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Sanford R. Silverburg

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# PALE AND WAN, COMATOSE MAYBE, BUT NOT DEAD: A RESPONSE TO BLEIMAIER

SANFORD R. SILVERBURG\*

The law hath not been dead  
though it hath slept. . . . . William Shakespeare<sup>1</sup>

The necrology of public international law has been published recently in the pages of this journal.<sup>2</sup> The judgment as described by Bleimaier, however, in my opinion is incorrect on two salient points: the substance of the assertion, and the description of the phenomenon bringing about the condition. The purpose of this essay, hence, is to provide an alternative explanation to the meaning and significance of a mutually agreed lamentable condition.

We begin an analysis of Bleimaier's position with his statement that public international law "deals with relationships *between and among nation states*,"<sup>3</sup> which we submit is too narrow a definition and which displays little awareness of contemporary political realities. We can agree with Bleimaier that the law developed into a western, Christian, and "civilized," political environment. It was in turn sustained, according to Bleimaier, on the principles of natural, or divinely ordained law, executed and enforced by sovereign monarchs;<sup>4</sup> he emphasizes further the quality

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\* Ph.D. International Relations, The American University, School of International Service, 1973. Professor and Chairman, Department of Political Science, Catawba College, Salisbury, North Carolina.

<sup>1</sup> W. SHAKESPEARE, *MEASURE FOR MEASURE*, Act II, Scene 2, line 90.

<sup>2</sup> Bleimaier, *The Demise of Public International Law*, 23 *CATH. LAW.* 79 (1978).

<sup>3</sup> *Id.* at 79 (emphasis added).

<sup>4</sup> Bleimaier properly discusses the origins of the law with reference to Hugo de Groot, followed by Samuel Puffendorf. The successors of Puffendorf were Christian Wolff and Em-

of sovereign enforcement. As the political world (as distinct from the "civilized" world) expanded, it encompassed political forms much different from the traditional examples found in the West. There can be little argument that the history of the changes has indeed been remarkable. With a universal church and empire there had at first been no requirement for the law. Western Christendom was governed by natural law, canon law, the papacy, the Roman civil law, and local custom. Both kings and local rulers owed allegiance to Pope and Emperor. By the sixteenth and seventeenth centuries, however, religious and dynastic wars destroyed the authorities underpinning the then Western political world. Bleimaier believes that as the political world altered itself, the law, as a peculiarly western institution, rooted in its historical tradition, necessarily waned and its future fortune linked in an inverse relationship to the rise of nationalist sentiment among non-western people.<sup>5</sup>

It is a tragic loss to the study of comparative law that third world jurists see their legal thought as diametrically opposed to that of the West. In addition, it is in some sense also a false notion of superiority on the part of western jurists to see the development of the law in terms of Western civilization solely. It is to be remembered that the western Roman *ius gentium* operated similarly in the Eastern Empire. The contact was but one source of transmission of legal influence from the East.<sup>6</sup> Through the migration of Jews and the expansion of Islamic civilization, the Near Eastern legal codes<sup>7</sup> most certainly found their influence in the development of western law. The current controversy raised by non-western jurists may in fact be just one more evolutionary step in the law's development.<sup>8</sup>

The simplicity of order in Europe in the Age of Empire, as it is called, matches the neatness of the natural law basis for world order, both of which are abandoned with the opening of the international frontier.

merich de Vattel. This school posits an international political system with autonomous states operating in a state of nature. Vattel instructs that the "Law of Nations is a law of sovereigns." 3 E. DE VATTEL, *THE LAW OF NATIONS; OR, PRINCIPLES OF THE NATURAL LAW OF NATURE, APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND SOVEREIGNS*, ch. 4, 38-39 (1758), (C. Fenwick trans. 1916).

<sup>5</sup> Bleimaier, *supra* note 2, at 80.

<sup>6</sup> L. MITTEIS, *REICHSRECHT UND VÖLKSRECHT IN DEN ÖSLICHEN PROVINZEN DES RÖMISCHEN KAISERREICHS* (1891); *Hammurabi and Syrian-Roman Law*, 19 *JEWISH Q. REV.* 606 (1907); Yaron, *Syro-Romans*, 1966 *IURA* 17, 114.

<sup>7</sup> See, e.g., the Code of Hammurabi in A. POHL & R. FOLLET, *CODEX HAMMURABI* (1950), and the Code of Eshnunna in *ANCIENT TEXTS RELATING TO THE OLD TESTAMENT* 161-63 (J. Pritchard ed. A. Goetze trans. 1955).

<sup>8</sup> For the idea of paradigmatic, cultural evolutionary development of the law see Jackson, *Evolution and Foreign Influence in Ancient Law*, 16 *AM. J. COMP. L.* 372 (1968). For a debate on the issue see Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 *MOD. L. REV.* 1 (1974); Watson, *Legal Transplants and Law Reform*, 92 *L.Q. REV.* 79 (1976).

What has remained in the interim has been described by Joseph Kunz as "a period of transition from 'classic' law of nations which is definitely gone to some 'new' international law which has not arrived."<sup>9</sup>

The development of the law is characterized by Bleimaier in idyllic form as a period "where individual sovereigns took for granted each other's basic rights and royal prerogatives."<sup>10</sup> The contemporary world, on the other hand, is contrasted as one in which competitive ideologies, symbolizing coalitions of states, are combative to the extent that they seek each other's total destruction.<sup>11</sup>

The post-World War II era, furthermore, according to Bleimaier, has been marked by a radicalized lack of acceptance of western-initiated treaty law and laws of war. With regard to the development of treaty law in the contemporary period the influence of newly independent members of the Third World is clearly reflected. It was in the process for concluding the Vienna Conference on the Law of Treaties<sup>12</sup> that the judicial insight of the Third World was made manifest.<sup>13</sup> The evidence for the absence of law is the occurrence of armed conflict with greater frequency.<sup>14</sup> Frequency of conflict is but one factor of relevance to take into consideration in relating war to world order. The contemporary experience of warfare is one of a limited nature in terms of the goals of the belligerents as well as the geographical extent. The most recent addition to the Geneva Conventions may in fact prefigure the Third World's intentional use or support of guerrilla warfare.<sup>15</sup>

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<sup>9</sup> Kunz, *The Changing Science of International Law*, 56 AM. J. INT'L L. 488, 488 (1962).

<sup>10</sup> Bleimaier, *supra* note 2, at 81.

<sup>11</sup> See, e.g., Wilk, *International Law and Ideological Realignment: Universality Reexamined*, 10 N.Y.U.J. INT'L L. & POL. 463 (1978); Schacter, *New Directions in International Law*, 49 CHI.-KENT L. REV. 13 (1972).

<sup>12</sup> Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969).

<sup>13</sup> For a discussion of Afro-Asian jurisprudence in the United Nations' Sixth Committee and the International Law Commission see Abi-Saab, *The Third World and the Future of the International Legal Order*, 29 REVUE EGYPTIENNE DE DROIT INTERNATIONAL 27 (1973); Bedjaoui, *LE REGLEMENT PACIFIQUE DES DIFFERENDS AFRICAINS*, 18 ANNUAIRE FRANCAISE DE DROIT INTERNATIONAL 85 (1972); Fahmi, *Preemptory Norms as General Rules of International Law*, 22 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 383 (1972); Wilson, *A Decade of Legal Consultation: Asian-African Collaboration*, 61 AM. J. INT'L L. 1011 (1967).

<sup>14</sup> Eckart & Azar, *Major World Conflicts and Interventions, 1945 to 1975*, 5 INT'L INTERACTIONS 75 (1978).

<sup>15</sup> Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I), adopted at Geneva, June 8, 1977. Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted at Geneva, June 8, 1977. Both Protocols are open for signature by the parties to the 1949 Conventions six months after the signing of the Final Act by the Participants of the Conference, and will remain open for a period of twelve months. Both are also open for accession

Bleimaier errs still when he identifies an increased interest in international economics with proof for the growing awareness of private international law; rather, it is the changing nature of political power centering on economic interdependency. Indeed, contemporary theories of power no longer are bounded by the traditional confines of evidenced massive strength. Certainly, the war in Vietnam and the Arab oil embargo of 1973-1974 have done much to show the world that actual power may be more in fact economic self-sufficiency.

At the heart of Bleimaier's misunderstanding is an uncompromising position opposed to adaptation, adhering to a philosophy of natural law while at the same time rebuking the positivist approach to world order. Adherence to a particular value system and set of principles in itself is an admirable quality but rewarded only by the theorist's appreciation of the position advanced or by the reemergence of those symptomatic characteristics at some undetermined future date. Bleimaier would have us believe that sovereigns, representing the basic politico-legal units and without the opportunity for a mutually agreed forum for conflict resolution, relied upon their own self-interest to abide by consensus during the Middle Ages. The condition has less to do with morality than it does with rationality and self-serving interests which must ultimately determine the extent of adherence to agreement. One need only return to the classic words of Thomas Hobbes, a natural law theorist himself, whose seminal thoughts set down in 1651 aptly apply today: "[C]ovenants, being but words and breath, have no force to oblige, contain, constrain, or protect any man but what it has from the public Sword . . . ."<sup>16</sup> A couple of classic examples are also offered to show the despair and frailty of the medieval world order to which Bleimaier alludes. It was in the latter part of the fourteenth century that Philip de Mezeires attempted to bring about Anglo-French detente by organizing a crusade against the Turks and thus to restore the unity of the Church.<sup>17</sup> The move was marked by anything but common agreement or even success. Similarly, violence was pervasive enough in European society to cause the Church hierarchy to create peace associations, but conflict over proper authority for the maintenance of law and order continued to arise.<sup>18</sup>

Traditionally, rules and laws are societal implements to impress upon its members the means to provide for order. But lacking in any significant degree in the world is enforcement, as Bleimaier's argument implies, which is still another indicator of the law's decline. Here we return to the

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by any party to the Convention which has not signed the 1949 Conventions.

<sup>16</sup> T. HOBBS, *LEVIATHAN* 145 (Library of Liberal Arts ed. 1958).

<sup>17</sup> See generally IORGA, *PHILIPPE DE MEZIERES, 1327-1405, ET LA CRUSADE AU XIV SIECLE* (1896).

<sup>18</sup> See M. BLOCH, *FEUDAL SOCIETY* 408-20 (1971).

standard touchstone of debate that order precedes law without which the latter does not exist. This elementary argument is then augmented by other critics of the law who decry the lack of enforcement.<sup>19</sup> It is often heard, accordingly, that there is no such thing as international law or, as some would have it, universal law (with an emphasis on law in either case). To this, the response must be that although at any given time and place there are criminal acts for which no offender was apprehended, the responsible legal instrument is certainly not vitiated.

Enforcement has been the essential element of a state centric system with the monarch at the head of the only recognized political unit. Orders flowed downward and respect for each sovereign was assumed in order to maintain stability. A recognition of the change that has occurred in the international political system is to be found in the classical positivist tract, Oppenheim's *International Law: A Treatise*.<sup>20</sup> For Oppenheim, there has been a fundamental change in terms of the thrust of the law, from *enforcement* to *consent*, thus replacing a factor essential to the binding nature of traditional rules of international law.<sup>21</sup>

Concepts of normative<sup>22</sup> and "alternative"<sup>23</sup> world orders have been developed by a number of specialists. Moreover, as the future becomes a subject of concern, the study of the law has come under review to determine its contributory role.<sup>24</sup> It is not difficult to appreciate then, that the observer schooled in one frame of mind at one period of time when the individual reigned supreme can in some instances fail to appreciate legal developments and nuances in a later age of technology in which real or

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<sup>19</sup> See, e.g., J. BRIERLY, *THE OUTLOOK FOR INTERNATIONAL LAW* (1974); G. SCHWARTZENBERGER, *INTERNATIONAL LAW AND ORDER* (1971); R. JENKS, *A NEW WORLD OF LAW?* (1969); Coplin, *International Law and Assumptions About the State System*, 1968 *INTERNATIONAL LAW AND ORGANIZATION* 15.

<sup>20</sup> L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* (8th ed. H. Lauterpacht ed. 1955).

<sup>21</sup> *Id.* at 1-23.

<sup>22</sup> See BEDJAOU, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* (1979); *WORLD FAITHS AND THE NEW WORLD ORDER: A MUSLIM-JEWISH-CHRISTIAN SEARCH BEGINS* (J. Gremillion & W. Ryan eds. 1978). See also Hicks, *International Order and Article 38(1) of the Statute of International Court of Justice*, 2 *SUFFOLK TRANSNAT'L L.J.* 9 (1978). A view from a real-politik perspective can be found in Almond, *The Struggle for a World Legal Order: An Overview of an Adversary Process*, 61 *MARQ. L. REV.* 1 (1977).

<sup>23</sup> L. BROWN, *WORLD WITHOUT BORDERS* (1972); DAMMANN, *THE FUTURE IN OUR HANDS* (1979); R. FALK, *A STUDY OF FUTURE WORLDS* (1975); TINBERGEN, *RESHAPING THE INTERNATIONAL ORDER: A REPORT TO THE CLUB OF ROME* (1976).

<sup>24</sup> See, e.g., Falk, *A New Paradigm for International Legal Studies: Prospects and Proposals*, 84 *YALE L.J.* 969 (1975); Falk, *The Adequacy of Contemporary International Law—Gaps in Legal Thinking*, 50 *VA. L. REV.* 231 (1964); Finnegan, *Three Models of Science in the Study of International Law*, 8 *CAL. W. INT'L L.J.* 272 (1978); Fitzmaurice, *The Future of International Law and of the International Legal System in the Circumstances of Today*, 5 *INT'L REL.* 743 (1975); Jenks, *Orthodoxy and Innovation in the Law of Nations*, 57 *PROC. BRIT. ACAD.* 215 (1971).

clock time tends to operate exponentially rather than lineally.<sup>25</sup> The failure of the European Metropolises to maintain their colossuses and the commensurate emergence of new, non-western, and non-Christian states challenge the established order and the institutions of law itself. Impatience, compelling domestic needs, and an ever increasing economic gap between the industrialized and developing world<sup>26</sup> have brought about conditions deplorable to those whose professional rearing was conducted under the long term shadow of Grotius, Puffendorf, Vitoria, Suarez, and Gentili. The nation-state system emerged to fulfill certain functions at a particular time and place. But no single principle can be expected to support any social institution beyond the circumstances for which it arose; changing circumstances require changing principles, *i.e.*, *clausula rebus sic stantibus*.

Instead, we find a web of interlocking principles all of which are rearranged as the need for the institution is molded by those who are affected. So while it might seem to someone rooted in the thought developed during an earlier age that the law has succumbed to devious forces, we would agree but at the same time help them to adjust to a new style of reality. The state-centric system was founded on the basis of certain assumptions which when altered sufficiently—and this appears to be the case by the middle of the nineteenth century in Europe alone—the forms of political organization were bound to change. For a consideration of the rest of the world we must realize that the nation-state, as the embodiment of a territorial principle, was superimposed along with its socio-cultural underpinnings by imperial considerations or by the weight of intellectual appeal on non-western people.

The confluence of many factors that brought about a more interdependent system also gave rise to new forms of global political organizations.<sup>27</sup> It is safe to say that there is no devolutionary retreat to previous global configurations in the offing; instead the trend toward greater ethno-national pluralism is gaining recognition. This democratization process among the world's peoples has had the effect of seriously challenging the once politically powerful western metropole dominance. Under the rubric of "national self-determination," ethnic groupings around the globe are demanding parity with the established powers. The inherently disas-

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<sup>25</sup> Lienhard, *The Rate of Technological Improvement Before and After 1830's*, 20 *TECH. & CULT.* 515 (1979).

<sup>26</sup> The listing of national capital assets held by the world's top 50 banks is an obvious example of the gap in holdings, see *FORTUNE*, Aug. 1976, at 231.

<sup>27</sup> See, e.g., Huntington, *Transnational Organizations in World Policies*, 25 *WORLD POL.* 333 (1973); Lindbeck, *The Changing Role of the Nation State*, 28 *KYKLOS* 23 (1975); Singer & Wallace, *Intergovernmental Organizations in the Global System, 1815-1964: A Quantitative Description*, 24 *INT'L ORG.* 277 (1970).

trous potential of this development is recognized by some.<sup>28</sup> This development, however, may also be nothing more than a rear guard action by those who are not so motivated by the "revolution of rising expectations" that has seized the imagination of many in the lesser developed areas of the world. Nor can we avoid coming to grips with the growing phenomenon of the national liberation movement. Here is a situation where organized guerrilla warfare serves as an instrument for legitimizing and masking terrorism in lieu of the ability to bring about structured governmental change.<sup>29</sup> The Third World's litany of damnation also includes years of foreign control over natural resources leading them to the nationalization of their domestic industries and natural resources.<sup>30</sup> In this connection, the call for a New International Economic Order<sup>31</sup> by the world's developing states and the accompanying Charter of Economic Rights and Duties of States,<sup>32</sup> are sure to provide greater substance to Bleimaier's fears.

If there has been a reorientation of public international law resulting in the deprivation somewhat of the once all-powerful Western States of their dominant position, there also have been some changes introduced to benefit mankind. (And there has also been a commensurate emergence of regional bodies for the codification of the law, *i.e.*, the Asian-African Legal Consultative Committee and the Inter-American Juridical Committee.) There has been, for example, the Charter of the United Nations<sup>33</sup> and the Declaration of Human Rights<sup>34</sup> merely to cite the most glaring. Bleimaier's emphasis on trade and private international law is a confusion with the regulating effect that the law is concerned with in regards to inter-state or even transnational economic and trade activity. There is,

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<sup>28</sup> See, e.g., Silverburg, *In Perpetuation of Myth: National Self-Determination de Lege Ferenda*, 2 GLENDALE L. REV. 273 (1978).

<sup>29</sup> See, e.g., Abi-Saab, *Wars of National Liberation and the Laws of War*, 3 ANNALES D'ETUDES INTERNATIONALES 93 (1972). But see Dinstein, *The New Geneva Protocols*, 33 Y.B. WORLD AFF. 265 (1979); Silverburg, *Sanctuary and Irregular Warfare: Contortive International Law*, 2 HOUS. J. INT'L L. (1980).

<sup>30</sup> See The Declaration on Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) 15, U.N. Doc. A/5217 (1962). The United States Supreme Court has recognized that there is no specific rule of law limiting the state's power to expropriate alien property. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). See also The First Hickenlooper Amendment, § 301(e) of the Foreign Assistance Act of 1963, Pub. L. No. 88-205, 77 Stat. 386 (1963), as amended by 22 U.S.C. § 2370(e)(1) (1976).

<sup>31</sup> G.A. Res. 3201, U.N. GAOR, Supp. (No. 1) 6th Special Sess. 3, U.N. Doc A/9559 (1974). The first case attempting to cite the new International Economic Order as customary international law is *Texaco Overseas Petroleum Company/ Libyan Arab Republic, Award on the Merits*, Findings No. 83, reprinted in 17 INT'L LEGAL MATERIALS 1 (1978).

<sup>32</sup> G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 12) 50, U.N. Doc. A/212 (1974).

<sup>33</sup> U.N. CHARTER, June 26, 1945, 59 Stat. 1031, T.S. No. 993.

<sup>34</sup> G.A. Res. 217A (III), U.N. Doc. A/810, at 71-77 (1948).

therefore, hesitation to mention the International Monetary Fund,<sup>35</sup> the General Agreement on Trade and Tariffs,<sup>36</sup> or the Organization for Economic Cooperation and Development,<sup>37</sup> all efforts to introduce global economic stability.

The emphasis on economic development in the law can be stated to have begun in December 1961 when the United Nations General Assembly declared the decade of the 1960's as the first U.N. Development Decade.<sup>38</sup> As part of the program the Assembly passed a resolution which called for "International Trade as the primary instrument for Economic Development."<sup>39</sup> The next session of the Assembly resulted in the acceptance of a resolution from the United Nations Economic and Social Council (ECOSOC)<sup>40</sup> in order to convene a United Nations Conference on Trade and Development (UNCTAD) early in 1964.<sup>41</sup> Thus UNCTAD was established as a permanent subsidiary organ of the Assembly.

The convening of UNCTAD was a milestone in the creation of a new international political context. Conflict ceased being considered primarily in ideological terms, pitting East against West. Now emerging was an economically based and oriented confrontation state between the North (industrialized regions) and South (developing areas). At the Sixth Special Session of the United Nations a new phrase was articulated which epitomized the changing character of international politics: a New International Economic Order (NIEO).<sup>42</sup> Similar feelings and policies have also been evidenced on a regional and subregional scale, as evinced by the Latin American Free Trade Association<sup>43</sup> and the Andean Group (ANCOM),<sup>44</sup> respectively.

It becomes incumbent upon the publicists of the law as well as states

<sup>35</sup> Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39.

<sup>36</sup> Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

<sup>37</sup> Convention on the Organization for Economic Cooperation and Development, Dec. 14, 1960, T.I.A.S. No. 4891, 12 U.S.T. 1728.

<sup>38</sup> G.A. Res. 1710, 16 U.N. GAOR, Supp. (No. 17) 17, U.N. Doc. A/5100 (1961).

<sup>39</sup> G.A. Res. 1707, 16 U.N. GAOR, Supp. (No. 17) 14, U.N. Doc. A/5100 (1961).

<sup>40</sup> 34 U.N. ECOSOC, Supp. (No. 1) 7, U.N. Doc. E/3671 (1962).

<sup>41</sup> G.A. Res. 1785, 17 U.N. GAOR, Supp. (No. 17) 14, U.N. Doc. A/5217 (1962).

<sup>42</sup> United Nations Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, U.N. GAOR, Supp. (No. 1) 6th Special Sess. 3, U.N. Doc. A/9559 (1974). See generally *On the Creation of a New International Economic Order: Issue Linkage and the Seventh Special Session of the UN General Assembly*, 30 INT'L ORG. 309 (1976).

<sup>43</sup> The Latin American Free Trade Association was created by the Treaty of Montevideo, signed Feb. 18, 1960, U.N. Doc. E/CN. 12/AC. 45/3 (1960).

<sup>44</sup> The Andean Foreign Investment Code, formerly entitled Common Regime of Treatment of Foreign Capital, and of Trademarks, Patents, Licenses and Royalties, was created by the effect of the Cartagena Agreement. Agreement of Cartagena, May 26, 1969, signed in Bogota, Columbia, in force Oct. 16, 1969, reprinted in 8 INT'L MATERIALS 910 (1969).

who create custom to serve each other in making all those affected by the changes aware, not only of the substance but also of the context. Reaction and adaptation in an evolutionary manner will more than likely insure the continued effectiveness of the law.