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by

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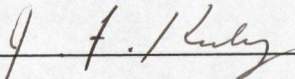
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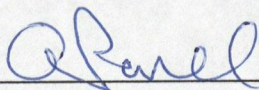
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THE UNIVERSITY OF CALGARY  
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## ABSTRACT

The perception of the role of international law in international relations has been strongly affected by the so-called "idealist-realist" debate. Finding the terminology of the debate a main source of the existing skepticism about international law, this thesis examines critically the premises of the existing analytical framework. Following the rejection of the idealist-realist model as confounded, an alternative way of conceptualizing international law in international relations is presented.

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## CHAPTER I

### GENERAL INTRODUCTION

#### INTRODUCTION

From the moment of the conception of international relations as a modern intellectual discipline our understanding of international law has been to a large degree affected by the framework of the "idealist-realist" debate.<sup>1</sup> Theorists of international relations have traditionally grouped themselves into two virtually exclusive "camps" consisting of the so-called "realists" and the so-called "idealists".

"Realists"<sup>2</sup> who emphasize "power politics" have usually denied that international law could play an important role in the relation of states.<sup>3</sup> To realists it makes little sense to speak of law or of conduct according to rules where the rules are not legislated or cannot be enforced, and where every state is "the final judge in its own cause".<sup>4</sup> The skepticism

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<sup>1</sup> See John Hertz, *Political Realism and Political Idealism*, (Chicago: Chicago University Press, 1951); also: F.H. Hinsley, *Power and The Pursuit of Peace*, (New York: Cambridge University Press, 1967); or: Charles W. Kegley Jr., *Controversies in International Relations Theory - Realism and the Neoliberal Challenge*, (New York: St. Martin's Press, 1995); Richard. Little, (1980) "The Evolution of International Relations as a Social Science" in: R.C. Kent, and G.P. Nielsson *The Study and Teaching of International Relations - A Perspective on Mid-Career Education*, (London: Frances Pinter Publishers Ltd.), pp. 1-28.

<sup>2</sup> Under the label "Realists" I also include "Neo-Realists".

<sup>3</sup> See Hans Morgenthau, *Politics Among Nations*, New York: Knopf, 1973; Kenneth Waltz, *Man, The State and War*, (New York: Columbia University Press 1959).

<sup>4</sup> Waltz, *Man, The State and War*, p. 60.

of the realists toward international law comes, admittedly, from their pessimistic view of human nature. According to the realist doctrine, humans are wicked, tainted by original sin and therefore capable of evil.<sup>5</sup> Furthermore, to realists international environment represents an "anarchy" characterized by the existence of "many sovereign states, with no system of law, enforceable among them, with each state judging its own grievances... according to the dictates of its own reason or desire...".<sup>6</sup> They also accept the so called Austinian definition of law. According to Austin law must be created by a political superior to a political inferior in the form of commands.<sup>7</sup> Law which is not legislated or does not possess an enforcing mechanism "cannot be properly called law".<sup>8</sup> The explicit acceptance of these three elements causes them to cast off international law as a generally unimportant factor in the conduct of international relations. Law without enforcement cannot play a significant role in a world defined by a constant power struggle.<sup>9</sup> Since power is the main factor in world politics, only the "balance

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<sup>5</sup> On this issue see for example: James E. Dougherty, and Robert L. Pfaltzgralf, *Contending Theories of International Relations*, (New York: Harper and Row, 1990), pp. 90-129.

<sup>6</sup> Waltz, *Man, The State and War*, p. 159.

<sup>7</sup> John Austin, *The Province of Jurisprudence Determined*, (London: Weidenfeld and Nicholson, 1954), p. 11.

<sup>8</sup> Austin, *Jurisprudence*, pp. 13-14, 17-18.

<sup>9</sup> See Kenneth W. Waltz, *Theory of International Politics*, (Reading, Mass.: Addison-Wesley, 1979), p. 102; Joseph M. Grieco, *Cooperation Among Nations*, (Ithaca, N.Y.: Cornell University Press, 1990), pp. 28-29.



of power", that is a constant process of maintaining equal capabilities in conjunction with a fluid system of alliances, can serve as a true and effective ordering mechanism in world affairs.<sup>10</sup>

"Idealists",<sup>11</sup> on the other hand, have generally been more interested in international law, and hoped to utilize it in the establishment of world government.<sup>12</sup> Although idealists, similarly to realists, accept the international environment as anarchic, lacking law and not yet being a society, they also believe that these problems are only temporary.<sup>13</sup> Idealists are generally more hopeful for the future since they believe that human nature is essentially good and progress and improvement in the human condition is inevitable.<sup>14</sup> To idealists, the importance of international law for the international environment is largely dependent on its instrumentality in fulfilling the goals of the future international society.<sup>15</sup> However, whenever the hopes for the realization of such goals are disappointed, idealists become skeptical about international law and claim that it is not yet developed enough to serve their needs.<sup>16</sup>

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<sup>10</sup> See Morgenthau, *Politics Among Nations*, pp. 164-215.

<sup>11</sup> Under the label "Idealists" I also include "Neo-Idealists".

<sup>12</sup> See Hinsley, *Power and The Pursuit of Peace*, pp. 289-323.

<sup>13</sup> Ibid., p. 290.

<sup>14</sup> Kegley, *Controversies in International Relations*, p. 4.

<sup>15</sup> See Saul H. Mendlovitz, (ed.), *Legal and Political Problems of World Order*, (New York: The Fund For Education Concerning World Peace Through World Law, 1962).

<sup>16</sup> Stanley Hoffmann, "International Law and the Control of Force" in: Karl W. Deutsch and Stanley Hoffman, *The Relevance of International Law*

In summary, even though idealists and realists differ in many ways they all accept the view that in its present form, international law is largely irrelevant for international relations. Such a characterization, however, contradicts our daily experience where neither international law nor the international state system could objectively be characterized in the idealist-realist terms of anarchy and lawlessness. While law is sometimes broken and conflicts do arise, this does not constitute a permanent characteristic of the international environment. Consequently, neither perspective should be viewed as an appropriate representation of the existing reality. Furthermore, although such concepts as the Austinian definition of law, the presumption of anarchy or the inexistence of international society serve as premises of the idealist-realist deliberations, as we shall see in this thesis, all of these assumptions are in fact highly questionable if not outright misleading. It is therefore these terms of the debate, not merely its conclusions, which need to be addressed if we are to properly understand the role of law in international relations.

In an effort to clarify some of the existing doubts about international law, this thesis will attempt to present a model by which we could conceptualize international law in terms different from those dictated by the idealist-realist

debate. We will do this by looking at problems related to the notions of law and order common to both idealists and realists, which will be followed by a more specific look at the relationship between international law and international society. It is hoped that by removing some of the common building blocks in the idealist-realist theoretical framework and by proposing a more adequate model of analysis this thesis will bring us closer to an understanding of the specific relationship between international law and international order within the existing state system.

#### STRUCTURE OF THE THESIS

Chapter Two will acquaint us with the details of the "idealist-realist" debate and identify some of the common premises which according to this thesis are the real sources of the skepticism about international law. The Austinian command theory of law, the presumption of anarchy and the teleological concept of society will be identified as the key issues for further analysis. Chapter Three will address questions relating to the existence and the identity of international law in view of the commonly accepted Austinian definition of law. Chapter Four will address issues relating to the question of order and the anarchic characterization of international environment. By rejecting "anarchy" as a description which is inappropriate in either theoretical or practical terms this chapter will prepare the ground for the

examination of the relationship between law and order within the context of international society. Chapter Five, after critiquing the dominant teleological concept of society, will present a "pragmatic" model of international association which could allow us to understand the existing state system without referring to misleading idealist-realist terms of debate. Finally, Chapter Six will present a summary of the issues covered by the thesis, followed by some thoughts on the possible implications.

## CHAPTER II

### THE IDEALIST - REALIST DEBATE AND INTERNATIONAL LAW

#### INTRODUCTION

As noted earlier the perception of international law has been considerably affected by the idealist-realist debate. Its effects on the perception of international law seem to be potentially damaging, considering the level of skepticism about the law and its role in international relations. The purpose of this chapter is to identify and briefly discuss both idealist and realist positions regarding international law. The differences in their respective approaches will be examined followed by some examples of the effects the debate has on research in the area of international law. Finally, some issues on which the idealist and realist perspective converge will be identified as objects of analysis and possible sources of the skepticism about international law. This preliminary identification will serve as the basis of a closer examination which will follow in subsequent chapters.

#### THE IDEALISTS

The rise of modern political idealism in the theory of international relations is closely related to the devastation of World War I. The speech delivered by President Wilson to the American Congress in early 1918 has always been considered as the idealist manifesto. The speech contained

the famous Fourteen Points, that synthesized the ideas of such writers as Alfred Zimmern, S.H. Bailey, Philip Noel-Baker, David Mitrany and James Shotwell by calling for the creation of the League of Nations and other institutional and political changes. The political system which was responsible for the catastrophe of World War I, had to be replaced by new international structures and institutions that would bring a lasting peace to the world community.<sup>17</sup>

This new arrangement for the world would consist of international law and international organizations, collective security, open diplomacy free trade, freedom of the seas, arms reduction and disarmament, and national self-determination.<sup>18</sup> Idealists assumed that progress toward a law-ruled, pacified and structurally state-like international society where legal norms would be used to restrict the often anarchic expressions of international relations was inevitable. With the help of newly created institutions the new world order was supposed to eradicate the mistakes of the past.<sup>19</sup> Since the economic, social and political necessities demanded a more integrated international society, world developments were thought to "necessarily" lead to a super-state organization of mankind of global proportions.<sup>20</sup>

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<sup>17</sup> Joynt, C.B. and P.E. Corbett, *Theory and Reality in World Politics*, (University of Pittsburgh Press, 1978) p. 34.

<sup>18</sup> Kegley, *Controversies in International Relations*, pp. 1-17.

<sup>19</sup> See Michael Doyle, "Liberalism and World Politics," *American Political Science Review*, 80, (1986), pp. 1151-1170.

<sup>20</sup> Hertz, *Political Realism and Political Idealism*, pp. 17-102.



Institutions like the League of Nations were therefore interpreted as early realizations of such needs.

#### THE IDEALISTS AND INTERNATIONAL LAW

The idealists viewed international law, as binding on nations, which in itself implied the existence of something like an "international society". So conceived society due to the nature of common goals, would have to be superior to the states and their laws. According to idealists an increasing international integration in many fields, strengthened by the world demand for a stronger international system required the abandonment of the concept of "dualism"<sup>21</sup> and creation of a "primacy" of international law over the laws of the "members of the international community".<sup>22</sup> Rules of international law were to be interpreted as forming a "system of sanctioned norms", that is binding norms on the "subjects" of international law in a fashion similar to municipal law. The primacy of international law over the municipal law was understood to mean that domestic law was simply "delegated" in its validity by those rules of international law which defined the state as a legal entity, and which circumscribed its international jurisdictions.<sup>23</sup> Idealists realized that

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<sup>21</sup> "Dualism" means here that international and domestic laws are seen as being parallel in a sense that both spheres are considered valid "law", but independent of each other. Hertz, *Political Realism and Political Idealism*, p. 96.

<sup>22</sup> Hertz, *Political Realism and Political Idealism*, pp. 96-102.

<sup>23</sup> *Ibid.*, p. 98.

actual international law fulfilled the criteria of law less adequately than domestic law. To correct this "primitivism" international law needed to develop institutions to provide for permanent, not only occasional, authorities. Calls were therefore made for institutions such as international courts, with the power to decide whether a rule has been violated, or a centralized machinery of enforcement or coercion to replace self-help, with its dubious and uncertain chances of success, would be with a system of efficient and objective constraints. Finally, desperately needed was a more centralized system of international legislation, which would not only replace vague and mostly unwritten rules of usage and custom with clear-cut regulations, but would also prevent dissension between this law and the legal systems of the various states.<sup>24</sup>

#### THE REALIST CRITIQUE OF IDEALISM

The outbreak of World War II delivered a crushing blow to everything the idealists held dear. Critics of the idealists, such as Carr or Morgenthau who "modestly" called themselves "realists" claimed that Western states which accepted the idealist views emasculated themselves through their acceptance of unrealistic ideals and unwisely endangered the very existence of their peoples. Instead of

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<sup>24</sup> See Hinsley, *Power and The Pursuit of Peace*.

fighting to preserve their hegemony, they preferred to trust in their illusions. They believed in "empty" declarations such as Wilson's Fourteen Points and the Kellogg-Briand Treaty of 1928, which "outlawed" war by a moralistic declaration but provided no adequate means of enforcement.<sup>25</sup> They naively relied on the powerless organs of the League of Nations. They did not realize in time that the idealist doctrines such as disarmament and arbitration served only their enemies and not their vital national interests. What was even worse, instead of helping themselves by building up their own power they actually believed that world public opinion would protect them from violence.<sup>26</sup> According to Carr, by deemphasizing the importance of power politics Western democracies showed their ignorance of the dialectic process of politics. The lack of understanding of this relation led to the reliance on law-created order "to an extent unknown in previous international law or in the municipal law of any civilized country", which he considered to be the main reason for the resulting disregard of international law.<sup>27</sup> Morgenthau, carried the critique even further by emphasizing the role of power and by making it the

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<sup>25</sup> Dougherty and Pfaltzgraff, *Contending Theories* p. 3.

<sup>26</sup> E. H. Carr (1964) *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations*. London: Macmillan, pp. 31-36.

<sup>27</sup> *Ibid.*, p. 191.

primary and often the only determinative factor in international politics. According to Morgenthau ,

International politics, like all politics, is a struggle for power. Whatever the ultimate aims of international politics, power is always the immediate aim.<sup>28</sup>

Challenged by the realists, many idealists admitted that international law, although useful for certain purposes, was not really "law", nor was it yet developed enough to serve their far-reaching goals in the anarchic environment.<sup>29</sup> International law is unfortunately still in its infancy. In order for international law to be of use a legislative body would have to be established, to which states would pledge their allegiance.<sup>30</sup> Even though a considerable body of rules has been created, the basic weakness of international law is lack of enforcement, which would assure the utility of law in creation of international society. Although skeptical about the existing international law, idealists believe that all of those problems of order, international law and international society would be solved if only adequate international institutions were created.<sup>31</sup>

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<sup>28</sup> Morgenthau, *Politics Among Nations*, p. 25.

<sup>29</sup> See Hertz, *Political Realism and Political Idealism*; Hoffmann, "International Law", p. 21-46.

<sup>30</sup> See J. H. E. Fried, "The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View", in: Karl W. Deutsch, and Stanley Hoffman. *The Relevance of International Law - Essays in Honor of Leo Gross*, (Cambridge, Mass.: Schenkman Publishing Company, 1968), pp. 93-132.

<sup>31</sup> See Mendlovitz, *Legal and Political Problems*; Richard A. Falk *A Study of Future Worlds*, (New York: Macmillan, 1975); Kegley, *Controversies in International Relations*.

Realists on the other hand are highly skeptical as to the possible resolution of those dilemmas. To realists, who often point to the same problems, international law lacks any significance in political decision making. As one author phrased it,

international law, morality, ethics, ideology and even knowledge itself are often seen as mere components in the power equation, devoid of non-instrumental significance or prescriptive worth. They are subject to compulsory service as tools of power when deemed necessary for the vital interests of state.<sup>32</sup>

The nations of the world are theorized to survive precariously in the Hobbesian state of nature where life is "solitary poor, nasty, brutish and short".<sup>33</sup> There exists no law or justice, no conception of right or wrong, no morality but only a struggle for survival in a state of constant "war of all against all".<sup>34</sup> The acquisition of power and aggrandizement at the expense of other states in a quest for unattainable absolute national security is the fundamental right, the fundamental law, and the fundamental fact of international politics.<sup>35</sup> Sheer physical survival in a Machiavellian world of power politics, *raison d'état*, and

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<sup>32</sup> Michael Taylor, *Anarchy and Cooperation* (London: Wiley, 1976), p. 6.

<sup>33</sup> Thomas Hobbes, *Leviathan*, (London: Penguin Books, 1985), p. 100.

<sup>34</sup> Waltz, *Man, The State and War*; Morgenthau, *Politics Among Nations*; see also Joseph M. Grieco, "Anarchy and the Limits of Cooperation: A Realist Critique of Neoliberal Institutionalism," in: Kegley, Charles W. Jr. *Controversies in International Relations Theory - Realism and the Neoliberal Challenge*, (New York: St. Martin's Press, 1995).

<sup>35</sup> See Friedrich Meinecke, *Machiavellism: The Doctrine of Raison d'Etat and Its Place in Modern History*, (New Haven, Yale University Press, 1957).

totalitarianism must be the litmus test for the validity of man's political, philosophical, moral and legal presuppositions.<sup>36</sup> Since the international scene lacks any central enforcing agency, states are constantly insecure. Instead of relying on international law or organizations, each state should depend for its survival on its own efforts. Given anarchy, states must base their strategic behavior on the capabilities, not the intentions, of other states. They must begin from the assumption that other states' capabilities may be used against them.<sup>37</sup> Considering this, there are no barriers to the acquisitive nature of the nation state beyond its own inherent limitations and those constraints imposed upon it by the international political milieu.<sup>38</sup> Consequently, the analysis of international relations must concentrate primarily on the dynamics of power politics and the strategic adjustments required by the "balance of power".<sup>39</sup>

Unlike idealists, realists deny that an anarchic international system can produce security for all states simultaneously. Since states may decide to use force at any time the measures each state takes to reinforce its own

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<sup>36</sup> Hans J. Morgenthau, *Scientific Man versus Power Politics*, (Chicago: The University of Chicago, 1946), p. 144.

<sup>37</sup> See Grieco, "Limits of Cooperation".

<sup>38</sup> See Meinecke, *Machiavellism*; Morgenthau, *Politics Among Nations*.

<sup>39</sup> Waltz, *Theory of International Politics*, p. 102; Grieco, *Cooperation Among Nations*, pp. 28-29, Henry A. Kissinger, *Diplomacy*, (New York: Simon and Schuster, 1994).



security are precisely those that endanger others.<sup>40</sup> Statesmen, it is argued, who disobey the "iron law" of power politics at the order of international law invite destruction at the hands of aggressors and thereby facilitate the destruction of third parties which, in today's world, cannot realistically hope to remain neutral in a serious conflict between great powers.<sup>41</sup> Historically, the realists assert, whenever statesmen have in good faith interjected determinative considerations of international law into attempted solutions for the monumental problems of international politics, the probability that violence, war defeat, death and destruction would ensue was magnitudinally increased.<sup>42</sup>

#### LAW SKEPTICISM AND ITS EFFECTS ON THE DISCIPLINE

The skepticism about the relevance of international law to international politics over the years has affected most of international relations theory. The realist critique combined with idealist resignation, discouraged much of research on international law. Some of the theorists, however, attempted to defend international law by arguing that the purpose of law in international relations was to aid the realization of common values instead of restraining behavior. Authors such

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<sup>40</sup> Waltz, *Theory of International Politics*, p. 64.

<sup>41</sup> Morgenthau, *Scientific Man*, p. 144.

<sup>42</sup> George F. Kennan, *American Diplomacy 1900-1950*, (London: Hutchinson, 1951), pp. 93-97.

as McDougal and Lasswell called for the invention of world public order which would serve all the humanity,<sup>43</sup> but even their disciples such as Falk or Mendlovitz criticized them for venturing too far into politics, and unrealistically encouraging confrontation in the world threatened by a nuclear catastrophe.<sup>44</sup> Others tried to refocus the concentration of the discipline upon the broad systemic mechanisms of that would be more scientific and more useful than that applied by the realists. Authors like Hoffmann or Kaplan and Katzenbach attempted to apply domestic systems theory to international relations, examining at the same time international law for the evidence of the influence of such systems on law and its effectiveness.<sup>45</sup> Although Kaplan and Katzenbach admitted that it was in the interest of the superpowers to adhere to some normative understandings they nevertheless showed doubts about international law by admitting that, given the international anarchy the normative structures could be disregarded, depending on the turn of events in international politics.<sup>46</sup> Hoffmann, on the other hand, although generally admitting the possibility of

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<sup>43</sup> See for example Meyers S. McDougal, "The Ethics of Applying Systems to Authority: The Balanced Opposites of a Legal System", in: Harold D. Lasswell and Harlan Cleveland, (ed.) *The Ethics of Power*, (New Haven, N.H.: Yale University Press, 1962), pp. 221-240.

<sup>44</sup> See Falk, "New Approaches to the Study of International Law" in: Morton A. Kaplan *New Approaches to International Relations* (New York: St. Martin's Press, 1968), p. 371.

<sup>45</sup> See Hoffmann "International Law" or Morton A. Kaplan and Nicholas B. de Katzenbach *The Political Foundations of International Law*, (New York: Wiley, 1961) pp. 357-381.

<sup>46</sup> Kaplan and Katzenbach, *Foundations of International Law*, pp. 357-381.

international law as a concept, was even more skeptical when it came to law's influence on international relations.<sup>47</sup> He attributed responsibility for this situation to the alleged fact that contemporary international affairs manifested a "revolutionary" and "heterogeneous" nature as opposed to a "moderate" and "homogenous" one due to a variety of political, economic, cultural, demographic and scientific factors.<sup>48</sup> Such factors included dissolution of the classical balance of power, global revolutionary insurgency, infinitely destructive nuclear weapons systems, the relentless power of nationalistic fervor, uncurbed exponential population growth, and unremitting technological and industrial innovation. These elements were said to interact in combination to create an international political environment inhospitable to the application of international law. The irrelevance of international law would persist until the world returned to the conditions of relatively simple placidity that supposedly characterized its formative period. In other words, international law would not become relevant to international politics in the foreseeable or even distant future.

There are now many theories of international relations. No one questions that international relations is a field in search of a "paradigm".<sup>49</sup> But although the proponents of

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<sup>47</sup> Hoffmann, "International Law", pp. 21-46.

<sup>48</sup> Ibid.

<sup>49</sup> See H. Ferguson and Richard W. Mansbach, *The State, Conceptual Chaos, and The Future of International Relations*, (New York: New York

these respective theories differ among themselves in a many ways, for the most part they are still skeptical about international law and its role in international relations.

It was only recently that some writers began to question the idealist/realist approach for lack of objective realism when it comes to the analysis of the role of international law in international relations.<sup>50</sup> By utilizing the expertise of international law some authors have looked at a possibility of using international rules and practices as a basis for a new model of international association.<sup>51</sup> Thus far, however, this kind of research although potentially highly significant to the future development of the discipline, has not been widely recognized in international relations theory.

#### A NEED FOR A NEW APPROACH

Today we are witnessing a period of change in world affairs. It is not surprising then that in this time when we

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University Press, 1989), p. 1; or: Richard W. Mansbach, and John Vasquez. *In Search of Theory: A New Paradigm for Global Politics*, (New York: Columbia University Press, 1981); see also: John Lewis Gaddis, "International Relations Theory and the End of the Cold War," *International Security* 17, (1992-1993), pp. 5-58.

<sup>50</sup> Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977); Terry Nardin, *Law, Morality, and the Relations of States*, (Princeton, N.J.: Princeton University Press, 1983); Friedrich Kratochwil, *Rules, Norms and Decisions* (New York: Cambridge University Press, 1989).

<sup>51</sup> Kratochwil, *Rules, Norms and Decisions*; Nicholas Greenwood Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations*, (University of South Carolina Press, 1989); Charles W. Kegley Jr. and Gregory A. Raymond, *A Multipolar Peace? Great Power Politics in the Twenty-First Century*, (New York: St. Martin's Press, 1994).

urgently need to make sense of this new situation, the existing theories of international relations often seem inadequate and sometimes simply misleading. Our understanding of the role of international law in international relations represents an especially vivid example of the theoretical problems that need to be addressed.

Most of the critiques about the lack of appreciation for international law usually focus on one or the other side of the idealist-realist debate. An argument could however be made that the problem of the perception of international law lies in the terms rather than the respective conclusions of the idealist-realist debate. If this argument is correct, then the doubts about international law cannot be resolved by taking sides in the debate but rather through its repudiation.

As hinted in the introduction, the rest of this thesis will follow this argument and closely examine what seem to be the key issues influencing the perception of international law, the issue of the definition of law and the presumption of anarchy. Such an approach seems justified, since what usually goes unnoticed by the critics is that although the two sides of the idealist-realist debate differ in their conclusions they often share the same premises and expectations as to how a society and law should operate. For example, both sides reject international law in its present form, because it does not fulfill the requirements set by the

command theory of law such as a sovereign governing body or a sanctioning mechanism. Although both legislation and enforcement may be important factors in effectiveness, neither is essential to the functioning of international law. Even more importantly we cannot say that a system where rules are enforced and legislated is an order, and another in which they are not is an anarchy in the sense of chaos and lack of rules. Furthermore, idealists and realists talk about the international system as an anarchy. By looking at the international environment in terms of a dichotomic division between either order or anarchy, they tend to inadvertently substitute one meaning of anarchy in a sense of lack of government for a highly pejorative meaning of a chaos or rulelessness. Although such an operation takes place in the world of ideas, its consequences are often felt in reality.

Finally, what reinforces the perceptions of lack of law and anarchy is the common notion to both sides, that international association must be based exclusively on the pursuit of common ends for which a congruence of values is required. An unfortunate consequence of such a model is that its application leads to the problem of treating every violation of international law as a proof of systemic anarchy and disregard for law. In a way all of these concepts are closely interconnected for if there is a problem of law there is a problem of order; and if order is threatened so is international society.



## CONCLUSIONS

The purpose of this chapter was to introduce us to the idealist and realist debate. We have done this by addressing briefly the historical source of the argument followed by a closer introduction to their respective positions on international law. As shown, even though both sides come from different perspectives and represent seemingly different views on human nature, they nevertheless agree in their skepticism about international law. This combination of realist pessimism with idealist frustration leads to negative implications for scientific research directed towards the examination of the role of law in international relations. Studies that follow the existing framework show obvious limitations, while others that do not, tend to be ignored. In an effort to examine the role and character of international law in a more realistic light, it was proposed to focus our attention on issues where, at least in terms of preliminary assessment, the views of the idealists and realists converge. It is hoped that if we are able to show that these points of agreement are incorrect then the whole debate could be abandoned and the view of international law would no longer be obstructed by unrealistic phraseology. The following chapters, will be devoted to the specific examination of the aforementioned issues. Chapter Three will begin this process

by examining the problems related to the idealist-realist acceptance of the "Austinian" definition of law.

**CHAPTER III****DOUBTS ABOUT INTERNATIONAL LAW****INTRODUCTION**

Entrenched in the idealist-realist debate, most theorists have a tendency to take extreme positions on the role of international law in international relations. Affected by the acceptance of one definition of law, which requires the existence of legislative and enforcing bodies, many theorists have fallen into a trap of an unrealistic dichotomy between two extreme and abstract states of affairs, one in which the rules are enforced and legislated and another in which they are not. They would say, for example, that either there exists an international society constituted and regulated by rules whose observance is guaranteed by a superior power or else there is an international anarchy in the extreme sense of lack of rules. Finding such an approach harmful and largely misleading, this chapter will critically examine its sources as well as its implications. In contradiction to the commonly accepted Austinian "command" theory of law, an attempt will be made to show that neither legislation nor enforcement are essential to the functioning of international law and some explanations will be provided as to how and why the law operates as it does.

## REALIST AND IDEALIST POSITIONS ON INTERNATIONAL LAW

As we have noted in the previous chapter, in the theory of international relations, many writers representing both sides of the idealist-realist argument have also expressed doubts about the existing international law. To realist writers such as Morgenthau or Waltz, for example, it makes little sense to speak of law or of conduct according to rules where the rules are not legislated or cannot be enforced and where every state is "the final judge in its own cause".<sup>52</sup> The skepticism of the realist position toward international law comes admittedly from their pessimistic view of human nature, the presumption of anarchy and the acceptance of the "command" definition of law. The explicit acceptance of these three elements entices them to be dismissive about the role of law in international relations. Since the realist position has been discussed in the previous chapter, our focus will shift more toward the idealist stance.

The idealist position is intriguing because, as we have noted in the second chapter, the idealists usually begin with an acceptance of international law but end up rejecting it. According to idealists international law exists in and through the United Nations and manifests itself in the "new" areas of economic and human rights law, the law of natural

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<sup>52</sup> Morgenthau, *Politics Among Nations*, or Waltz *Man, The State and War*.

resources and environment and so on.<sup>53</sup> Idealism in a way relies on the assumption that "new developments" in international society have vastly enlarged the scope of international law.<sup>54</sup> That law is absolutely binding is usually taken as an implicit and unproblematic assumption. Even though idealists tend to accept the "command" theory of law when it comes to the need for realization of their goals, they at the same time, attempt to distance themselves from positivism, which they "reject" as conservative formalism. An analysis of the idealist argument is also difficult because as one author put it, "it avoids express theorizing and is dressed in intangible generalities".<sup>55</sup>

However it is possible to isolate two assumptions behind the idealist position. On the one hand, law is understood as a reflection of a society or as Starr phrased it, it is society's "mirror".<sup>56</sup> On the other hand, it is also critical of existing structures within international relations, and this includes a law which does not perform as the idealists think it should. These assumptions contradict each other, since if law mirrors society, what basis is there to adopt a

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<sup>53</sup> See Kegley, *Controversies in International Relations*; see also: Yoram Dinstein (ed.) *International Law at a Time of Perplexity - Essays in Honour of Shabtai Rosenne*, (Dordrecht: Martinus Nijhoff Publishers, 1989).

<sup>54</sup> Saul H. Mendlovitz, "Introduction", in Richard Falk, *A Study of Future Worlds*, (New York: Macmillan, 1975), p. vi.

<sup>55</sup> Marcus Martti, *International Law and Liberalism*, (Helsinki: Maltus, 1989) p. 179.

<sup>56</sup> Harvey Starr "International Law" in: Charles W. Kegley Jr., *Controversies in International Relations Theory - Realism and the Neoliberal Challenge*, (New York: St. Martin's Press, 1995) p. 308.

critical posture? Thus, "idealism" creates strategies for explaining away the contradiction by often using the very "realist" terminology which they objected to in the first place.<sup>57</sup> For idealists the test of law is its correspondence to what they perceive as the common interests and needs of the international society. As the test is a loose, almost intuitive one, idealism often expresses itself in terms of general principles or broadly conceived "rights" to development, peace, etc. In any case, the idealist argument usually either dissolves in contradiction or turns out to be a realist approach in disguise. The idealists will try to argue that law is based on international society and at the same time be critical of it. If they insist on the latter, they can not claim that law is widely applicable without becoming naturalists and rejecting their positivistic command premises. Since the idealists would like to have their cake and eat it too, it is hardly surprising that many idealists, as the result of this process overrun by mistaken premises, have turned into skeptics in regard to the relevance of international law in general. Consequently it would be fair to say that to both realists and idealists alike international law is so ineffective in its present form that they seriously doubt its legal character as law. It is

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<sup>57</sup> See Stephen A. Kocs, "Explaining the Strategic Behavior of States: International Law as System Structure", *International Studies Quarterly* 38, (1994), pp. 535-556.

important to note here that both sides of the idealist-realist debate agree on that issue. The idealists think that this problem can be resolved through institutional restructuring of the world system. Realists, on the other hand see this as a reflection of the real nature of the international system, and are therefore highly skeptical as to the possible resolution of this dilemma.<sup>58</sup>

#### SOURCES OF THE PROBLEM

Historically, the concept of law has long been associated with universalistic or transcendent principles of "natural law". Writers such as Grotius (1583-1645), Vittoria (1486-1646), Suarez (1548-1617), Gentili (1552-1608) or Zouche (1590-1661), while disagreeing on certain things, agreed that basic principles of all law were derived not from any deliberate human choice or decision but from principles of justice. These principles had a universal and eternal validity and could be discovered by pure reason; law "was to be found not made".<sup>59</sup>

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<sup>58</sup> See D. Decosse, (ed.), *But Was It Just?* (New York, Doubleday, 1992); Michael Donelan, "A Community of Mankind", in: James Mayall *The Community of States - A Study in International Political Theory*, (London: George Allen and Unwin, 1982); Richard A. Falk, "The Legal Control of Force in the International Community", in: Saul H. Mendlovitz, (ed.), *Legal and Political Problems of World Order*, (New York: The Fund For Education Concerning World Peace Through World Law, 1962), pp. 143-161.

<sup>59</sup> Michael Akehurst, *A Modern Introduction to International Law*, (London: Allen and Unwin, 1987), p. 13.

Over time, however, the "positivistic" concept of law has become the dominant one and by and large captured for itself an almost exclusive title to the word "law". Beginning with the eighteenth century, people started to argue that law was largely positive, that is, man-made; consequently, law and justice were not the same thing.<sup>60</sup> Laws could therefore vary from place to place, according to the will of a legislator. Applied to international law, "positivism" regarded the actual behavior of states as the basis of international law. The first great positivist writer on international law was van Bynkershoek (1673-1743) but his theory did not gain him immediate recognition. In the nineteenth century a different and more restrictive version of that concept, called the "command" theory of law, was conceptualized by an English legal philosopher, John Austin (1790-1859).

According to Austin, commands had to be enforced in order to be legally binding.<sup>61</sup> Unless the commands were issued by a sovereign and were backed by an effective sanction, they were thought not to create any duty or obligation. According to this approach, if rules of law are not adequately legislated or enforced they cannot impose

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<sup>60</sup> See J.L.Brierly, *The Basis of Obligation in International Law and Other Papers*, (Oxford: Clarendon Press, 1966); see also: *The Law of Nations*, (Oxford: Oxford University Press, 1966).

<sup>61</sup> Austin, *Jurisprudence*, pp. 14-16.



obligations on those whose conduct they attempt to regulate.<sup>62</sup>

Before we get to the implications of this definition for the perception of international law, we have to address some of the problems inherent in the definition itself.

First of all, in what is now commonly acknowledged in legal and political theory as a major error, Austin confused commands with rules. Friedrich Kratochwil who addressed this problem in *Rules, Norms and Decisions*, explains the distinction between rules and commands by an analogy to a religious commandment.<sup>63</sup> Thus, according to Kratochwil, "even when the obligatory character of prescriptions is derived from an absolute sovereign - God - language clearly distinguishes between a command and a commandment".<sup>64</sup> "While commands are situation specific" he continues, "commandments (which show rule-like features) are always thought to be applicable to broad classes of events".<sup>65</sup>

However, the main criticism of the Austinian definition relates to his confusion of reality with legality. Such theorists as Kelsen or Hart, for example, criticized this approach for its confusion of matters of fact with matters of right.<sup>66</sup> As Hart put it,

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<sup>62</sup> Ibid.

<sup>63</sup> Kratochwil, *Rules, Norms and Decisions*, p. 53.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Hans Kelsen, *Pure Theory of Law*, (Berkeley, CA.: University of California Press, 1969), pp. 14-16 or H.L.A. Hart, *The Concept of Law*.

That one agent is able by force to compel another to act in a certain manner can hardly mean the first has a right to demand such conduct, nor can it mean that the second has a duty or obligation to comply. The latter may be "obliged" to obey, but he is under no "obligation" to do so.<sup>67</sup>

Thus, coercion alone cannot create rights or obligations of any sort, legal or non-legal. On the contrary, enforcement presupposes the validity of the law that is enforced. As Fitzmaurice phrased it,

the law is not obligatory because it is enforced: it is enforced because it is obligatory; and enforcement would otherwise be illegal.<sup>68</sup>

The biggest problem with the Austinian definition, however, lies not in the normative problems in the definition itself - these are relatively easy to correct - but rather in the acceptance of this definition by theorists of international relations.

Although the expression "law" has been used to describe international law for hundreds of years, acceptance of the command theory of law led to a wave of skepticism that continues to affect the theory of international relations to this day. If we accept the definition of law that requires legislative and enforcing bodies as a condition of its

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(Oxford: Clarendon Press, 1984), pp. 80-81. For discussion see: Nardin, *Relations of States*, pp. 121-133.

<sup>67</sup> Hart, *Concept of Law*, p. 84.

<sup>68</sup> Gerald Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law." (Hague Academy of International Law, 1957), p. 45, cf. Nardin, *Relations of States*, p. 126.

existence then international law presents us with a case which is difficult to reconcile with this definition.

#### THE QUESTION OF ENFORCEMENT - LAW WITHOUT SANCTIONS?

Perhaps the most significant source of that doubt about international law comes from a perception of the absence of reliable, powerful enforcement machinery. Following the Austinian definition of law, many theorists of international relations take the threat of punishment as the central quality of every legal system. As Waltz put it,

With many sovereign states, with no system of law enforceable among them, with each state judging its grievances and ambitions according to the dictates of its own reason or desire - conflict sometimes leading to war, is bound to occur.<sup>69</sup>

As long as no machinery exists to enforce that law, that is to punish violators, and as long as that machinery is not stronger than and independent from even the strongest potential violator, such law would lack, what they see as the essential characteristic of law.<sup>70</sup>

As we have noted above, legal writers such as Kelsen or Hart have criticized Austin for his confusion of obligations with sanctions, but they nevertheless shared the same view of law as a "coercive" order.<sup>71</sup> Application of sanctions in whatever form, i.e. physical or diffuse, meaning the pressure

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<sup>69</sup> Waltz *Man, The State and War*, p. 159.

<sup>70</sup> Fried, "Relevance of Political Context", pp. 93-132.

<sup>71</sup> Kelsen, *Pure Theory of Law*; or Hart, *Concept of Law*.

of public opinion, was seen by both authors as a required element of any legal order, and in a fashion similar to Austin they both dismissed any system lacking sanctions as a "morality".<sup>72</sup> Interestingly, both Kelsen and Hart found enough similarities between the domestic and international legal systems to accept international law as law even though its sanctions were considered weak and mostly diffuse, applied by the society as a whole rather than by a specialized organ.

The international legal system has adjusted itself to the fact that for much of its history nothing remotely resembling a central law-applying institution has existed. Despite the establishment of the United Nations and the International Court of Justice, centralized law-application exists only in a limited form, and the manner in which international law is created is likewise decentralized. But although the resulting uncertainty and inconsistency of international law are defects that a centralized institution for legislation and enforcement might do much to remedy, if one were possible, it does not follow from the lack of such an institution that the degree of uncertainty and inconsistency within the system must be so great as to fully discredit its workings.

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<sup>72</sup> Hart, *Concept of Law*, p. 84.

A closer look at the existing international system, for example, shows that the absence of an enforcing authority does not mean that states choose to exercise their sovereign freedoms without restraint or to routinely disobey prevailing rules, practices or customs. A voluntary compliance system does not mean disrespect for rules. Disobedience is statistically rare.<sup>73</sup> The widely publicized cases where governments do not observe international law do not reflect the far greater number of cases where governments do observe international law. States do police themselves. They do comply with existing laws, even though some would say they "do not have to". Although Austin suggests that law works only because it is backed by a superior force, Fisher demonstrated that even in domestic societies sovereign governments routinely comply with domestic law because the political costs of failing to do so outweigh the gains realized from breaking the law.<sup>74</sup> For example, governments often lose judgments in their own domestic tribunals, and they honor those judgments.<sup>75</sup> No superior force requires the government to comply with the decisions of its courts. Governments do so because that is the law. The same

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<sup>73</sup> See Charles W. Kegley, Jr. and Eugene R.W. Wittkopf, *World Politics - Trend and Transformation*, (New York: St. Martin's Press, 1995), p. 503; Roger Fisher, "Bringing Law to Bear on Governments" in: Saul H. Mendlovitz, (ed.), *Legal and Political Problems of World Order*, (New York: The Found For Education Concerning World Peace Through World Law, 1962), pp. 104-114.

<sup>74</sup> Fisher, "Bringing Law to Bear", pp. 104-108.

<sup>75</sup> Ibid.

governments usually honor their obligations under international law because doing so is in their best interests.<sup>76</sup> As one author phrased it:

Enforcement, is not essential to what is meant by law because even domestic rules are obeyed not out of fear of the state's power, but because the rules by and large are perceived to be right, just or appropriate.<sup>77</sup>

Thus, although formal enforcement may be helpful in some cases, its lack does not provide sufficient support to a claim that the lack of enforcement means lack of law. We cannot say that the present international system is an anarchy where no rules are observed or that their observance is so rare that laws are in fact irrelevant.<sup>78</sup> This is especially true when we consider that there are mechanisms other than physical enforcement which serve the maintenance of order just as well. Perhaps the strongest ordering factor in the existing system is self restraint. In general, states' long term interests encourage them to voluntarily comply with agreements and defer to legal obligations. Although perhaps not the strongest factor in securing compliance, sanctions

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<sup>76</sup> Ibid., pp. 110-111.

<sup>77</sup> Anthony A. D'Amato, *International Law and Political Reality: Collected Papers*, (Chicago: University of Chicago, 1995), p. 195.

<sup>78</sup> We will discuss the issue of anarchy in the next chapter. What I mean by anarchy here is chaos rather than lack of super-state governing institutions.

such as reprisals<sup>79</sup> or retortion<sup>80</sup> do play a role in international law.<sup>81</sup> Thus coercion may be used to enforce the law, even though its application is for the most part a matter of self-help.<sup>82</sup> Researchers have also demonstrated that even a society which lacks legislating or enforcing institutions does not have to be rule-less or violent.<sup>83</sup> As Michael Barkun observed while researching order in "primitive" segmentary societies, law is possible "without sanctions", that is without the kinds of institutionalized sanctioning processes and procedures for punishment of rule violation found in some domestic legal systems.<sup>84</sup>

Furthermore, even the presence of formal institutions for rule enforcement is not a guarantee of rule compliance. Sanctions can take a wide variety of forms and need not be centralized in a single enforcing authority. The fear of punishment or other pain is simply one among a number of

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<sup>79</sup> "Reprisals" are defined as "acts which would normally be illegal but which are rendered legal by a prior illegal act committed by the other state". Reprisals must be proportionate to the original wrong: e.g. if the state A took over a ship belonging to state B, state B could not take for example more than one ship of approximately the same value of the state, in: Akehurst, *Introduction to International Law*, p. 6.

<sup>80</sup> "Retortion" is defined as "a lawful act which is designed to injure the wrong-doing state". For example, cutting off economic aid is seen as lawful because there is no legal obligation to give economic aid, apart from special treaty provisions, in: Akehurst, *Introduction to International Law*, p. 6.

<sup>81</sup> Due to its controversial character I avoid including war as a legal sanction.

<sup>82</sup> Bull, *Anarchical Society*, p. 101.

<sup>83</sup> See Richard A. Falk, "New Approaches"; Kaplan and Katzenbach, *Foundations of International Law*, pp. 357-381.

<sup>84</sup> Michael Barkun, *Law without Sanctions: Order in Primitive Societies and the World Community*, (New Haven, Conn.: Yale University Press, 1968), p. 89.

motives inclining people to obedience.<sup>85</sup> Indeed, no legal system is capable of deterring all its members from disregarding or breaking existing laws. It is therefore a mistake to expect any legal system, including the international legal system, to prevent all criminal behavior or to insist that any violation of law proves the inadequacy of the legal structure. That asks too much of law. It places a burden on international law that no system can fulfill. Hence every instance of the breakdown of international law should not be interpreted as a confirmation of general international lawlessness any more than the sporadic occurrence of crime in the domestic system should be regarded as indicating the absence of law. As one author put it,

perfect compliance suggests the triviality of rule... If there was no pressure on the rule, there would be no social function for it.<sup>86</sup>

#### LAW WITHOUT LEGISLATION?

The society of states is also not the only society whose laws are neither the product of legislation nor enforced by a single superior authority. For example, comparative constitutional studies reveal that in today's modern states customs are often legally binding even though they have not been enacted by legislative bodies. After examining the legal

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<sup>85</sup> See Zygmunt Ziembinski, *Logika Praktyczna*, (Poznan: Polskie Wydawnictwo Naukowe, 1976).

<sup>86</sup> Falk, "Legal Control of Force", p. 230.



basis and powers of the British parliament, for example, Oppenheim pointed out that:

all statute or written law is based on unwritten law in so far as the power of Parliament to make statute law is given to Parliament by unwritten law.<sup>87</sup>

In most states, customary law emerged earlier than written law and usually became a part of the law of the land.<sup>88</sup> Therefore, if statute law represents only one kind of law then the fact of having been created through legislation should not be treated as a necessary condition of its legality.

The existence of legislative institutions as an essential feature of a legal system could also be questioned, for it would exclude from the category of legal systems not only international law but many other systems based largely on custom.<sup>89</sup> Studies of law systems among "primitive" societies contradict such claims.<sup>90</sup> Integration, uniformity, and adaptation to changing circumstances are accomplished by means other than legislative coordination. For example, "primitive" law comprises a variety of prescriptions concerning the "right" way of life such as taboos, rites,

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<sup>87</sup> Lassa Oppenheim, *International Law*, (Harlow, Essex: Longman, 1962), I, 9-10.

<sup>88</sup> William L. Tung, *International Law in an Organizing World*, (New York: Crowell, 1968), p. 18.

<sup>89</sup> See Barkun, *Law without Sanctions*.

<sup>90</sup> See for example, Bronislaw Malinowski, *Law and Order in Polynesia: A Study of Primitive Legal Institutions*, (New York: Cooper Square Publications, 1972); or Margaret Mead, *Cooperation and Competition Among Primitive Peoples*, (Boston: Beacon Press, 1961).

mythical lore, etc., which assure their effectiveness by the mutual reinforcement of face-to face contacts.<sup>91</sup>

No one questions the fact that, considering the complicated nature of the issues that international law has to deal with, some form of legislation might be beneficial. What many authors question in the case of international relations, is whether the creation of legislative institutions would strengthen or weaken the effectiveness of international law and the quality of international legal order.<sup>92</sup> If we look at international law from the domestic law perspective, the need for such structures seems evident and necessary. However, as soon as we realize the significant differences between the two environments, the need for such creations seems less evident. The realization that control over such organs may lead to the ability of some to impose their own objectives on others has often been a source for concern to states. Considering the present state of world affairs, it is hard to say if we should wish for international legislation or be afraid of it. Furthermore, the need for legislative procedure may be dependent on the concept of law itself. If we conceive of law as an end-oriented instrument for the achievement of common goals the need for legislation might be more pressing. On the other hand, if we look at law as rules and practices which

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<sup>91</sup> Kratochwil, *Rules, Norms and Decisions*, p. 251.

<sup>92</sup> Ibid., pp. 249-256.

facilitate exchange among states pursuing divergent as much as convergent ends, the desirability of legislative organs may seem less obvious. In such a model which will be explained later in this thesis, the long established procedural rules and common practices, serve as a sturdy mechanism for coexistence which no longer requires high levels of consensus on the part of the states. These rules and practices go beyond written legal norms and are based on understandings and reasoning which were developed over the centuries among states which wanted to maintain their independence and at the same time had to communicate and cooperate with other states. Such law is not based on a static set of norms or a system of rules which are defined by a common characteristic such as sanctions as portrayed by Kelsen or Hart, nor is it a McDouglian "process" where law is often indistinguishable from policy. The source of the rules and practices, mentioned above, has an authoritative character derived from a choice process defined by a principled nature of the norm use in arriving at a decision through reasoning. As Kratochwil who is the major exponent of this approach explains,

What the law is cannot... be decided by a quick look at statutes, treaties or codes (although their importance is thereby not diminished), but can only be ascertained through the performance of rule-application to a controversy and the appraisal of the reasons offered in defense of a decision.<sup>93</sup>

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<sup>93</sup> Ibid., pp. 18, 181-249.

It is these rules which are based in a long-standing tradition of reason and justifiable practice that allow states to "legislate" for each other in the form of treaties and other agreements. Such a system by no means does not exclude a possibility of declaration of certain acts as illegal according to an agreed upon standard, which could then be enforced and prosecuted by states.

#### CONCLUSIONS

Nothing that was said above should be construed as a rejection of legislation or enforcement as unimportant factors in the effectiveness of various legal systems. As was stated at the outset, however, when addressing the existing problems of international law we must be especially wary of treating international affairs in absolute terms of either total order or a raging anarchy. In analyzing the effectiveness of law, an uneven or non-centralized enforcement of a body of rules might lead us to question its fairness or utility but would not justify us in doubting the existence of such a body unless the rules were totally ignored. But in that case it would be the general disregard of the rules and not the ineffectiveness of their enforcement that would provide the decisive ground for concluding that a body of common rules did not exist.

Furthermore, no matter how we would like it to be, international law presently is primarily based on the

practice of its users. Many of the rules of international law are not the outcome of particular decisions to create them, but rather the indirect consequence of innumerable and substantively motivated acts, decisions, and policies. The result is a body of rules that rests upon a consensus of states, not expressed in any code or pact, and that in the absence of express agreement is capable of proof only by evidence of usage to be obtained from the action of nations in similar cases in the course of their history. The rules of international law are a distillation of the constantly changing practices of states, and they reflect the collective will of the international community only in the sense that certain patterns of conduct from time to time attain a degree of acceptance sufficient for them to be acknowledged as a distinct practice entitled to govern future conduct. It is true that the rules of international law are not, like those created by domestic legislators, the direct and explicit expression of a wish to pursue certain substantive ends or observe certain formal restraints. However, international law serves its purpose by arising wherever there exists a general or uniform practice together with the general acceptance of this practice as law. The role of international law could also be explained by the fact that its rules function as predictors of the behavior of the other states. Since all national political systems are ways of dealing with the problems of scarcity and resource allocation, some order in

the international environment is essential. Rules of international law serve this need for the reduction of randomness. Rules of international law are the past solutions to continuing problems. As one author put it they constitute "the focal-point solutions" for any decision maker.<sup>94</sup> Also, it should be pointed that deviant behavior is to some extent self-punishing. Rules of international law grow out of interactions, out of mutual expectations, out of network reciprocity. They function because their operation benefits the participants. The breach of a rule is not simply an act in the realm of ideas. As was noted above, it jeopardizes the concrete relationships between states and the benefits these relationships produce. Thus, it costs something to break a rule. A country may well choose to absorb the costs, but it cannot expect deviance to be without consequences.

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<sup>94</sup> Kegley, *Controversies in International Relations*.

## CHAPTER IV

### ANARCHY AND INTERNATIONAL LAW

#### INTRODUCTION

One of the most important sources of the skeptical perception of international law is the "anarchic" characterization of international relations.<sup>95</sup> Although anarchy in this context is merely meant to describe a system which lacks a common governing institution, its meaning is often confused with disorder and chaos. The source of that confusion could be found in the Hobbesian concept of the "state of nature" or "war of all against all".<sup>96</sup> Hobbes used chaos as a description of the struggle of individuals for survival in the early stages of development of domestic societies. States, however are different from individuals in many ways and lack of government among them does not have to lead to chaos in the sense of lack of rules and constant violence.

Unfortunately for the discipline, theorists of international relations attempting to resolve the question of how a fragmented system of states might be able to coexist without government, are often caught in the conceptually-biased terms of the idealist-realist debate. The partisan

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<sup>95</sup> See Hayward R. Alker Jr., "The Presumption of Anarchy in World Politics." (Griffith Lecture, American University, 1986).

<sup>96</sup> Hobbes, *Leviathan*, pp. 185-188.

nature of that argument, which is reflected in an all or nothing attitude, may lead to the international system often being explained in terms of a dichotomy between ultimate order through a "world state" or an ultimate disorder as in the "state of nature". A common result of those influences is a negligent approach toward a significant portion of state behavior which takes place without reaching any of the extremes. It is important to explore this "gray" area of "anarchy" because hidden behind the label is a large domain of state behavior regulated by international law.

The object of this chapter is therefore to explore the origins of the anarchic characterization and to discuss the difficulties it causes for the perception of the existing international environment and international law. The first part of this chapter will therefore focus on the theoretical sources of the "state of nature" description and how it affects our perceptions of international arena. Next, we will examine the idealist and realist positions on anarchy and order in international relations. A critique of their postulates will be presented followed by an argument in favor of a more practical rather than hypothetical approach towards the existence of order in international society. Finally the present state system will be used to illustrate how rules and practices of international law allow states to coexist without reaching either of the idealist-realist extremes.



## HOBBES AND THE NOTION OF ANARCHY AND INTERNATIONAL LAW

One of the key theoretical sources of the "anarchic" description of international relations could be found in Hobbes' *Leviathan*.<sup>97</sup> Hobbes, who devoted his treatise to explaining the role of power in politics, used "anarchy" or "chaos" as a description of the pre-societal period of human development which he called the "state of nature".<sup>98</sup> During that stage people had no protective authority to rely on and lived their short and brutish lives in an atmosphere of constant fear for survival. The resolution of this predicament, which he also called "a war of every man against every man," Hobbes thought, would be difficult without "a common Power to keep them all in awe".<sup>99</sup> The lack of a central governing agency, in the eyes of Hobbes, led also to the lack of law since "where there is no common Power, there is no Law".<sup>100</sup>

The debate over the interpretation of Hobbes' writings as well as their practical implications for international relations has been going on among theorists ever since *Leviathan* was published. The reasons for the debate are not surprising since, as one author put it,

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<sup>97</sup> Ibid., p. 187.

<sup>98</sup> Ibid., p. 185.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid., p. 188.

How any collection of self-interested agents might be capable of coexistence is one of the central substantive questions for social science paradigms...<sup>101</sup>

Authors who extrapolate Hobbes' theory into international relations have a tendency to portray the international environment along lines similar to Hobbes' account of individuals living in the pre-societal state of nature. States are therefore a collection of independent and self-interested actors whose relations are accidental, transitory and generally unstable.<sup>102</sup> Due to the lack of a common governing organ which would be able to enforce laws, states exist in an atmosphere of confusion and insecurity. In this environment, states do whatever they please, by picking and choosing rules that only serve their own interests while violating all others. Since the decisions of states are governed by different rules, the separate states do not operate within an order of rules whose authority is acknowledged by all states. Such a collection of international actors, driven by different interests and playing by their own rules, cannot be legitimately considered an order. The international environment is thus an assemblage of solitary agents with little in common with the exception

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<sup>101</sup> Onuf, *World of Our Making*, p. 163.

<sup>102</sup> Waltz, *Man, The State and War*, pp. 224-238; Waltz, *Theory of International Politics*, pp. 79-128; Raymond Aron, *Peace and War: A Theory of International Relations*. Translated by Richard Howard and Annette Baker Fox, (Garden City, N.Y.: Doubleday 1966), pp. 6-10; Robert Gilpin, "The Richness of the Tradition of Political Realism," in Roberto Keohane, (ed.), *Neorealism and Its Critics*, (New York: Columbia University Press, 1986) p. 304.

of being alone and insecure in a world lacking dependable order, exposed continually to the invasion of others.<sup>103</sup>

Although we could say that both sides of the idealist-realist debate would generally agree with this description we have to qualify that statement by saying that while realists treat this situation as constant, idealists prefer to see it as either slowly diminishing in importance or one which should be eliminated by a rapid action. To all "idealists" however this problem is curable as long as proper institutions are established.<sup>104</sup> The more moderate idealists believe that although the international arena has not yet reached its final destination - that is the ultimate world order - some progress in that direction has already been made.<sup>105</sup> The "natural" progress in the development of human relations inevitably leads to such solutions. Thus anarchy, which still represents the main feature of current international relations, goes through a slow but steady evolution which makes the above picture more and more obsolete.<sup>106</sup>

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<sup>103</sup> Aron, *Peace and War*, pp. 7, 64-65; Gilpin, "Political Realism", p. 305

<sup>104</sup> Robert M. Hutchins, "Constitutional Foundations for World Order" pp. 62-74, in: Saul H. Mendlovitz, (ed.), *Legal and Political Problems of World Order*, (New York: The Found For Education Concerning World Peace Through World Law, 1962), pp. 62-74; Falk, "Legal Control of Force", pp. 128-143.

<sup>105</sup> Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, (Princeton, N.J.: Princeton University Press, 1984), pp. 9, 26.

<sup>106</sup> Robert Axelrod, and Robert O. Keohane, "Achieving Cooperation Under Anarchy: Strategies and Institutions," *World Politics* 38 (October 1985),

According to Buzan, who is a major exponent of this view, anarchy which initially was "immature" and like the "Hobbesian" "state of nature", is slowly progressing towards its ultimate stage of "mature anarchy".<sup>107</sup> In the "very mature anarchy" stage, states will be able to enjoy the benefits of fragmentation<sup>108</sup> "without the costs of continuous armed struggle and instability" which is assumed to be the characteristic of lower stages.<sup>109</sup> Because of that, Buzan believes that the evolution towards anarchic maturity must have a considerable appeal to the states.<sup>110</sup> In fact, considering the goal of that evolution, he would not mind trying to force the pace of that evolution by more directed, but not specified, measures.<sup>111</sup>

Nevertheless, the progress of international "anarchy" has its limitations. Aside from the uneven pace of reaching maturity, which could lead to a split between states achieving different levels of anarchy, the biggest problem for the international environment comes from the ever-

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p. 226; Robert Axelrod, *The Evolution of Cooperation*, (New York: Basic Books, 1984), pp. 3-6.

<sup>107</sup> Barry Buzan, *People, States, and Fear: An Agenda for International Security Studies in Post Cold War Era*, (New York: Harvester Wheatsheaf, 1991), pp. 146-181.

<sup>108</sup> According to Buzan "fragmentation" represents a characteristic of anarchy which is orderly in spite of not being ruled by a common government. However he explains, "Where states are strong, the pattern of fragmentation is clear and provides a firm basis for relations between states. Where they are weak, the pattern is less clear, and relations less firmly based" in: *States, and Fear*, pp. 149-154.

<sup>109</sup> Buzan, *States, and Fear*, pp. 175-176.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid., p. 178.

increasing threats to security, which grow proportionally to the maturity itself. Consequently even though it is a step in the right direction, a "mature" international anarchy needs not stand in the way of "world government" and "universal peace" that will lead to a "planetary federation".<sup>112</sup>

While moderate idealists accept anarchy as a long-lasting feature of the international environment, they also think of it as mutable through evolutionary means.<sup>113</sup> The radical idealists, however, are more forceful in their rejection of the present state of affairs, because they are not as convinced of the progress humanity has made toward the ultimate security of world government.<sup>114</sup> The threats related to technological advancements that go along with the "maturing" of anarchy, are more urgent to them than to the moderates. The radical idealists do not want to wait for evolution to fulfill their objective when civilization is threatened. A quote from Hutchins' "Foundations for World Order" captures the essence of that argument:

Before the atomic bomb we could take world government or leave it. We could rely on the long process of evolution to bring the world community and world government hand in hand. Any such program today means another war, and another war means the end of civilization. The slogan of our faith today must be, world government is necessary, and therefore possible.<sup>115</sup>

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<sup>112</sup> Ibid., pp. 179-181.

<sup>113</sup> Keohane, *After Hegemony*, pp. 14-29, 67-84.

<sup>114</sup> See: Falk, "Legal Control of Force", p. 177.

<sup>115</sup> Hutchins, "Constitutional Foundations", p. 67.

Other authors see the sense of urgency in other areas. To Falk, for example, the present anarchic system is unacceptable because it "accepts as virtually permanent the present structure of inequality, violence, oppression, misappropriation of resources and poverty".<sup>116</sup> Falk asserts that the current system is doomed to be replaced "during the next few decades".<sup>117</sup> Another author makes further predictions:

It is my considered judgment that there is no longer a question of whether or not there will be world government by the year 2000. As I see it, the questions we should be addressing ourselves to are, how it will come into being - by cataclysm, drift, rational design - and whether it will be totalitarian, benign or participatory (the probabilities being in that order).<sup>118</sup>

Although, the idealists differ somewhat in their perceptions of how quickly world order will be achieved, the common thread of their arguments is optimism as to the inevitability of progress and the eventual establishment of world government.

To realists, however, such progress is not assured. While similarly stressing the "anarchic" character of international relations, realists reject any inevitability of final solutions to the problem. Rather than accepting or attempting to impose what they consider to be the "best scenarios", realists prefer to accept the anarchy as given

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<sup>116</sup> Falk *Future Worlds*, p. 77.

<sup>117</sup> Ibid.

<sup>118</sup> Mendlovitz, *Introduction*, p. xxvi.

and prepare for the worst, which in most cases is war.<sup>119</sup> Realists do not believe that progress will eliminate the struggle for power, which they see as an inherent human predilection. According to Waltz, for example, in anarchy wars occur "because there is nothing to prevent them", and therefore "in international politics force serves, not only as the *ultima ratio*, but indeed as the first and constant one".<sup>120</sup> Thus, although realists, like idealists, may think that government could be beneficial in the elimination of chaos, they reject it on the same grounds as they accept the permanence of anarchy - the evil human nature. Consequently, even if such an institution were possible people would only use it to overpower other people. Anarchy should not be considered as something temporary but rather as a permanent condition dictated by a wicked human nature. Realists acknowledge that while some individuals and groups may seek truth, beauty and justice, "all these more noble goals will be lost unless one makes provision for one's security in the power struggle among groups",<sup>121</sup> The only way to contain those problems of anarchy is not a government but exercise of power. If all states seek to maximize power, stability will result from maintaining a balance of power and by a flexible

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<sup>119</sup> See Morgenthau, *Politics Among Nations*; Waltz, *Theory of International Politics*; Grieco, "Limits of Cooperation".

<sup>120</sup> Waltz, *Man, The State and War*, p. 232; Waltz, *Theory of International Politics*, p. 113.

<sup>121</sup> Gilpin, "Political Realism", p. 305.

alliance system which will help to regulate it. Consequently, to realists the only relevant mechanism for achieving and maintaining order is power and structural or institutional mechanisms are only important as long as they help to maintain the balance of power.

#### THE PROBLEM OF SOLUTIONS

Those who take "anarchy" to be but a "stage" in the development of a "world state" attempt to devise systematic and mostly institutional solutions, because they believe that such models can explain how social life can exist at all. The spectre that haunts these theorists is the Hobbesian "state of nature", "a war of all against all" in which "life would be solitary, poor, nasty, brutish and short".<sup>122</sup> The question they ask either implicitly or explicitly is: how could we have been spared this living hell in domestic societies and not yet achieve it in the international arena?<sup>123</sup> This is what has been called the Hobbesian "problem of order".<sup>124</sup>

Although there can be an almost infinite number of meanings which the different writers find in words, their uses of "order" cluster around two basic notions. "Order" in

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<sup>122</sup> Hobbes, *Leviathan*, p. 186.

<sup>123</sup> The sparing could be considered as relative, given the terror imposed on some by the state and private organizations. On this issue see for example: J. Helmer, *The Deadly Simple Mechanics of Modern Society*, (New York: Seabury Press, 1974); A. Friedenberg, "The Side Effects of the Legal Process", (New York: New York University Press, 1971).

<sup>124</sup> For an extensive discussion of this issue see for example: C.T. Parsons, *The Structure of Social Action*, (Free Press: New York, 1949).



one sense refers to systems where "everything is in its proper place and performs its proper function", where there is "orderliness".<sup>125</sup> In another sense, "order" is merely "an absence of insurrection, riot, turbulence, unruliness or crime of violence", or what we could call, "peaceful coexistence".<sup>126</sup>

The "problem of order" in international relations involves questioning how it is that there is order in the second sense - "peaceful coexistence". Most of the solutions however, consist of claims that society is at least partly characterized by order in the first sense - orderliness. Indeed, it would seem that many think that this is the only solution for the international environment. This provides the impetus for a search for order - where some orderly features of the domestic society could be extrapolated to the international arena.<sup>127</sup> Usually then, institutions such as governing or enforcing bodies are proposed as necessary and ultimate answers to world problems. Proponents of such solutions usually argue that unless their ideas are quickly implemented by whatever means, international trends and risks

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<sup>125</sup> Marcus Unger, *Order in International Relations*, (New York: Seabury Press, 1986), p. 23.

<sup>126</sup> Ibid., pp. 23-24.

<sup>127</sup> For a good discussion of this issue see: Kratochwil *Rules, Norms and Decisions*, or Nardin, *Relations of States*.

will lead to the eventual collapse of civilization. Either we accept their solutions or face the inevitable apocalypse.<sup>128</sup>

Historically, however, the worst episodes of human-inflicted suffering have occurred when people were organized around a simple set of ideas or a single loyalty to batter those who had different ideas or loyalties. We cannot simply assume that the effort to establish civil institutions in the society of states will necessarily strengthen and improve international law and order. On the contrary, there is evidence that efforts to govern the society of states on the model of the modern state tend to corrupt and weaken international law, causing violence and disorder.<sup>129</sup> Social order, in the sense of "peaceful coexistence", would therefore be threatened by the imposition of a social order in the sense of social "orderliness". This is what Dahrendorf called the "unsociable sociability" of man.<sup>130</sup>

On the other hand, if we accept the "anarchic" description of international relations as an unchangeable "reality" we create an unmerited atmosphere of mutual suspicion and insecurity where only state capabilities matter. In such an environment state security seems

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<sup>128</sup> The abuse of claims of immediate urgency has been criticized as counterproductive even by the "idealists" themselves. For discussion see: Falk, "Legal Control of Force".

<sup>129</sup> Wars of religion or wars of independence are good examples of those problems.

<sup>130</sup> Ralf Dahrendorf, *Law and Order*, (London: Stevens and Sons, 1985), p. 22.

threatened by definition and states have to take measures to protect themselves. What complicates this situation even further is the possibility that the attempts of one state to improve its security precipitate the feeling of insecurity in other states.<sup>131</sup> As a consequence, their collective actions generate a spiral of insecurity which leads to violence in a fashion which is only slightly different from the one proposed by those who see the "anarchy" as temporary.

As we can see the alternative between anarchy and world government is not an alternative between insecurity and security, but one between different types of security problem. On one hand violence may occur due to the intervention of states in the affairs of other states. On the other, the disputes over the control of power may lead to similar problems. These concepts, however, represent the extremes on the continuum between total "anarchy" and what is thought to be the ultimate embodiment of "order". What lies beyond is perhaps more important to the proper understanding of how states function than exploring hypothetical propositions with no immediate practical applications.

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<sup>131</sup> For an excellent discussion of this issue see Robert Jervis *Perception and Misperception in International Politics*, (Princeton, N.J.: Princeton University Press, 1976); see also: Joseph de Rivera, *The Psychological Dimension of Foreign Policy*. (Columbus, Ohio: C. E. Merrill, 1968).

## PROBLEMS WITH THE ANARCHIC CHARACTERIZATION

There is no doubt that the international arena is often tense. It is also true that if such tension does not find a peaceful resolution through law or negotiation violence and disorder may result. The occasional character of such problems, however, does not warrant claims that violence is rampant and that international relations resemble the Hobbesian "state of nature" or "the war of all against all" which would justify either the imposition of world government or a constant preparation for war. As we have noted in the previous chapter, states observe their obligations most of the time, and international law plays a significant role in the functioning of the international system even though it lacks many of the characteristics of domestic law.

If this is the case, then, we should examine more closely some of the assumptions we make about the existing international environment. For example, there is no doubt that there could be many answers to the question why we do not kill each other off. It is strange, however, that we should be so concerned as to ask ourselves why we do not have a state of affairs that never occurred. Hobbes calls his eternal war the "state of nature", yet humans in their "natural" state were tribal animals, having descended from tribal primates. Indeed the very image of "war" is provided by an activity characteristic of socialized humanity and intensified with greater degrees of social organization, so

now the analogy has been extrapolated to the international arena where its application is also questionable.

According to Onuf, for example, the depiction of international relations as anarchic in the sense of international disorder is also a mistaken invention of modern times.<sup>132</sup> "International relations were never anarchic, at least not any more than domestic societies could have been", he claims.<sup>133</sup> Furthermore, according to Onuf, social and political thought during the times of Hobbes viewed international relations as being ruled arrangements. Virtue, rights, and manners were seen as important features of arrangements lacking central authority. It was only later that theorists substituted "utility for virtue, law for rights, and conventions for manners". As a result, the existing "order" took on an entirely negative meaning and became an "anarchy".<sup>134</sup>

Furthermore, it has often been assumed by both realists and idealists that Hobbes must have intended to impose a Super-Leviathan above the states. Such a creation has been seen as a "logical" consequence of the Hobbesian theory and an answer to the "anarchy" in world politics.<sup>135</sup> Today we are told, however, that there is no compelling evidence to

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<sup>132</sup> Onuf, *World of Our Making*, p. 165.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid., pp. 165-166.

<sup>135</sup> See Kratochwil, *Rules, Norms and Decisions*, pp. 3-4; Kenneth A. Oye, (ed.) *Cooperation under Anarchy*, (Princeton, N.J.: Princeton University Press 1986), p. 17.

suggest that Hobbes actually intended such solutions or that he even thought of the international environment as an "anarchy" in the domestic sense of the word. Recent interpretations of the *Leviathan* show that Hobbes understood the differences between the domestic and international arenas much better than many of his "interpreters". According to Kratochwil, for example, Hobbes knew that the incentive structures which influence the choices of actors are significantly different in the domestic and international environments.<sup>136</sup> In the domestic arena, people have a stronger motivation to leave what Hobbes called, the "state of nature" for fear of violent death or the prospects of "commodious living". But in the international environment the situation is different. The reasons for leaving the "state of nature" are not as compelling for collective actors such as states.<sup>137</sup> There are different ways to establish the division of labor, and the fear of death is not as strong since "guards" can take shifts in ensuring safety.<sup>138</sup> Thus, unlike individuals who have to rest and can then be overpowered, the states have an arsenal of resources that could be used for their protection. Consequently, when it comes to order the reality of international life is quite different from the state of "war of all against all" that has often been

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<sup>136</sup> Kratochwil, *Rules, Norms and Decisions*, pp. 2-4.

<sup>137</sup> Buzan, *States, and Fear*, pp. 37-38, 148-149.

<sup>138</sup> Kratochwil, *Rules, Norms and Decisions*, pp. 3-4.

considered the main feature of the international environment.<sup>139</sup> If this is the case, perhaps both the "urgent solutions" proposed by idealists as well as the "defensive mechanisms" of the "realists" are addressing a theoretical construct rather than the actual problem facing international society.

The hypothetical character of the problem of anarchy seems to be further confirmed by the difficulty in finding a "real life" example of an anarchy which would have similar qualities to the ones ascribed to the international system. Although the analogy of a market has been taken to have such qualities,<sup>140</sup> recent research has shown its evident shortcomings. In spite of the lack of governing institutions similar to "international anarchy", markets cannot be said to be ruleless environments. In fact, as one of the critics says,

...markets are probably the social institution which are most dependent upon normative underpinnings. While markets are anarchical in the sense of lacking central decision making institutions, it is unimaginable that they could function without the common acceptance of the convention of money, without the protection of property rights and without the institutions of promising and contracting, governed by practice type rules.<sup>141</sup>

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<sup>139</sup> Kratochwil, *Rules, Norms and Decisions*, p. 4, Buzan, *States, and Fear*, pp. 148-149.

<sup>140</sup> Waltz has been a major proponent of the market analogy; see for example, Waltz, *Theory of International Politics*, pp. 89-101.

<sup>141</sup> Kratochwil, *Rules, Norms and Decisions*, p. 47. The importance of the practice rules for the existence of international society will be discussed in the next chapter.

In view of the theoretical problems with the concept, perhaps it would be better to direct our attention to the existence and workings of international "order" rather than to international "anarchy".

#### THE WESTPHALIAN SYSTEM AS AN ORDER

The statesmen and leaders who fashioned the peace treaties between the warring factions in Münster and Osnabrück in 1648 were very much aware of the problem of "anarchy". What they created is not perfect but it is still an order. After all, the Peace of Westphalia ended 30 years of anarchy and violence triggered by an attempted imposition of a system which was intended to end all violence. Instead of bringing the expected peace and order, which must have been thought guaranteed under the Universal Christian Empire, each day of continued warfare led to new savageries which only emphasized the mistaken premise on which the whole endeavor had been based. As a consequence, the Westphalian accords stressed independence and autonomy for the purpose of creating order out of what could be called at that stage "the defensive anarchy".

The concept of sovereignty, which was developed earlier as a construct for justifying internal hierarchy and creating order within states (dominium) was strengthened and further extended to assure nonintervention through the equality of



the sovereigns.<sup>142</sup> The rights of states, which were initially analogous to the "property" rights in the domestic setting, became a part of practice and of international law. In the context of international relations sovereignty created conditions and requirements for regulatory mechanisms. It fostered the system of rules and laws that dealt with the needs of states and that reflected the self-interests and consent of those states. Such laws, in return, reinforced and further developed the concept of sovereignty as the legal basis for states and for the expansion of state power and control. As one author put it,

States, needing mechanisms for order, created norms and rules of law that permitted them to do what they wanted to do, to do so more efficiently, and to do so in such ways as to enhance the status of states but respecting at the same time the rights of other sovereigns.<sup>143</sup>

In spite of its fragmented character, the Westphalian order composed not only a set of independent elements but in some ways facilitated interactions between them on an orderly and equal footing. These interactions entail some degree of interdependence as none of the states is fully self-sufficient. The sensitivity to changes of this arrangement leads to some tensions due to the "vulnerability" of states, which are often noticed by the public, but at the same time

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<sup>142</sup> On the subject of sovereignty see Kratochwil, *Rules, Norms and Decisions*: 252-253, on sovereign equality see Richard A. Falk, *The End of World Order: Essays on Normative International Relations*, (New York : Holmes and Meier, 1983), pp. 20, 197-198).

<sup>143</sup> Starr, "International Law", p. 302.

most of the "regular" exchanges between states go unnoticed.<sup>144</sup> The appreciation of political and economical exchanges taking place between the states is often lost when we insist on looking at international relations as anarchy rather than a differently organized order.

The international order, like any other order, deals with all the problems and opportunities generated by interdependence, and the Westphalian order does so within the framework of the existing structure. International law in this context provides the states with opportunities and constraints within which they may act. States within this order create laws, and these laws in turn become part of the context within which the states and other members perform, constraining them through a set of rules that alter the incentives, costs and benefits of various possible choices and behaviors.<sup>145</sup> This may be problematic at times, as states find themselves facing a complex reality consisting of both interdependence and fragmentation. Although such a system may seem lacking when compared with domestic structures, the present arrangement needs no central authority or special governmental institutions to maintain acceptable social order among its members. Aside from international law, among the most important elements of this order are self-help and

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<sup>144</sup> See: Robert Keohane, (ed.) *Neorealism and Its Critics*, (New York: Columbia University Press, 1986).

<sup>145</sup> Starr, "International Law", pp. 300-302.

nonintervention. The first describes the directive to the sovereign whose own values are threatened, and the second is meant to prevent the sovereign from threatening the values of others. Together they serve to sustain the decentralization of power and authority and the essential impermeability of the territorial state. The logic of Westphalia could be found as Miller phrased it,

...in that it is a positive good to keep various subjects apart from each other, as far as possible, and with the general understanding that their apartness itself can be maintained only if they all agree upon its mutual value for each.<sup>146</sup>

#### CONCLUSIONS

As noted at the beginning of this chapter, the theory of international relations has a tendency to portray the international arena as an "anarchy". Although anarchy is meant to describe a system lacking a common governing body, its meaning is often confused with a lack of order in the sense of what has long been called the Hobbesian state of nature. The framework of the idealist-realist debate, oscillating between the extremes of world government and anarchy in Hobbesian terms, has only strengthened this perception. As shown in this chapter, however, we do not have to refer to the extremes of anarchy as a situation lacking either government or rules and the order of the world state,

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<sup>146</sup> Lynn H. Miller, *Global Order - Values and Power in International Politics*, (London: Westview Press, 1985), p. 25.

in order to show the possibility of life according to common rules even in the absence of common government. Aside from the fact of a misrepresentation, the "anarchic" characterization carries with it a certain degree of danger to the world order. On the one hand, if we accept world "anarchy" as a permanent feature of world affairs, the resulting sense of insecurity may drive us to actions which could cause a reaction in other states and eventually end up with war. On the other hand, if we accept international anarchy as a bad stage in the process leading to a world state and attempt to fix it, we may threaten the existing world order with an imposition of an unacceptable social system and also cause war. Consequently, when it comes to anarchy the preferred and in many ways more realistic option would be to rid ourselves of this equivocal and misleading characterization and instead focus our research on the existing mechanisms of cooperation and conflict resolution within the Westphalian state system.

## CHAPTER V

## INTERNATIONAL LAW AND INTERNATIONAL ASSOCIATION

## INTRODUCTION

The prevailing trend in current international relations theory is to interpret the character of the international environment on the basis of the degree of international consensus as to the goals of cooperation.<sup>147</sup> In this view, unless states have achieved a high degree of agreement as to their ends, they cannot be considered a society nor would they likely feel bound by international law. To idealists such a consensus could be facilitated by institutional solutions of the type discussed in the previous chapters.<sup>148</sup> Realists disagree on this, and claim that consensus about the ends must come first, for otherwise states may feel threatened and conflict may arise.<sup>149</sup> Generally, however, both sides of the idealist-realist debate have a tendency to question if international society is possible without achieving a high degree of congruence as to the ends the members expect the society to perform. This "teleological"<sup>150</sup>

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<sup>147</sup> See Michael Oakeshott, *On Human Conduct*, Oxford, Clarendon Press, 1975), pp. 114-118; Hidemi Suganami, "International Law", in: James Mayall *The Community of States - A Study in International Political Theory*, (London: George Allen and Unwin, 1982), pp. 63-73.

<sup>148</sup> See: Hutchins, "Constitutional Foundations"; Mendlovitz, *Introduction*; Falk, *Future Worlds*; Keohane, *Neorealism*.

<sup>149</sup> Waltz, *Theory of International Politics*; Grieco, "Limits of Cooperation".

<sup>150</sup> The term "teleological", which will be used here exchangeably with "end-oriented", is an attempt on my part to combine what Oakeshott, *On Human Conduct*, pp. 113-158 meant by "enterprise association" with

or "end-oriented" concept of association leads to a negative perception of international law, since the value of law in this model is judged solely on its ability to bring the required consensus into being. Law which is not instrumental or successful in achievement of what is seen as "common" purposes is therefore taken as either useless or insignificant.

The purpose of this chapter is to examine critically the teleological model in terms of its effects on the perception of international society and international law and to propose a more positive and perhaps more realistic model of association. Such a model, based to a large degree on procedural rules and practices, although in existence for centuries, has been largely forgotten due to the common acceptance of the teleological model. Recently, however, such authors as Oakeshott, Bull, Nardin, and Kratochwil have been attempting to revive that tradition.<sup>151</sup> Although the proposed model is based on elements common to "procedural" models, the term "pragmatic" will be used to signify some important differences in scope between the two models.

While procedural models are usually comprehensive and all-encompassing, the scope of the pragmatic model is more

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Nardin's *Relations of States* pp. 3-27 "purposive association". The label "teleological" is borrowed from Kratochwil, *Rules, Norms and Decisions*, pp. 46-47, who uses it to describe the conventional way of thinking about structured social systems.

<sup>151</sup> See Oakeshott, *On Human Conduct*; Bull, *Anarchical Society*, Nardin, *Relations of States*, and Kratochwil *Rules, Norms and Decisions*.

restricted. Rather than trying to explain every function of international society by procedural rules, our model instead will focus only on rules that form its structure. This approach will be particularly helpful when dealing with issues of conflict which traditionally caused problems for the procedural models. Since, as it will be shown, the pragmatic model is not dependent for its structure on instrumental rules, their change or collapse due to conflicts does not affect its existence. The pragmatic model, which is not dependent on law as a whole but rather on essential rules and procedures, will therefore be more capable of explaining why rules are broken and at the same time why there is no anarchy or chaos in international relations.

#### THE TELEOLOGICAL CONCEPT OF ASSOCIATION AND INTERNATIONAL LAW

The modern theory of international relations tends to assess the development of the international system on the basis of the degree of international consensus as to the goals of cooperation.<sup>152</sup> Both sides of the idealist-realist debate have a tendency to assume that a high degree of agreement about common goals is a condition for the existence of international society and international law. Although idealists and realists disagree on the possibility of the

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<sup>152</sup> Good discussions of this issue could be found in Oakeshott, *On Human Conduct*; Bull, *Anarchical Society*; Suganami, "International Law", Nardin, *Relations of States*.

achievement of end-oriented congruence, they nevertheless accept this concept as a valid measure of societal development. Realists argue that law or society cannot function without a full acceptance of communal purposes. Realist pessimism about the wickedness of human nature leads them, however, to the rejection of a possibility of achieving any such consensus.<sup>153</sup> Thus anarchy remains an immutable feature of the international environment and the role of the international law is limited to instrumental purposes of particular states.

Idealists, on the other hand, argue that an as yet not existent convergence of interests is achievable. Idealists, who as we already know are more optimistic about human nature and the possibility of progress, hope that they can facilitate such consensus through institutions and proselytizing. Instances of "chaos" or "anarchy" in international relations are therefore taken as proof of the need to deal with global issues collectively, on a large scale and without waiting for a common consensus. Their assumption is that common agreements will be easier to reach when proper institutions are already in operation.<sup>154</sup> International law is seen as one potential mechanism for consent, but the utility of international law for world order

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<sup>153</sup> See Reinhold Niebuhr, *Christian Realism and Political Problems*. (New York: Scribner, 1953); Morgenthau, *Politics Among Nations*.

<sup>154</sup> See Hutchins, "Constitutional Foundations", p. 67; Falk, *Future Worlds*, pp. 11-30.



is as yet limited due to its ineffectiveness in the realization of desired ends.<sup>155</sup>

The problem that the end-oriented approach causes for international law and the discipline of international relations lies not in the attitudes toward the possibility of achieving the required level of congruence but rather in the teleologically-oriented concept itself. If we take the degree of teleological consensus as the main criterion of societal character, we are bound to reach the same conclusions about the systemic inadequacy of law because state interests are not identical.

While realists acknowledge this fact, they nevertheless set up unrealistic expectations for international society when they require a high degree of end-oriented consensus as a proof of its societal qualities.<sup>156</sup> To realists international society is an impossibility not worth their attention. The interests of researchers and politicians alike should be directed towards issues of security, such as state capabilities or the maintenance of the balance of power, rather than hopes for future consensus.<sup>157</sup>

Similarly, if idealists expect to achieve such congruence through institutions designed for that purpose, they are bound to be disappointed by states whose interests

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<sup>155</sup> Hoffmann, "International Law", pp. 21-46.

<sup>156</sup> For discussion see Suganami, "International Law", pp. 63-73.

<sup>157</sup> Morgenthau, *Politics Among Nations*; Waltz, *Man, The State and War*.

stand in contradiction to idealist versions of "common" ends. The belief that to make the world better requires the creation of world institutions, which would bring about the necessary changes for the achievement of particular ends, leads to despair whenever it becomes apparent that such changes, if possible at all, will come slowly and with insufficient force. Idealists are therefore constantly defeated by the double problem of demonstrating how the institution-driven changes can be produced and substantiating the assertion that the changes described as necessary would be sufficient to accomplish the desired ends.

The problematic character of the teleological approach adds also to other problems which we have already discussed. Such concepts as the presumption of anarchy or the command theory of law, even though highly problematic or simply mistaken, are often reinforced by unsuccessful attempts at the realization of teleologically-dictated ends. For example, if we assume that a high level of consensus is required for society to exist, any setbacks in the realization of common goals will be perceived as reasons to discredit international law and international society. Thus if we judge the effectiveness of law merely by its instrumental ability to fulfill the goals of the teleological concept, and forget or ignore other functions of law, its ineffectiveness will always lead to doubts about its character and applicability to international relations.

## THE PROCEDURAL CONCEPT OF ASSOCIATION

Many of the problems presented above could possibly be resolved if we looked at the international system not in terms of institutional proliferation or a goal-oriented convergence but in terms of rules and practices which allow states actually to coexist in the international environment even though it is often portrayed as anarchy and chaos. The bases for such an approach could be found in the process of development of international law.

Although in historical sources the Peace of Westphalia in 1648 is often used as a date of creation of the existing international system, it was not until the second half of eighteenth century that the rules of international law and diplomacy became more widely understood.<sup>158</sup> Moreover, at that time the content of diplomacy and the law of nations became oriented more to patterns of trade and influence and less toward ideology. The rules and practices in operation were no longer dependent upon any particular principles other than the pragmatics of competition. The law of nations during this period was primarily concerned with the basic mechanics of state relations, such as the mechanisms of establishing and maintaining diplomatic relations, forms of treaty-making, laws of war and neutrality, and territorial boundaries on

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<sup>158</sup> Bull, *Anarchical Society*, pp. 127-162; Nardin, *Relations of States*, pp. 49-68.

land and sea.<sup>159</sup> Both common practices as well as rules of international law recognized the sovereign character of states within the society of states, and each member was free to pursue external and internal policies subject only to the minimal constraints imposed by international law. It was those functional and to a large extent value-neutral concerns of the law of nations that were the main facilitators of the expansion and exportability of what was originally almost exclusively a European system.<sup>160</sup>

International law at the time was understood as being concerned with the terms of association among sovereign states, and was occupied almost exclusively with securing such terms as would permit them to preserve their independence. It served as the structure of coexistence - a set of regular procedures within which states might survive and according to which they could pursue their own interests, excluding only those activities that threatened to undermine the system itself. The resulting conception of international society was one in which that society was regarded as an association of political communities united through the existence of common procedural rules and extra-legal practices that were significantly different from the

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<sup>159</sup> Hedley Bull and Adam Watson, *The Expansion of International Society*, (Oxford: Clarendon Press, 1989).

<sup>160</sup> See Bull, *Anarchical Society*; Bull and Watson, *International Society*.

instrumental ones required by the teleologically-oriented concept.<sup>161</sup>

These rules and practices, which are also in existence today, should be recognized as important for international relations because they facilitate exchange among states pursuing divergent as much as shared ends. Such rules set the stage for relations among not only friends but also antagonists.<sup>162</sup> They make up a framework of common practices based on rules capable of providing some unifying bond where shared ends are lacking. Such rules, when embedded in common practices, the usages of diplomacy or international law, are not in themselves a source of goals but rather a set of directions for or constraints on the pursuit of goals already chosen.<sup>163</sup> The rules regarding making treaties, for example, specify the forms and procedures to be observed in reaching international agreements and in handling the problems of interpretation and application that may arise with respect to them.<sup>164</sup> But they do not impose upon states any duty to make or avoid making treaties, nor do they specify, except indirectly, anything concerning the purposes for which treaties should be made. These procedural rules and practices should be considered as meaningful for international

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<sup>161</sup> Oakeshott, *On Human Conduct*, pp. 113-118; Nardin, *Relations of States*, pp. 3-24.

<sup>162</sup> Nardin, *Relations of States*; Kratochwil, *Rules, Norms and Decisions*; Starr, "International Law".

<sup>163</sup> Nardin, *Relations of States*, p. 11.

<sup>164</sup> Kratochwil, *Rules, Norms and Decisions*, pp. 249-262.

relations, for they not only regulate such relations but define and serve their perpetuation by allowing for different interests to be realized at the same time.<sup>165</sup> Specifically, by prescribing restraint, toleration, and mutual accommodation according to common standards of international conduct, they make it possible for states pursuing different ends to exist.

The model of association built on the basis of those rules and practices is called different names by different authors, but we will call it "procedural". The procedural concept is based on states' need for order within the existing Westphalian state system, not in the sense of its ideal or absolute embodiment but rather in its practical "everyday" functionality.<sup>166</sup> International law is therefore seen as a facilitator of communication among states, which allows them to do things according to their specific needs and interests. Since states existing in a condition of interdependence need to exchange resources they must also communicate.<sup>167</sup>

While the teleological model of association emphasizes the instrumentality of law and due to the lack of value convergence has to rely on coercion, the practical model of

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<sup>165</sup> Nardin, *Relations of States*, pp. 187-219, Starr, "International Law", pp. 299-310.

<sup>166</sup> See Oakeshott, *On Human Conduct*; Bull, *Anarchical Society*; Nardin, *Relations of States*.

<sup>167</sup> William D. Coplin, *The Functions of International Law*, (Chicago: Rand McNally, 1966); Starr, "International Law".

association is much more compatible with actual day-to-day relations in the international arena. The procedural view of international society recognizes, therefore, the character of international relations as being, as Bull put it, in "neither complete conflict of interest between states nor complete identity of interest".<sup>168</sup>

Furthermore, common rules and practices as identified by the procedural concept serve as boundaries and guidelines, but they do not impose destinations. They warn others of behavior considered unacceptable and permit others in the international society to respond. Following the procedural rules and practices allows states to avoid chaos, uncertainty, unpredictability, and costs generated by a breakdown of order.<sup>169</sup> In addition, by recognizing that states have not only congruent but also divergent interests, the procedural view sees international law as useful in clarifying rights, responsibilities and competencies, even when some ends are not realized the way some groups would want them to. William Coplin has been a major exponent of the communicative function of what he called quasi-authoritative rules and practices.<sup>170</sup> As he explains, such rules serve not only as media of communication but also as socializing mechanisms for policymakers, who this way familiarize

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<sup>168</sup> Bull, *Anarchical Society*, pp. 26-27.

<sup>169</sup> See Kratochwil, *Rules, Norms and Decisions*, pp. 6-4.

<sup>170</sup> Coplin *Functions of International Law*, p. 101.

themselves with what we could call "rules of business". To use an analogy, we could say that the "procedural" concept of association is based on principles, practices and rules similar to traffic rules. All of those rules tell us what we should do and what others will do, but they do not tell us where to go. Accidents and deliberate crashes do happen along the way but they do not mean that all the traffic is chaotic or that no one observes any rules. Even if we want to go cross-country, where no signs are posted, following common rules and practices will help us get through other traffic paths without getting "hit".

#### THE PRAGMATIC MODEL OF ASSOCIATION

Although the procedural model represents an important conceptualization of the international environment, its influence on the theory of international relations has been limited thus far. The major reason for this is that, due to its comprehensive approach, the critics of the model have a tendency to confuse instrumental rules which, as we have noted, serve the realization of particular purposes, with procedural rules which we could call purpose-neutral. The claims of the irrelevance of international law and of rule-based association are usually based on the observation that



laws are always broken when conflict ensues, and even without a conflict there are numerous cases of noncompliance.<sup>171</sup>

Fuel for the critique comes also from the proponents of the procedural model themselves, for the procedural position generally tends to under-explain the role of conflict in international relations. Rather than discuss collisions and their effects on their model, its advocates prefer to discuss only peaceful ways of conflict resolution.<sup>172</sup> Nardin, for example, assumes that the obligation to conform to international law lies in "recognition of the authority of international law as a whole".<sup>173</sup> What he does not explain is what happens to the model when states do not feel so obligated and conflict ensues. Realistically, however, it is highly unlikely that all states will resolve all their conflicts in a legal manner, especially since there is no evidence that the required "recognition of law as a whole" has already taken place.

Although according to critics the procedural model is void as soon as it faces a conflict, some of the questions relating to this dilemma could probably be resolved by a modification of some aspects of the concept. Thus, in addressing the problem of conflict first, we need to explain

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<sup>171</sup> See Stephen Layne, *Law and Conflict*, (New York: New York University Press, 1987), p. 14.

<sup>172</sup> See Jan Rohas, *Morality and Legal Obligations*, (New York: Harper Collins, 1987), pp. 122-123.

<sup>173</sup> Nardin, *Relations of States*, p. 220.

how it is that some rules survive conflicts. This can be done through a differentiation between two modes of association and different types of law. Second, we need to explain how an association survives a conflict. This will be done through narrowing the focus of the procedural model to structural rather than functional considerations, and by basing the structure of international society on procedural rules of coexistence rather than instrumental rules of cooperation.

Before we address the first problem, we have to realize that even though conflicts do occur frequently in international relations, so does peace. States which are not in a state of all-out war, even when they are not particularly friendly to other states, do observe some rules.<sup>174</sup> Even in the absence of treaties or other agreements some rudimentary contacts between states are usually maintained. This is usually done through procedural rules and practices that have been noted above. Such rules, as we already know, do not require high levels of convergence and therefore allow actors even with divergent interests to go about their business as long as the rules are followed. Since these rules are not involved in the pursuit of any particular ends, and were created by states who needed them in order to communicate with other states, they help states to coexist even if there is no cooperation. These rules may change but

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<sup>174</sup> See Kocs, "Strategic Behavior"; Bull, *Anarchical Society*.

as with language it is in the interest of states, or at least not against it, to be able to interact with other states in a mutually understandable and a coherent manner.<sup>175</sup> While conflict may be devastating to instrumental rules and agreements due to the collapse of consensus, procedural rules remain largely untouched by such events and usually serve as ready guidelines for the future normalization of relations.<sup>176</sup>

As we shall see below, even if states have no common interests they may be mutually interested in avoiding a particular outcome such as conflict. For example, according to Stein, who examines the formation and dissolution of international regimes, states often find themselves in situations where the only common interest they have is in avoiding a particular outcome.<sup>177</sup> As he explains, "these situations occur when actors with contingent strategies do not most prefer the same outcome but do agree that there is at least one outcome that all want to avoid".<sup>178</sup> Although Stein himself does not recognize the basis of regime creation in other than game-theoretic terms, he admits that

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<sup>175</sup> See: Zygmunt Ziembski, *Teoria Prawa*, (Poznan: Polskie Wydawnictwo Naukowe, 1978); Kratochwil, *Rules, Norms and Decisions*; Charles W. Kegley Jr. and Gregory A. Raymond, *When Trust Breaks Down: Alliance Norms and World Politics*, (Columbia: University of South Carolina Press, 1990).

<sup>176</sup> See F. Lador-Lederrer, *War and Normalization*, (Vienna: Neuhoff, 1989) pp. 361-369.

<sup>177</sup> Arthur A. Stein, "Coordination and Collaboration: Regimes in an Anarchic World," in Stephen D. Krasner, (ed.), *International Regimes*. (Ithaca, N.Y.: Cornell University Press, 1983).

<sup>178</sup> *Ibid.*, p. 299.

flexibility as to the level of interest convergence allows regimes to form quickly and their coordinative character allows for their longevity. Considering that there is no convergence of interests, which is the requirement of a formation of instrumental rules, the longevity of those regimes must be dependent on the other that is the procedural, rules. Observance of those rules allows states, if necessary, to coexist without cooperation.

Regimes of "common interests" on the other hand, which were also identified by Stein, correspond more closely to our teleological model of association.<sup>179</sup> These regimes require a higher degree of interest convergence in pursuit of certain ends. These end-oriented regimes, unlike the "procedural" ones, are set up to deal with conflicts through a goal-oriented collaboration. Although the first type of regime recognizes the importance of divergent state interests, regimes of "common interest" are largely dependent on convergences of ends. While regimes of "common aversion" rely on mutual constraint, the regimes of "common interest" require consensus as to the ways in which the institutionalization of power to supervise state behavior should proceed. Not surprisingly, formation of those regimes is usually quite difficult and their longevity is more limited than the "procedural" ones.<sup>180</sup>

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<sup>179</sup> Ibid., pp. 299-324.

<sup>180</sup> Ibid., pp. 304-308.

As we have seen, the survival of rules in either conflict or peace is largely dependent on the role they play within the system and their character in terms of the level of convergence required for their formation. While conflict may lead to dissolution of treaties based on instrumental arrangements when convergence of interests is lacking, procedural rules survive largely intact to serve as a necessary base for future arrangements.

This ability to survive, characteristic of procedural rules, is also important for the perception of the existence of international society. Although the procedural approach emphasizes the role of procedural rules in the existing international system, its main problem is its requirement of the acceptance of international law as a whole. This leads, however, to the situation where if laws are broken for whatever reason the whole model of association is questioned. However, as we have seen above, not all the laws play an equal role in international society. Although perhaps all laws were meant to be observed, some are bound to be broken. That, in spite of all the rules broken, we cannot say that we live in anarchy or chaos, tells us something about the ability of international society to somehow endure challenges to its existence.

If rules play any role in this process it must be the procedural rules and practices, with their non-teleological orientation, that help do it. Although all rules may be

thought of as equally binding not all of them constitute the basis of international society nor should they. If contemporary international law is said to encompass two types - procedural law that sets out the minimum conditions for the coexistence of states and instrumental law that facilitates a higher degree of cooperation among them - then considering all the above, the structure of international association should be based on the former. This approach seems especially plausible when we realize that a systematic development of the law of cooperation without the convergence of interests and values seems rather remote. On the other hand, demands of present state interactions are effectively satisfied by the broadly-defined rules and procedures that form the law of coexistence. These are the rules and practices of daily state-to-state relations that are not as affected by conflicts as the instrumental rules, which are bound to be broken when the convergence of interests is not fully achieved. The procedural rules give us the basis for the creation of instrumental rules and allow us to regroup when instrumental rules are failing. It must also be stressed at this point that, although only the procedural rules and practices should be considered as the structural backbone of international society, this does not mean that instrumental rules are no longer important. Such rules play an important role in expanding on the procedural rules, and perform many important tasks without which the existing society would be

limited to simple cohabitation. Instrumental rules, however, should be treated as what they are - instruments or tools of a society which wants to achieve certain goals. That some of the goals are not secured may usually mean one of two things: first, that some goals are not achievable; and second, that the tools which we use are not appropriate for the realization of goals that are achievable. However, neither of those problems should be construed as meaning that international society does not exist or that it will not exist unless such goals are achieved.

#### CONCLUSIONS

To summarize, this chapter addressed the issue of a depiction of international association as lacking societal character and not being bound by international law. In the first part of the chapter, the teleological model of association, was identified as the source of this perception. This form of relationship is often found among those who cooperate for the purpose of securing certain shared beliefs, values and interests, and who adopt certain practices as means to that end. The main problem with this model is that it prematurely assumes congruence as to the goals different states share. Based on that assumption, institutional structures which we have discussed in Chapter Four are proposed in order to deal with lack of convergence. Practices and rules including international law are therefore seen as

worthy of respect only to the extent that they are useful instruments of the common purpose. In effect, the difficulty with the application of this model to the Westphalian system leads to the prevailing trend of characterizing international relations as anarchic and devoid of law.

In the latter part of the chapter our focus shifted toward a different model of international association which although in existence for some time, has been recently reintroduced in the theory of international relations. This model of association, which we have called procedural in contrast to the teleological one, unites those engaged in the pursuit of different and sometimes incompatible ends through their recognition of rules and practices that apply to them as members of a international political community. The advantage of this concept over the end-oriented one can be found in its more realistic reflection of the actual environment, but also in a fuller and more appropriate utilization of international law. By focusing on the existing practices and rules which serve as restraint guidelines for state behavior it recognizes that states pursue divergent as well as common purposes, and that mechanisms exist to reconcile their differences.

Although an important conceptualization of the international environment, the procedural model suffers from problems related to its holistic approach toward law and its disregard of the role of conflict in international affairs.



By insisting that all laws should be accepted as a package, the procedural approach is forced to disregard conflict, for if it leads to violation of laws the whole model is threatened. In the last part of the chapter a modification of the procedural approach was introduced in which a more restrictive approach towards rules as a structure of international association was taken. According to this model, which we have called "pragmatic", instrumental rules should not be considered to be a part of the structure of international association due to the difficulty of reaching the convergence required for their existence, and lack of longevity. Instead our focus should be on the procedural rules and practices which represent stability but also flexibility. Such an approach would be particularly helpful in understanding why international society survives conflicts even though many of its laws fall in the process. According to the view presented, most of the laws affected by conflicts are usually instrumental or end-oriented but these laws are not essential to the structure of the society, which relies primarily on procedural rules.

## CHAPTER VI

### CONCLUSIONS

#### SUMMARY OF THE THESIS

My aim in this thesis has been to propose an alternative to the idealist-realist model by which we could think theoretically about international law and its role in international relations. Such a model would explain how international law contributes to order and "society" in that system, and would help us understand the realist and idealist conceptions of international law. We have done this by looking at the elements common to both idealist and realist conceptualizations of law and order followed by a more specific look at the relationship between international law and international society.

Following a historical overview of the ongoing idealist-realist argument, three key issues were identified for the purpose of our analysis - the problem of the Austinian definition of law, the presumption of anarchy, and finally, the issue of international society. Chapter Three addressed some of the problems related to the perception of international law as law. Such questions are largely based on a factor common to both sides of the idealist-realist debate: acceptance of the positivistic "command" theory as presented by Austin. By treating enforcement and legislation as definitive and indispensable characteristics of a legal

order, both idealists and realists express doubts about international law. However, the Austinian definition is seriously flawed and should not be accepted as a valid premise of the idealist-realist deliberation. Its applicability even to domestic law has been questioned by legal theorists for some time. While legislation and enforcement could be beneficial in certain cases, neither the practice nor the theory of international relations seem to confirm their necessity. Many legal systems, including international law, effectively function without any such institutions. In fact, considering the present international arrangements, the establishment of such institutions could be more of a impediment than a benefit. Thus, the idealist and realist doubts about law stem more from the acceptance of a mistaken definition than from the actual problems in its functioning.

Chapter Four discussed the so-called "presumption of anarchy" as an example of another mistaken premise and an unfounded source of skepticism about international law. While anarchy was meant to be understood as merely a system lacking government, its meaning has often been confused with lack of order in a sense of chaos and lack of rules. What exacerbates the problem is a tendency common to idealists and realists to look at the international environment in dichotomic terms, of either a perfect order or a complete anarchy. Such a characterization as we have seen, leads to

two problems. First, by taking the most extreme positions with regard to the international system, both sides tend to overlook a broad range of state behavior which does not reach either of these positions. Second, by basing their solutions on a mistaken premise, both sides reach conclusions which are potentially dangerous for the existing world order. Consequently, following examples which showed the original premise as confounded, we rejected it and instead suggested that research efforts should be directed to the already-existing mechanisms of coexistence and conflict resolution.

Following the repudiation of arguments suggesting the lack of law and the lack of order, in Chapter Five addressed a common presumption to idealists and realists, that a society of states cannot be attained unless a high degree of convergence as to the goals of cooperation is present. Law in this context is judged solely by its ability to fulfill those expectations. Rules which are not effective or instrumental in achievement of those goals are usually disregarded.

The picture resulting from the shared premises of the idealists and the realists of the international environment is one of anarchy and disregard for law, where international society is either an impossibility or only a hope for a distant future. The second part of Chapter Five discussed an attempt within the discipline to resolve this problem by emphasizing the role of international law viewed in terms of rules and practices. Authors who propose rule-based solutions

justifiably point to this important aspect of law, which implies a greater stability in world affairs than either side of the idealist-realist debate has been willing to admit. Unfortunately, by trying to apply their rule-based model to every aspect of the international environment, proponents of this model stopped short of addressing issues of conflict and its effects on international society.

In an attempt to resolve that issue, a modified, "pragmatic" version of this model has been proposed. In it, the holistic acceptance of law characteristic of the rule-based approach has been moderated in favor of a stronger differentiation between instrumental and procedural rules. By examining the teleological and rule-based positions we have surmised that for international society to exist without falling into chaos it must depend on some rules which survive conflicts. If this assumption is correct, then the broadly-understood rules and practices of procedure could very well serve that purpose. Since these rules are primarily oriented towards coexistence rather than cooperation, they do not require high levels of goal-oriented convergence and are more easily accepted by states which are driven by different interests. On the other hand, instrumental rules are more sensitive to shifts of convergence since their existence is dependent on cooperation. Thus, if conflict ensues, instrumental rules would most likely be broken, but the non-instrumental rules and practices, which are value-neutral

would in most cases survive and serve as grounds for future normalization. If this model is correct, then if some rules fall in the process of conflict this does not mean that the existence of the system is actually threatened, since it would be only the instrumental rules that were broken. In this scenario, the procedural rules and practices would survive most conflicts, and these would be the rules that should be taken as forming the structural bases of international society within the existing Westphalian system.

#### POSSIBLE IMPLICATIONS

One of the more important implications of this thesis is that we should not look at the international environment through the prism of the idealist-realist framework. As we have noted throughout, although idealists and realists differ in their respective approaches towards the existing state system, neither perspective should be viewed as an appropriate representation of reality. To take one of the sides in the debate means to accept its terms. But as we have shown, for a critique to be effective it is the terms of the debate that need to be questioned and not just its conclusions. Consequently, in order to objectively examine the existing international reality, we need to abandon the idealist-realist debate and its unfortunate vocabulary in favor of new and unbiased conceptualizations. We cannot reasonably expect to understand the role of law in

international relations if we keep referring to it in the dichotomic terms of order vs. anarchy. Accordingly, those writers who propose an amalgamation of idealist and realist positions in order to come up with a set of conclusions may not be able to avoid the negative consequences of the underlying assumptions that are independent of the two positions.<sup>181</sup> A more promising approach seems to emerge from some of the writers in the theory of regimes. Kratochwil's work with norms, values and principles, which has been quoted extensively throughout this thesis, is particularly interesting and links nicely to the pragmatic model advanced above. Although Kratochwil's approach is based on speech-act theory, his critique of the anarchic description of international relations as well as his rejection of instrumentality are especially illuminating.

Finally, although, the objective of this thesis has been to view international law in international relations in terms of a possible new model of analysis, the arguments presented above are not solely of theoretical interest and their primary concern is not merely the relative advantages of one model of analysis over the other. What is important here is

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<sup>181</sup> Interestingly most of the calls for unification come from the idealist side only. See for example Kegley *Controversies in International Relations*, Starr "International Law"; Anne-Marie Slaughter-Burley, "International Law and International Relations Theory: A Dual Agenda," *The American Journal of International Law* Vol. 87, (1993), p. 205; Kocs, "Strategic Behavior". Realists usually call for maintaining of boundaries, see for example: Grieco, "Limits of Cooperation".

rather the understanding of the social reality called law, the perception of which has been distorted by not simply the extremes but more significantly the very foundations of the idealist-realist debate. In order to correct those distortions we have attempted to present international law in terms different from the ongoing discourse. International law as understood by the pragmatic model takes into consideration the conflictual character of international society. It acknowledges the absence of consensus on political values between international actors while still not declining to propose solutions to conflicts which have become threatening. It involves appreciating the particularity of each problem and declining to accept as inevitable routine institutional solutions applied elsewhere, in other and less appropriate contexts from the perspective of international relations.



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