A World Transformed

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Two decades ago, while Richard Nixon was President and the Vietnam War still raged, ten energetic Yale law students founded *Yale Studies in World Public Order*. The prologue to their first issue, painstakingly typed and mulitlithed, announced the journal's commitment "to publishing articles which contribute to the understanding of [a] highly interrelated global process."[1] The lead article, entitled *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, observed:

> The New Haven school does not describe the world's different community decision processes through a dichotomy of national and international law, in terms of the relative supremacy of one system of rules or other interrelations of rules. Instead, it describes them in terms of the interpenetration of multiple processes of authoritative decision of varying territorial compass. . . . [I]nternational law is most realistically observed, not as a mere rigid set of rules but as the whole *process* of authoritative decision in which patterns of authority and patterns of control are appropriately conjoined.[2]

The *Journal*'s intervening years have seen remarkable growth and change. Today, the masthead has grown to number 63 students, including 26 women and 21 people of color. Issues are now word-processed, desktop-published, and sent to the publisher in camera-ready copy from the *Journal*'s law school offices. As the New Haven School has evolved to employ new modes of analysis, the *Journal* has followed it.[3] And as scholars in New Haven and elsewhere have come to study international law from perspectives other than World Public Order, the content of the *Journal* has widened to encompass new subjects and strands of thinking. In the last few years, for example, the *Journal* has come to examine international law through the lens of rational choice theory,[4] environmental law from a regime perspective,[5] labor law from feminist viewpoints,[6] the concept of international obligation from

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1. The Editors, *The Reasons for Yale Studies in World Public Order*, 1 YALE STUD. WORLD PUB. ORDER ii (1974).

2. Eisuke Suzuki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, 1 YALE STUD. WORLD PUB. ORDER 1, 30 (1974).

3. *See, e.g., Special Feature — The Incident as a Decisional Unit in International Law*, 10 YALE J. INT'L L. 1 (1984). For a recent thoughtful evaluation of the contributions of the New Haven School and the intellectual strands within it, see Richard A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 YALE L.J. 1991 (1995).

4. *See, e.g.*, Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989).

5. *See, e.g.*, Elizabeth P. Barratt-Brown, *Building a Monitoring and Compliance Regime Under the Montreal Protocol*, 16 YALE J. INT'L L. 519 (1991).

6. *See, e.g.*, Symposium, *Women at Work, Rights at Risk — Toward the Empowerment of Working Women*, 17 YALE J. INT'L L. 139 (1992).

Kantian perspectives,[7] and international trade law from a variety of methodologies.[8] In its tenth year, the journal changed its name to the *Yale Journal of International Law*, formally acknowledging that it had become "increasingly catholic in its choice of material," while "retaining at its core the distinctive character bequeathed to it by its founders."[9]

As the *Journal* enters its third decade, it confronts a global landscape transformed by international law's tumultuous "fourth era." During the first, classical era, which preceded World War II and the erection of the United Nations/Bretton Woods system, international law occupied a simple, relatively limited structural form. Sovereign states were the chief actors within that system, with intergovernmental and nongovernmental organizations playing relatively minor roles on the global stage. Custom and state practice formed the primary sources of international law, which served a largely interstitial, laissez-faire function, reflecting vested national interests and leaving large realms of unregulated state activity. The system was in important respects "monistic," inasmuch as international and domestic law together constituted a unified legal system, with domestic institutions — especially courts — acting as important interpreters and enforcers of international legal norms.[10]

Following World War II, the architects of the postwar political and economic system posited in place of this loose customary web of state-centric rules an ambitious positivistic order, built on institutions and constitutions: international institutions governed by multilateral treaties organizing proactive assaults on all manner of global problems.[11] This complex positive law framework of charters, treaties, and formal agreements reconceptualized international law as a creative medium for organizing the activities and relations of numerous transnational players, now expanded to include intergovermental organizations with independent decisionmaking capacity regarding a broad array of planetary issues. In this new, intensely regulatory global framework, it was imagined, treaty would replace custom as the primary source of law and legal rules would reflect international systemic concerns, not parochial interests.

Almost immediately, however, the Cold War era and the intense bipolarity and political realism it fostered rendered this positivistic vision a Potemkin Village. With respect particularly to the international use of force, the Cold War order soon resembled a "revolutionary system," one "wracked by inexpiable power rivalries and ideological conflicts . . . in which

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7. *See, e.g.*, Fernando Teson, *International Obligation and the Theory of Hypothetical Consent*, 15 YALE J. INT'L L. 84 (1990).

8. *See, e.g.*, Harold Hongju Koh, *The Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement*, 12 YALE J. INT'L L. 193, 196-200 (1987).

9. *Preface: Entering Our Second Decade*, 10 YALE J. INT'L L. i (1984).

10. *See generally* Louis Henkin, *The Constitution and United States Sovereignty*, 100 HARV. L. REV. 853, 864 (1987) (discussing monism and dualism).

11. For one such vision, see Grenville Clark & Louis B. Sohn, WORLD PEACE THROUGH WORLD LAW (1958).

international organization is reduced to impotence as a force of its own."[12] The system became increasingly dualistic, particularly in the United States, as international and domestic law settled into separated systems, with little interpenetration.[13] At the same time, the fields of international law and international relations became oddly estranged, covering much of the same territory, but evolving independently, pursuing different analytic missions, and reaching markedly different normative conclusions about the influence of law in international affairs.

But all was not bleak in this third era of global law. Multinational enterprises, nongovernmental organizations, and private individuals became significant actors on the transnational stage. The oil crisis of the early 1970's highlighted the interdependence of politics and economics in the new transnational economy.[14] Interstate cooperation persisted, and fed the growth of formal and informal, public and nonpublic regimes, which promoted the evolution of norms, rules and decisionmaking procedures in such areas as international human rights, arms control, international economic law, and international environmental law.[15] Liberal institutionalists studying international political economy began to focus upon "regime theory," the notion that institutions, governmental, and private participants in a given issue area will develop a set of governing arrangements, ideologies and expectations, that both restrain the participants and provide means for achieving their common aims. Their analysis created new theoretical space for international law *within* international relations theory. For by shifting the focus of inquiry from the functioning of international organizations *per se* to the broader phenomenon of *international cooperation* — e.g., the regime of "international peacekeeping" or "debt management" as they transpire both within and without institutional settings — lawyers and political scientists came to agree that legal rules foster compliance with regime norms by providing channels for dispute-settlement, signaling and triggering retaliatory actions, and requiring states to furnish information establishing their compliance.

These developments triggered the fourth era of global law, in which we now live. In this brave new world, transnational actors, sources of law, allocation of decisional functions, and modes of regulation have all mutated into fascinating hybrid forms. International law now comprises a complex blend of customary, positive, declarative, and "soft" law. Sovereignty has declined in importance in this "world of pluralism and diversity, a global arena in which various participants — groups (territorial and functional,

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12. Stanley Hoffmann, *International Organization and the International System*, in JANUS AND MINERVA: ESSAYS IN THE THEORY AND PRACTICE OF INTERNAITONAL POLITICS 293 (1987).

13. *See* Suzuki, *supra* note 2, at 32 (describing U.S. Supreme Court's decision in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) as "a case in which the United States Supreme Court abdicated its active role in the global process of constitutive decision.")

14. ROBERT KEOHANE & JOSEPH NYE, JR., POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION (1977); WORLD POLITICS AND INTERNATIONAL ECONOMICS (C. Fred Bergsten & Lawrence B. Krause eds., 1975).

15. *See generally* INTERNATIONAL REGIMES (S. Krasner ed. 1983).

governmental and intergovernmental) and individual human beings — constantly interact under ever-changing conditions."[16] Decisionmaking functions are now executed by a complex tag-team match of nation-states, intergovernmental organizations, regional compacts, nongovernmental organizations, and informal regimes and networks. The system has become neomonistic, with new channels opening for the interpenetration of international and domestic law through judicial decision, legislation and executive action.[17] New forms of dispute resolution, executive action, administrative decisionmaking and enforcement, and legislation have emerged as part of an emerging "transnational legal process," which influences national conduct, transforms national interests, and helps constitute national identity.[18]

In the days just after the collapse of the Berlin Wall, the future seemed unusally bright for this "New World Order." Democracy was breaking out all over. Multilateralism resurged with the United Nations' defeat of Saddam Hussein in Operation Desert Storm. The Cold War's end left the United States as the only surviving superpower. The conclusion of the Uruguay Round of the GATT, the North American Free Trade Agreement, and the Maastricht Treaty all signaled new vitality for trade liberalization and regional organization. But like a cold shower, recent events have tempered the initial euphoria over the possibilities for new global law. As Communism has collapsed, states have fragmented, triggering violent waves of ethnic nationalism. Regional organizations like NAFTA and the European Union have faced new and taxing challenges brought on by the global recession. Failed states like Somalia, Rwanda, and Haiti have faced crises of civil society and refugee outflows that have challenged our compassion and vexed our policymakers. Foreign policy values have come into direct conflict. In one commentator's words:

> [s]overeignty (as a principle of order and, still, a barrier against aggressive or imperial designs), self-government or democracy, national self-determination (with all its ambiguities and flaws), and human rights (which are not devoid of ambiguities of their own, as debates over the priority of political over economic and social rights, and over the rights of individuals vs. the rights of peoples and groups indicate) are four norms in conflict and a source of complete liberal disarray.[19]

In short, because the real world has not waited for international law to reach its full maturity, students of international law cannot wait to study a fully developed normative system. After all these years, we still need what in the years ahead this *Journal* will surely keep providing: scholarship that "give[s] us a functional critique of international law in terms of social ends,

16. MYRES MCDOUGAL, HAROLD LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 179 (1980).

17. *See generally* HENRY STEINER, DETLEV VAGTS, & HAROLD HONGJU KOH, TRANSNATIONAL LEGAL PROBLEMS 514-995 (4th ed. 1994) (providing examples of this interpenetration).

18. *See* Harold Hongju Koh, *Refugees, the Courts and the New World Order*, 1994 UTAH L. REV. 999, 1014-18 (1994) (discussing the normativity of transnational legal process); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2398-2402 & n. 278 (1991) (describing this "new international legal process.").

19. Stanley Hoffmann, *The Crisis of Liberal Internationalism*, 98 FOREIGN POL'Y 159, 169 (1995).

not an analytical critique in terms of itself, and above all that shall conceive of the legal order as a process and not as a condition."[20]

20. Roscoe Pound, *Philosophical Theory and International Law*, 1 BIBLIOTHECA VISSERIANA 73, 89 (1932), *quoted in* MYRES MCDOUGAL, INTERNATIONAL LAW, POWER AND POLICY: A CONTEMPORARY CONCEPTION 137 (1954).