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Kaplan & Katzenbach: The Political Foundations of International Law

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RECENT BOOKS

THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW. By *Morton A. Kaplan* and *Nicholas deB. Katzenbach.* New York: John Wiley & Sons. 1961. Pp. xi, 372. $6.95.

The stated objective of this book is to "make use of a systems theory of international politics" to relate "the norms of international law to their political foundations." (p. *v*) More concretely, the authors' aim is to set forth the difference between international law in the two systems: the nineteenth century "balance of power" system and the prevailing "loose bipolar system." The authors also expect to show that state behavior neither is, nor ought to be, given solely to the pursuit or acquisition of power, as is asserted by the neo-realists, but that it also is subject to normative constraints. They wish to illustrate the reciprocal relation between politics and law: the political systems impose constraints on international law, and international law imposes constraints on political behavior. These being the main objectives, the authors do not attempt an exhaustive or even a complete analysis of the corpus of international law. The student is advised to use a good case book as supplementary reading. Let it be said at once that this is eminently sound advice.

In pursuing their inquiry the authors follow guidelines which are not made explicit. What goes into or out of a chapter is a matter of continuous surprise to the reader. Thus in chapter one he will find some random remarks about characteristic features of domestic or of international law, about the nature of customary and conventional law, and about general principles and the moderating influence of international law. The sources of international law are discussed in greater detail in chapter nine, and the role of international law in the final chapter. In chapter two, the authors show the interdependence between international law and political systems. Here the model and systems are introduced: the "balance of power" model, which corresponds to international politics in the eighteenth and nineteenth centuries, and the loose bipolar model of the international system, which corresponds to current international politics. The period from about 1871, when the "balance of power" system lost some of its "flexibility" of alignment, to the emergence of bipolarity after World War II, is somehow left dangling, although it is much longer than the period from 1815 to 1871, the heyday of the classic flexible balance of power system. Now the models set certain requirements. For instance, according to the first model "the relationships of nations to one another must be competitive, suspicious and primarily instrumental"; (p. 32) they were, as postulated by the model, in a "state of equilibrium"; (p. 34) and they provided non-interference in the affairs of the nations. (p. 36) It is fortunate indeed that this was so, for if it were otherwise there would be something wrong with the model. History cannot be reversed to fit a model, though it can be reinterpreted, but models can be reconstructed to fit historical reality. In any event, the

burden of the argument here is that the rules of international law which prevailed or evolved during the nineteenth century, along with other factors, made it possible for the states to maintain flexibility of alignment and a degree of peace. The flat statement, however, that "the period from 1870 to 1945, with brief interludes, was a period in which conflicting standards were asserted by nations acting within a changing and transitory social structure," (p. 44) can hardly be accepted without more evidence than is provided for it. The assertion of conflicting standards is the lot of international law at any period, and, as to the social structure, it is arguable at least that the industrial revolution, the emergence of the third estate, the rise of capitalism and trade, the transition from a largely rural to a largely urban society, and the development of technology in communications were phenomena which characterized the nineteenth century, although there may have been changes in the speed of acceleration.

The authors stand on firmer ground if they assert that the period between the two world wars was one of social turmoil, but it is more than doubtful when they assert that this period did not "produce standards of international law which had reasonable prospects for acceptance." (p. 44) Much of the law-making activity was merely a continuation of nineteenth century efforts. The law of air was developed and universally accepted. Much progress was made in the fields of labor, health and opium control. Even the Covenant had a "reasonable prospect for acceptance," though events in the thirties provided a retrogressive movement. The law of war remained unsettled, as usually is the case after a major war. Generally, this period saw a great activity in the field of international adjudication which firmed up and clarified many standards of international law and of its interpretation and application.

The authors refer to the Hague tribunals and the League of Nations as "sufficient evidence that the old system was collapsing." (p. 49) This is an odd proposition. The Hague tribunals, which probably means the Permanent Court of Arbitration and the Permanent Court of International Justice, were based on the principle of voluntary submission, and in this respect they did not differ from the nineteenth century. In any event it would require more argument than is found in the book to show that peaceful settlement of disputes is incompatible with the "balance of power" system as it was practiced, though it may be incompatible with a contrived model of that system. As to the League, it did not cause but followed a spectacular collapse of the system. Rather than relying on voluntary self-restraint which proved to be not dependable, the Covenant made self-restraint a matter of legal obligation. The Covenant put a damper on self-help, the Corfu Island incident to the contrary notwithstanding, and in the Western Hemisphere the principle of non-intervention was firmly accepted for the first time. Article 15, paragraph 8, of the Covenant was judicially clarified and firmly applied by the League Council. Such interference as there was in matters of protection of minorities and mandates

rested on treaty commitments which were expressive of trends clearly visible in the nineteenth century. The nineteenth century rule of the game relating to limitations of objectives was made a matter of legal obligation in article 10 of the Covenant. Both the rule and article 10 were disregarded in practice, however.

The loose bipolar system consists of two blocs, a large number of uncommitted nations, and a universal organization, the United Nations. In his earlier work, Kaplan presented this system as characterized by participation of supranational as well as national actors. The class of supranational actors is divided into the sub-class of "bloc actors," of which NATO and the Communist bloc are examples, and "universal actors," of which the United Nations is an example. Each bloc has a leading actor, presumably the United States and the Soviet Union, respectively, which constitute the "gravitational poles" of the system.[1] The norms of international law in this system are different from those which prevailed in the "balance of power" system: the blocs have supranational characteristics, the alignment is relatively stable, and "the particular motives for limitation of objectives and non-interference in the internal affairs of other nations that operated in the 'balance of power' system do not operate in the loose bipolar system." (p. 50) The question of the supranational actors will be taken up later. It is sufficient to point out here that they are essential to Kaplan's model. The absence of a limitation of objectives is a question of fact and the events since 1945 do not furnish conclusive evidence one way or another. In the case of Korea, the one major war during the period, objectives became limited after it became obvious that the unification of Korea by force was not feasible. In a nuclear war between the blocs objectives might well become unlimited, not because of the nature of the system, but owing to the nature of the weapons systems that may be employed. Insofar as law is concerned it is reasonably clear: The Kellogg-Briand Pact is probably still the law for the parties and this is in any case reinforced by the provisions of the Charter. If anything, the law is now more explicit and more restrictive of the freedom of action of the members of the United Nations than it was in the "balance of power" system or in the inter-war period. With respect to non-interference there has probably been no major change in customary international law. Here too, the law as represented by article 2(7) of the Charter is more restrictive than article 15, paragraph 8, of the Covenant, but the practice is vastly different. The wholly political application of article 2, paragraph 7, respects no boundaries or limitations. Kaplan is right in pointing out that within blocs the leading nation intervenes and interferes brutally as in Hungary or more subtly as in Italy,[2] or not so subtly, as in Guatemala. The political style of both the United Nations and the leading powers is

1 KAPLAN, SYSTEM AND POLITICS IN INTERNATIONAL POLITICS 36 (1957).

2 Here Kaplan refers to the elections of 1949. *Id.* at 51.

certainly different from that of the League and the great powers of that period.

The third chapter in the introductory part is largely devoted to theories of international law at various epochs: theory before 1815, from Congress of Vienna to Second World War and, somewhat inconsistently, theory since 1914. Positivism, as a school, largely tended to support the flexibility of alignment characteristic of the balance of power system. Some observations of state practice are mentioned along with doctrine, and some of them are questionable.[3]

It is quite remarkable that for the period since 1914 the authors could only think of American legal realism as a theory developed for or during this period so rich in theoretical work. This selection is all the more astonishing as the authors do not regard "legal realism" as developed in the United States as a theory or doctrine, but as an "intellectual *potpourri*," (p. 73) with an especial appeal to New Dealers. (p. 74) One of the unexplained mysteries of this section is the involvement of Austin. (p. 75) Be that as it may, realism is what the authors believe in. Law is always an expression of public policy, law is a "policy science"; realism marks a return "to both humanism and individualism"; and, finally, law is regarded "as a process rather than a body of formal rules." (p. 74) The essence of international law appears accordingly as "the process of making effective decisions governing transnational events." (p. 79) Is it relevant that these decisions conform to formal rules or to "public policy"? The authors' preference seems clearly the latter, for in their view this process is today "increasingly subjected to effective restraints which limit the freedom of action of national officials and which promote policy choices which are compatible with an international political system of associated states which share (for the most part) a belief in human dignity for all persons." (pp. 79-80) This amounts to a denial of an objective legal order in the relations of states, a denial of international law as understood and practiced by international judicial or arbitral institutions. The identification of international law and policy becomes even more explicit in the following sentence which links international law with the policy of the United States: "The United States by reason of its power and resources (and Europe to a lesser extent) plays a leadership role in promoting compatible national policies through the resolution of disputes within the Free World, usually by a process of suggestion coupled with subsidy."[4] (p. 80)

3 Such as on p. 63: "A nation such as Switzerland could be neutralized by agreement and could be relied upon to protect its neutrality; more doubtful, but possible, (with an assist from the North) was the neutralization of the Latin American countries; out of the question was the neutralization of Asia and Africa." One wonders what the import of this was intended to be.

4 The authors have some trouble with their use of the term "policy" or "policies." Thus, speaking of the judicial process and the techniques peculiar to it, they say: "These techniques are primarily designed to insure impartiality between litigants and, in modern times, subservience to policies laid down by other governmental organs." (p. 4) This will come as a shock to those who believe that ours is government under law.

The chapters devoted to substantive international law, which the authors for some unfathomable reason group under the heading "doctrinal framework," and from which, for similar reasons, they omitted the sources of international law, cannot be reviewed here in any detail. The student will be well advised to turn to a good case book or to Oppenheim-Lauterpacht's treatise to learn about the subjects of international law, recognition, etc. The authors probably did not intend to do a thorough or systematic job of presentation, for both thoroughness and method are absent. Rather, one gets the impression of a hurried and eclectic job. The justification for taking up the substantive norms of international law would have been to show their relation to the political system and the changes that were wrought by the changes in systems. This the authors attempt to do but their argument is often lacking in persuasiveness. Some random remarks will have to suffice if the bounds of a book review are not to be exceeded.

The authors' discussion of recognition is interesting. The stress on policy considerations connected with past and present practices is welcome. Less welcome is the intermingling of rules regarding succession of states and governments with recognition. No doubt these two areas of international practice are connected sometimes, but not always, and problems of the former arise in cases where there is no problem of recognition. Relating recognition practices to political systems is tenuous at best. "De-factoism," which was the prevailing practice in the nineteenth century, gave way to the Wilsonian view even before World War I. The United Kingdom Memorandum of 1948 which advocates a return to "de-factoism" is not mentioned anywhere. Non-recognition of Communist China by the United States was originally based on grounds unrelated to the use of force against Formosa. The authors read too much into the present rather chaotic situation when they say that nineteenth century standards of recognition "cannot prevail today." (p. 128) The Soviet Government did recognize the German Federal Republic, though the authors seem to imply the contrary, and, while it is true that it does not recognize the Taiwan regime, it is not the only country to fail to do so. (p. 127)

A tighter grip on the subject and emphasis on underlying policy considerations characterize the discussion of jurisdiction. Here there is but one reference to political systems and this is wholly unconvincing.[5] The transition to the loose bipolar system seems to have brought about no changes in the law. Use of conventional terms would have facilitated communication between the authors and the reader, and there are inaccuracies which could easily be avoided. The universality principle is adopted in a number of countries, was relevant in war crimes trials and presented a convenient basis for Israel's jurisdiction over Eichmann. To regard the NATO Status of Forces Agreement as representing customary law is farfetched to say the least. (p. 194) This view stems from the authors' posi-

[5] "Jurisdiction over sovereigns would also have been inconsistent with the independence necessary to the desirable functioning of the 'balance of power' system." (p. 191)

tion that "armed forces admitted to the territory of a state enjoy a limited immunity" (p. 193) which is ambiguous. No reference is made to the 1958 Geneva convention in connection with innocent passage. While it is true that, in the case of diplomats, immunity from jurisdiction is not to be construed as immunity from liability, there is hardly any basis for suggesting that "the diplomat will be punished by his state for the delict" committed in the territory of the receiving state. (p. 196) Similarly, one wonders what authority is relied upon for the proposition that "the rule of political asylum . . . characterizes most practice outside the Communist bloc." (p. 197)

Custom, general principles, publicists and judicial precedents are discussed more or less briefly and, of course, without reference to authority.[6] It is regrettably not always clear whether the authors have in mind usage which is not binding and customary international law which is.[7] Sometimes it is impossible to fathom what the authors have in mind when they refer to general principles applied by "the judicial-administrative arms" of international agencies, such as are the International Labor Organization, or the question whether "international arbitrators are free to decide *ex aequo et bono*." (p. 263)

The League of Nations is presented as a mechanism to prevent the complete overturn of the "balance of power" system made necessary by the fact that "the process of 'balancing' and flexibility of alignment cannot be depended upon to limit wars and to maintain the independent existence of the major states." (p. 288) As a substitute for the self-interest of states the League failed. It failed, in other words, because "no alliances existed to enforce" League principles. (p. 292) In fact, there were alliances and there was even the Locarno guarantee, but there was also chiefly a lack of political wisdom and a shortsighted estimate of self-interest. This lack of wisdom appeared as soon as the United States, in the words of the authors, "refused to accept its seat" (p. 284) in the League Council and refused to ratify the alliance with France and England providing for assistance in case of attack by Germany. The "balance of power" system worked as long and as well as it did, not because of any inherent virtue, but because the statesmen who made up the Concert of Europe, which, incidentally, is never mentioned in this book, had greater wisdom in determining the self-interest of the states they represented than their successors in the League.

It will be recalled that the existence of supranational actors of the subclass "bloc actors" is essential to the concept or model of the bipolar system. It is undeniable that blocs exist although the free world resists energetically Chairman Khrushchev's efforts to formally recognize and re-

[6] It may surprise some readers to find the statement that the *Scotia* case "is often cited as one of the strongest cases demonstrating the existence of customary international law." (pp. 247-48)

[7] *Cf.* p. 251, "the belief that the rule binds because of its customary qualities is untenable," and p. 255, "whether or not they are codified in treaties, rules so generally supported are mandatory."

build the United Nations around them. And it may be pointless to argue whether "they are a response to bipolarity" (p. 315) or the reverse. What does matter is whether the blocs are in fact supranational organizations. It is generally accepted that the European communities represent this type today. However, neither NATO nor the Warsaw Pact have been regarded as such. To be sure the latter may be "supranational in a factual but not a formal sense that international law would be able to recognize." (p. 332) This may be so because of the interlocking Communist parties of the participating states and their factual, though not legal, subservience to the Soviet Government. If that is so, then the Warsaw Pact organization is more akin to the form of an empire than to the functional type of supranationalism represented by the Coal and Steel Community.

SEATO, CENTO, the Council of Europe and the OAS are not supranational organizations by any stretch of the imagination.[8] This leaves NATO as the only potential supranational bloc actor to satisfy the model. The authors make the most strenuous efforts to fit NATO into the procrustean bed of the model. Whether they succeeded or failed must be left to the judgment of those who are as intimately acquainted with the inner workings of this organization as the authors appear to be. There is nothing in the treaty to support their view, as they admit. (p. 318) It is not currently accepted that "the Military Committee, designed to establish policy, and the Standing Group, which has executive functions, are supranational in scope." (p. 319) But it may well be that, in the command structure like in any military hierarchy, there are features of supranationalism, and that a war in Europe "would discover NATO asserting the functions of a supranational government and making the most vital decisions that any government can be called upon to make." (p. 321) This contingency does not make NATO a supranational body today. The requirements of the model then may be met in war even if they are not, or not altogether, met in peace.

In their conclusion the authors display a remarkably affirmative attitude toward international law. While not denying that in some cases states "would implement only national and not international values," (p. 342) they lay great and welcome stress on the advantages derived from self-restraint and the reputation derived from law-abiding and principled behavior. They are most emphatic in declaring that "a principled nation, with a reputation for being principled, is less subject to blackmail and hard bargaining techniques than a nation that continually trims corners to gain some advantage." (p. 345) However, in order to be able to be principled "a nation ought to commit itself only to principles with which it can live—and with which others can also live." (p. 345) Furthermore, a nation should not sacrifice long-term interests for the sake of short-term goals.

A lengthy and detailed review can be justified, if at all, by the merits

8 The French, German, Italian Weapons Development Center "which is being established" (p. 322) is said to have "the potential beginnings of an important supranational tendency." (p. 323) We have to take the authors' word for this.

of the book concerned. This is no ordinary book. It is interesting, trivial, exasperating and important. Any attempt at a sociological interpretation of international law is always welcome. Over the years there were several, each contributing some light with respect to the factors which determine or influence the growth or decay of rules of international law. The authors attempt to show systematically what the relationship is between international law and politics. The accent is on "systematically" and cannot be elsewhere because, as they are well aware, the relationship itself was always understood. True enough, teaching or learning international law from case books may tend to play down this relationship. The advantage is that cases are useful vehicles for discussing the policy issues involved in the application of abstract norms to concrete issues. One of the best features of this book is the elaboration of these policy considerations. The authors, however, aimed higher than that, and it seems doubtful that they achieved their objective. The political systems may be taken for what they are. Certainly the authors do not provide a fundamental analysis of either the "balance of power" system or the "loose bipolar" system. Operating with models precluded this. Now, accepting that the "balance of power" system presupposed or required flexibility of alignment, international law as formulated by Vattel[9] was well suited for the task of diplomacy.[10] All sorts of self-help, including intervention, were sanctioned, and the only practical restraint was self-restraint, the "internalized" sanction of which the authors speak. The resulting freedom of action could be, and was, used and abused subject to the restraining influence or action of the great powers acting in concert or individually. The two world wars, the disintegration of the Western community of values, economic dislocation, technological advances, are among the factors which played havoc with international law.[11] The shift in the location of power from Europe to the United States and the Soviet Union raised further problems for the stability and observance of international law, as did the establishment, functioning and demise of the League of Nations, and the establishment and functioning of the United Nations. Neither the United Nations nor the "supranational actors" have so far shown any exaggerated devotion to international law or the law of the Charter. What the bipolar system will do to either or to both remains to be seen. What they have accomplished so far is, to say the least, not encouraging. However, it would be shortsighted to relate the function of international law exclusively or predominantly to the political system. The authors are well aware of this.[12] Any

9 How curious that his work is omitted from the list of Classics of International Law edited by James Brown Scott and published by the Carnegie Endowment for International Peace. See p. 356.

10 See de Lapradelle's Introduction to Vattel, in the edition referred to in note 9 *supra*.

11 See Kunz, *The Changing Law of Nations*, 51 AM. J. INT'L LAW 77-83 (1957), and his lectures, *La Crise et les Transformations du Droit des Gens*, 88 HAGUE RECUEIL DES COURS 1 (1955).

12 *Cf., e.g.*, p. 347.

concentration on a single factor is bound to be misleading in view of the complexity of international relations. If one looks for such a factor one wonders whether de Visscher's emphasis of the dynamics of international relations resulting from the struggle for hegemony, the hegemonial tensions, may not be preferable to emphasis on systems, particularly the bipolar system which to this reviewer, at any rate, appears to have a static quality. Be that as it may, the book is short on "systematic" analysis of the relation between law and political systems. To repeat and repeat again that intervention or non-intervention are favored or discouraged in one epoch or another is not a systematic analysis. To select some aspects of international law and omit others is no systematic analysis either. Recognition practice is confused and confusing but this belongs to the realm of politics and not of law. From the point of view of law the non-recognition of the Soviet Union or of Communist China by the United States is hardly relevant on the international plane where the principle of effectiveness prevails. If there is one area of international law in which significant adaptations have been taking place, it is that of diplomatic protection generally and more particularly in connection with expropriation of property of aliens. This branch of law is almost totally ignored. Where law and systems are claimed to be related, the relation is more in the nature of a juxtaposition than of a systematic analysis of the impact of the systems upon law.

The authors are attracted to McDougal's concept of customary international law as a process of "claims and concessions." This view is inimical to norm stability. What it appears to amount to is the denial that there ever is a norm of customary international law binding upon states and not subject to change by unilateral fiat posited by the norm-contrary act. Admittedly, theorists on the nature of customary international law have not been able to come up with a satisfactory explanation of or agree among themselves on the "first act." Somewhere in the state practice a rule of customary international law has its inception and at some point of time usage hardens into a binding rule. At some point of time it becomes "unhinged," as it were; that is, it begins to lose its obligatory character, and the process starts all over again. Now then, is every act of a state to escape being judged or evaluated by scholars in terms of existing rules, if there be any, and to be judged and evaluated always and exclusively as a step in the never-ending process of law-making without creating law? If norm instability is better attuned to the loose bipolar system than norm stability, then indeed this doctrine would seem to serve this purpose admirably well. It affects not merely customary, but conventional international law, as well. It is a boon to the advocate and a bane to the scholar. For it should not be overlooked that bloc leaders appear to be either supremely indifferent to the forum of the United Nations or they manipulate majorities to their advantage. The rule of law is the loser, for above all bloc leaders are allergic to the International

Court of Justice. It may be true, as the authors contend, that great powers will intervene but will not tolerate intervention. What is perhaps in even greater measure a matter of concern is that they will judge but will not be judged.

The authors dispense completely with the usual methodology of scholarship which requires, as they point out themselves, "accurate statement and citation of authorities, including those that do not support their conclusions." (p. 260) If they do not conform to this standard among others they lose status as scholars. "Hence, what the scholar states to be prevailing doctrine ought to have considerable foundation, ought to be capable of verification by others, and ought to employ the same sources acknowledged by formal decision makers. What he says is both based upon, and inevitably an addition to, what went before." (p. 260) The authors have elected to disregard their own prescription. There are no references to authority or source material, and the very brief bibliography is no adequate substitute. There are direct and indirect quotations without citations. Checking one's recollection against the source is useful discipline.[13] It seems the fashion nowadays, encouraged or even fostered by publishers, to produce clean, uncluttered books. They may sell better but they do not conform to the requirements of scholarship, assuming, of course, that they were intended to be a contribution in that general direction.

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13 Thus Anatole France is credited with the "sardonic comment about the law equally forbidding rich and poor to sleep on park benches." In this country one speaks colloquially of people sleeping on park benches, but in Paris the poor proverbially sleep under bridges, and this is what Anatole France said, sardonically or otherwise. For even though he may be poor, the Frenchman is rational and logical in the choice of free and equal sleeping facilities. Under the bridge he is protected from the not infrequent rain and the inquisitive eye of the "*flic.*"