly not to imply that realism is outmoded. On the contrary, it remains crucial to an understanding of the international system *** where the balance of power and other instrumental facets of the game of hardball are still strongly in evidence. It is only to say that in some quarters today and particularly the area of North-South relations a different game more like softball is now being played. This may, of course, be an instance of suspended realism only. *** Juridical statehood could be among the first casualties if Third World peripheries again became objects of intense rivalry by the major powers as was the case in the late nineteenth century. At this time, however, it does appear more like a regime change than a temporary historical aberration.

Revolutionism

None of this yet addresses arguments characteristic of revolutionism in the Kantian sense of universal morality or what today is understood

⁷⁸ The skeptic might point to the recent U.S. interventions in Grenada and Libya or the Soviet intervention in Afghanistan. In the former case, however, the Association of East Caribbean states solicited it and the U.S. justified it partly on these grounds. Moreover, most of the world, including many members of NATO, condemned it. In the latter case, Libya is clearly viewed widely not only in the West but also in the nonaligned world as a rogue elephant: an unpredictable international outcast that will not reciprocate. The Soviet Union also claimed that its intervention in Afghanistan was solicited – although it had evidently enthroned the communist regime which made the request.

⁷⁹ *The Peloponnesian War* (New York: Modern Library, 1950), p. 331.

⁸⁰ See the various selections in Keohane, *Neorealism*.

as international human rights.⁸¹ At first glance much positive international law and organization, especially that which addresses development rights, appears consistent with Kantian theory. It expresses a universal morality reminiscent of the New Testament teachings on what the rich owe to the poor. It is couched in a moral language concerning positive rights of subsistence and positive duties to materially assist beyond borders which is widely and fluently spoken by international practitioners and theoretical commentators alike.⁸² It therefore denies that human obligations end at international frontiers. It seeks to ameliorate if not eliminate underdevelopment. It has given rise to an elaborate superstructure of international aid targeted at Third World poverty which is historically unprecedented and can be read as the ascendancy of a cosmopolitan moral community higher than the community of states. In short, it expresses the heightened awareness of people living in the developed quarter of the world of what people in other quarters are suffering which is precisely consistent with Kant's concern to make "a violation of law and right in one place felt in all others."⁸³

In practice, however, contemporary positive international law does not and cannot transcend juridical statehood. On the contrary, it postulates it. The duties and obligations acknowledged by it are those not of individuals but of states. If sovereigns object to international policies intended to mitigate human suffering within their borders, perhaps traceable to their own actions or omissions, there is no legitimate or legal basis for overruling them. *** Indeed, as R. J. Vincent puts it, in the community of states "righteous intervention will be received as imperialism."⁸⁴ International borders still intervene strongly

⁸¹ The structuralist image of international relations, Marxist or non-Marxist, in which horizontal socioeconomic divisions take precedence over vertical state divisions is a non-Kantian variant of revolutionism which I do not have the space to consider. For recent analyses see Ralph Pettman, "Competing Paradigms in International Politics," *Review of International Studies* 7 (1981), pp. 39-49, and, by the same author, *State and Class: A Sociology of International Affairs* (London: Croom Helm, 1979). For a characteristically brilliant essay pertinent to this discussion, see Ali Mazrui, "Africa Entrapped: Between the Protestant Ethic and the Legacy of Westphalia," in Bull and Watson, *International Society*, chap. 19.

⁸² See, for example, Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980).

⁸³ As quoted and discussed in R. J. Vincent, *Human Rights and International Relations* (New York: The Royal Institute of International Affairs and Cambridge University Press, 1986), p. 118.

⁸⁴ Vincent, *Human Rights*, p. 118.

with individual right and duties.⁸⁵ Moreover, when *** international aid transfers are made they are made either between states or with the permission of the recipient state. Individual or private transfers can only be undertaken in stealth if they do not have the sanction of targeted sovereign states.

We live in a world entirely enclosed by equal sovereignty. International aid is profoundly affected by this juridical consideration. On closer inspection development rights look more like sovereign's rights than human rights. The fact of the matter is that southern sovereignty can direct development aid and even redirect it into the pockets of ruling elites. If northern countries could intervene when this happened, then the new sovereignty would be undermined and we would be witnessing a return to the old game of imperialism in which the developed states could legitimately dictate to the underdeveloped in matters affecting their domestic jurisdiction. Juridical statehood only embraces distributive justice insofar as it conforms to the rights of Third World sovereigns. The morality and the elaborate superstructure of international aid which is targeted specifically at countries rather than individuals is inconsistent with Kantian morality.

Kantianism, however, is primarily concerned with individual morality – classical natural rights – in international relations. It is revolutionary because it postulates the priority of human rights over sovereign's rights, which are secondary claims. The ultimate moral agents are individuals. The only authentic moral community is mankind. When statesmen claim rights above individuals or justify their exercise of power in violation of natural rights, injustice is committed. Kantianism, by subordinating sovereign rights to human rights, is therefore revolutionary in regard to the community of states.

Kant's vision of a community of mankind is incipiently evident today only among select developed states, particularly those of the European community, which have freely suspended although not permanently revoked their sovereignty in regard to some important civil rights. They have set up a wholly independent *** European Court of Human Rights which can sit in judgment of them in questions of human rights violations. Moreover, these bodies can hear cases brought by individuals against states and deliver binding judgments. "All this amounts to a

⁸⁵ See the characteristically subtle and discerning analysis by Stanley Hoffman, *Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics* (Syracuse: Syracuse University Press, 1981).