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# *The Concept of International Law*

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## **Abstract**

*The social function of international law is the same as that of other forms of law. It is a mode of the self-constituting of a society, namely the international society of the whole human race, the society of all societies. Law is a system of legal relations which condition social action to serve the common interest. Law is a product of social processes which determine society's common interest and which organize the making and application of law. The international legal system integrates all subordinate legal systems (international constitutional law) and regulates the international public realm and the interaction of subordinate public realms (international public law). National legal systems (including private international law) are part of the international legal system. International law takes a customary form, in which society orders itself through its experience of self-ordering, and a legislative form (treaties). The state of international law at any time reflects the degree of development of international society. Recent developments in international society have made necessary and inevitable the coming-to-consciousness of international law as the fully effective law of a fully functioning international society, but that development faces a number of problems and impediments which must be overcome.*

## **The Social Function of Law**

1. Law, including international law, has a threefold social function. (1) Law carries the structures and systems of society through time. (2) Law inserts the common interest of society into the behaviour of society-members. (3) Law establishes possible futures for society, in accordance with society's theories, values and purposes.

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2. Law is a presence of the social past. Law is an organizing of the social present. Law is a conditioning of the social future.

3. There are eight systematic implications of such an idea of the social function of law in general, and of international law in particular.

- (1) Law forms part of the *self-constituting* of a society. A society is a collective self-constituting of human beings as society-members, co-existing with their personal self-constituting as human individuals. International society is the collective self-constituting of all human beings, the society of all societies. International law is the law of international society.
- (2) The legal self-constituting of society (the *legal* constitution) co-exists with other means of social self-constituting: self-constituting in the form of ideas (the *ideal* constitution) and self-constituting through the everyday willing and acting of society-members (the *real* constitution).
- (3) Law is generated, as a third thing with a *distinctive social form*, in the course of the ideal and real self-constituting of society, but law itself conditions those other forms of constituting.
- (4) Law is a *universalizing* system, re-conceiving the infinite particularity of human willing and acting, in the light of the common interest of society.
- (5) Law is a *particularizing* system, dis-aggregating the common interest of society so that it may affect the infinite particularity of human willing and acting.
- (6) Law requires that society have adequate means for *determining the common interest* of society, in accordance with society's values and purposes. *Politics*, in the widest sense of the word, is the will-forming struggle in the ideal and real constitutions, the struggle to influence the determination of the common interest of society and to influence the making and application of law.
- (7) Law requires that society have *theories* which explain and justify law within social consciousness (the public mind) and within individual consciousness (the private mind, including the social consciousness of subordinate societies). Such theories reflect and condition society's values and purposes. They may be customary, religious or philosophical theories: for example, theories of revealed transcendence, charismatic authority, natural law, sovereignty, constitutionalism, naturalism. They are generated and re-generated in the public mind of society in the course of its ideal and real self-constituting.
- (8) Law thus presupposes a *society* whose structures and systems make possible the mutual conditioning of the public mind and the private mind, and the mutual conditioning of the legal and the non-legal. These two reciprocating and reinforcing processes offer a limitless dynamic potentiality for human self-evolving through social self-constituting.

## Law and Social Psychology

4. Society and law exist nowhere else than in the human mind. (1) They are products of, and in the consciousness of, actual human beings. But a society generates a social consciousness, a public mind, which is distinct from the private mind, distinct from

the consciousness of actual human individuals. Social consciousness flows from and to individual consciousness, forming part of the self-consciousness of each society-member. (2) The psychology of the public mind is a manifestation of the psychology of the private mind. The constitution of a society and the personality of a human person are both the product of human consciousness. Social psychology is a form, but a modified form, of personal psychology. But social consciousness functions independently from the private consciousness of every society-member, and is retained in forms (the theories, structures and systems of self-constituting society) which are an 'other' in relation to the 'self' of the self-constituting of any particular society-member. (3) Society wills and acts collectively, as the output of systems (including law-making systems) which aggregate the willing and acting of individual human beings. But the intervention of those systems creates a new mind-world, a new form of human reality, a new form of human world. The public mind is society's private mind. The public mind of international society is the private mind of the human species.

5. This peculiar relationship, separate but inseparable, between personal and social psychology means that all the systematic functions of personal psychology are present in social psychology, but functioning in a special way. For its own purposes and in its own way, society uses *emotion, memory, rationality* and *morality*. And society's use of these functions affects their functioning in the psychology of individual society-members. Public emotion, especially the emotion of the crowd, flows from and to private emotion. Society's collective memory, its so-called history, flows from and to private memory. Society's collective deliberations, using the self-ordering functions of the human brain, including language and logic, flow from and to our private deliberating. Society's self-regulating in terms of its values and purposes flows from and to our private self-regulating in terms of duty. Beyond the systematic functions of individual psychology, there is the power of unconscious consciousness, the residues of our biological inheritance and of our life-experience, which do not function systematically but which intervene in every aspect of our personal self-constituting and must intervene in every aspect of the collective self-constituting of society. Social consciousness is also a collective unconscious.

6. For individual human beings, the integrating of the processes of the mind in the moment-to-moment self-constituting of personality is an unceasing struggle. The struggle of self-integrating can lead to crises which may be seen as pathological, in the sense that they threaten the survival or general well-being of the person concerned, or of other persons. Society-members contribute their psychic states to social consciousness, including pathological psychic states. Society-members with exceptional social power may even impose their own psycho-pathology on the society they dominate. So it is that a society may experience episodes of social psycho-pathology, when a society may be said, in crude terms, to go mad; it may become alienated, with its potentiality of self-creating distorted by symptoms of self-wounding and self-destroying. Nowhere does social psycho-pathology reveal itself more clearly than in the society of societies, international society, where its symptoms can be human self-wounding and self-destroying on a massive scale.

7. Law, as a social phenomenon, corresponds to whatever is the ultimate self-integrating capacity of individual consciousness, that capacity which enables us to

pursue our personal survival and prospering in our unique existential situation, in the moment and at the place where our own systematic functioning, as body and mind, intersects with the systematic functioning of all that is not us, that is to say, the natural world and the human world of other people as individuals and as society. I am, therefore I am a legal system for myself. A society also has a unique existential situation, the point in time and space at which it intersects with the existence of the natural world, the existence of other societies, and the existence of its society-members. To exist as a society is to have a legal system with a view to the survival and prospering of the society as a whole and of the human beings who are its members. International society has a legal system with a view to the survival and prospering of international society as a whole, that is to say, the survival and prospering of all subordinate human societies and of all human beings.

## Law and Justice

8. Law is purposive human activity, a particular species of willing and acting, so that it is necessarily action of moral significance, action which is subject to moral duty and which gives rise to moral responsibility. Moral duty — the duty to do good and avoid evil — attaches to the participation of *individual human beings* in law-making, law-applying, law-enforcing and law-abiding. The moral situation of *society* is more problematic, since society acts through systems whose aggregative systematic output — surplus social effect, as we may call it — is greater than the sum of the individual human inputs, the surplus being the product, and the purpose, of the systematic process. Law is a surplus social effect of many systems within a society. The apparent consequence is that, since no human individual is responsible for the macro-product of social systems, there can be no moral responsibility for that product, including the macro-product known as law. Apparently, the social actual, and hence the legal actual, are necessarily right. This chain of reasoning, with its machiavellian implications, has been especially characteristic of the conceiving of the relationship among those forms of society which came to be known as ‘states’. So-called international relations seemed to be the more or less random aggregating of the aggregate output of the systems of those societies, so that the absence of potential moral responsibility was even more evidently the case between the states than within those states. It seemed also to follow that international law, even more than national law, was morally immune, since it was itself seen as a secondary surplus social effect of the morally immune relations between states, the content of those relations — so-called foreign policy — being itself the morally immune systematic product of the internal national systems.

9. *Cui bono?* In whose interest has it been to propagate such ideas? Machiavellism, the overriding of general moral duty by *raison d'état*, was well intentioned, in the sense that it was designed to define a special kind of moral duty (*virtù*) owed by ‘the prince’, by those with personal responsibility for government. Its paradoxical character, a morality of immorality, gave it a particular frisson, calculated to shock those with conventional moral ideas, especially the religiously conditioned. But it also gave an

impulse of self-justification and self-assertion to those who would have power, not merely over this or that Italian city-state, but over the great centralizing monarchies, giving a veneer of moral necessity to the arrogance of their absolutism.

10. Machiavellism was also a calculated negation of a long tradition which conceived of values that transcend the power of even the holders of the highest forms of social power. Those ideas — especially ideas of justice and natural law, but also all those philosophies which speak of ‘the good’ or ‘the good life’ — were transcendental and aspirational and critical in character; that is to say, they were conceived of as an *ideal* which could not be overridden or even abridged by the merely *actual*, and in relation to which the actual should be oriented and would be judged. The idea of the ideal makes possible a morality of society. It makes possible the idea that society’s systems, including the legal system, can have moral purpose at the systematic level, at the level of surplus social effect.

11. Within some national societies, an idea of the transcendental was actualized in the development of *constitutionalism*. It was found possible to conceive of a law-above-law which was nevertheless present within the same legal system. Appropriate *theories* were developed (especially social contract theory) to explain and justify the legal system, suggesting that the law itself had purposes, because the formation of society had purposes, and that the law had inherent limits — formal limits (the consent of the people through their representatives) and substantive limits (fundamental rights). In the national societies in question, machiavellism was negated by constitutionalism, and law was conceived as being something other than merely a manifestation of actual relations of social power. *Law* was made to co-exist systematically with its ideal of *justice*. Constitutionalism accompanied, and made possible, the development of an idea of the *public realm* — that is to say, a part of the social process in which legal powers are to be exercised only in the public interest. The holders of public-realm powers are thus immediate and active agents of the common interest of society rather than, as in the case of private-realm power-holders, indirect agents who serve the common interest merely by conforming to the law.

12. International society, however, remained a constitution-free zone. On the contrary, the controllers of the national public realms found that they continued to be *ancien régime* free agents, constrained only by natural necessity and the force of the actual, in a form of co-existence which was clearly not a society, with only the most crude of organizing systems (diplomacy, war), and with a legal system which, fortunately, seemed to them, and their acolytes, to lack most of the essential characteristics of their national legal systems, not least a transcendental constitutional structure. And international unsociety was evidently also a morality-free zone, in which moral discourse had only a marginal rhetorical or tactical function, and the only recognized ethical imperative was self-judging machiavellian princely virtue. For the controllers of the national public realms and their apologists, an international public realm without law or justice seemed to be a state of nature of the most exciting kind, in which the survival of the fittest is decided by an intoxicating mixture of urbane diplomacy and mass murder.

## Law and the Common Interest

13. Common interest is a society's self-interest, a self-interest which may conflict with the self-interest of society-members in their capacity as individual human beings, but which is in their interest in their capacity as society-members. Common interest is not merely an aggregation of particular interests. It is formed at the intersection between the ideal and the real, as society responds to its current and potential situation in the light of its continuing theories, values and purposes. It is an idea of society's enlightened self-interest formed in a society's public mind. A given society may contain conflicting ideas of its theories, values and purposes, conflicting ideas of its current and potential situation, and conflicting ideas about the relationship of the one to the other. Whether it is the whimsical will of a tyrant or direct consultation of the people or anything between, a society contains systematic means for resolving such conflicts; that is to say, *politics* in the widest sense of the word.

14. Other social systems are responsible for actualizing the common interest, including the dissemination of ideas and information with a view to the conditioning of social consciousness, educational systems with a view to conditioning the minds of the next social generation, action on the part of social institutions of all kinds in furtherance of the common interest. But it is, above all, a function of law to ensure that the willing and acting of society-members, including subordinate societies, serves the common interest. The law is capable of performing this function with wonderful efficiency.

15. Law is not, as so often supposed, a system of legal rules. Law is a system of legal relations. A legal system is an infinite number of interlocking legal relations forming a network of infinite density. A legal relation (right, duty, power, freedom, liability, immunity, disability) is a pattern of potentiality into which actual persons and situations may be fitted. It is a *matrix* which identifies persons and situations in an abstract form. It is an *heuristic* which connects aspects of those persons and situations to each other in a particular way, in isolation from the rest of their reality and the rest of social reality. It is an *algorithm* which triggers the operation of other legal relations when actual persons and situations are found to fit its pattern of potentiality.

16. Such a network of legal relations constitutes a parallel *legal reality* in which every possible aspect of social reality has a second significance, in which language has a legal meaning, persons have a legal status, natural and human events have a legal character. Actual human beings may be more or less unaware of the legal relations to which they are potentially parties. They may abide by the law, or violate the law, without knowing that they are doing so. And the law itself can never be known for certain. The content of a legal relation is as imprecise as the language in which it is expressed, sharing in the necessary imprecision of all language or purposefully choosing limited precision (with such terms as 'reasonable', 'good faith', 'equal protection', 'due process'). And the abstract form of the content of a legal relation necessarily allows for a wide range of interpretations when the question arises of its application to actual persons and situations, interpretations which may alter with the

identity of the interpreter and as a function of the time and context in which the interpretation occurs.

17. Notwithstanding the potential character of the legal relation and its limited certainty, and the ignorance of most people for most of the time as to the content of the law, the law gives to society a range of possible futures that society has chosen as being futures which would serve the common interest. When a person acts consciously or unconsciously in conformity with the law (exercises a power, claims a right, uses a freedom, carries out a duty...), that action, although it may involve a choice on the part of that person, and a self-interested choice, actualizes society's determination of its common interest. The law-conforming action of all society-members is the self-constituting of a society through law.

## The International Legal System

18. International law is the self-constituting of all-humanity through law. It is the actualizing through law of the common interest of international society, the society of all societies. The legal relations of international law organize the potential willing and acting of all human beings and all human societies, including the forms of society conventionally known as 'states'.

19. The international legal system contains three systematic levels:

- (1) international constitutional law;
- (2) international public law;
- (3) the laws of the nations.

20. *International constitutional law* is what some older writers called the 'necessary' law of nations. It contains the structural legal relations which are intrinsic to the co-existence of all kinds of subordinate societies. It confers on artificial legal persons, including the state-societies, the capacity to act as parties to international legal relations. It determines the systematic relationship between levels (2) and (3), and the horizontal relationship among the many laws of the nations.

21. *International public law* is the law of the intergovernment of international society. It is that part of international law which regulates the interaction of the subordinate public realms within the international public realm. The principal participants in the legal relations of international public law are the 'states', represented by their 'governments', that is to say, by the controllers of their respective public realms. 'States' are considered to be those societies whose internal public realms are recognized as capable of participating in the international intergovernment. International constitutional law determines the conditions of that participation and also the participation of other persons, on the basis of legal relations to which they are made parties (for example, intergovernmental institutions, or individuals and non-governmental bodies participating in international public-law bodies).

22. *The laws of the nations* are an integral part of the international legal system.

- (a) It is international constitutional law which determines the participants in the international legal system (for example, making a particular society into a 'state'), and determines the conditions of their participation.

- (b) The geographical and material distribution of constitutional authority among subordinate legal systems cannot be finally determined by those legal systems themselves, but only by a superordinate legal system, namely international constitutional law.
- (c) The content of the law of the subordinate systems may be subject to legal relations arising under international constitutional and public law; and those legal relations prevail, as a matter of international constitutional law, over the law of the subordinate systems.
- (d) Legal transactions arising under the law of a subordinate system may take effect outside the sphere of the constitutional authority of that system and interact with transactions arising under the law of another system. That interaction may be legally regulated, in the first place, under Private International Law (itself also a major part of the international legal system), but always subject to any applicable international constitutional or public law. The so-called global economy, for example, is the aggregate product of the actualizing of legal relations arising under the laws of the nations (contract law, corporation law, securities law, private international law, etc.) and the actualizing of legal relations under international constitutional and public law.

23. It follows that international public law is a joint product of both international constitutional law and national constitutional law. International constitutional law determines the legal relationship of the subordinate public realms. National constitutional law determines the legal status and powers of each particular state-society and its government. It follows also that the three levels of the international legal system are a hierarchy, with international constitutional law having systematic supremacy, and with international public law dominating the exercise of legal powers within the national public realms, including the powers to make, apply and enforce national law.

24. The international legal system, as a systematic totality, thus reconciles the respective common interests of all subordinate societies with the common interest of all human beings in the survival and prospering of the human species, one species among so many in a habitat shared by all.

## **The Making of International Law: (1) Customary International Law**

25. International law has been made in the form of customary law. Customary law is a form of law which arises out of the ideal and real self-constituting of a society as a particular kind of residue of the past, rather than through a formal law-making process in the present. Society thereby makes law for itself through a tacit legislator which is society itself, universalizing its experience of self-ordering.

26. Customary law, including customary international law, is the product of a *dialectic of practice*, as opposed to legislation, including international treaty-law, which



is the product of a *dialectic of ideas*. Society-members produce the conditions of their orderly social co-existence through the practice of orderly co-existence. Customary law is the presentation of those conditions in the form of law; that is to say, setting the terms of the future co-existence of society-members in the form of legal relations. It follows that the place of *consent* in the making of customary law is subtle. Clearly, it is not the specific consent of the subjects of the law. Customary law is not made by any specific act of will on the part of its subjects. Their assent to customary law (*opinio iuris*) is manifested, in the first place, in their participation in the society whose law it is. Secondly, it is manifested in their participation in the day-to-day struggle of social self-ordering, knowing that some aspect of that self-ordering may come to be universalized as law. Thirdly, it is manifested in their being party to, and relying on, the legal relations flowing from the existing state of customary law.

27. Customary law thus shares in the transcendental aspect of constitutionalism, discussed above, at least to the extent that it is systematically independent of the will of current society-members, especially current controllers of the public realm. Customary law may also be said to depend on a form of implicit 'social contract' theory, which finds the authority of the law in the hypothetical 'consent' of the subjects of the law, where consent is postulated as a corollary of their participation in the society in question, including its law-making system. To borrow a Hobbesian play on words, society-members are the 'authors' of customary law because they are the source of its 'authority'. Society-members in a customary law system are also Kantian universal legislators, in the sense that they know that the governing principle of their own willing and acting is liable to be universalized as a governing principle of legal relations applying to all society-members.

28. It follows also that there is no merit in that trend in international legal theory which supposes that states, as the subjects of customary international law, consent to its formation as if by some specific act of will, as if their participation were a voluntary act. The abusive use of the ideas of the 'natural liberty' of states, and hence the need for their 'consent' to any abridgement of that liberty, are a cynical misappropriation of some part of the ethos of revolutionary democracy. For the controllers of the public realms of old- and new-regime states, it was good to learn from Vattel (*The Law of Nations*, 1758) that the states were all 'free, independent, and equal', fortunate inhabitants of a Lockean 'state of nature', so that the making, judging and enforcement of the law were entirely in their hands. It might have been thought that such a voluntary theory of international law had reached its pitiful nadir in the decision of the Permanent Court of International Justice in the so-called *Lotus Case* (1927). But the intellectual decline has continued, reaching new low points in such ideas as: (1) that the formation of new rules of customary international law requires some actual assenting state of mind on the part of states, as if governments, let alone states, had determinable states of mind; (2) that states might unilaterally exclude themselves from the application of a new rule of customary international law, or even, when they first become members of international society, from the application of pre-existing rules; (3) that rules of international constitutional law about the limits on the treaty-making capacity of states (including so-called *ius cogens*) are the product of

an ad hoc expression of the will of states (say, in the Vienna Convention on the Law of Treaties).

29. The dialectic of practice which makes customary law includes ideas, but ideas as a form of practice. At any particular time, society's struggle of self-ordering takes the form of both a struggle of willing and acting and a struggle about the theories, values and purposes applicable to such willing and acting, including a struggle about what the law is and what it should be. It is possible to chart the development of international society over the last five centuries as a progressive self-ordering reflected in a corresponding development of customary international law. Each episode can be seen as a stage in a gradual process of international self-ordering at the level of *intergovernment*; that is, the interaction of the controllers of the national public realms.

*Public Order 1. The Possibility of Universal Law.* Modern international law (from 1500) began with a dialectic of practice which produced a fragile notion of the potentiality of universal international order from profoundly disordering diversity (the New World, the disintegration of Christendom), a dialectic in which powerful actors struggled using the weapons of powerful ideas (Christianity, civilization, law, reason, natural law, the law of nations, sovereignty, self-preservation and self-interest).

*Public Order 2. Diplomacy and War.* In the 16th century, the centralizing monarchies and the multitude of other forms of polity became self-conscious participants in an evolutionary game of survival, in which diplomacy and war were the instruments of competition and co-existence, as each national realm began to identify its self in opposition to the many others, and as it came to seem necessary and possible to imagine a 'law of war and peace' as a compendium of the minimal conditions of co-existence.

*Public Order 3. The Territorial Polity.* Violent competition in the appropriation of overseas territories and in relation to the control of local and distant sea-areas focused the struggle of ideas on the question of the physical limits of state-power. Physical frontiers, which had been uncertain and unstable, became an integral part of the defining of the selfhood of the polities, and customary international law developed into an externalized feudal law of landholding and the adjustment of relations between land-owners. The disintegration of Christianity meant that physical frontiers became mental frontiers (*Treaty of Augsburg*, 1555), and the dialectic of ideas within the dialectic of practice, which forms customary international law, came to be dominated by a dialectic of *reason of state*.

*Public Order 4. The Two Realms.* The idea of the intrinsic independence of the national and international realms was established before the period of seismic internal social change following the French Revolution. The dialectic of ideas soon freed itself from talk about 'natural law' as a universal quasi-legal and quasi-moral regime applying equally to both realms. The law of the co-existence of the 'states' came to be seen as a product of the mutual recognition of their right to determine the conditions of their internal self-ordering. With the development of the subjective identity of the 'nation', with its own personality and its own history, the international realm became derivative and residual in relation to the national

realm, with the controllers of the national public realms (governments) now behaving not only as sole agents of the public realms of the states but also as sole representatives of national charisma in the inter-national struggle to survive and prosper, a struggle in which diplomacy and war were still the primary instruments of social control. (It was at the end of the 18th century that the word 'diplomacy' came to be used to apply to the conduct of the formal relations between states.) The 'law of nations' or 'international law' (a neologism dating from early in the 19th century) was still a secondary socializing phenomenon. It was seen as the rules of the game of the externalized public realms, a pale shadow of national public law. But it was a social phenomenon of growing intellectual and practical substance, developing in complexity and density in step with the development of national public law.

*Public Order 5. The International Public Realm.* From the latter part of the 19th century, there began to appear, in the international realm, *externalized forms of national public realm management*. International institutional processes proliferated as simulacra of national constitutional processes — deliberative, administrative, arbitral. They took on systematic integrity and organic life, each a social system with its own constitutional structure and process, but systematically linked to the national systems, with the social outputs of the external systems flowing back into the national systems as social inputs (leading to legislation and administration and judicial decisions giving effect to decisions of the international systems). In this way, national processes were *communalized externally* to form an informal and rudimentary international public realm of ever-increasing complexity (of organization) and density (of outputs), and national processes began to be *co-ordinated transnationally* with national decision-making processes coming more and more to be conditioned by products of international decision-making processes. It began to be appropriate to see national public-realm systems as systematically integrated within an international public-realm system which had itself been formed from an external communalizing of the national systems. International constitutional law responded by acknowledging the capacity of international institutional systems to participate as such in international legal relations, legal relations with and in their own member-states and non-member-states (*ICJ Advisory Opinion on Reparation for Injuries*, 1948). International public law also expanded rapidly to include the law governing the intergovernmental public realm, including an international administrative law governing the internal and inter-se functioning of the international public-realm systems.

*Public Order 6. The Possibility of Universal Values.* The management of a public realm of a society reflects the theories, values and purposes of that society, given that it is itself an integral part not only of the real and legal self-constituting of society but also of its ideal self-constituting (para. 3(2) above). After 1945, the international public realm began to generate theories, values and purposes appropriate to its general nature as a public realm and its particular nature as an international public realm. They are ideas which flow out from and into national social self-constituting, in such a way that it began to be appropriate to see an emerging

process of ideal self-constituting even at the global level. As always, that process is inseparable from real self-constituting at the global level, as the controllers of national public realms bring vastly differing actual capacities to the dialectical struggle of idea-formation and law-making at the global level. The dialectical ideal struggle has been a struggle concerning the potential universality of particular ideas: human rights, the rule of law, public order, self-determination, distributive justice, global commons, environmental protection, democracy, public-realm crime. And it is also a struggle as to whether and how far such ideas are appropriate as the content of legal relations, both international public-law relations and legal relations under the laws of the nations as they are co-ordinated by international constitutional and public law. The reciprocating character of law as a social system (para. 3(8) above) means that the dialectic of idea-forming and the dialectic of law-making and the dialectic of real-world action have reinforced each other, together conditioning social consciousness (paras. 4–7 above), the social consciousness of all subordinate societies and the social consciousness of international society itself.

30. The current self-ordering of international society is a palimpsest, which includes all six layers of public order, in a cloudy confusion of atavism and progressivism. Customary international law is the legal form of the sedimentary self-ordering of a self-evolving international society.

## **The Making of International Law: (2) Treaty-Law**

31. Treaties are older than the idea of international law. Wherever polities have co-existed, the possibility of the inter-polity exchange of promises in ritualized form seems to have been present, even if, perhaps especially if, the promising parties do not regard each other as belonging to a single transcendental system of ideas, let alone of law. In the absence of a superordinate idea-system or legal system, the taboo-sanction for treaty-violation is determined by the respective idea-systems of the contracting parties — shame, ostracism, disrepute, reprisal, retorsion, purification, compensation. The social practice of treaty-making has continued from the days of the earliest recorded human history to the present day, more or less in isolation from the troubled development of international law in general. It is as if the controllers of the public realms of polities had treaty-making as an inherited and instinctive mode of behaviour, regardless of their attitude towards international law in general, and regardless of the familiar fact of human experience that a treaty successfully regulates inter-polity interaction until the day when one or other party chooses otherwise.

32. Within the history of national societies, there came a time when the increasing complexity and density of social relations made necessary a transition from customary law to legislation, from slow-motion law-making to instant law-making. The hand of the invisible systemic legislator began to give way to the very visible hand of the institutional legislator. King, council, senate, parliament. Doom, decree, statute. Each society generated appropriate institutional forms. Lacking a legislative institution, international society has appropriated the hallowed institution of the treaty as

its institutional legislator. As international society began to increase rapidly in complexity and density from, say, 1815, treaties began to perform a social function closely analogous to legislation in national legal systems. (The Vienna *Règlement* on diplomatic representation of 19 March 1815 is a striking early example, but the whole ethos of the Congress of Vienna was unashamedly legislative in character.)

33. In legislation, the dialectic of ideas dominates the dialectic of practice. The dialectic of ideas which is concealed within the dialectic of practice of customary law becomes the dominant form of the dialectic of practice, in the sense that the act of legislating reflects a specific purposive choice of a possible future for the society in question (para. 1(3) above), a specific purposive actualizing of the common interest of the society (para. 1(2) above), in accordance with the society's theories and in implementation of its values and purposes (para. 3(6) and (7) above). But legislated law is structurally the same as customary law, in the sense that it consists of legal relations, so that behaviour in conformity with legislated law is also necessarily behaviour which serves the common interest of society (para. 15 above).

34. The idea of the legislative function of treaties in international society necessarily raises two questions: (1) In what sense is the *common interest* of international society as a whole actualized in a treaty among particular members of international society? (2) In what sense is treaty-law subject to a will-forming process of *politics* in international society (para. 3(6) above)?

35. *Common interest*. A treaty is a disagreement reduced to writing (if one may be permitted to do such violence to an ancient definition of a contract). But so is legislation. The eventual parties to a treaty enter into negotiation with different ideas of what they want to achieve. Negotiation is a process for finding a third thing which neither party wants but both parties can accept. The making of legislation, at least in a society with an active system of politics, is a similarly dialectical process, by which conflicts of ideas and interests are resolved into a legal form which then re-enters the general social process as a new datum. A treaty is not the end of a process, but the beginning of another process. And so is legislation. The treaty and the law become a datum in the general social process, but it is a datum with a life of its own. The parties to a treaty, like the parties interested in the making of a legislative act, no doubt have different ideas about what has been fixed in the treaty, and different interests in relation to its interpretation and its application to actual persons and events (its particularizing — para. 3(5) above). But their degree of control over their own social situation is limited by the social effectiveness of the treaty or the law. The treaty and the law create a micro-legal system within the general legal system from which they derive their legal effect, and within the society from which they derive their social effect.

36. There is a common interest of international society as a whole in the creation of micro-legal systems of treaties, just as there is a common interest of national societies in the creation of the micro-legal systems of legislation. They are an integral part of a society's legal self-constituting, its self-ordering through law. Treaties are a sub-delegation of law-making power. The parties may make law for themselves, their legal capacity to do so deriving from international constitutional law, which may set formal

and substantial limitations on that capacity (for example: *ius cogens*, interaction with legal relations under other treaties). But the international legal system is a legal system which still contains a customary form of law, and treaties have a complex and subtle relationship to customary international law.

37. Treaty-law has three *meta-legislative effects*.

- (1) The first such effect is that treaties are an integral and important part of the *dialectic of practice* which generates customary international law. Within that dialectic, treaties may contribute to the formation of legal relations applying not only to their parties but also to non-parties.
- (2) The second meta-legislative effect is that treaties may create a *general legal situation* in which legal relations with non-parties are modified without their specific consent. This is the case where a treaty empowers a party to create a situation (say, a sea-area regime, or a regime of universal criminal jurisdiction, or an arms control regime, or a use-of-force regime, or an external trade regime) which cannot reasonably be applied on the basis of a discrimination between parties and non-parties. This is especially the case where the international regime is one which must be implemented within national legal systems, or where the international regime is an aspect of an indivisible conception of international public order. In such a case, the corresponding legal relations of customary international law must be understood as containing the power (of the party) and the liability (of the non-party) to create and to be affected by such a regime. It follows that the ruling of the International Court of Justice in the *Nicaragua Case* (1992), that the relevant customary international law co-exists with the provisions of the UN Charter, can only be regarded as preposterous.
- (3) The general-legal-situation effect is a particular instance of a general effect of treaty-law. Treaty-law breaks the *network of mutuality* which underlies customary international law. A customary legal system is a permanent negotiating of a social contract, the forming and re-forming of a legal basis of social co-existence from day to day, with a necessary and inherent deep-structural mutuality of legal relationships. When, as in the international legal system, the surpassing of customary law by legislation is not a surpassing by and for all members of society, the relationship of the two sources of law cannot be conceived either in terms of a lazy analogy with contract law or by a one-to-one correspondence with their relationship in a national legal system. The existence of treaty-law modifies the legally protected expectations of all members of international society, including non-parties to particular treaties.

38. Within the history of national societies, the ever greater complexity and density of social relations gave rise to the need for delegated legislation, and powers to make legislation are conferred, by legislative act, on persons or bodies other than the primary legislative institution, especially on the executive branch of government. Nationally, the volume of delegated legislation soon came to exceed the volume of primary legislation. It is also important to understand that society delegates a law-making function to countless forms of subordinate society, especially industrial and commercial corporations, which are micro-systems of self-legislation and

self-government. It is in the common interest of society that such micro-systems should pursue their self-interest under and in conformity with the law of society which actualizes the common interest of society as a whole.

39. With the development of the international public realm (para. 29: Public Order 5, above), the need for delegated legislation has been met by conferring legislative powers on international institutional systems. The volume of treaty-law long since exceeded the volume of customary international law. The volume of international delegated legislation probably now rivals the volume of primary treaty-law. And international society, like national societies, includes the activity of countless subordinate societies, other than the state-societies, not least industrial and commercial corporations acting outside the place where they are incorporated. Such societies are systems of delegated self-legislation and self-government under and in conformity with international law and the laws of the nations in which their activities take place.

40. Within national systems, it also became necessary to develop forms of para-legislative acts (so-called *soft law*, such as codes of practice, administrative rules, etc.), whose function is to control specifically the law-interpreting and law-applying behaviour of public-realm persons and bodies. They are not normally regarded as giving rise to legal relations to which the citizen is a party. Rather, they modify the application of pre-existing public-realm powers and duties in relation to the citizen. They have been held to give rise to 'legitimate expectations' on the part of the citizen that such powers and duties will be implemented in accordance with the soft-law provisions. Such a thing has now been found to be necessary also in the international public-realm. Multilateral and unilateral declarations, resolutions, final acts, memoranda of understanding, statements of principles, programmes, action plans — all such things have been developed organically to be something other than treaties, giving rise to legitimate expectations about the implementation of legal relations rather than themselves giving rise to legal relations. In those institutional systems where national public law and international public law are now functionally linked in the work of specialized international institutions, such para-legislative acts may especially affect the implementation of legal relations within national legal systems.

41. Within national societies, and now within international society, it also became necessary to confer a new kind of legal power on public-realm bodies. All legal powers include a double discretion (whether to exercise the power, what decision to take within the limits of the power). All legal powers include the potentiality of the modification of the legal situation of persons other than the power-holder. But what we may call *administrative-law powers* take these characteristics to a degree which almost gives rise to a difference of kind. Public-realm bodies take power-decisions within broad areas of discretion, sometimes formulated in the most general terms ('necessary in the public interest', 'with a view to the preservation of public order/international peace and security', 'in accordance with equitable principles', 'on a basis of non-discrimination', 'to give effect to the purposes of the present Act/treaty'). Although modern administrative law gives to courts a legal power to define and control the outer limits and the procedural aspects of such discretions, the

generality of their scope and the scale of their effects (perhaps, the whole population or all members of international society) give a sort of law-making power to public-realm bodies, including international institutions.

42. *Politics*. Politics seeks out public-realm power. Public-realm power seeks to surpass (*aufheben*) politics. The social struggle to control and influence the exercise of public-realm power (para. 3(6) above) arises most powerfully in relation to the making of law. The exercise of public-realm power, especially the making of law, is a sustained effort to resolve the struggle of politics into an act which defines and enacts the common interest of society and transcends particular interests. Treaty-law, like all law-making, is a by-product of politics. Treaty-law negates the politics which produces it. In the case of treaty-law-making, however, the role of politics is obscure and complex.

43. There are three phases in the making of treaty-law:

- (1) *Projection*. The internal political process of each participant generates its input into the negotiation (usually formalized as so-called ‘instructions to the delegation’) and then projects that input externally into the process of negotiation. The nature of the internal process is specific to each society and its constitutional structure. The process may itself involve complex inter-departmental negotiation within the public realm, and negotiation with parliamentary organs or relevant special interest groups.
- (2) *Negotiation*. Negotiation is dominated by potential treaty-texts, most often prepared in advance, and the crux of the negotiation is a search for ‘forms of words’ acceptable to all, or the relevant, participants. The passionate and formless world of politics is re-born as a world of words. Matters of great practical consequence, perhaps involving life and death on a great scale, are concentrated into the tiny mass of a few words, in a sort of ritualized trench warfare, in which big victories are measured in small gains of verbal territory.
- (3) *Re-entry*. The treaty-text produced by negotiation is taken back into the internal political process of each participant. In constitutional systems where the executive branch of government and parliament are systematically integrated, the final acceptance of the treaty may be relatively straightforward, politically and legally. Elsewhere, most notoriously in the United States constitutional system, the re-entry stage is a resumption of the projection stage, and the fate of the treaty text is as uncertain as that of any other executive-branch initiative.

44. The Wilsonian new-diplomacy ideal of ‘open covenants openly arrived at’ has not proved possible, even in the most apparently public of conference settings. (Of the Paris Peace Conference itself, Harold Nicolson, a member of the British delegation, wrote in *Diplomacy* (1939): ‘few negotiations in history have been so secret, or indeed so occult’.) The crux of a negotiation, as in the most traditional forms of diplomacy, is still located in confidential meetings of restricted groups of participants. A form of negotiation which has become common since 1945, and which may be entitled to be called a new form of diplomacy, is *parliamentary diplomacy* — large-scale conferences in which there is a projection of extra-parliamentary national politics, in the form of open-ended participation by persons and groups other than the representatives of the



national and international public-realms and where the rituals of diplomatic negotiation are overtaken by free-ranging debate of a broad political character, about ends and means, values and purposes. But, even in this form of negotiation, the last word as to the content of the treaty-law and its re-entry into the national legal systems remains with the controllers of the public-realms.

45. The making of treaty-law is accordingly anomalous in relation to national constitutional systems, in the sense that it brackets out of the national process a central part of the making of a form of law which is liable to become an important factor in national public-realm decision-making, or even to become part of the substance of national law. This bracketing-out means that normal national constitutional processes, including political accountability for executive-branch action, may apply in a disorderly way, if at all, to treaty-law-making. Treaty-law-making, a substantial and rapidly increasing part of the law-making of the international legal system, continues to share in the unreality of traditional diplomacy, a ghost-filled world of 'power' and 'national interest' and 'foreign policy', the world of war by other means. (It follows that nothing can be said in favour of the existence and the work of the International Law Commission, which manages to combine the unreality of the academy with the unreality of traditional diplomacy.)

## The Future of the International Legal System

46. The *aggiornamento* of international society means purposively bringing international society into line with our best ideas and highest expectations about society in general. At the beginning of the 21st century, such a thing seems at last to be a reasonable enterprise. It is an enterprise in which the re-conceiving of the international legal system is an integral part. It is also an enterprise which faces a series of formidable obstacles which we must identify if we are to overcome them.

(1) *The degradation of universal values.* The emergence of potentially universal values after 1945 (para. 29 above) suffered a deformation as the emerging values were subjected to almost-instant rationalizing, legalizing, institutionalizing and bureaucratizing. That is to say, they were corrupted before they could begin to act as transcendental, ideal, supra-societal, critical forces in relation to the emerging absolute statism of society, including 'democratic' society. They were also systematically corrupted before they could acquire a more clearly universal substance, so that they became vulnerable to charges of cultural relativism and hegemonism. And they were corrupted, finally, in the context of the so-called Cold War which was waged, at the ideal level, as a cynical disputation about general ideas, so that the 'winning' of the Cold War could be presented as a final validation of general ideas. It will not be easy to redeem the idea, the power, and the social function of transcendental values from such relentless degradation.

(2) *The hegemony of the economic.* In democratic-capitalist societies, experience over the last two centuries of the relationship between the economic development of society and its socio-political development (including the development of the legal system) suggests that there is a definite correlation between the two, but no

unequivocal correlation, either in point of time or in substance. Leading instances (the United Kingdom, the United States, Prussia, Japan, the European Union) show significant differences on the most critical of all points, namely, the post-Marxian questions of whether socio-political change is caused by economic development and whether the form of socio-political change is determined by the form of economic development. However, such questions have themselves been overtaken by a form of general social development which has led to the conceptual and practical dominance of economic phenomena over all other social phenomena.

The economy has become a virtual public realm. The ‘economy’ here means the socially organized transformation of natural and man-made resources through the application of physical and mental effort. In a capitalist society, private-interest economic activity is seen as activity also in the public interest. The primary function of management of the traditional public realm, where social power is exercised exclusively in the public interest, has gradually come to be not the service of some common interest of well-being conceived in terms of general values (say, justice or solidarity or happiness or human flourishing), but the maintaining of the conditions required for the well-being of the economy, including, above all, the legal conditions.

The global economy is the limiting-case economy, as the transformatory activity of the whole human race comes to be socially organized under an international legal system which is, in this context, dominated by the laws of the nations (para. 22 above). Functional economic high-values will dominate the development of the global economy, and hence presumably the further development of the international legal system, to an even greater extent than in national societies, so long as there is only a piecemeal international public realm and rudimentary international politics.

(3) *The poverty of politics.* When politics is seen as a general social process for determining the common interest (para. 13 above), then it is possible to make judgments about the way in which politics makes such determinations in particular societies or at particular times. Since early in the 19th century, institutionalized politics has been public-opinion-led and ends-oriented. There developed alongside such politics a public decision-making system (‘government’) which is rationality-led and means-oriented. The merit of a political system might be measured by the degree to which it allows for a rich debate about both ends and means and provides efficient systems for resolving the debate in the form of legal and other action.

Politics in the most socially developed national systems has recently degenerated into an impoverished debate within narrow dialectical limits, focused particularly on the manipulation of mass-opinion. At the same time, the professional controllers of the public realm (politicians and public servants) have acquired an unprecedented degree of de-politicized pragmatic power, corresponding to the urgency and complexity of the day-to-day problems of the internal and external management of such systems, especially the problems of economic management. It is the externalized form of this politics-free power that has been pooled in the intergovernmental institutions of the international public realm. And the controllers of the economic virtual public realm, although they may cause profound macro social effects by their private-interest micro-decision-making, are not themselves subject to the political and

legal public-realm control-systems, but devote substantial resources to managing the outcomes of those systems. The development of the international system, including the international legal system, is likely to be determined by such national developments. It is not likely that international politics will be better than the best of national politics, even if it ever comes to be better than the worst.

(4) *The poverty of philosophy.* Who killed philosophy? Was it democracy, with its capacity to process all questions of ends and means in the public forum? Or was it capitalism, with its own internalized high values, interpreted and applied in the market-place? The primary perpetrator was philosophy itself. While societies continued to embody the fruits of old-regime transcendental philosophy in the forms of their social organization, and continued to enact the fruits of old-regime philosophy in their self-understanding, their high values, and their purposes, a new-regime philosophy, strictly an unphilosophy or an anti-philosophy of terminal pragmatism, decreed that old-regime transcendental philosophy is impossible, an illusion, a fraud. It followed that the surpassing of old-regime philosophy on its own terms was impossible, and that the surpassing of existing forms of social organization and social consciousness was possible only to the extent that such surpassing arose within existing social processes. Democracy and capitalism have taken power over the possibility of their own negating, and hence over their own surpassing, and it is philosophy which has given a spurious charisma to their mental absolutism. Corrupted social consciousness fills the private minds of human beings everywhere with low values generated as systematic by-products of social systems which will soon be, if they are not already, beyond the redeeming power of higher values.

The reciprocating character of a legal system, formed by and forming the ideal and the real self-constituting of society (para. 3(2) above), means that a legal system cannot be better than the social consciousness that it enacts. If the role of philosophy in human self-surpassing and self-perfecting is not restored, perhaps with the assistance of non-Western participants in global social consciousness, then the development of the international legal system is condemned to be the impoverished product of an impoverished human consciousness.

(5) *The tyranny of the actual.* The actual seems inevitable because, if it could have been otherwise, it would have been otherwise. From the necessity of the actual it is a short step to the rationality of the actual (Hegel), to believing that what is is right (Pope), in the best possible world (Leibniz). But the human actual, including the social actual, is the product of human choice, that is to say, moral choice. To rationalize or naturalize the human actual is to empty it of its moral content, to neutralize it. It has been an effect, if not the original purpose, of the 'human sciences', over the last century and a half, to rationalize and naturalize the human actual, and so to make the actual seem to be morally neutral. We seek to assign 'causes' to things in the human world, such as slavery or trench warfare or genocide, knowing that causation is our category for understanding the non-human world. Conversely, we assign personality to reified ideas of particular social systems ('nation' or 'state' or 'class'), so that actuality-making choice is isolated from any particular human moral agent or agents, and then

we speak of the ‘intention’ of such a systematic process, knowing that a process cannot be morally responsible.

Nowhere has human de-moralizing been as relentlessly practised as in the international realm, the imaginary realm inhabited by ‘states’. It is practised by those who act within that realm and by those who study it. The external aspect of government is still conducted in pursuit of what is still called ‘foreign policy’ through the means still known as ‘diplomacy’, old-regime games as anachronistic as real tennis or prize-fighting. And those who study such things still seek to uncover the rules of such games, as if they were studying the behaviour of alien life-forms, as if their bizarre ideas of the human actual were the hypothetical rationalizing of some part of the natural world.

The meaning and the measure of human progress are difficult to establish. A fair general judgment might be that material progress has not been matched by spiritual progress. It also seems right to say that such human progress as there has been, over the last several thousand years, has been due to three strange accidents of evolution, or gifts of God: rationality (the capacity to order our consciousness); morality (the capacity to take responsibility for our future); and imagination (the capacity to create a reality-for-ourselves). Using these capacities, we found within ourselves another capacity, the capacity to form the idea of the ideal — the idea of a better human future which we can choose to make actual. The ideal has been the anti-entropic and anti-inertial moving-force of human progress, of human self-surpassing and self-perfecting. To overcome the tyranny of the actual, to overcome the ignorant and infantile belief that the actual self-organizing of humanity is necessary and inevitable, we need only recall and recover our extraordinary power constantly to re-conceive the ideal, in order yet again to choose to make it actual.

## The New Paradigm

47. The new paradigm of the international legal system is a new ideal of human self-constituting. It has three leading characteristics. (1) The international legal system is a system for dis-aggregating the common interest of all-humanity, rather than merely a system for aggregating the self-determined interests of so-called states. (2) The international legal system contains all legal phenomena everywhere, overcoming the artificial separation of the national and the international realms, and removing the anomalous exclusion of non-governmental transnational events and transactions. (3) The international legal system, like any legal system, implies and requires an idea of a society whose legal system it is, a society with its own self-consciousness, with its own theories, values and purposes, and with its own systems for choosing its future, including the system of politics.

48. The idea of international society, the society of the whole human race and the society of all societies, takes its place at last, centuries late, within human self-consciousness, and international law finds its place at last, centuries late, within the self-constituting of international society; that is to say, as an essential part of the self-creating and the self-perfecting of the human species.