International Law as Ideology: Theorizing the Relationship between International Law and International Politics

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Theorization of the relationship of international law to the broader political system of which it is a sub-system is of relevance to scholars of international law and international relations. The dominant post-war paradigm in international relations has been realism,[1] which dismisses international law as being virtually irrelevant to matters of 'high' politics.[2] The process of international politics is accounted for by the concept of power and international law is regarded as having no intrinsic significance.[3] The retention of a power-law dichotomy has effectively blocked moves towards a more sophisticated conceptualization of the significance of international law to international politics. It is understandable that, as a group, international lawyers have perceived little to be gained from dialogue with proponents of realism and have remained sheltered behind legal positivism. The two disciplines have for the most part remained comfortably disengaged on the subject.[4] And yet, international legal theorists have increasingly recognized their need for greater understanding of the politics of international law[5] and stand to gain much

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1 Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers', 14 *Yale J. Int'l L.* (1989) 338. Keohane refers to realism as an interpretive framework. See R.O. Keohane, *Neorealism and its Critics* (1986) 7; while Gilpin considers it to be a philosophical disposition. Gilpin, 'The Richness of the Tradition of Political Realism', 38 *International Organization* (1984) 290.

2 F. Boyle, *World Politics and International Law* (1985) 6-7.

3 Boyle, 'The Irrelevance of International Law: the Schism between International Law and International Politics', 10 *Calif. West. Int'l L.J.* (1980) 198.

4 See Abbott, *supra* note 1, at 336-338.

5 Regarding 'philosophical', 'humanistic' and 'scientific' as three kinds of sophistication that have existed in international law, Macdonald and Johnston comment that the late twentieth century appears to be characterized by a new approach that strives for *political* sophistication. Macdonald and Johnston, 'International Legal Theory: New Frontiers of the Discipline', in R.St.J. Macdonald and D.M. Johnston (eds), *The Structure and Process of International Law: New Frontiers of the Discipline* (1983) 4.

5 EJIL (1994) 313-325

from a fresh theorization of the international law-international politics relationship that subsumes the power-law dichotomy. Such a theorization would offer a more meaningful basis for inter-disciplinary dialogue, the goal of which would be a theory of international politics capable of incorporating legal debate itself.

I. Realism and International Law

The characteristic feature of modern realism[6] is its use of the power concept to explain the course of international politics. The primary unit of analysis is the State which is regarded as operating in an anarchical system dominated by conflict.[7] Foreign policy decisions are based on a rational calculation as to how most effectively to enhance State power.[8] Realism aligns international law with power in so far as international law is considered a tool at the disposal of the most powerful. Yet international law and power are also frequently contrasted.[9] A realist perspective deems international law to have no significance in its own right and so seeks to ascertain why it is that States obey international law.

The realist portrayal of international law is unable to account for occasions when powerful States show deference to international law even when to do so appears to be contrary to their power interests. Franck has recounted, for example, how, when protecting vessels in the Persian Gulf in early 1988, the US Navy permitted the passage of a ship carrying a load of Silkworm missiles to Iran even though it perceived that this would increase the danger to both protected and protecting US ships in the region. The State Department had determined that interceptance of the ship would constitute search and seizure on the high seas which was illegal under universally recognized rules of law and neutrality.[10] Realism is also unable to explain the strong commitment of the Third World to international law. Third World States do not appear to consider the system inherently incapable of helping them redress their grievances but, rather, have attempted to use it for precisely that

6 'Realism' is used to refer to a body of writing dating from Thucydides' *The Pelonnesian War* (c.400BC) but 'modern realism' is generally used to refer to works from about Carr's *The Twenty Years' Crisis, 1919-1939* (1939) on. Classic modern realist works include H. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (1949) and G. Schwarzenberger, *Power Politics* (1951).

7 Gilpin pointed to three assumptions regarding political life which he considered characteristic of realism. These were that international affairs are basically of a conflictual nature, that the essence of social reality is the group, and that power and security are the prime human motivators in all political life. Gilpin, *supra* note 1, at 290.

8 Keohane identifed a set of three realist assumptions: that States are the key units of action, that they seek power, either as an end in itself or as a means to other ends, and that they behave in ways that are by and large rational, and therefore comprehensible to outsiders in rational terms. Keohane, *supra* note 1, at 6.

9 For example, Keohane stated that: 'The struggle with Nazism cast doubt on the efficacy of international law and emphasized the role of power in world politics.' Ibid., at 9.

10 T. Franck, *The Power of Legitimacy Among Nations* (1990) 3-4.

purpose.[11] The behaviour of international actors does not seem to bear out the realist assumption of the impotency of international law.

The corollary to realism within international law has been positivism. Positivist lawyers have concentrated on determining a body of 'legal' rules but have paid scant regard to non-legal political considerations that might influence the implementation of such law.[12] Legal positivism does not deny the law-power divide of realism. The difference is a moral one; legal positivists believe that law *should* be obeyed even if it is not.[13] Positivists see their role as the determination of legally correct behaviour, a view based on an assumption of the possibility of a legal-illegal categorization of political behaviour.

Realism and positivism, as they have been presented here, are obviously ideal types. But even though most writers do not advance a position as extreme as either of these, the tenets of realist and positivist thought remain dominant in the literature. So long as 'power' continues to play an explanatory role in international relations akin to that of causation in other disciplines,[14] and yet its relationship to certain key aspects of international politics fails to be explicitly theorized, realist assumptions regarding the impotency of international law remain unassailed.[15]

Unable to dismiss the realist power-politics equation, but just as incapable of integrating international law into it, many writers opt for analyses which do not incorporate the power concept into the structure of the explanation. Emphasis is directed away from the significance or impact of international law to its political role or function.[16] Bull, for example, explains the international law-international

11 See, *inter alia* Anand, 'Attitude of the Asian-African States toward Certain Problems of International Law', 15 *ICLQ* (1966) 5; Bull, 'The Third World and International Society', 32 *The Year Book of World Affairs* (1979) 15; Levi, 'Are Developing States More Equal than Others?', 32 *The Year Book of World Affairs* (1978) 286; Sinha, 'Perspective of the Newly Independent States on the Binding Quality of International Law', 14 *ICLQ* (1965) 121; F.E. Snyder and S. Sathirathai (eds) *Third World Attitudes Toward International Law* (1987); and Tieya, 'The Third World and International Law', in Macdonald and Johnston, *supra* note 5, at 955-976.

12 Boyle discusses the evolution and contemporary prevalence of legal positivism in Boyle, *supra* note 2. A number of international lawyers have commented on their colleagues' tendency to remain aloof from political issues. See, for example, Fisher, 'International Law: A Toolbox for the Statesman', 9 *Calif. West Int'l L.J.* (1979) 472.

13 Boyle, *supra* note 2, at 59.

14 It is contended that causation is the essence of all definitions of power. Some scholars such as Robert Dahl and Jack Nagel have actually defined power as causation. See discussion in Baldwin, 'Power Analysis and World Politics: New Trends versus Old Tendencies', 31 *World Politics* (1979) 161.

15 Bull, for example, postulates four reasons why States obey international law: habit or inertia, coincidence, coercion, and reciprocal agreement. Bull recognizes that the interests of a State may sometimes coincide with international law but he does not believe that 'a very substantial degree of conformity' to the rules of international law means that international law is a powerful agent or motive force in world politics'. H. Bull, *The Anarchical Society: A Study of Order in World Politics* (1977) 139-140. Realist assumptions that States act according to what they perceive to be in their own power interests and that international law is, in its own right, incapable of moderating those interests to any significant degree, therefore underpin the interpretation offered by Bull.

16 See generally, Johnston, 'Functionalism in the Theory of International Law', 26 *Can. Y.B. Int'l L.* (1988) 3 and M. Koskenniemi, *From Apology to Utopia* (1989) 4 at n. 6.

politics relationship in terms of three political functions fulfilled by international law: to identify the idea of a society of sovereign States, to state the basic rules of coexistence among States and international actors, and to help mobilize compliance with the rules of international society.[17]

Coplin offers a system-level functionalist analysis of international law, in which he examines international law

> as it allocates legal competences among states, as it constrains the political behavior of states particularly when it comes to the use of force, as it aids in developing world public welfare and, finally, as a device for communicating and developing a consensus on the international system.[18]

Chayes stresses the inadequacy of the prevalent though simplistic image of decision-makers choosing between 'obeying' and 'disobeying' international law.[19] In his functionalist analysis of the role of international law in US decision-making during the Cuban missile crisis, Chayes approaches the issue in terms of three ways in which law might be thought to have affected the action adopted: law as a constraint on action, law as a basis of justification or legitimation for action, and law as providing organizational structures, procedures and forums.[20] Also aware of the illusory nature of any clear law-non-law divide, Boyle proposes that a legal positivist approach be replaced with a graduated scale of legal to illegal options available to policy makers.[21]

Perhaps the best known and most sophisticated functionalist approach is the policy-oriented framework of enquiry advanced by McDougal and associates.[22] McDougal downplays international law as rules in favour of law as 'a comprehensive process of authoritative decision'. He seeks to place international law within the realm of social and political forces. Like other functionalist analyses this work is valuable in illuminating the inter-relationship of international law and international politics. But while it highlights the political nature of law, it nevertheless fails to account adequately for the widespread perception of international law as a coherent body of rules which States are bound to obey.[23]

17 Bull, *supra* note 15, at 140-142.

18 W.D. Coplin, *The Functions of International Law: An Introduction to the Role of International Law in the Contemporary World* (1966) 25.

19 A. Chayes, *The Cuban Missile Crisis* (1974) 4.

20 Ibid., at 7.

21 Boyle, *supra* note 2, at 164-167.

22 See M.S. McDougal, *Studies in World Public Order* (1960); McDougal, 'Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry', 4 *Journal of Conflict Resolution* (1960) 337; McDougal, Lasswell and Reisman, 'Theories about International Law: Prologue to a Configurative Jurisprudence', 8 *Va. J. Int'l L.* (1968) 188; and McDougal and Reisman, 'International law in Policy-Oriented Perspective', in Macdonald and Johnston, *supra* note 5, at 103-129. See also Higgins, 'Policy Considerations and the International Judicial Process', 17 *ICLQ* (1968) 58 and cf. Falk, 'The Validity of the Incidents Genre', 12 *Yale J. Int'l L.* (1987) 376.

23 See discussion in Allott, 'Language, Method and the Nature of International Law', 45 *BYbIL* (1971) 79 and Onuf, 'International Legal Order as an Idea', 73 *AJIL* (1979) 250-252.

It appears that a theory of the international law-international politics relationship must be a political one, for even though there is an inter-relationship between international law and international politics, international law is a part of international politics in a way that is not true *vice versa*. In order to overcome the inadequacies of the current realist interpretation, any new theorical explanation must deal explicitly with the relationship of international law to broader structures of power.

II. Theorizing the Power of Ideas

One often noted feature of the international legal system is that it contains no international executive. This fact has prompted international lawyers to engage in a 'rather arid exercise in semantics', concerning whether international law, lacking a means of enforcement, could really be law.[24] Given the evidence that international law does appear to hold some sway, it appears that a more useful implication to draw from its lack of an executive is that the influence of international law must be of an intangible nature. The power of international law can only be the power of the idea of international law.

To accept that the idea of international law has autonomous power in international politics firstly requires acceptance of the fact that ideas have power. This cannot be definitively proven within a positivist epistemology, in which knowledge is that testable within the see-touch realm. Nevertheless, it is possible to point to instances in which the rejection of a previously accepted idea has preceded major change in the material world. For example, the growing rejection of the idea of colonialism in the first half of the twentieth century was followed by the rapid post-Second World War disintegration of a global colonial order.[25] It would be difficult to deny that the rejection of the ideology of colonialism and acceptance of others, notably self-determination, was a major factor in the historical process. Ideas do seem to constitute a form of power.

The power of an idea can be said to reside in people's acceptance of that idea as a basis for action. Because it is impossible to distinguish beliefs from expressed beliefs, the power of an idea will in this study be determined by the demonstrated acceptance of the idea. In order to explore the possibility that the significance of international law lies in an 'idea of international law', this paper will draw on the insights of certain theorists of ideology who have sought to explain the relationship

24 Macdonald and Johnston, *supra* note 5, at 5. The debate stems principally from a notion, made famous by John Austin, that the defining test of law is that of enforcement. Williams, 'International Law and the Controversy Concerning the Word "Law"', 22 *BYbIL* (1945) 146. See also D'Amato, 'Is International Law Really "Law"', 79 *Northwestern University Law Review* (1985) 1293.

25 See Emerson, 'The New Higher Law of Anti-Colonialism', in K.W. Deutsch and S. Hoffmann (eds), *The Relevance of International Law* (1968) 153.

of ideas to structures of power and the way in which meaning can be used as a political tool. There are many different and inter-related schools of ideology theory. This approach draws heavily on the work of John Thompson in *Studies in the Theory of Ideology*.[26]

As used here, there is no intrinsic difference between ideas, principles and ideology.[27] The distinction lies in the method of their analysis; an ideology is an idea/principle or set of ideas analysed in terms of power. It is assumed that every political structure has one particular principle integral to that power structure. The power structure is more than that ideology, but without the ideology, the structure would collapse. Members of the power structure communicate on the basis of the implicit acceptance of the ideology. The ideology has existence only in its repeated expression and in allusions to it. An ideology can be brought into service by those in positions of domination, but ideology is a tool at the disposal of all members of a political structure.

It is important to note that an ideology can successfully fulfil a role within a power structure whether or not it is true. It does not even matter whether individuals believe the idea or not. What is crucial is the demonstrated acceptance of the shared idea by members of the political order. This confirms the membership of an individual to the group and at the same time reinforces the ideology. The ideology must remain an implicit assumption in debate within that political order. While an ideology may be explicitly stated, it can most frequently be identified as an assumption on which debate implicitly rests.

An ideology upholds an order of power through blocking evidence of that power structure. An unequal relationship of power is concealed or denied.[28] An ideology sustains a power structure through its portrayal of the ideology's subject matter as not only a source of power but as one of prestige. This justifies utilization of that power source by those placed in a favourable position by its use. Those in a less favourable position, on the other hand, are unlikely to challenge the validity of that power source, but rather to endeavour to improve their own position in relation to it. The ideology presents all members of the political structure as equally placed in relation to the subject of the ideology.

In the portrayal by the ideology of its subject matter, the notion of time is removed and processes are represented as things. The ideology itself comes to be

26 J. Thompson, *Studies in the Theory of Ideology* (1984). At page 3 Thompson explains that this is not a systematic treatise on the nature of ideology but a series of essays, each of which 'engages with' a particular theorist.

27 The term *ideologie* was first coined by the French philosopher Antoine Destutt de Tracy in 1796 to denote the 'science of ideas', the study of the origins, evolution and nature of ideas. R.M. Christenson *et al*, *Ideologies and Modern Politics* (1975) 4. Ideology theorists are not concerned with whether beliefs are true or false, but to examine them 'from the standpoint of the practical needs of those who hold them'. Goldie, 'Ideology', in T. Ball, J. Farr and R.C. Hanson (eds), *Political Innovation and Conceptual Change* (1989) 267.

28 Thompson, *supra* note 26, at 131.

regarded as 'an eternal and universal truth'.[29] But, although slow to change, an ideology must do so if it, and hence the power structure that it sustains, is to survive. For an ideology does not exist in isolation from other ideas and meanings which 'overlap, compete and clash, drown or reinforce each other'.[30] An ideology must deal with competing ideologies through defeating or absorbing them. If the ideology ceases to be upheld, that set of inter-related power relationships will come to an end.

III. The Application of Ideology Theory to the Theorization of the International Law-International Politics Relationship: The Idea of International Law and Legal Discourse

This is not the first occasion on which international law has been referred to as ideology. Morgenthau regarded international law as an ideological disguise for political policy, used by States whose power interests were served by retention of the status quo.[31] Morgenthau was once again viewing international law as no more than a tool to be used by the powerful in the pursuit of even greater power. Usage of the term by Morgenthau was firmly rooted in the realist assumption that international law is ultimately impotent.

In order to apply ideology theory to the idea of international law,[32] the whole international political order is to be regarded as one power structure.[33] The system of international law has evolved in conjunction with the modern international political States system and it is hypothesized that the idea of international law is integral to that power structure. Without that idea, the system would not operate as it does currently. This is a bold statement. It points to the fact that, far from being irrelevant, international law is, in its own right, a prime, though not the sole, determinant of relative power positions in international politics.

The ideology of international law can be identified from references to international law and to legal rhetoric in inter-State correspondence. It stipulates

29 Christenson *et al*, *supra* note 27, at 8.

30 G. Therborn, *The Ideology of Power and the Power of Ideology* (1980) vii.

31 Morgenthau, *Politics Among Nations* (1967) at 87.

32 Reference is often made to an idea of international law but, rather than treating that idea as an ideology whose verity is irrelevant to its political role, the idea is taken at face value and not analysed in terms of power. See, e.g. Bull, *supra* note 15, at 128 and M. Koskenniemi (ed.), *International Law* (1992) xi. Cf. 'For the idea of law, ... is the idea of a body of ideas: and in so far as it has any existence as law, it has this existence *in idea*.' Manning, 'The Legal Framework in a World of Change', in B. Porter (ed.), *The Abersytwyth Papers* (1972) 303.

33 It is not at this stage necessary to move beyond the broad categorizations of relative power positions often identified within the international order. The 'First World', for example, has often been used to refer to the most powerful States, such as the United States and the Soviet Union; 'Second World' to refer to middle-ranking States such as Japan, Canada, and those of Europe; while the 'Third World' consists of Asia, Africa, Latin America and other so-called 'developing countries'. Tieya, *supra* note 11, at 956. 'North' and 'South' are terms also used to denote relative power positions in the international political order.

that, as an autonomous set of rules which international actors must obey, international law is ultimately distinguishable from the current operation of power politics.

> What this means operationally ... is that a question as to the applicability of a rule ... should be capable of determination by an impartial judge (even if hypothetical) on the basis of legal standards that are valid and applicable independently of the preferences of the judge, of the parties or any other particular State.[34]

This is the 'classic' perception of international law as 'a set of rules ... applied even-handedly between weak and strong, ... on all occasions'.[35]

> This view ... entails the beliefs that law is 'rules'; that these rules are 'neutral'; that the judiciary is 'objective'; and that its prime task is to 'apply' rather than to 'make' the rules.[36]

International law is presented as a 'body of timeless absolutes, good for all seasons and all places, and postulated *a priori* in advance of actual problem situations'.[37] International law is portrayed as a unified system with internal cohesion.[38]

The ideology of international law does not deny that international politics may influence the international legal system. To acknowledge that classical international law developed in an *ad hoc* manner, in response to concrete international conflicts,[39] is no impediment to acceptance of the notion that it is possible to distinguish a legal argument from a 'mere' political point of view. The ideology of international law presents legal norms, principles, rules and negotiating positions as not only distinguishable from non-legal political ones, but as somehow 'more than' or superior to them.

International lawyers are required to uphold the ideology by giving it practical expression. The notion that there is indeed an autonomous set of rules about the conduct of international relations which international actors must obey underpins all legal discourse.[40] It is assumed that, even if the law on a particular point is not yet hard and fast, legal debate will produce such an outcome and that, even if the system is not wholly objective, then, at least in comparison with international

34 O. Schachter, *International Law in Theory and Practice* (1991) 34.

35 Higgins, 'The Identity of International Law', in B. Cheng (ed.), *International Law: Teaching and Practice* (1983) 37.

36 Higgins, *supra* note 22, at 58. Higgins asserts this to be the image of international law dominant among British international lawyers.

37 E. McWhinney, *United Nations Law Making. Cultural and Ideological Relativism and International Law Making for an Era of Transition* (1984) 23.

38 Schachter, 'International Law in Theory and Practice: General Course in Public International Law', 178 *RdC* (1982/V) 22.

39 McWhinney, *supra* note 37, at 23.

40 Legal discourse operates as a body of knowledge. While a number of writers, foremost amongst whom is Foucault, stress the inter-relationship of knowledge and power, few have explored the mechanism by which the two are inter-related. M. Foucault, *Power and Knowledge* (1980) 51. The ideology of international law can be regarded as such a mechanism.

politics, international law is 'less dependent on subjective beliefs about what the order among States should be like'.[41]

International lawyers advance, debate, apply and modify rules to deal with every aspect of international relations. At any particular stage, some of those rules are widely agreed to and others much less so. As new issues arise in international politics so international law expands to cover those areas in a manner such that the system retains the appearance of political neutrality. Of course, given that international law is a sub-system of international politics, which is in a continual state of evolution, an ultimate set of international rules appropriate for ever more will never be produced. It is the impossibility of ever reaching such a situation that permits the idea of international law to be used as a political tool.[42]

The international States system has undergone considerable expansion in the post-World War Two years and there has been a corresponding growth of international law – both quantitative and qualitative – to deal with new issue areas such as resource use and human rights. In those new fields in which a set of rules has not yet been widely agreed upon, lawyers tend to rely on the application of broad principles to uphold the ideology.[43] The principle of equity, for example, which has been increasingly used,[44] is a simple formulation of part of the ideology by which it appears that international law does not operate in favour of any particular State or group of States.

The core of the process of upholding the ideology lies with the constantly evolving set of legal rules that pertain to the operation of the international legal system itself. International lawyers are required to find a means of stipulating how it is that an autonomous set of compulsory rules can operate within, and yet be distinguishable from, the process of international politics. This requires delineating a law-non-law boundary with an 'on-off' quality,[45] and is a task undertaken within sources discourse. In political terms, the boundary between law and politics can only be that which it is perceived to be; in legal terms, it must be an identifiable boundary established via an applicable criterion. Similarly, while international custom might be 'evidence of a general practice accepted as law',[46] consensus is

41 Koskenniemi, *supra* note 16, at 1.

42 A study by Kennedy of contemporary public international legal doctrines and arguments operates with the image of international law as a 'coherent fabric' to conclude that 'the interminability of international law seems the subtle secret of its success'. Kennedy, 'Theses About International Law Discourse', 23 *GYIL* (1980) 353. Cf. the positivist legal attitude that international lawyers *should* be able to clarify what is or is not international law. See B. Cheng, *International Law* (1982) xxiv.

43 See Schachter, *International Law in Theory and Practice*, 21.

44 Koskenniemi, *supra* note 32, at xxvii.

45 D. Kennedy, *International Legal Structures* (1987) 21. Koskenniemi highlights the difficulty faced by lawyers in locating the law-non-law boundary somewhere between law being indistinguishable from, or irrelevant to, politics. Ibid., at xxvii.

46 Article 38(1)(b) of the Statute of the International Court of Justice. Article 38(1) is generally taken as the starting point for a discussion of the sources of international law.

'merely a definition of what we *mean* by the expression 'international law'.[47] Lawyers must stipulate how a neutral observer might identify such a practice – specifying, for example, the length of time during which the practice must have been undertaken in order for a rule of custom to have been established.

Perhaps the most difficult task in relation to upholding the ideology of international law is that faced by international legal theorists who have traditionally provided another ideology, internal to the system of international law, by which to justify those rules that pertain to the international legal system. As with all ideologies, this one undergoes evolution over time, in response to debate within the international community of legal theorists, current usage of the ideology of international law, and broader intellectual movements. Naturalism attributed the existence of international law to the moral law of nature; according to the currently dominant ideology of positivism, sovereign consent constitutes the basis of the system. In their search for increased political sophistication, many international legal theorists have challenged positivism but have not as yet been able to offer a coherent alternative legal ideology by which to justify legal discourse.

Progress appears thwarted by an attempt to blur the ultimately unblurrable line between theories *about* law and theories *of* law.[48] While the present paper demonstrates the possibility of subsuming legal debate within a political theory of international law, the reverse does not seem possible. Proponents of what can broadly be termed Critical Legal Studies (CLS)[49] have expended considerable analytical energy in order to demonstrate that aspects of what has here been referred to as the ideology of international law are not true.[50] But in political terms, such a finding is not significant, for the verity of an ideology is irrelevant to its role within the power structure of which it is a part. CLS rather serves to reinforce the need for a fresh political theorization of the international law-international politics relationship that can account for the apparent discrepancy between the discourse of international law and political 'reality'.[51]

47 D'Amato, 'On Consensus', 8 *Can. Y.B. Int'l L.* (1970) 122.

48 A distinction drawn by McDougal and Reisman, "The Changing Structure of International Law" Unchanging Theory for Inquiry', 65 *Columbia Law Review* (1965) 813.

49 See, *inter alia*, D. Kennedy, *supra* note 45; Carty, 'Introduction', in A. Carty (ed.), *Post-Modern Law* (1990) ; Koskenniemi, 'The Politics of International Law', 1 *EJIL* (1990) 4; P. Allot, *Eunomia* (1990); and Purvis, 'Critical Legal Studies in Public International Law', 32 *Harv. Int'l L.J.* (1991) 81-127.

50 Carty, for example, denies that there is a universal system of international law; Koskenniemi, that international law provides a non-political way of dealing with disputes. Carty, 'Critical International Law: Recent Trends in the Theory of International Law', 2 *EJIL* (1991) 66. Koskenniemi, *supra* note 16, at 50.

51 The general paucity of challenge by international lawyers to the assumption of objectivity may well be due less to their naivety or complacency than to their widespread appreciation – on some level – of its crucial importance to the viability of the international legal system.

IV. The Idea of International Law and the Realist Paradigm

In presenting a new theorization of the relationship of international law to international politics the objective is not to negate a realist theory of the operation of international relations but to locate the realist image of international law within a broader framework of understanding. To the extent that States obey international law, realists deem this to be because the law coincides with a State's power interests. Realists believe that foreign policy is based on a rational calculation of a State's interests. Since law is not theorized in terms of power, realism has difficulty in accounting for occasions when a powerful State obeys international law against its apparent political interests and why States with little power in the international system nevertheless participate willingly in the international legal order.

A theorization of international law in terms of ideology suggests that demonstrated acceptance of the ideology – even if left implicit – is a criterion for membership of the international States system. It follows from this that ongoing, affirmative support for the ideology must be a primary goal of a rational foreign policy. This is not to say that policy makers view it in these terms, but to offer a heuristic explanation of what happens in practice. Two aspects of the ideology must be upheld. The first is the legal-non-legal dichotomy which is the essence of the ideology. Acceptance of this is reflected in the categorization of political positions as either 'legal' or 'illegal'. A second aspect of the ideology is the notion that international law is a set of binding rules. This is reinforced whenever an international actor emphasizes the legality of its own position.[52]

The system of international law is such that virtually any position can be argued in terms of legally correct behaviour.[53] The relationship of the conceptualization of international law as ideology to the realist notion of rational State behaviour therefore hinges on the degree to which the necessity of upholding the ideology of international law influences State behaviour. For a realist who considers power the prime determinant of foreign policy, any correspondence between international law and political action is mere coincidence. Law is, at best, a disguise for policies based on power considerations. The interpretation offered here does not deny that power interests shape State policy but, through its theorization of the relationship of international law to power, offers a more sophisticated explanation of State behaviour. Since a State must act so as to reinforce the ideology of international law in order to retain its position within the international order, it follows that, where there could be little doubt as to a legally 'correct' course of action, a State is most likely to comply with the law, because to refrain from acting according to widely

52 Cf. the argument that the hasty justification of political positions by highly debatable legal arguments and rationalizations results in the 'devaluation of international law and a "credibility gap" at the expense of those States who have debased the currency'. Hoffman, 'Introduction', in L. Scheinman and D. Wilkinson (eds), *International Law and Political Crisis: An Analytic Casebook* (1968) xvi. See also 'Legal Argumentation in International Crises', 97 *Harv. L. Rev.* (1984) 1211.

53 See Schachter, *supra* note 34, at 20 and Kennedy, *supra* note 42, at 359-60.

recognized law is to deny acceptance of the law's binding quality. This accounts for US choices in favour of international law and against immediate political considerations.[54] Had the law on the issue in question been particularly unclear, it would be unlikely to have impinged greatly on the US decision-making process.

The realist paradigm is also unable to adequately account for the support for international law on the part of the less powerful States in international politics. An interpretation based on ideology theory posits that the actual idea of international law can be used as a political tool. As a member of the international political-legal order, a State can improve its position on particular issues through demonstrating a discrepancy between existing legal provisions and the ideology. If the system is to survive in its present form, this requires that, either the ideology must undergo substantial modification to account for the discrepancy, or else the pertinent aspects of law will have to change so as to uphold the ideology. Developing States have, for example, pointed to a discrepancy between the ideological stipulation that all States are treated equally under existing economic law. In order to improve their position, old rules have been reformulated and new principles developed in support of the demand for economic equality.[55] This has been done while the Third World States have remained staunch supporters of the idea of international law. It is the stability of the ideology and its crucial importance to the powerful that permits the less powerful to improve their positions in the international political order via the idea of international law.

Power is not a consideration distinct from international law. It appears that the idea of international law is an important form of power in international politics.

V. Conclusion

The realist paradigm in international relations is unable to explain the nature and degree of the significance of international law to the system of international politics. Although international law appears to play a political role, that role cannot be conceptualized within a paradigm that posits power as the prime determinant of political outcomes and yet does not theorize the relationship between international law and power.

It has been hypothesized that the power of international law resides in an idea which specifies that international law is a set of binding rules distinguishable from current international politics. Certain insights of ideology theory regarding the relationship of ideas to power have been applied to explain the relationship of the idea of international law to the operation of the international political system.

54 Franck, *supra* note 10.

55 Osieke, 'The Contribution of States from the Third World to the Development of the Law on the Continental Shelf and the Concept of the Economic Zone', 15 *The Indian Journal of International Law* (1975) 313.

It has been suggested that the idea of international law is integral to the international distribution of power and that it actually sustains the structure of the international political order. In political terms it does not matter whether or not the ideology is true; it is not the verity of an ideology that matters but its acceptance by international actors as a basis for interaction. Legal debate is the process of ostensibly establishing a concrete law-non-law boundary and a set of objective, applicable rules to deal with all political issues. In order for the ideology to operate successfully, lawyers must continue to find ways of demonstrating the practicality of the image of international law portrayed by the ideology. Legal discourse is founded on an assumption of legal objectivity.

This conceptualization of the relationship of international law to international politics means that many previously asked questions regarding international law have been superseded. For example, the questions as to whether and why States 'obey' international law are no longer meaningful. It can now be seen that States neither obey nor disobey international law; they simply act so as to demonstrate acceptance of the ideology of international law. While States might be concerned that international law develops in their favour, this interest is indirect; favourable terms means that the State can more readily uphold the notion of the binding quality of international law.

Seeking reasons for the obedience of States to international law is representative of a whole approach to international law by which the law is regarded as a set of neutral, compulsory rules, whether that be on the part of those sceptical of the value of international law or those who regard it as an avenue to world peace. A theorization of international law in terms of ideology interprets the law-as-rules approach as a straightforward enunciation of an ideology of international law. While not wrong, this tells only part of the story. It is as an idea that international law has its reality and its power.

A conceptualization of international law as ideology has integrated the image of international law as a set of objective rules with its political reality. The portrayal of international law need no longer swing between 'myth' and 'panacea'.[56]

56 Terms used by Rogoff in 'International Politics and the Rule of Law: The United States and the International Court of Justice', 7 *Boston University International Law Journal* (1989) 267.