The Constitution of International Society

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It is hardly novel to speak of the constitution of international society. The League (or *Société*) of Nations had the Covenant as its constitutive instrument. Nevertheless, the term 'international society' has a decidedly rhetorically flavour, often used interchangeably with terms like 'international community' and 'family of nations'. For some time, scholars have favoured 'order', as in 'international legal order'.[1] In the field of international relations, most scholars in the United States posit a Hobbesian state of anarchy among states, while some writers in Britain have sought to redeem the idea of an international society by references to Grotius and Vattel.[2] Recent developments in theory present an opportunity to reconsider what might be meant by speaking of international society, and suggesting that it has a constitution. Philip Allott has recently done just this in the context of proposing 'a universal theory of human society'.[3] Allott's work and the pages to follow share some of the same sources of inspiration. They differ, however, in one decisive respect. Allott claimed that a society – any society, including international society – '*is not a thing but a process*'.[4] I claim that any society, including international society, is a thing *and* a process.

Scholarship is also a thing and a process, a series of texts and, in a familiar simile, a conversation enacted through texts. The conversation is public. Participants imagine an audience and load their texts with interlocutors formed by reference, conscious or not, to other texts. Conversations within texts spur the production of further texts, the texts themselves becoming turns in a conversation. All such

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1 Cf. Onuf, 'International Legal Order as an Idea', 73 *AJIL* (1979) 244.

2 Notably H. Bull, *The Anarchical Society: A Study of Order in World Politics* (1977), who managed to sow considerable confusion by conflating (as in the title of his book) all three terms – anarchy, society and order.

3 P. Allott, *Eunomia: A New Order for a New World* (1990) page xxiii.

4 Ibid., 39, his emphasis.

conversations exhibit identifiable structures – affirmation or negation by repetition, argument by point and counter-point, demonstration followed by confirmation or qualification, expansion through illustration, development through clarification – typically compounded in complex patterns. Through these conversations causes are promoted, allies secured, empires built, egos gratified, scores settled, reputations made and, most of us would like to think, knowledge advanced.

The audience imagined for this essay is the small but growing band of scholars who find international legal theory intriguing, along with the few theorists of international relations whose sympathies are Grotian, Vattelian or (as in my own case) Kantian. Formed from many other texts, the essay's interlocutors include a number of its intended auditors, some of those theorists of international relations with Hobbesian inclinations, and great figures (for example, Durkheim, Kelsen) from other broadly configured, long-lasting and much admired conversations. The conversational legacy of many other figures join Grotius, Hobbes, Vattel and especially Kant as a formless and, for the most part, nameless presence.

The essay repeats a number of propositions drawn from other texts and refutes some others. These propositions are organized around four themes – theory, rules, constitution, society – each naming a section of the essay, which proceeds through argument, demonstration and illustration. Yet the essay's structure most of all reflects an emphasis on clarification – of constitution in relation to rules, of rules in relation to society, of society in relation to constitution – for the purpose of developing a minimal account of international society. In four further sections the essay then returns to each theme to develop an account of international society's constitution and thus a fuller account of international society itself. The point of this structure is to send the essay and its audience spiralling ahead, just in the way we tend to think the advancement of knowledge should proceed. As subsequent texts continue the spiral, the process of scholarship cumulatively bears on a much larger process – the constitution of international society – of which, at any moment, it is only a modest part.

I. Theory

In recent years the study of international law has seen a remarkable florescence of theoretical scholarship, much of it critical in temper.[5] The most striking subject of the new scholarship is doctrine. Traditionally theorists talked about what people say in the name of law. Within each theoretical tradition there developed 'a meta-

5 M. Koskenniemi's *From Apology to Utopia* (1989). See also a review of this book by Onuf, 84 *AJIL* (1990) 771; Simma, 'Editorial', 3 *EJIL* (1992) 215; A. Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (1986); D. Kennedy, *International Legal Structures* (1987).

language *about* law, as distinct from the technical language *of* law...'.[6] Now theorists talk about the way we talk about law. Critical of all theoretical traditions, they develop a meta-language *about* theory on the premise that we are talking about the way we talk when we think we are talking about, and acting in, the world.

Much the same may be said of the study of international relations. Lacking the centuries-long pedigree of international legal scholarship, this field has seen a great deal of theoretical discussion, mostly divisive, over the several decades of its history.[7] Recently, however, much of this discussion has turned sharply critical.[8] On the premise that theories about the world are not what they claim, 'meta-theory' has made an entrance.[9] Some of the new, critically-oriented work in international law and international relations effectively sabotages the conventional separation of these two fields of study as substantially unrelated theoretical domains.[10] We should expect no less from recent challenges to received traditions.

International law and international relations are hardly alone in the turn to theory. It is tempting to blame, or credit, academic fashions: theory is yet another novelty; rampant empiricism and naive scientism have finally run their course. Yet something more is needed to account for a movement so pronounced in so many fields of study.[11] The *world* as (we think) we know it must somehow be implicated. This world is neither the natural world as such nor the sum of every single person's

6 McDougal, Lasswell & Reisman, 'Theories about International Law: Prologue to a Configurative Jurisprudence', in M. McDougal & W.M. Reisman (eds), *International Law Essays: A Supplement to International Law in Contemporary Perspective* (1981) 53.

7 K. Holsti, *The Dividing Discipline: Hegemony and Diversity in International Theory* (1985); Y. Ferguson and R. Mansbach, *The Elusive Quest: Theory and International Politics* (1988).

8 Contrast R. Keohane (ed.), *Neorealism and Its Critics* (1986) with J. Der Derian and M. Shapiro (eds), *International/Intertextual Relations: Postmodern Readings of World Politics* (1989); 'Speaking the Language of Exile: Dissidence in International Studies', Special Issue of *International Studies Quarterly* (1990) 259.

9 Wendt, 'Bridging the Theory-Meta-Theory Gap in International Relations', 17 *Review of International Studies* (1990) 383. Cf. R. Walker, *Inside/Outside: International Relations as Political Theory* (1993) 182: 'Whether in relation to culture, class or gender, to the demands of security or the possibilities of equity, a critique of modern theories of international relations ... must lead to very difficult questions about principles and aspirations that presuppose a nice, tidy world of Cartesian coordinates, at least as a regulative ambition'.'

10 F. Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989); N. Onuf, *World of Our Making: Rules and Rules in Social Theory and International Relations* (1989); Allott, *supra* note 3. See also Scobbie, 'Towards the Elimination of International Law: Some Radical Scepticism about Radical Scepticism', 61 *BYbIL* (1991) 340, 361 who implies that Koskenniemi, *supra* note 5, and Kratochwil have done so perversely. They 'maintain that international law somehow isn't; Mr Koskenniemi eliminates it as a category whereas Professor Kratochwil reduces it to a style of argument'.

11 In English language scholarship, this movement appeared in many fields of study well before its arrival in international law and international relations. See illustratively H. White, *Metahistory: The Historical Imagination in Nineteenth Century Europe* (1973); R. Bernstein, *The Restructuring of Social and Political Theory* (1978); Q. Skinner (ed.), *The Return of Grand Theory in the Social Sciences* (1985); D. Fiske and R. Shweder (eds), *Metatheory in Social Science: Pluralisms and Subjectivities* (1986). The current literature is voluminous beyond reckoning. The influence of Continental scholarship on this movement suggests that less 'disciplined' or 'scientific' Europeans never turned away from theory.

experience. Instead it is the *modern* world, the world of *our* experience, the world we moderns have made for ourselves. Wherever the turn to theory, and especially the quest for meta-theory, there we find talk of modernity in crisis. Two camps are discernible. One is late-modern. It takes the Enlightenment project of universal reason, individual moral autonomy, representative political institutions, technical rationalization and material progress as flawed, egregiously perhaps, but not beyond the possibility of reconstruction. The other camp is post-modern. It takes the Enlightenment project as misconceived, terminally flawed, unworthy of redemption and perhaps already ended.

At this juncture I wish to affirm my late-modern allegiances. I believe that the Enlightenment project can only be salvaged by its reconstruction from the ground up. Such an undertaking requires a reconsideration of modernity's putative grounding while defending the possibility of grounds. These claims are ontological in the first instance, and thus they are self-consciously meta-theoretical. Elsewhere I call my project 'constructivism' to indicate my belief that individuals and society continuously constitute each other through the medium of rules, and that rules depend on the performative power of language.[12] So conceived, constructivism complements the Enlightenment belief in the power of language to instantiate reason and qualifies the belief in the power of language to represent the world as it is.

II. Rules

Whether late-modern or post-modern, involved in the development of a meta-language for theorizing or not, critical theorists in international law and international relations tend to view social reality, like critique, as a process. Yet the preference for process over structure, like criticism of modernity, is hardly new. The great antinomies of order and change, classicism and romanticism, positivism and historicism, have always structured the manifold processes that constitute the modern world as we know it. Modern international legal theory exemplifies this large structure.

Consider, for example, the critique that Myres McDougal and his associates performed with respect to 'the vast legacy of past theories about international law', which they organized into six 'frames'. First is the 'non-law' frame. Its theorists associate law with certain 'structures' not to be found in international relations. Process prevails. The next frame holds the opposite. Natural law theorists sever law from 'social process', but in this case structure prevails. Next is the historical frame, which understands 'the relation of law to process' but fails to see this relation as a two-way street. Instead, process prevails. Thereupon follows the analytical frame, or positivism, so favoured by contemporary international lawyers. Analytical theorists

12 Onuf, *supra* note 10, ch. 1.

disregard 'the relation of social process and authoritative decision' as a matter of 'conscious choice'. The structure of 'fixed rules' dominates their attention.[13]

The last two frames are 'distinctly modern creations', as indeed is positivism – 'products of the 19th and 20th centuries'. They are the 'sociologistic' frame, and 'limited factor analysis' associated with empirical social science. Sociologically oriented theorists focus on 'why and how the "law" comes about' but neglect 'the ends and consequences of that process'. Limited factor analyses disaggregate 'world social process' into combinations of variables.[14]

Switching back and forth from structure and process, rules and context, McDougal and associates could tell their story of international legal theory in distinctly modern terms. First presented, and quickly repudiated, is a theoretical orientation that denies the 'social reality' of the modern world.[15] The story then presents a chronology of modernity by starting with naturalism, moving on to historicism, followed by analytical positivism and concluding with the contributions of social thought and several social science disciplines.

Of course this story is simplified and, in the process, liberties are taken with chronology. Although the non-law position comes first, it has a place near the end of the story. This century's excesses of violence and inhumanity raise unmistakably modern doubts about the efficacy of international law. Early positivism is a response to naturalism, not the historical school. Only gradually, with the emergence of coherent doctrines about the subjects, sanctions and sources of international law, did positivist preoccupation with structure supersede an initial concern for the modalities of state practice.[16] Nevertheless, the story is familiar and satisfying because it sees international legal theory not just as an alternation between the preference for structure and the preference for process, but as a spiral of increasingly refined positions and thus of advancing knowledge. By telling the story, McDougal and associates set the stage for their own contribution to theory.

This they call 'configurative jurisprudence'. It is emphatically oriented to process and context, as are the two frames preceding it. It differs from them by being inclusive and systematic and therefore seeks to supplant them in confronting analytical positivism and its preoccupation with rules. Such an ambition enables the rest of us in the modern fold to tell an even simpler story. On the one hand we find Kelsen and the analytical tradition; on the other McDougal and configurative jurisprudence. One ignores social process, the other ignores rules as things constituting society as a thing. In the collision of these irreconcilable points of view are the makings of more sophisticated positions, reconceiving structure and process

13 *Supra* note 6, at 60, 61, 74, 91, 93.
14 Ibid., at 106, 107, 121.
15 Ibid., 64.
16 Onuf, 'Global Law-Making and Legal Thought', in N. Onuf (ed.), *Lawmaking in the Global Community* (1982) 1, 6 et seq.

so as to account for the critiques on both sides without repeating the errors of each.[17] Knowledge advances as modernity ineluctably spirals ahead.

It is stories like these that post-modern theory challenges. It does so first by pointing out that the story is just that – a story – and second by mocking the story's happy ending. Instead of an advancing spiral, the post-modern critique sees an argument without end. The repetition of positions only seems to be about structure and process. Apologists for existing rules face reformers who would commandeer the legal process. Planners of a new world of better rules face defenders of the way the world already works. The story is about itself and thus its tellers. It is not about the march of reason; it is about the fears and fantasies of those who profess to reason.

Post-modern theory goes further. There are only stories and they are only about themselves and their tellers' preoccupations. Stories about international legal theory, like most legal and political talk in the modern world, relate to a single, controlling argument. Behind the contradictions and disguises is 'the liberal doctrine of politics'. Modernity is but a running argument over the practical implications of liberal ideas. Are the 'formally neutral and objectively ascertainable rules' implied by the rule of law even possible? Are freedom and order 'compatible notions'?[18]

Where modern theory finds rules, post-modern theory puts texts. Social process is discourse by various means. Yet texts contain rules, and rules contain texts. Discourse depends on the rules that discourse produces. Rules and the choices they afford connect arguments over liberal premises to people's practical concerns. Post-modern scholars err in equating what scholars do as scholars with what everyone does all of the time. People can and do argue. They must deal with rules.

Dealing with rules prompts people to talk about reasons for following them, and involves them in the many arguments to which rules relate. Nevertheless, all such talking must in the first instance refer to rules *as if* they exist apart from the reasons and arguments they elicit.[19] By virtue of such talk, rules do exist – not just as inferences, but as things, however protean or transitory. No differently, the people doing the talk also exist as agents who (according to the rules) are in a position to make choices afforded by rules. By making, following and talking about rules people constitute the multiple structures of society; through such rules societies constitute people as agents.

17 R. Falk, *The Status of Law in International Society* (1970) 41 et seq.; Onuf, *supra* note 1, 252 et seq.

18 Koskenniemi, *supra* note 5, 52 et seq., quoting 52, 53.

19 'Mandatory rules', as opposed to rules of thumb, 'furnish reasons for action because simply by virtue of their existence *qua* rules, and thus generate normative pressure even in those cases in which the justifications (rationales) underlying the rules indicate a contrary result'. F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (1991) 5.

III. Constitution

The co-constitution of people and societies is a continuous process. Rules are central to this process because they define agents in terms of structures, and structures in terms of agents, but never definitively.[20] As rules change in number, kind, relation and content, they constantly redefine agents and structures, always in terms of each other. As Anthony Giddens noted in his systematic formulation of the position taken here, 'all rules are inherently transformational'.[21] In other words, all rules perform a constitutive function all the time. The usual view has rules performing a regulative function. Indisputably they do. 'All social rules have both constitutive and regulative (sanctioning) aspects to them'.[22]

So conceived, rules make constitution a comprehensive process yielding constitution as a general condition. Society is coextensive with its constitution. Yet societies have constitutions in a more limited sense: they have rules giving them identities and direction. These rules are commonly held to differ fundamentally from other rules. More abstractly, but incorrectly, rules are said to be either constitutive or regulative.[23]

Even if all rules are always constitutive and regulative, some degree of functional specialization among rules is not only possible but likely. A few rules are disproportionately weighty in constitutive effect. This conclusion also holds when process, not rules, is the point of reference. Thus McDougal and associates comprehensively describe a 'world constitutive process' regulating 'public order' decisions. The latter are 'specialized to the shaping and sharing' of community values. 'These distinctions, between constitutive and other decisions, are matters of relative emphasis, not exclusion'; each performs the others' function 'in varying degrees'.[24]

Ever since Durkheim, sociologists have tended to link societal development to the degree of functional differentiation. By implication any society lacking an identifiable constitution is so rudimentary or arrested in its development that it hardly warrants description as a society. Most scholars in the field of international relations hold this view. The 'international system' lacks functional differentiation, not to mention a constitution. Instead of an international society, there is anarchy – a collection of autonomous, self-interested actors whose relations are shaped only by the distribution of their material capabilities. In this system rules reflect incidental accommodations to and positional implications of a more or less fixed distributive

20 A. Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (1984) 5 et seq.; Onuf, *supra* note 10, 52 et seq. See M. Archer, *Culture and Agency: The Place of Culture in Social Theory* (1988) 72 et seq., for a critique of this position as 'central conflation'.

21 *Supra* note 20, at 17.

22 A. Giddens, *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis* (1979) 66.

23 For a critique of the way philosophers have handled matters, see Onuf, *supra* note 10, at 51-52.

24 McDougal, Lasswell & Reisman, 'The World Constitutive Process of Authoritative Decision', in M. McDougal & W.M. Reisman (eds) *supra* note 6, at 192. Cf. Schauer, *supra* note 19, at 7.

pattern.[25] Thus understood, rules are the ontological debris of international relations.

I reject every element in this view. In constructivist terms, the international system must be a society insofar as it is constituted by the deeds of many individuals, themselves constituted as agents. This process of constitution depends on rules, without which deeds have no social meaning, and some of these rules form what can only be called a constitution.

IV. Society

At least in the United States, the great majority of scholars in the field of international relations assiduously avoid any mention of international society in the interest of 'realism'. Anyone who does not courts dismissal as a naive exponent of ideas decades, even centuries, out of date – as Wilsonian 'idealist', Lockean liberal or Grotian legalist.[26] Since the mid-1970s, however, many scholars have concerned themselves with 'international regimes'. Mistakenly thinking this was a new idea (international lawyers had long employed it) and faced with unavoidable evidence that rules abound in international relations, they seized an opportunity to reconsider matters long out of fashion.

Almost immediately there emerged what can only be called a movement, herein called 'the regimes movement'. In 1982 the movement's principals published a collection of essays clearly intended to legitimize the movement and stabilize its terms of reference.[27] Not surprisingly, the group's working definition of international regimes, as presented by Stephen Krasner, has now become standard:

> Regimes can be defined as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations.[28]

Krasner's definition assumes that any rule set corresponds to 'a given area of international relations'. To simplify and generalize this definition, principles, norms and the like 'give' any area of social (not just international) relations what observers

25 See preeminently K. Waltz, *Theory of International Politics* (1979).

26 For evidence of a nascent reaction to the hegemony of Hobbesians in the field of international relations, see C. Kegley (ed.), *Realism and the Neoliberal Challenge: Controversies in International Relations Theory* (forthcoming).

27 S. Krasner (ed.), 'International Regimes', special issue of 36 *International Organization* (1982).

28 Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', ibid., 186. Intellectual anarchy in the field of international relations, at least in Oran Young's judgment, makes this 'apparent definitional consensus ... a remarkable achievement...'. *International Cooperation: Building Regimes for Natural Resources and the Environment* (1989) 194-195. In my judgment deference to opinion leaders makes this an unsurprising development. See generally I. Sperber, *Fashions in Science: Opinion Leaders and Collective Behavior in the Social Sciences* (1990).

may take to be its objectively 'given' character.[29] States are regimes. The principle of sovereignty gives the state as a large, internally differentiated ensemble of social relations its evidently sharp boundaries. Differentiation within regimes yields sub-regimes, each with an observable 'area' of operation and degree of autonomy. Formal nesting of regimes has long been recognized.[30]

Societies are congeries of regimes. The same may be said of international relations. Obviously regimes stand in complex relation to each other, those relations themselves constituting regimes. Society is thus a general and inclusive term for that regime giving any observer a frame of reference. International society is nothing more than an inclusive regime, within which are nested all international regimes, themselves constituted from the relations of states and other well-bounded regimes.[31]

V. Rules, Again

As defined, regimes resemble grab bags, stuffed with this and that. Krasner's terse definitions of principles, norms and the rest fail to identify what a regime's constituent elements might have in common or to differentiate them systematically. As for what they have in common, Friedrich Kratochwil has noted that principles, norms and rules all possess 'prescriptive force', as indeed do decision-making procedures.[32] They all take the form of prescriptive statements. As for their differences, Krasner presented his list of any regime's contents in what appeared to be descending order of generality. Kratochwil justly remarked that the differentiating criterion of generality-specificity, taken by itself, points 'to a certain conceptual impoverishment'.[33] A second such criterion – the degree to which prescriptive statements are explicit – is acknowledged in Krasner's basic definition but never elaborated.

29 Onuf, *supra* note 10, at 144-145; also see R. Marlin-Bennett, *Food Fights: International Regimes and the Politics of International Trade Disputes* (1993).

30 H. Kelsen, *General Theory of Law and the State* (1961) 363 et seq.

31 Cf. Young, *supra* note 28, at 13: 'International orders are broad, framework arrangements governing the activities of all (or almost all) the members of international society over a wide range of specific issues.' One of the few scholars in the United States at least willing to mention international society, Young never made clear how it differs from an international order, which is his preferred construct for conceptual purposes. Nor is it clear how orders and regimes differ conceptually. That the former are 'framework arrangements' and the latter 'more specialized arrangements' may be taken to suggest that, as a matter of functional specialization, an order's rules are predominantly constitutive and a regime's rules predominantly regulative.

32 *Supra* note 10, at 57. They 'are employed not to reflect the world but to apply *pressure* to it'. Schauer, *supra* 19, at 2, defining 'prescriptive rules'. Emphasis in original.

33 Ibid. Krasner separated principles and norms from rules and procedures by holding the former to be 'basic' to a regime's identity. Here the property of generality is related to functional specialization, yielding change of regime versus change in regime as unproblematically separate categories. Presumably large changes in the content of regulatively-oriented rules and procedures

I would reformulate the second criterion as degree of formality,[34] and I suggest that prescriptive statements enjoying some considerable degree of formality and institutional support are *legal*.[35] Principles and procedures are capable of being legal no less than rules – they *are* rules respectively of great generality and specificity. Norms of any durability and importance are subject to acknowledgement and support such as to make them law, specifically customary law. Furthermore, legal discourse tends to use the terms 'norms' and 'rules' interchangeably.[36] As prescriptive statements, principles, norms and procedures all take the linguistic form of a rule, as that term is conventionally defined by philosophers.[37]

Rules describe some class of actions and indicate whether these actions constitute warranted conduct on the part of those to whom these rules are addressed.[38] They are 'prescriptive generalizations'.[39] Within the broad reach of this definition, rules may be differentiated by reference to what they *are*: rules are statements of greater or lesser generality and formality, law or not, as suggested above. Or rules may be differentiated by reference to what they *do*: as statements indicating what kind of conduct is warranted, rules tell people what to do and, simply and succinctly, how to do it. This is because rules always and necessarily derive from performative speech – utterances through which people accomplish social ends directly. The primary unit of performative speech is a speech act. Like rules, speech acts convey propositional content (what to do) and indicate to some hearer an appropriate response to whatever the speaker proposes (how to do it).

Such acts take the generic form, 'I hereby [verbs such as declare, demand, promise] that [propositional content]'. Because people respond to these acts with their own performances, not always spoken, the pattern of speech acts and related performances constitute those practices that make the material conditions and artifacts of human experience intelligible. In so doing, the pattern of speech acts endows practices with normativity, giving rise to rules which, in synopsizing that pattern, fix preferences and expectations and shape the future against the past.

Speech acts fall into three, and only three, mutually exclusive categories for such constitutive purposes. They are assertive speech acts (I state that...), directive (I request that...), and commissive (I promise that...). Deriving from them are

allow us to infer correlative changes in constitutively-oriented principles and norms. Krasner, *supra* note 28, at 187-188.

34 Kratochwil also hinted at such a criterion. *Supra* note 10, at 57. Formality means scrupulous adherence to prescribed forms. Implied is a 'sacralizing mark,' such as writing conferred when few wrote. M. Foucault (C. Gordon (ed.), *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (1980) 127.

35 See further Onuf, *supra* note 10, at 136 et seq.

36 For fuller discussion see ibid., at 129-130.

37 Ibid., at 78 et seq.

38 This definition is adapted from M. Black, *Models and Metaphors* (1962) 208. See also Onuf, *supra* note 10, at 78 et seq.; the following pages draw liberally from ch. 2, 4.

39 Schauer, *supra* 19, at 25 et seq. For Giddens, rules are 'generalizable procedures'. *Supra* note 20, at 21.

categories of rules, also three in number, and fully independent of each other. I call them instruction-rules, directive-rules, and commitment-rules.[40]

As the term suggests, instruction-rules inform their audience of states of affairs and the likely consequences of disregarding that information. The instruction-rule, 'wash before meals', is a useful example. The context of this instruction is immediately evident. Not washing is a bad practice because it may result in illness or social offense. When instruction-rules are general, formally stated, and, more likely than not, connected to people's larger ethical concerns, we recognize them as principles. The Puritan adage, 'Cleanliness is next to godliness', is one such principle, which may well result in the ruled practice of washing 'religiously' before meals. At the other extreme of specificity and informality, the instruction-rule, 'wash before meals', may be one of innumerable instructions constituting the code of comportment by which most adults in the modern world conduct themselves.

When a parent says to a child, 'Dinner's on; wash your hands', there are two speech acts to which the child responds. One asserts a state of affairs. The second is directive. The child knows that when certain conditions operate, such a directive requires a particular response, with specific, known consequences likely to follow any response. Complying with the request usually results in a pat on the head, peace in the household, dessert. Choosing not to comply risks a reprimand, a negative response to the child's next request, a meal delayed while hands are washed. The parent's directive invokes a known rule, the model of which is the familiar one of criminal law backed, as Durkheim noted, by 'repressive' or negative sanctions.[41] Current scholarship would add positive sanctions, or inducements, to the equation without changing its character. Anyone encountering the linguistic formulation, 'wash before meals', knows with considerable assurance whether a rule, or even a law, is at stake, or merely a speech act formulated for that one occasion, and whether that rule, legal or not, is an instruction or a directive.

Commitment-rules may not be so easily recognized in every instance. They derive from mutual promising and are often left implicit. When promises are broken, however, the rule is evidenced by calls for restitution, or 'the return of things as they were...'.[42] For Durkheim, all 'juridical rules', except for penal law, fall into this category: 'civil law, commercial law, administrative law and constitutional law,...'.[43] While not all of the rules in these large bodies of law are commitment-rules, certainly the most characteristic of them are.

The model situation involving commitment-rules is a contract, including of course any putative social contract, in which rights and duties are assigned. Rights

40 Much of this paragraph closely paraphrases Onuf, *supra* note 10, at 183-184.

41 E. Durkheim, *The Division of Labor in Society* (translation) (1964) 69.

42 Ibid.

43 Ibid. Civil law should not be taken to exclude common law in this context. The conventional distinction between civil law and common law refers to the source of their legality (formal statement) – legislation and authoritative precedent respectively – and not their source in performative speech. Indeed, commitment-rules comprise the bulk of the common law.

and duties formalize the implications of ruled promising, sometimes to the extent that rights are held to be inalienable or inherent. By definition rights and duties are formally symmetrical – one's right is equally and necessarily another's duty. The rule itself is contained in this formal, reciprocal relation, which, as an empirical matter, rarely distributes consequences symmetrically.[44] Rights may entitle their holders to receive particular benefits. Alternatively, rights may empower their holders to act in particular ways with respect to designated others.[45] The latter then have the duty not to interfere with the exercise of such powers.

Commitment-rules granting powers constitute agents who act in support of rules directing other people to act in specified ways. This is a general pattern. Principles are more likely to meet with principled conduct when they are backed by directives, whether a barrage of directive speech acts exhorting and admonishing regime participants, or a tidy set of formal, general directive-rules in turn supported by empowered agents. In their turn, agents find support for their powers in detailed instruction-rules. We can also see how directive-rules specifying penalties for empowered agents' failure to observe these instruction-rules would support the latter, and how an appeals process to protect such agents' rights would use commitment-rules in support of such directive-rules, and how an appeals tribunal would have recourse to instruction-rules in support of its activities. Rules of different categories support each other in potentially endless layers.

Each layer varies in the number of rules it contains, their formality and generality, and the extent of institutional support for them. As a very general matter, rules become more numerous and more specific in propositional content as we descend through the layers in any regime. The pattern of formality and institutional support from layer to layer resists generalization. In a caste society, for example, principles defining caste membership have the formality of sacred texts but little or no support from formal directive- or commitment-rules. Instead, an unruly mass of speech acts, many of them directive and commissive, links these principles to a fourth layer of detailed instruction-rules. Alternatively, principles may be so taken for granted that their presence and content must be inferred from the rules regime participants collectively commit themselves to when they formally constituted that regime or the rules some awesome, perhaps mythic figure has ordered them to obey.

Regimes must have at least some general rules of considerable formality, be they cherished principles, commandments from on high or formal agreements. Were this not so, it would be difficult to distinguish a given regime against a horizon of rules

44 Contrast this to Young's treatment of rights and rules, 'core of every international regime', as if they were conceptually unrelated. *Supra* note 28, at 15 et seq. Nevertheless Young's definition of a right, at 15 – 'anything to which an actor (individual or otherwise) is entitled by virtue of occupying a recognized role' – gives away the conceptual dependence of rights on rules creating or recognizing roles.

45 H.L.A. Hart, *The Concept of Law* (1961) 27 et seq.; J. Raz, *Practical Reason and Norms* (2nd ed. 1990) 97 et seq.

belonging to other regimes. In other words, legal rules grant any regime, and not just the state, the coherence presupposed by the term 'regime'.

VI. Constitution, Again

Few if any regimes consist exclusively of legal rules. Informal rules and related practices spring up in the margins of any rule set, no matter how assiduously the appropriate agents promulgate new legal rules. Few regimes have no rules deserving to be called legal; almost all regimes are legal regimes in greater or lesser degree. If a regime has at least some legal rules, it must also have rules specifying conditions under which legal rules come into being. These rules need not be legal rules themselves, in which instance they give rise to customary law or, in H. L. A. Hart's words, 'a régime of primary rules'.[46] When the rules responsible for the legal status of primary rules are also legal rules, Hart labelled them 'secondary'.

The simplest secondary rule is a 'rule of recognition': 'a rule for the conclusive identification of the primary rules of obligation'.[47] Other secondary rules are 'rules of change'. 'The simplest form of such a rule is that which empowers an individual or body of persons to introduce new primary rules ... and to eliminate old rules'.[48] Hart observed that written constitutions place legal limitations on those empowered to enact or rescind primary rules.[49] Constitution in the most limited sense of the term evidently refers to those legal rules conferring and limiting powers to make legal rules within a given regime. In the usual, still limited sense of the term, a constitution also includes legal rules conferring and limiting powers to execute and adjudicate legal rules.[50]

Note that rules of change depend on a logically anterior rule, or set of rules, for their 'conclusive identification', which must of course be a rule or rules of recognition. Hart effectively conceded the existence of such rules in his analysis of sovereignty. These are 'rules defining what members of the society must do to function as an electorate' or otherwise act to empower agents. When people follow such rules, they act 'as a sovereign', and the rules themselves 'are *constitutive* of the sovereign...' (Hart's emphasis).[51]

More precisely, these rules empower the people to act on their sovereignty, which in turn depends on a rule, however informal, recognizing the people as sovereign. Rules of recognition answer the question, on whose behalf, and at whose sufferance, do those who make (apply, adjudicate) legal rules exercise their powers? If rules conferring and limiting such powers belong in any regime's constitution, so

46 *Supra* note 45, at 89 et seq.
47 Ibid., at 92.
48 Ibid., at 93.
49 Ibid., at 67 et seq.
50 Kelsen, *supra* note 30, at 258-259.
51 *Supra* note 45, at 74-75. See generally, at 70 et seq.

must the rules recognizing the legality, indeed the constitutionality, of empowering rules.

Constitutions consist of Hart's secondary rules: rules of recognition and rules of change. Rules of recognition are instruction-rules, often nesting a regime within the constitution specifically enabling the formation of rules of change. By following instructions, agents are able to recognize which other rules are legal and which are not. The agents in question may be any and all members of a society. Or they may be members of an encapsulated regime with rules which confer on its limited membership a monopoly of relevant skills.

Rules of change are always commitment-rules. They empower agents to issue and provide support for formal directive-rules themselves supporting a society's principles, or top layer of instruction-rules. Those principles need not be articulated formally, although some of them are likely to appear in the written document – or 'material constitution', as Kelsen called it[52] – which collects the top layer of commitment-rules. Any constitution limits the conduct of empowered agents by specifying their duties. A written constitution may also contain commitment-rules limiting these agents by specifying rights held by some or all members of society.

Obviously the constitution as a written document, Kelsen's material constitution, may contain rules beyond those minimally necessary to the 'formal constitution'.[53] Thus it may contain general directive-rules, commandments to which all members of the society are subject, for example, specifying religious beliefs. Yet societies formally adopting constitutions frequently, even characteristically, forego the inclusion of many directive-rules. Instead, they entrust specified agents with responsibility for issuing directive-rules, or law, as needed. To prevent those agents from issuing laws that would circumvent the limits imposed on their powers, constitutional rules are widely held to be higher or more fundamental than law in the usual sense. In Madison's justly famous formulation, a constitution is 'established by the people and unalterable by the government', as against 'a law established by the government and alterable by the government...'.[54]

Madison's frame of reference was the British Constitution. Its rules always subject to alteration by Parliament, the contents of that constitution necessarily remain in doubt. A model constitution, a constitution beyond all doubt, includes all rules unalterable by other legal rules and no other rules. The constitution's rules must be formally articulated so as to make their status apparent, even if they are not included in a particular document materially identified as the constitution.

As a rule, the model constitution will contain rules of recognition – rules validating the constitution as such and perhaps additional rules providing for its change, the latter accompanied by rules empowering agents to undertake such change. The model constitution may well contain other principles, but few if any

52 *Supra* note 30, at 124-125.
53 Ibid.
54 C. Rossiter (ed.),*The Federalist Papers, Federalist* No. 53 (1961) 331.

directive-rules. The bulk of its rules are commitment-rules specifying conditions of agency relevant to rules in the next layers of the rule set. These commitment-rules may themselves be accompanied by constitutionally specified instruction-rules.

VII. Society, Again

Societies are congeries of regimes and regimes themselves, normally distinguishable from some more inclusive regime, or society, by reference to rules notable for their formality and support. Every regime must have a rule of recognition, however informal, stipulating conditions of agency. Because regimes do not exist in a social vacuum, they are always linked to other regimes that have their own rules of recognition. Rules linking regimes also constitute regimes, consisting minimally of rules of recognition coordinating the relations of agents for the regimes nesting within it. Any statement locating sovereignty is, or proposes, a rule of recognition. As such, it defines the conditions of agency, and thus the disposition of sovereignty, for *that* regime.

International society is marked by the presence of many rules conventionally described as legal. These rules constitute a broad, historic regime well known to us as international law. This regime does not coincide exactly with international society, to which must be added other regimes identifiable to the observer despite their informality – regimes constituted by 'rules of the game' instead of legal rules. Nevertheless, the international legal regime dominates the congeries of regimes constituting international society because its rules provide the chief agents in that society with their standing as such, and the scope and formality of these rules provide agents and observers alike with an unavoidable frame of reference.

The international legal regime consists of a few principles, the first being the principle of sovereignty, which formally restricts the regime's membership to states. The regime exhibits no directive-rules of any formality and generality. Instead there are a large number of formal commitment-rules specifying the rights and duties of states. A distinctive feature of this regime is its stringent limitation of agency. Governments are the designated agents of states; at least in principle, governments collectively monopolize agency in the regime.[55]

Secondary agents hold powers by delegation. Treaties are the primary device for the empowerment of secondary agents, most notably by creating international organizations. Proliferating multilateral treaties, some creating organizations of near-universal membership, are perhaps the most arresting feature of contemporary international society. Again consisting substantially of instruction- and commitment-rules, these treaties increase the identity and coherence of the society's

55 See further Onuf, 'Intervention for Common Good', in G. Lyons and M. Mastanduno (eds), *Beyond Westphalia? National Sovereignty and International Intervention* (forthcoming).

many sub-regimes – the very regimes to which members of the regimes movement have devoted their full attention.

International society has no constitution announcing itself as such. Nevertheless, one might see the rudiments of a material constitution in the most important of multilateral treaties, the Charter of the United Nations.[56] In language strikingly reminiscent of the Constitution of the United States, the Preamble of the Charter begins: '*We the peoples of the United Nations...*'. Whether this is an empty flourish or sign of a rule recognizing the sovereignty of many peoples, Article 2(1) offers another rule of recognition without clarifying its relation to the prior rule, if indeed there is one. 'The Organization is based on the principle of the sovereign equality of all its Members'. Article 2(7) spells out the necessary inference that the organization is to refrain from intervening in its members' domestic affairs, while Article 2(6) extends the Charter's reach to states that are not members of the United Nations. Sovereignty notwithstanding, the organization is to ensure that such states act in accordance with principles enumerated in Article 2, including most notably Article 2(4)'s stricture against the threat or use of force.

Most of the provisions of Article 2 are cast in a general directive form and in the passive voice. Much discussion of Article 2(4) assumes that it is a directive-rule, and that repeated violation may have resulted in the rule's revocation and perhaps even its replacement with rules specifying conditions under which the use of force is permitted. Yet Article 2 is a recitation of principles. If taken at its word, then its regulative failures are much less important than its constitutive intent, amply reconfirmed in principle.

Complementing Article 2 is Article 1, which enumerates the purposes of the United Nations. This list is exceedingly general. It calls for international peace and security, friendly relations among states, cooperation in economic, social, cultural and humanitarian matters, and a central role for the organization in the attainment of these ends. The Charter's remaining provisions empower the United Nations' organs to act on these goals but only within narrow limits. Insofar as the organization may be said to possess some measure of implied powers to fulfil its purposes, Article 2(1) and its corollary, Article 2(7), are commensurately attenuated as rules of recognition.

If the Charter contains a material constitution, its provisions are to be found in Chapter I (Articles 1 and 2). There is much support for the view that Article 2(4) is *jus cogens* – a peremptory rule of law which may only be superseded by another such peremptory rule. If Article 2(4) is peremptory, it is hard to see why all of Chapter I is not as well. The parallel between claims on behalf of *jus cogens* and

56 A. Ross, *The Constitution of the United Nations* (1950) 30 et seq.; Falk, *supra* note 17, at 217 et seq.; Onuf, *supra* note 1, at 257-258. Indeed, Article 103 would seem to make the Charter a treaty above treaties. By stipulating that obligations under the Charter 'shall prevail' over members' obligations 'under any other international agreement', Article 103 departs from the longstanding rule that when the terms of two treaties conflict, the later treaty shall prevail over the earlier for parties to both.

Madison's claim that constitutional law is unalterable by law issued under the constitution further supports the view that Chapter I stands apart from the rest of the Charter – and the rest of international law.[57] That Chapter I approximates a model constitution strengthens the case for its status as a material constitution.

International society has always had a formal constitution. As a rule of recognition, the principle of state sovereignty took a clearly modern form at least from the time of Vattel.[58] Even the topical format of great treatises, substantially fixed by Wolff and Vattel, functions as a rule recognizing the division of international law into a number of regimes which later treaties codified, extended and supplemented. Rules of change appeared in the 19th century in the form of sources doctrine. Now embodied in Article 38 of the Statute of the World Court, they may qualify as an integral part of international society's material constitution. Whether these rules are subject to change through the several processes they specify for legal change in general is an open question.[59] A definite answer in the negative would suit the requirements of a model constitution and substantiate the claim that international society has a material constitution of its own.

International society law has long known rules of recognition explicitly identified as such. The foremost of these rules requires recognition of states by other states for membership in the international legal regime. Scholars have wondered whether recognition is a declaratory or a constitutive act – declaratory insofar as recognition acknowledges that the material conditions of statehood have been met, constitutive insofar as statehood depends on acknowledgment and not just material conditions.[60]

In constructivist terms any rule of recognition, as an instruction-rule, declares some state of affairs to be regulative and, in so doing, constitutes that state of affairs as declared. Recognition of and by states operationalizes sovereignty on both sides. With every member of the regime deciding independently on membership in the regime, all acts of recognition are sovereign acts with regulative consequences. Yet no one act of recognition suffices for constitutive purposes, for the performance of such an act would effectively shift agency from the aggregate of governments to one in particular.

One might think that the principle of self-determination, affirmed in Article 1(2) of the Charter, has superseded recognition as the controlling rule for the constitution

57 International lawyers frequently refer to 'constitutional' rules. E.g. Mosler, 'The International Society as a Legal Community', 140 *RdC* (1974-IV) 31-32; Henkin, 'International Law: Politics, Values and Functions: General Course on Public International Law', 216 *RdC* (1989-IV) 60-61. However, they have not (to my knowledge) distinguished such rules as *jus cogens*, perhaps, as Mosler intimates, at 35, because the concept of *jus cogens* has developed in the narrow context of formal agreements. See also Onuf & Birney, 'Peremptory Norms of International Law: Their Source, Function and Future', *Denver Journal of International Law and Policy*, 4 (1974) 187; Danilenko, 'International *Jus Cogens*: Issues of Law-Making', 2 *EJIL* (1991) 43, 48 et seq.

58 Onuf, 'Sovereignty: Outline of a Conceptual History', 16 *Alternatives* (1991) 425.

59 Cf. Onuf, 'Professor Falk on the Quasi-Legislative Competence of the General Assembly', 64 *AJIL* (1970) 349.

60 H. Lauterpacht, *Recognition in International Law* (1947) 38 et seq.

of states, in the process shifting agency entirely to the determining 'self'. Yet society always participates in constitution, and not just by warranting self-determination in principle. In the instance of international society, admission to the United Nations concludes the process of self-determination with a singular, constitutively sufficient act of recognition.[61] Without the normative and material benefits attending United Nations membership some of these states might not survive in their current territorial configurations.[62] In effect membership in the United Nations confers and sustains membership in international society. Once again, the Charter functions as if Chapter I were international society's material constitution.

VIII. Theory, Again

Recent events attest to extraordinary changes in international society. The speed and extent of these changes surprised almost everyone, including theorists, who always have change as their subject. Some theories seek to explain why change takes place. They work backwards from a given pattern of change to its cause. That cause must also involve an identifiable pattern of change, with its own cause, and so on, in a potentially infinite regress. Other theories seek to explain how change takes place. They posit some cause and examine its ever more proximate effects. To suppose that any theory can work in both directions at once – to explain how and why simultaneously – invites an unmanageable expansion in the terms of explanation and defeats the theory's purpose.

To view constitution as process makes change the subject without making theory the objective. As presented in these pages, constructivism is not a theory. Its terms are deliberately inclusive, and it acknowledges change – change as a pervasive and inevitable feature of social construction – in the very definition of those terms. Many, perhaps most, deeds are responses to rules. Rules are regulative because agents usually choose to follow them, and continuity and stability rather than change is the result. Those same rules are constitutive because they do provide agents with choices. Every time agents choose to follow a rule, they *change* it – they strengthen the rule – by making it more likely that they and others will follow the rule in the future. Every time agents choose not to follow a rule, they change the rule by weakening it, and in so doing they may well contribute to the constitution of some new rule.

Paradoxically the constructivist emphasis on rules seems conservative – a ruled environment resists change on any scale – even as constructivism insists, quite radically, that every act in response to a rule entails a change in that rule, in the

61 On 'collective recognition of State through the United Nations' and its 'implications for the debate between constitutivists and declaratorists', see J. Dugard, *Recognition and the United Nations* (1987) 78 et seq.

62 R. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (1990).

environment of rules and in the agent as a product of that environment. Constructivism is not a theory of change because it explains change indiscriminately. By definition, everything social changes – everything social. Constructivism does offer a general description of the sites of change. Every rule is an occasion for choice, every choice an incidence of change.

An inquiry into *the* constitution of any society usefully calls on the tradition of analytical positivism, represented here by Kelsen and Hart, to offer a more specific description of the more important sites of change. Some rules are functionally specialized as rules of recognition and change. When linked in a discrete structure, or constitution, these rules, I suggested earlier, give societies their identity and direction. They do so by regulating processes through which other rules are known and changed.

By focusing on these processes, constructivism offers a means for classifying the kinds of change for which theorizing is in order. Obviously, the general process of constitution yields *cumulative change*, measured in a given society's changing stock of rules. Within the general pattern of cumulative change, some agents are empowered to change existing rules and make new ones. In modern societies the process of *legal change* is chiefly associated with legislation. In the instance of international society, the process has sometimes been called 'peaceful change' and multilateral treaty-making 'international legislation'.[63] Legal change is nothing more than the normal operation of Hart's secondary rules.

More substantial than legal change is the process of *constitutional change*, both affecting secondary rules and effected through them. As noted, material constitutions frequently include rules for their amendment; otherwise the exceptional rules must be devised for the occasion. By contrast *revolutionary change* depends on self-empowered agents. They dispose of the old constitution and introduce a new set of secondary rules reflecting a new distribution of powers in the society.

Most substantial of all is *transformative change*, which alters the way regimes, or societies, are nested. These changes are not always as immediate and obvious as revolutionary change, but their consequences are epochal. Consider the emergence of an international society of substantially sovereign states, each of which drastically transformed the many regimes within its territory. Though a process of cumulative change over two centuries, the result is modernity itself. Whether modernity is subject to a comparable transformation in our own time remains to be seen.

63 F. Dunn, *Peaceful Change: A Study of International Procedures* (1937). On legislation as a distinctively modern vocation, see Onuf, *supra* note 16, at 74 et seq.