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International Law

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International Law?

Mark W. Janis*

INTRODUCTION

The recent developments in Eastern Europe and the Persian Gulf dramatize the efforts of the United States to muster the support of other states and international organizations in asserting principles of international law and process. These diplomatic initiatives to win a global consensus about the rule of law in international politics reflect an important turn in U.S. policy. In the past few decades the United States has mostly enunciated a parochial rhetoric regarding international law, treating it either as a sort of extension of United States law or as a flexible framework that somehow always promoted U.S. legal and political values. In the present, however, the United States is promoting a vision of international law as a set of legal norms and as a form of legal process that exists apart from a nationalistic interpretation by the United States and is ultimately universal in nature.

The developments of the Gulf and in Eastern Europe have also underscored as well the increasing importance of international institutions in the formulation and administration of international law. If Security Council resolutions during the Gulf crisis helped shape specific diplomatic objectives and military tactics, they also fit into a more general political context involving internationalism and non-state actors. The internationalization of the media, for example, played a role in the formulation of political initiatives in the Gulf, as it has helped to encourage the political development of Eastern Europe. Multinational enterprises helped prompt the Soviet Union into pursuing ties with the West. The Red Cross and other humanitarian organizations are playing increasingly important roles in international relief operations. Private environmental groups are ever-more influential in setting and implementing international environmental agendas. Such phenomena underscore the need to rearticulate the theory and practice of international law. International lawyers have never really made room for the obvious importance of non-state actors in international politics. Although there have been many calls for such recognition, international law needs finally to develop intellectual models that include not only the state but also international institutions and individuals.

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Now is the time to seize the opportunity afforded by the renewed attention being paid to international law and modify the discipline's contemporary conceptions, both in its basic theory and in its practice. Now is the time to return to the universalism that characterized the foundation of the modern law of nations. Now is the time to break the mold of international law's twentieth-century paradigm, to assault the discipline's basic assumptions, and to refashion the subject in a form suitable for the obvious needs of the next century. This essay begins the task by challenging the parochialism of the U.S. approach to international law and by attacking some of the legal notions related to the sovereign state. It concludes by doubting that the term "international law" is still appropriate for the discipline.

PAROCHIALISM

The initial problem, the paradigmatic parochialism of at least the United States approach to the theory of international law, is encapsulated in the very title of the American Law Institute's *Restatement of the Foreign Relations Law of the United States*.¹ The *Restatement's* first section defines its subject and depicts its coverage:

1. Foreign Relations Law of the United States

The foreign relations law of the United States, as dealt with in this *Restatement*, consists of

- (a) international law as it applies to the United States; and
- (b) domestic law that has substantial significance for the foreign relations of the United States or has other substantial international consequences.²

The Introduction to the *Restatement*, while confirming the first part of the definition, that the "international law restated here derives largely from customary international law and international agreements to which the *United States* is a party"³ modifies this self-imposed limitation with a more universalistic assertion drawn from the previous 1965 *Restatement*: "The positions or outlooks of particular states, including the United States, should not be confused with what a *consensus of states* would accept or support."⁴ However, the second part of the "Foreign Relations Law of the United States" is by definition "domestic"; it is "federal law, deriving principally from the United States

1. AMERICAN LAW INSTITUTE, *RESTATEMENT OF THE LAW (THIRD), THE FOREIGN RELATIONS LAW OF THE UNITED STATES* (1987).

2. *Id.* at 7.

3. *Id.* at 3 (emphasis added).

4. *Id.* (emphasis added).

Constitution, acts of Congress, and judicial decisions.”⁵ Furthermore, the combination of this second domestic component with the “as it applies to the United States” limitation of the first component gives the *Restatement* a parochial orientation, all too clearly reflected in a title, “Restatement of the Foreign Relations Law of the United States,” that mentions neither international law nor the law of nations. The point seems to be, and it is arguably intended, that what is important is not any universalistic law of nations but some particular law relating to the foreign relations of the United States.

The *Restatement's* position is by no means the only possible U.S. vision of international law. The forerunners of modern international lawyers in the United States did not espouse a comparable parochialism. Their intellectual models from the seventeenth and eighteenth centuries, Grotius, Vattel, and Blackstone—each very influential on the early American scene—were all decidedly universalistic. Grotius, meaning to bridge the religious differences between the Catholic and Protestant nations, chose to base his seminal text of 1625, *On the Law of War and Peace*, on common sources drawn from Jewish theology, Greek philosophy, and Roman law.⁶ Vattel, in his much-read text first published in 1758, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, relied less than Grotius upon specific sources and more upon general principles, which were, as his very title indicated, natural to all nations.⁷ Vattel, for example, defined the “necessary law of nations” as the law of nature that all “nations are absolutely bound to observe.”⁸

Universality is also to be found in the treatment of the law of nations in Blackstone's foundational four-volume treatise (1765–1769) on the laws of England:

The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.⁹

5. *Id.*

6. HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* (Kelsey trans. 1925).

7. EMERICH DE VATTTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* (1797 ed.).

8. *Id.* at lviii.

9. 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 66 (1st ed. 1765–1769).

The universalism of the classic texts of the seventeenth and eighteenth centuries was reflected in the two great nineteenth-century American treatises addressing the law of nations. In his *Commentaries* (1826–1830), Kent gave the law of nations first place, beginning his four volumes with 200 pages on international law.¹⁰ Kent modestly saw the newly independent United States as “subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe, as their public law.”¹¹ In 1836, in the first English-language treatise devoted exclusively to international law, Wheaton looked not only to Vattel’s natural law but also to “the general principles which may fairly be considered to have received the assent of most civilized and Christian nations.”¹²

Admittedly, Kent and Wheaton shared notions linking and, to a degree, limiting international law to “civilized” and Christian states. Although I explore this linkage elsewhere,¹³ for our purposes here it is sufficient to say that neither Kent nor Wheaton attempted to narrow the compass of interesting and important international law to just the view of or relevance to the United States. Rather, both Kent and Wheaton stressed the importance of putting the international jurisprudential approach of the United States well within the mainstream of the common law of nations, albeit one more or less culturally linked to the European tradition.

The parochialism of the *Restatement* is, sadly, essentially a twentieth-century American phenomenon. Besides the *Restatement* itself, the only longer twentieth-century American treatise on international law is Charles Hyde’s book, which appeared in 1922 and in a second edition in 1945.¹⁴ Significantly, Hyde chose the title *International Law, Chiefly as Interpreted and Applied by the United States*. The other major modern extensive U.S. treatments of international law are the casebooks used for law school and undergraduate teaching. Generally, they too replicate the narrow focus of the *Restatement*.

Most straight-forward among the authors of the casebooks, Thomas Franck and Michael Glennon carve out “foreign relations law” as a distinct discipline.¹⁵ Although their casebook covers much of the

10. JAMES KENT, COMMENTARIES ON AMERICAN LAW 1–200 (2d ed. 1832).

11. *Id.* at 1.

12. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW: WITH A SKETCH OF THE HISTORY OF THE SCIENCE iii (1st ed. 1836).

13. Mark Janis, *Religion and the Literature of International Law: Some Standard Texts*, in THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW 61–84 (Janis ed. 1991); Janis, *The International Law of Christendom: Kent, Wheaton and the Grotian Tradition*, 39 NETH. INT’L L. REV. §71 (forthcoming 1992).

14. CHARLES C. HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES (1st ed., 2 vols., 1922; 2d ed., 3 vols., 1945).

15. See generally THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW (1987).

material contained in other casebooks avowedly about international law, Franck and Glennon write that they seek to teach about "the interaction between the conduct of United States foreign relations and the constitutional distribution of powers, prerogatives and rights within the nation."¹⁶ Franck and Glennon's casebook contrasts with more typical international-legal casebooks, such as that by Sweeney, Oliver, and Leech,¹⁷ which, although devoted to international law, contains large segments of material concerning United States domestic law—for instance, large sections on United States rules about sovereign immunity, the act of state doctrine, and jurisdictional conflicts.

Perhaps the best-known casebook, that by Henkin, Pugh, Schachter, and Smit, devotes about one-third of its pages to United States materials.¹⁸ Although American commentary, references, and notes appear throughout the book, the largest United States elements relate to international law in United States law,¹⁹ bases of jurisdiction,²⁰ immunity from jurisdiction,²¹ and bases of state responsibility.²² Smaller United States elements, albeit some involving inter-state cases, are spread throughout the book.²³

Of course, the Henkin casebook, like the others, does contain a great amount of material that is not simply United States-oriented. There are international court cases, International Law Commission drafts, cases decided in foreign courts, foreign doctrine, United Nations declarations and resolutions, treaties, and other international agreements. Nevertheless, like the *Restatement*, the casebook is marked by a strong emphasis on U.S. materials and perspectives.

THE SOVEREIGN STATE

However relative, the problem of the parochial emphasis of United States foreign relations law exemplified by the Henkin casebook is joined in more absolute terms by a second general problem of the modern discipline of international law and one not confined to U.S. practitioners and theorists: state-centricity. In their introduction, Henkin *et al.* enunciate the ordinary claim of international law that

16. *Id.* at xvii.

17. JOSEPH M. SWEENEY, COVEY T. OLIVER & NOYES E. LEECH, *THE INTERNATIONAL LEGAL SYSTEM* 323-514 (3d ed. 1988).

18. LOUIS HENKIN, RICHARD C. PUGH, OSCAR SCHACTER & HANS SMIT, *INTERNATIONAL LAW* (2d ed. 1987).

19. *Id.* at 144-227.

20. *Id.* at 820-90.

21. *Id.* at 891-979.

22. *Id.* at 1082-1147.

23. *Id.* at 40-45, 132-35, 255-66, 287-93, 382-85, 430-31, 440-45, 542-47, 598-600, 608-10, 618-49, 662-64, 708-36, 763-67, 788-91, 1042-47, 1065-67, 1079-81, 1151-62, 1284-89, 1292-93, 1299-1301, 1306, 1312-14, 1376-78.

"[i]nternational law is the law of the international community of *states*. . . . [I]nternational law is law made by *states* to govern relations among them" ²⁴ While the intellectual and jurisprudential formulations of this state-centric aspect of positivistic doctrine can be criticized, ²⁵ here I merely sketch out a few present-day challenges, practical and theoretical, to the legal notion of the sovereign state as the central actor in international law.

Such challenges are of critical importance. No matter how dramatic might be the changes in world order effected by other phenomena, including the end of the Cold War and the war in the Gulf, nothing catalyzes the transformation of international law more substantially than the decline of the sovereign state. As the world's transactions—be they economic, environmental, cultural, military, political or social—increasingly transcend national boundaries, so the utility of the concept of the sovereign state diminishes.

The traditional elegance of the positivist paradigm of international law is derived from certain simplistic notions about "states" and "individuals." As Bentham and many other positivists have put it, international law is the law of the relations of sovereign states, while municipal law is the law of the relations of individuals with sovereign states or of individuals among themselves. ²⁶ Like many simplicities, the grand simplicity that international law is the law of sovereign-state relations was never wholly true empirically, but it was nonetheless extremely powerful as a concept defining and ordering the discipline. ²⁷

What bodes likely to replace the grand simplicity of the positivist theory of international law is the probably fatal challenge to the practical and theoretical reality, not so much to the concept of the "state" as to the sovereignty of the state. Accustomed as we are in the United States to the division of sovereignty between the political structures of the Federal Government and those of the individual states, U.S. citizens are in an especially good position to appreciate the trend toward legally divisible sovereign states elsewhere. Evidence of the new sovereign state divisibility abounds: the tensions between the Union of Soviet Socialist Republics and the individual republics, including Lithuania, Latvia, Estonia, the Ukraine, and even Russia; Canada and Quebec; Yugoslavia and Croatia, Serbia, *etc.* Furthermore,

24. *Id.* at xxix (emphasis added).

25. For an historic discussion of the critique of state-centric notions of international law dating at least from Bentham's 1789 rationale for creating the very term "international law," see Mark Janis, *Jeremy Bentham and the Fashioning of "International Law,"* 78 AM. J. INT'L L. 405 (1984) [hereinafter Janis, *Bentham*].

26. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 296 (Burns & Hart eds. 1970).

27. Mark Janis, *Individuals as Subjects of International Law*, 17 CORN. INT'L L.J. 61, 63-64 (1984).

new regional orders "above" traditional sovereign states are being created that also dilute the sovereignty of existing states: the European Communities;²⁸ new regional trade zones, such as the U.S.-Canada Free Trade Zone; new regional human-rights structures, such as the Council of Europe's Court and Commission of Human Rights.²⁹

Not only are heretofore sovereign states losing political and legal authority to alternative governmental structures both "above" and "below" them, but states are also losing chunks of real and theoretical sovereignty to non-governmental forms of organization. The "individual" so crucial to the classic Benthamite definitions of international and municipal law now includes not only natural persons, but also "private parties" of the size and influence of I.B.M., Shell, and Toyota. It is a commonplace that multinational corporations have more global importance than do scores of small and poor sovereign states with seats in the United Nations.

I am not arguing here either for or against the sovereign state, or for or against its modern private challengers. I simply want to emphasize what seems to me the outstanding new fact of modern international politics: the grand simplicity of the sovereign state, on which the positivist paradigm is grounded, is in serious decline and the theory and reality of indivisible sovereignty will be weaker still in the coming century.

The decline of the sovereign state and its replacement by a multitude of structures and institutions that share in political and legal authority is, I think, ushering in a new era. The old concepts of "municipal" and "international" law are being supplanted by broader and more flexible legal formulations. None of the new conceptions is entirely replacing the old notions of municipal law or international law, one for the state and its citizens internally and the other for the state externally. Rather, the emerging concepts are helping constitute a new theory of international legal pluralism, a theory that reflects the real multiplicity of authoritative political structures.

In more and more circumstances, no one jurisdiction, no one authoritative structure, including any state, has the sort of exclusive legal authority that has traditionally been associated with sovereign states and their legal institutions. Rather, what we conceive of as legislative, executive and adjudicatory jurisdiction is increasingly divided among a variety of legal structures or institutions. A search for a decisive "law" needs to be transformed into a weighing or an integration of alternative "laws" which is more reflective of today's international reality.

28. John Bridge, *American Analogues in the Law of the European Community*, 11 *ANGLO-AM. L. REV.* 130 (1982).

29. MARK W. JANIS & RICHARD S. KAY, *EUROPEAN HUMAN RIGHTS LAW* 39-116 (1990).

Take, for example, a possible human rights violation in England. Instead of looking for the "law" that regulates the incident, it makes sense to begin a legal analysis with what is more or less a conflict-of-laws analysis of possible law and possible legal process. A country like Great Britain has its own law and its own judicial and administrative processes. Furthermore, regional law and process are available in the form of European Human Rights Law and the European Commission and Court of Human Rights. There may also be universal process and law, in the shape of United Nations and customary law. While there may well be answers as to priority of law and process, such answers are neither assured nor necessarily the same from place to place or from time to time. Ultimately, both realism and theoretical soundness suggest that there are a variety of possible laws and legal processes available to regulate any such matter. "Sovereignty" alone no longer decides questions about the allocation of competence when competing authority structures all have valid claims on the transaction.

Alongside the breakdown in the positivistic notions of "sovereignty" and the state comes a necessary breakdown in international law's conception of the "individual." In a sense, all the subjects of any law are individuals. States, international organizations, business associations, religious communities, *etc.* are all finally composed of discrete natural persons. A corporation, whether it be constituted for political, military, economic, spiritual or whatever reasons, is always a legal fiction, a lawyer's contribution to the *dramatis personae* of the world's stage.

It is simply misleading and counterproductive for theory to distinguish between "states" on the one hand and "individuals" on the other. If there is a sound distinction, it can only be between individuals and corporate entities, states included. This should also put an end to the positivist distinction between public and private law.³⁰ It makes sense to rethink all of the restrictions imposed upon individuals and private corporate entities in international law. Why should suits in the International Court of Justice be the sole prerogative of states? Why should representation in the General Assembly and Security Council of the United Nations be limited to unelected delegates of state governments? And why should an international trade court not be created in which private corporations can sue state governments for violations of international economic law?

INTERNATIONAL LAW?

Such concrete challenges to traditional notions of international law will likely make a considerable impact on the form and substance of

30. Cf. Joel R. Paul, *The Isolation of Private International Law*, 7 WIS. INT'L L.J. (1988).

our discipline. Clear and persuasive lines can no longer be drawn between international law and municipal law. Rather, there are really many boundaries that can be drawn between many different sorts of law. For example, the dispute about whether the law of the European Communities is "international" or "municipal" law is a sterile exercise except as a way of illustrating how EC law is sometimes like traditional public international law and sometimes like the law of a federal system such as that of the United States. EC law is simply one of several laws. So is the law of Connecticut. So is the law of Nigeria.

This does not mean, however, that drawing lines between legal regimes ought to be the chief enterprise of the discipline of international law. Much more important will be the resolution of conflicts between competing rules and processes. This will be so whether such rules and processes emanate from a constituent state like California, a national state like Malta, a regional association like the EC, or a universal structure like the United Nations. Equally important will be the investigation, analysis, and reform of the rules and processes themselves. In a way, the task of the discipline can be likened to the fashioning of an immense jigsaw puzzle. Some will need to fashion the pieces. Others will be called upon to fit the pieces together.

In light of the decline of the degree of sovereignty of the state and the rise of alternative structures competing to regulate international activity, the peculiarly parochial approach of international legal discourse in the United States is particularly outmoded. To insist on emphasizing one legal system's approach to international law when what is at stake are the relative merits of competing rules and processes, is to approach the fundamental problem blindly. In the past, U.S. legal scholars have made great contributions to the development of international law. However, if American international lawyers focus their scholarship and pedagogy on practice-oriented, United States-focused conceptions of international law, they will miss a great opportunity to contribute to the transformation in progress.

Finally, I would like to ask whether the denomination of our subject, "international law," still makes sense. Positivist *international* law is rooted in the concept that relevant rules are those that address the interests of competing sovereign states. However, non-state actors now help to shape the global legal system. Arguably, it would be more appropriate and useful to re-adopt the term "law of nations." "Law of nations" was used in legal discourse until Bentham's criticism of the term replaced it with "international law." Bentham felt that "law of nations" did not clearly indicate that the subject had only to do with relations among sovereign states.³¹ Since "international law"

31. Janis, *Bentham*, *supra* note 25, at 408-09.

does not now solely concern “sovereign states”—and indeed may never have—it is time to put Bentham’s term to rest. Now that the practical and intellectual mold of international law is broken, why not announce a new paradigm for the discipline using older terms, “law of nations” or “droit des gens,” which more readily signal the diversity and complexities of the subject?