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The Legal Framework in a World of Change

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THE invitation to reflect and to write on the fortunes of international law during the past half-century was, with natural trepidation, accepted. Trepidation, because the pertinent literature had not in recent years been any of the writer's personal concern. It represented a terrain in the revisiting of which he must rather resemble a re-awakening Rip van Winkle, puzzled by overheard snatches of the talk of a generation not his own, phrased in an idiom rebarbative to his ear. Even so might an old-time gunner, reborn amid the chatter of a modern regimental mess, feel out of tune.

The parts, in warfare, of the horse and of the aeroplane, have changed since some of us were soldiers. But, whereas the aeroplane itself has changed, not so the horse. Whether or not the role of international law is still what once it was, what, we may ask, has meanwhile been happening to its essential nature? Has it been so to say the aeroplane—or the horse?

As a gauge of the spiritual distance man has travelled in recent millennia it is instructive to compare Old Testament story-telling with theological discourse of today. It may similarly assist the reader, for measuring the march of legal thinking between the twenties and the seventies, to see samples of the assumptions about international law with which in the twenties the writer would have expected to make do—and in particular to note his areas of semantic disagreement with some eminent specialists of today.

Wordage limitations require that he declare, without elaboration, that for him law, as such, and specifically international law, is the horse and not the aeroplane. He thus finds himself out of sympathy with those who see international law as a mere plurality, and not a *system*, of rules.[1] Also with those who conceive of it not strictly as rules

1. cf. H. L. A. Hart, *The Concept of Law*, Oxford, 1961.

at all but as simultaneously a process (of decision-making) and a tool (of social engineering).[2] And though, for him, legal language is indeed a form of social communication,[3] law, as such, is not. And though law may no doubt be scientifically studied, as may the marriage customs of the Eskimo, customs as such are not for him a science—not even a 'policy science'[4]—and neither, as such, is law.

When Dr. Rosalyn Higgins quotes the late Sir Hersch Lauterpacht for the proposition that what judges do is to make choices between claims—which for her must seemingly be something different from applying rules—are they not, one must ask, at least *supposed* to try to do their choosing correctly, in terms of criteria expressible, in principle, in rules? Those who, with Dr. Higgins, see law as a 'policy science', come close to implying that his 'choice' between competing claims is at times, if not invariably, a matter essentially of policy for the judge. Which causes one to wonder, Why then have judges? In order, one gleans, that the judges, duly selected or duly instructed, may make their policy decisions conformably with someone's (Whose? one wonders) 'preferred community goals'. Dr. Higgins is by no means alone in thus confounding the politics, with the science, of law. Law *can* indeed be an instrument of policy, as religion *may* have been an opiate for the people. But religion is not therefore definable as an opiate, or law as a tool.

Ideas about law, as to what it is or ought to be, what it prescribes and proscribes and what it permits, have influence, as they should do, on the making of decisions. But as for law being, as such, a process, whether of decision making or of anything else, as well might the same be said of music. The performing of music is indeed a process, as likewise is the applying of law. But music as such is not therefore intrinsically a process. Nor is law, either.

Perhaps least of all is Rip van Winkle disposed to equate law with legal argumentation.[5] Law can be argued about, and studied; it can be created, developed, applied, enforced, adapted—by processes. News and views about it can be communicated, and, true enough, it is not

2. cf. Rosalyn Higgins, 'International Law and International Relations', a paper presented to the twelfth S. H. Bailey Conference at the London School of Economics, January 1970.

3. William D. Coplin, *The Functions of International Law*, Chicago, 1966, p. 1.

4. Higgins, ibid.

5. L. Scheinman, and D. Wilkinson, eds., *International Law and Political Crisis—an Analytic Casebook*, with Introduction by Stanley Hoffmann, Boston, 1968. Legal argument is not itself law. Whether valid or not, it may serve its user's purpose. Believing that seven was his lucky number, and that seven sevens were forty-two, Sambo, backing his fancy, won, in a raffle, a car. Teased for his faulty arithmetic, 'O.K. boss', he replied, 'You'se got the education: but I'se got the Chev.'

merely rules. Horse-like too, it may well have suffered changes in its status: but in its essential nature? RvW thinks not.

What precisely then, in respect of law, is RvW's idea? His idea is that law itself is an idea. The idea of law is the idea of a system of ideas, expressible in principle, though in practice with only approximate precision—in a system of propositions—a complex of statements on the 'mays', the 'may nots', the 'musts' and the 'hows' for determinate categories of actors in a determinate milieu. It is of the very nature of law to be a body, or organic *system*, of ideas—on certain sorts of question—having imputed to it the status of an orthodoxy, and obtaining, for the relevant purposes, in a given, specific, social milieu. In the case, for example, of the English Common Law, the milieu in question is the society of the citizenry of a part of the United Kingdom. Socially prevalent in this society is a corpus of social theory in terms of which there is in particular postulated a factor, the common law, a system of ideas to which there is indeed attributed that 'binding force' which gives to it its quality as law. For the idea of law, as was said, is the idea of a body of ideas: and in so far as it has any existence as law, it has this existence *in idea*.

International law, in particular, at least in the accustomed meaning of the term, is indeed patently a system of ideas, obtaining as an orthodoxy in a certain social milieu. In this instance the milieu is in strictness no society at all, but, on the contrary, a *non*-society, or *quasi*-society, composed of the presently existing, and mutually recognized, sovereign states. Prevalent socially—or, perhaps, better, diplomatically—in this quasi-society is again a corpus of social—or, perhaps better, diplomatic—theory, in terms of which there is similarly postulated a system of law, having attributed to it the appropriate 'binding force'.[6]

On the particular matter of legal permissions, RvW must in passing confess that he has never been very partial to the use as if interchangeably of the notions of permission, and of authorization. How many writers have not held it as a reproach against international law that it authorizes [*sic*]—or did until recently—war? It is, indeed, true that war in general was, formerly, mostly not unlawful. It was something not forbidden by international law. It was something that states had traditionally been prone to get involved in: and, powerless to prevent it, international law had confined itself, in the main, to seeking to mitigate its horrors. War was in short something tolerated, legally, between consenting states in public. But to speak of it as having been 'authorized',

6. cf. C. A. W. Manning, *The Nature of International Society*, London, 1962, pp. 103, 133, 160.

or sanctioned, by international law is almost to imply that it had the law's blessing and commendation. Even to say that breathing, a human practice which law would be powerless to prevent, was authorized by the law, might verge upon the ludicrous. Law permits what it does not prohibit. Breathing in general it permits, and—save where it specifically forbids it—war.

If life may be likened to a game, it is a game in which players strive to get their way, by the means at their disposal, subject to limitations placed upon their legal freedom by the law. At their disposal, the players have various means of putting pressure upon one another, whether or not within their legal freedoms at any given point of time. In some circumstances where war formerly was lawful it no longer is. Within the state, as a means of pressurizing their employers, workers have the 'weapon' of the strike. It is a means whose use, not being forbidden by law, is lawful. It is within the rules of the game. To RvW it has always seemed more sensible to think of war, internationally, not as an essentially anti-legal activity to which the law must shut its eyes, but as a means of pressure by state upon state traditionally within the rules of the game. While domestic society is such that it has been on the whole feasible for violence to be proscribed in the dealings of man with man, it happens that in the quasi-society of sovereign states it has on the whole not been feasible, traditionally, for violence to be effectively proscribed in the dealings of state with state. Even with the United Nations Charter, which makes as if to ban it altogether, we do not seem quite to have got quit of it yet. Violence occurs, and diplomatic disputation does or does not then ensue over whether in the particular circumstances of its employment it has or has not been technically in violation of the law.

Technically, yes indeed. In the nature of things, law's criteria are technical, doctrinal, artificial. Even esoteric. A lifetime's study of a single legal system does not necessarily provide a man with certitude as to what in a concrete situation the law requires.

Consulted, by pupils, on a disputed point of arithmetic, your schoolmaster, if careful of his prestige, will at least purport to know, with certainty, the answer. But a lawyer consulted comparably on a point of law? More often than not, if he knows his place, he will furnish what he is paid for, namely, a mere opinion. And even judges can do no more than that. What litigants get, even from the highest court in the land, is at best a decision which it is constitutionally and legally incumbent upon them to accept as presumably correct. It is *formally* binding upon them. But lawyers, even so, are at liberty to probe in published

articles the reasoning upon which the decision rested. So, when it is said, in belittlement of international law, that all too often, when appealed to, its trumpet gives forth an uncertain sound, the fitting comment is that this is inevitable and only to be expected, since international law is like any other kind of law.

For law, of a kind, it definitely is—and this despite a view too commonly imputed, even nowadays, to John Austin—in whose defence it will not be otiose at this point once again to say a word. 'Now if international law were not law', writes, for instance, Josef Kunz, 'it would make no sense to compare and contrast it with other legal orders: one would only have to delimit it from law, as Austin did, who saw in international law not law, but only "positive morality".'[7] The truth however is that Austin never did so define law in general as to preclude the recognition of international law as law. What he did was to provide a famous definition of *that kind* of law from which international law was to be distinguished, namely, the *positive* law which he saw as having the nature of command.[8] Nothing that I have read since then has caused me to modify the views I expressed on Austin, on law and on sovereignty, in 1932.[9]

II

In the current literature, along with emphasis on the shifts that there lately have been in for instance the distribution of power, there often are things about changes in the nature of sovereignty, and even in the binding force of international law. Since in RvW's view law today is just as binding as ever it was, and sovereignty still what it always was,

7. Josef L. Kunz, *The Changing Law of Nations*, Columbus, Ohio, 1968, p. 16.

8. 'The offence which, in our enlightened age, has perhaps been most resented in Austin is his assertion that "international law . . . is not positive law at all but only positive morality" (*Austin's Jurisprudence*, Vol. II, p. 754). In this connexion it is not usually mentioned that, while consistently excluding it from the category of *positive* law as defined by him, Austin nevertheless does seem in the end to have classed international law with "law properly so called" (see *The Province of Jurisprudence Determined*, 2nd ed., footnotes on pp. xlv, 17, and 112), and does from the beginning put it on a level with "constitutional law"; which, except in so far as it consists of commands of the sovereign, is not, with him, an example of "positive law" either (*A.J.*, Vol. II, p. 746).'—C. A. W. Manning, 'Austin Today: or "The Province of Jurisprudence" re-examined', in W. Ivor Jennings, ed., *Modern Theories of Law*, London, 1933, p. 224.

9. C. A. W. Manning, 'Austin Today', in Jennings, op. cit. Even that early footnote (7th edn., p. 3) in C. K. Allen's *Law in the Making*, declaring unacceptable my suggestion that Austin—in supplying what had struck me as rather a sociological analysis, than a description, of the relation between citizenship and the authority of the state—might not himself have fully appreciated the difference, left me unpersuaded. Allen did not discuss my conjecture: he merely dismissed it.

he believes that he should now explain what it is that *he* means by sovereignty, and what by the binding force of law.

As binding, he said, as ever. Just how binding was that? The fact is that in RvW's considered opinion law is not in strictness binding at all. The most that can be strictly said is that it is binding *in idea*; in short, that it is *deemed* to bind. The bindingness of law is something that it is deemed (that is, socially and diplomatically considered) to have. Its bindingness is socially and diplomatically *imputed* to it. Law has binding force only in that this is imputed to it—in the case of municipal law by the theory of the particular human society, in the case of international law by the diplomatic theory which is shared by states at large.

The binding quality of a constitutional system upon all within the relevant jurisdiction is not a demonstrable proposition. It is a matter of dogma, serving as a premise for the intelligible functioning of the system as a going concern. What in detail the constitution prescribes is largely a matter of law, constitutional law. But that constitutional law as such is binding, upon all within the jurisdiction, is dogma. It is constitutional dogma. Constitutional, and thus logically *pre*-legal, since the bindingness of constitutional law presupposes the bindingness of the constitution as such. It is logically pre-legal dogmatic premise number one for the validity and functioning of the constitution as a whole. For the bindingness of the system as a whole is logically presupposed by the bindingness of its particular parts. Thus, participants in the international political quasi-game of sovereign states are, as such, and as though by definition, bound by the basic assumptions, or dogmas, of the game—one of these being the binding quality, for sovereign states, of that law. And the reason, in RvW's opinion, why the sovereign states are players—parties, that is, to this kind of thing—is because, like the passengers in an overloaded lifeboat in a stormy sea, they accept as self-evident the value of a modicum of voluntary collective self-discipline. Indeed its self-evidence is such that its voluntary quality comes close to being theoretical at best. Situated as they are, what choice, what effective choice, have they?

Thus it is not on Christian dogma, for example, that the international legal order as today we have it rests: but on the sufficiently general official acceptance of, accompanied by belief in the general acceptance of, a certain conventional vision of life, if only for the time being. International law exists because sovereign states, by their very situation as members, inescapably, of international society, are, as it were 'naturally', constrained to sustain and to tolerate some such system of law. What here is basic is their need for some such system. This is a

'natural' need—a need rooted in the conditions of their life in coexistence with other states. The necessity to which, in sustaining a system of international law, they bow is not a jural, but a natural, necessity. It is not law, even so-called 'natural' law, that here says to them—You jolly well simply must. . . . It is life that in effect says this to them.[10]

Sovereign states, in short, simply have to have, and ostensibly to revere, some such system of law. But to say that they tolerate such a system is not at all the same thing as saying that it is this law that sustains and tolerates them. In their quality as societies organized and articulated for self-representation and self-assertion, the states are logically prior to the law that they acknowledge. Their sovereignty is an aspect of their nature as organizations *constitutionally insular*. It is not a gift bestowed upon them by the system—the international legal system—which collectively they sustain. Wishful thinking has prompted some writers to interpret this position the other way round: and to see international law as if having delegated to the sovereign members of international society the competence or formal capacity to exist and to function as such. Municipal law does not delegate to the individual members of domestic society the competence to exist and to function as human beings. They *have* it, primordially, and independently of their situation as the beneficiaries, or victims, of social organization. And the nature of the sovereign states as constitutionally insular is analogous to that of the individual as a developed personality, dependent indeed upon society, yet at the same time inner-directed and self-contained.

The authority of the state derives not from international law, but from its constituted power; its power from the disposition towards it of those over whom it claims authority. What Austin called 'the habitual obedience of the bulk of the community', and what MacIver called 'the will *for* the state',[11] is basic to the very existence of the state—and is the source of its power, and hence of its authority. Some day, who knows, there may come to exist a world authority having the habitual obedience of the bulk of all mankind. In its contemporary absence we have a world order in which the highest authority is that of the individual sovereign state.

10. When, in reply to this same basic question, some writers have recourse to the concept of natural law, they evade, I suggest, the ultimate theoretical dilemma. Concede that law, as such, *ought* to be obeyed. But why ought it? The reason, submittedly, why the law, and the constitution, ought to be obeyed, is precisely because, in the *orthodoxy* of the matter, they both *are* binding—and not the other way about.

11. Robert MacIver, *The Modern State*, London, 1950, p. 200.

A due allowance, in one's comment on certain authors, should in fairness be made for the element of imperfect understanding, and lack of the relevant kind of expertise, in them. Enough to say that there are those who find apparent difficulty in comprehending the interdependence of sovereignty and international law. What is this element, their sovereignty, by their having of which sovereign states qualify as such? And how can this factor, even in fifty years, be considered to have undergone a change? What all too many writers seem not to notice is that by this same term, sovereignty, there are commonly connoted more concepts than one. To state, as Austin did, that sovereignty in Britain lies with the monarch, the lords and the electorate, acting in their collective, or corporate, capacity as 'the sovereign number', may or may not be found illuminating. But it is quite different from saying, with equal propriety, that sovereignty belongs in the case of Britain, as in that of other sovereign states, to the state as such, as an international person, a performer upon the international stage. And to say that the sovereignty of the sovereign state suffers abatement each time a new obligation is accepted is to use the term in a third kind of context and a third sort of widely accepted sense. What, when used in this third sense, is sovereignty but the sum total, at any given moment, of a states existing legal liberties? Sovereignty in this third context is a variable residue, composed of those of its original legal freedoms with which the state has not found occasion to part. Sovereignty in sense number one is, submittedly, a concept, sociological rather than legal, explanatory of an aspect of things domestic. In neither of numbers two and three, its internationally relevant senses, is sovereignty in any way incompatible with the technical subordination of the state to international law.[12] Meanwhile, though every sovereign state is an international person, not every international person is a sovereign state. For sovereignty in sense number two is constitutional insularity or self-containedness, something that India, for example, still lacked when she accepted her foundation membership in the United Nations. In sense number three Britain would certainly sacrifice some of her sovereignty in joining the Common Market. But whether she ever would cease to be sovereign, or compromise her sovereignty, in sense number two

12. Yet, according to Corbett, it is 'impossible to picture a legal system in which all the entities are sovereign'. For 'if it means anything sovereignty surely means the right to decide'. Percy E. Corbett, *Morals, Law and Power in International Relations*, Los Angeles, 1956, p. 26. The *competence*, by all means, but how the 'right'? Has the sovereign state a 'right' to transgress the law, or to decide so to do? Had man not the capability of sinning no man could sin. But man's capacity is scarcely an entitlement, or franchise, to sin.

would remain to be seen. Some hope, others fear, that eventually she would.

Equally would Britain and other sovereign states lose their nature as such were there ever to be realized Wilfred Jenks's vision of the gradual emergence of a 'common law of mankind'.[13] It is hard, at least in theory, to see how this could be imagined as coming about. For it seems that international law, as heretofore understood, would not be suppressed, or jettisoned, or displaced, but merely absorbed, by the global system of common law. As of today it is presumably still the law of the traditional quasi-society. Tomorrow it would have become that of a true society of man. The grin would still be visible, unaffected, but supporting it there would have been substituted the body of a different Cheshire cat. The thought is intellectually taxing. A rider may change horses in midstream. A legal system may even discard an outmoded dogmatic infrastructure for a new one, as when Grotius effected the secularization of natural law. But does a legal system dissociate itself from the milieu whose child it initially was, to become as it were the fruit from henceforth of a different sociological womb?

In changing its Cheshire cat, its sociological matrix, the legal system would incidentally have changed its status. As the law of a true society it would, submittedly for the first time, have become an instrument of social control. Municipal law exists, and is what it is, because, domestically, there does exist social control. International law exists and is what it distinctively is because, internationally, there does not. Municipal law is the handmaiden of government, international law of diplomacy. A remarkable thing, in the circumstances, is that municipal law is sometimes such a failure. The more remarkable thing is that international law is relatively speaking so great a success. It is often said of international law that allowance must be made for the fact that it is 'primitive'. Instead of asking why this sort of law is so primitive, it might be more to the point to look at the world—where there is government locally, but not universally, and where law is ordinarily a concomitant of government, yet where, nevertheless, though in the absence of an overall governmental set-up, there does exist an overall system of law—and ask, of this, Why is it so advanced? Rather than on the primitiveness of international law, the stress should thus be laid upon the primitiveness of international quasi-community. For the so-called international society differs not just in degree but in kind from ordinary human society. It is made up not of human beings but of organizations. Its possibilities derive from the disposition towards it not

13. C. Wilfred Jenks, *The Common Law of Mankind*, New York, 1958.

of men as such, but of the organizations that compose it. A man may think his life has a purpose, but he may not in practice always bear this purpose in mind. An organization if designed for a particular purpose is less likely to forget it. If the states are ever to wither away they will hardly do this of their own volition. They are not constituted for the purpose of withering away.

Municipally, authority rests ultimately, in principle, in one spot. Internationally, it rests in principle in many more spots than one. Nostalgically to insist that it ought 'by rights' to rest in one spot only is like regretting that the World Council of Churches does not elect itself a Pope. International law is what it distinctively is, not because the universal human society is only, as yet, primitively integrated; but because it is not the law of a community at all, but only of a quasi-community of organized communities, each individually a centre of ultimate authority of its independent own.

III

This principle, of the sovereign equality of the members of international 'society', a principle whose acceptance went without saying in the creation of the League of Nations, was affirmed out loud in the framing of the United Nations Charter.[14] The fact of this having been thought necessary is merely one of many indices of the change that had in the meantime come about in the general outlook for international law. It was part, at bottom, of a change in the prevailing public image of the future. Once upon a time one used to think of international law as a means by which international society might some day succeed in controlling the waywardness and egocentricity of even the mightiest of sovereign states. Disciplining the Great Powers: that, in one academic formulation, was essentially the problem, the supposed means to its solution being the 'strengthening' of international law. Arbitration, security and disarmament: such was the slogan of the later 1920s—each of these three postulating an over-arching fabric of law to canalize the conduct of states away from the flashpoint for the outbreak of a war. In those days men really did seem to believe in the possibility, by taking concerted thought and by mobilizing intelligent opinion, of devising and erecting legal fences whereby to contain in the hour of temptation the movements of sovereign states. Massive memoranda were devoted to the design, the location and the advocacy of these walls. But none of them ever took concrete shape: for if it was by Philip sober that they

14. Charter, Article 2(1).

were adumbrated, it was by Philip potentially drunk that they would have needed to be erected. Only by the sovereign states themselves could new burdens be laid upon the shoulders of sovereign states. And on this, when it came to ratification day, sovereign states seemed somehow insufficiently keen. Talk of disciplining the Great Powers fell to a whisper when it was perceived that the only form of discipline to which any such Powers could ever be subjected was the self-discipline to which they were not temperamentally predisposed.

Every one of us casts himself, and possibly his country, for some sort of a role in the world of the future, as he expects this, whether wishfully or realistically, to be. Among the victors of 1919 it was prevalently anticipated that in the morrow's world international law would provide the framework for a stabler, more civilized and peaceful system of coexistence among sovereign states. It would be a world in which the international establishment would look askance at any who treated international law with disdain, and in which repute would accrue to those who set the best examples of good conduct and concern for what was *comme il faut*. The sanctity of treaty obligations would in particular be much insisted upon. In such a climate it was natural that governments should indeed be attentive to their image as law-abiding members of society, and show a seemly indignation against any who were not. Law mattered, and would continue to matter. That was why it so much mattered just what law might tomorrow be having to say. Hence the effort devoted to the formulating of new sets of proposed treaty undertakings. That was what much of the sweat and toil of those Geneva meetings was frequently all about.[15]

What differentiated the outlook then from the outlook now was that the world then had yet to experience the disillusionments of the half-century that was to follow. Men still believed that the war of 1914 had been an aberration, and not a typical manifestation of the nature of the diplomatic system. The problem was seen as that of so organizing international society as to have it resemble domestic society, with international law performing the functions commonly attributed to law in the national domain. Men supposed that the war had begun partly because international law had not precluded it. Believing order to be the product of law, rather than *vice versa*, and desiring international order, men dreamt of the appropriate development of law. Important as was then the role of law in international affairs, how much

15. Two waitresses in a restaurant were depicted observing a solitary diner. 'He's eaten it!' said one. Sometimes one had a vision, in Geneva, of two diplomats, 'foreigners', watching a third, British, seated with a document before him. 'He's signed it!'

more so might it not in the future become? Statesmen peered into a tomorrow in which a name for correct behaviour—as tested by international law—would presumably be an element of diplomatic strength.

Today, after fifty years of disappointments, who any longer feels that way about the future of international law? Who expects that others will be particularly scrupulous, in the hour of their temptation to transgress? Who feels under any particular compulsion himself to be so scrupulous? Protests still are sent, but less and less do they seem to matter. In estimates of what the other man may be likely in tomorrow's situation to do, his interests, his aspirations, his affiliations—all these will be factors to reckon with, but less importantly his preoccupation with the niceties of the law. What is rather to be expected is that the other man will do in the main what suits him, and will put up some sort of a purported legal justification for what he will so have done. Seldom will he be so resourceless as to have to own to having flouted the law.

How different, as RvW remembers it, was the climate of those early Geneva days. Had the participants been competitors in some sort of tournament, in which points were forfeited for every slightest infringement of the rules, they could hardly have been more painstaking about their legal-procedural p's and q's. One might like to have seen in this an index of the regard in which the law as such was held, and of the social standing—in the salons of old-world officialdom—to be sacrificed by apparent indifference to the requirements of the prescribed ritual: but it is necessary to recall a further special circumstance. Conditioning all that was done or attempted in that Geneva setting in those formative early days was the quasi-chiliastic looking-forward to a second coming —the return of the Americans to the Europe they had so momentously frequented during the two-year period of their sharing in the winning of the War and in the writing of the Peace. Their chair awaited them, and until they elected to occupy it the motto could be 'Half a League onward', but nothing more. And the Americans—who knows why? —were prevalently pictured as unbending sticklers for the strictest observance of international law, as law. What they worshipped, it was supposed, was the ideal of an international 'government' not of men—certainly not the sort of men with whom in Paris they had been constrained to consort—but of laws.

If the war had been fought to make a world fit for returning heroes to live in, the peace-game must be one in which the most fastidious could congenially engage. The belief that there might have been

something in this impression was in my own case encouraged by the answer I got to a question put in a Boston drawing-room early in 1926 to a lady of local quality. 'Will your country', I had innocently asked, 'soon be accepting membership in the League?' 'NOT', she magnificently replied, 'until they come up to OUR standards!' And she said this as if it were in the circumstances the most inevitable, axiomatic, and accepted thing to say.

In the corresponding early years of the United Nations, the United States may be considered as having held something of the same sort of hegemonial position as had Britain and France in the early years of the League. But, subject to this distinction. If America was on her best behaviour in the later 1940s this was by standards rather different from those of my corseted Boston friend. America's posturing, if any, was for the approbation of a different kind of reference group. For the moment, she was the leader of a comfortable majority of the member states. But she had rivals for this role: and this may well have affected her thinking. And the mention of America's rivals recalls a further, more decisive, point of contrast between the climate of proceedings at the League and that at the United Nations. If ideological differences were at all reflected within the Geneva system, they were as nothing then to those that would menace the harmonies on which the effective functioning of the United Nations must depend. If the atmosphere of Geneva was pervaded with the odour of legalistic pedantry, that of New York was, and is, heavy with the vapours of political war. It was a different sort of set-up in a different kind of world. In terms of Stanley Hoffmann's idiom one may put it that, whereas in the twenties, beneath a surface calm of seeming stability,the forces of revolution may never have been far from the boil, the international system bequeathed by World War II has remained overtly revolutionary to this day. While the law of reciprocity and the law of community may, even in such conditions, continue to serve ever more effectively their modest purposes, the hopes with which men see the possible future of the law of the political framework are now markedly less ambitious than they were. Life in a loose bi-polar system—with the emphasis shifting from the bi-polarity to the looseness—and with nuclear armaments accumulating on either side, is a shade too real and earnest for statesmanship to embarrass itself with paper prohibitions of questionable reliability and doubtful relevance to the overriding needs of national survival. It has been said that the impact of modern technology has been to spell the doom of religious belief: and that ours, in the West, is in consequence more a post-Christian than a strictly Christian era. However that may

be, certainly we can speak of modern technology as having seemingly hustled us into a post-law-revering age. In major crises the imperative of American policy is that 'This thing has got to be stopped'. How far in the stopping of it the limits of the strictly legal may perhaps require to be transgressed is a matter for subsequent inquiry, among those having a specialized interest in that kind of question.

In a limited international society, confined to states of the appropriate outlook, a system of classical international law might flourish and long endure. But in a universal international society inclusive of the communist camp and the anti-colonialist have-not class of states, its claims upon the loyalty of the 'community' as a whole are feeble if not non-existent. If the United Nations Charter is a faulty document, this may partly be because a powerful hand in its preparation had to be allowed to those whose interest may have seemed to them to lie in ensuring that no document other than a faulty one should see the light of day. It may be wondered whether some who, when plans for a United Nations were still on the drawing-board, envisaged cheerfully the avoidance of what in Geneva had normally been unavoidable—the delays entailed by the persevering practice of conciliation—will have had any explicit conception of the sort of difference that such a change might make. Some of them may even have nursed the optimistic idea that a body unhampered by the unanimity principle should prove the better mechanism for serving the cause of peace.

If there was point and value in the League's unanimity rule, it resided in the way this placed everyone under the necessity of studying the situation and susceptibilities of those most vitally affected by what was being proposed. In New York there is no longer the same need for this. All that require to be studied are the prejudices of those whose votes are desired to swell the numerical majority, or without whose active co-operation the resolution envisaged could be a success on paper only. The search in Geneva was ever for the formula acceptable to all, since it must be something against which no one need find it necessary to vote. The business in New York is to isolate the unpopular and to generate, manipulate, organize, and canalize the official emotions, to give a maximum of apparent weight to what you will publicize as an expression of the conscience of mankind. In short, while at Geneva the search was at all times for political peace, at the United Nations the business, at any rate in some matters, is more justly describable as the high-minded, systematic and unremitting pursuit of political war. The motif in Geneva was stability. That in New York is change. Law is in general the ally of stability. And so, in Geneva, seldom or never was

a technically tenable legal argument cavalierly brushed aside. The mood is otherwise today.

In his memoirs, with reference to the Suez affair, Lord Avon (formerly Sir Anthony Eden), recalling the moment when, belatedly, Egypt submitted to the Anglo–French ultimatum, comments laconically that of course the invasion could then no longer proceed.[16] It is as though a traffic light had turned from green to amber. But why the sudden halt? It seems at least plausible to suspect that what was then judged to make the crucial difference was the elimination of what pretext the invaders might have thought themselves to possess for going any further. It is as if up to that moment the British, at any rate, had felt themselves to have a footing on which argumentatively to square their action with Britain's commitments as a member of the United Nations. Could it not, for example, have been pleaded that the stopping of an incipient war had been anything but inconsistent with the purposes of the organization? Even the resolution then so resoundingly voted by the General Assembly did not in terms seem to exclude such a defence: what it literally rejected was the use of force for the settlement of disputes. But the point was not argued by the offending states. There was perhaps less odium to be incurred by grimly accepting the sanctimoniously orchestrated rebuke than by smartly answering back.

But is it fanciful to perceive here a point of contrast with the temper of earlier times? After Italy's bombardment of Corfu in 1923, or Hitler's re-occupation of the Rhineland in 1936, as after the Japanese action in Manchuria in 1931 or Italy's invasion of Ethiopia in 1935, official attention to the technically legal aspects was keen, concentrated, and universal. It was as if, save for its possible illegality, there was nothing, in any of these cases, to be objected to in what had been done. The state with a watertight quibble could expect to leave the inquiry without a stain on its reputation.

Yet a question-mark remains. Granted the eager interest shown in the formal innocence or otherwise of what had happened, does it follow that people were chiefly worried, in all these instances, about the threats to the sanctity of law? It is at least possible to suppose that what they will have been looking for was less a ground for complaint against action on the part of others than a basis for inaction on their own. For it is only the victim of manifest aggression, as conventionally defined, who has claims to active assistance in its hour of need. There is no

16. Robert Anthony Eden, 1st Earl of Avon, Memoirs, *Full Circle*, London, 1960, p. 557. 'We had intervened to divide and, above all, to contain the conflict. Once the fighting had ceased, justification for further intervention ceased with it.'

necessity for promises to be either broken or implemented if they can but be explained away.

Pledges of military assistance are not a thing of the past. The United States has given many, and Britain some. One assumes that they would be honoured. One has to. But, in the event that they were not, though bitter words might flow, one doubts if much would now be specifically heard about the sanctity of law. And this is new. One remembers very well the agitated ingenuity with which, when the American Senate had rejected the Versailles Treaty, and along with it the country's commitment to participation in the League, the remaining membership contrived so to reinterpret the plain wording of its Covenant as to preserve for it some show of workability in the altered conditions. If ever there was a tribute paid to the importance of the law, this was it. The thought of simply disregarding the provisions of its constitution, as the United Nations was later to ignore the 'domestic jurisdiction' clause (Article 2 para. 7) in the Charter, would in those days have been coldly received. The beguiling idea that one could simply pick and choose among the rules of one's game, observing some while flouting others, would have had short shrift in the climate of those debates—and this notwithstanding the absence in the Covenant of that curious stipulation whereby, in adhering to their Charter, the members of the United Nations were solemnly to pledge themselves to comply with its requirements 'in good faith'![17]

Had the United Nations bodies shown more respect for the provisions of the Charter in their dealings, for instance, with South Africa, it would have been morally much more difficult for the latter, when the occasion came, to show even the slightest disrespect for those provisions. In the case of the sanctions against Rhodesia it may certainly be suggested that South Africa showed such disrespect. But it is at least equally arguable that the Security Council's purported decision, calling for the application of the sanctions, was in two respects so marginally within the Charter as to be doubtfully mandatory in its effect.[18] Whether or not the United Nations may be considered warranted in having, over the years, become, so to speak, a law unto itself, it is hard to see how it could so have become a law for its constituent members

17. Charter, Article 2(2).

18. In order for South Africa to have seen as mandatory upon her the relevant Security Council Resolution, she would have needed (a) to ignore the abstentions of the French and Russian representatives—or rather, to construe them as concurring votes (Charter, Article 27(3)); and (b) to ignore the absence in reality of that 'threat to the peace' whose presence the Security Council's competence in the matter presupposed (Charter, Article 39). Neither of these artificialities was inescapable.

—particularly for those whose dissent was grounded in a literal reading of the Charter itself. People who now stress the fact that the more recent sanctions decisions have indeed had the proper measure of support concede, by implication, the position of those who dwell upon the fact that the crucial earlier 'decision'—the basis for those that followed—had not.

Or take the General Assembly's purported termination, in October 1966, of South Africa's lawful tenure, dating from the First World War and the Peace that followed, of South West Africa. Even the Hague Court's Advisory Opinion of 1950—even if, incorrectly, treated as though binding on anybody—could hardly be interpreted as having ostensibly opened the way to that. (As well might the College of Cardinals have purported to terminate Britain's tenure of the Falkland Islands.) Yet, in ignoring that General Assembly 'decision', South Africa has been widely and insistently referred to as if in the wrong: even now, in its Advisory Opinion of 1971, by the Court itself, albeit with recourse to reasoning significantly distinguishable from its own in 1950; about which more, however, on page 334 below.

IV

Were a Rip van Winkle to find himself at the United Nations, and to be watching the game there in progress, his reaction would surely be predictable. 'Many of those players', he would remark, 'are much of the time off-side.' When we compare the same world as it existed in 1919 and in 1969, it is as if at some ancient university Black Power and the Students for a Democratic Society had taken control of the campus. The status of international law in the international system is becoming suggestive of that of the inherited regulations in more than one such venerable institution that one might name.

But what *of* it? So much the worse, might it not now be fashionably retorted, for the outmoded standards of old Rip? International law, like the Sabbath, was made for man. And at the United Nations it is Man, the old Adam, and the Rights of Man, that are on top. The fact that 'human rights' are a matter of wholesome social mythology rather than of law detracts nothing from their potency as a war cry against those who can be charged with their 'violation'. In fact it seems as if the time may be approaching when it will be a positive emasculation of some people's rights to say of them that they are merely legal.

If, of course, states could see their way, by reliance upon international law, to further the interests that they had in their own aggrandisement,

or even in their bare survival, that law might be enjoying more deference than it currently does. In retrospect, one may surmise that it was only because men—even in the sophisticated corridors of officialdom—had illusions about the nature of international society, and what might be found practicable in a world of sovereign states—that statesmanship in the early inter-war years was relatively so much more preoccupied than it nowadays is with prospects for a 'return to the rule of law'. Disenchantment obtains only where hopes had rested on misconceptions as to the character of the quasi-society into whose affairs it had been supposedly the function of international law to insinuate an element of order.

'In this period of uncertainty', someone was to write, 'the place of law has been taken by politics.'[19] How so? How *could* politics 'take the place' of law? Is it that international politics has latterly come to provide the framework or setting in terms of which international law must play such part as it is able to? But it always did. The title of this essay notwithstanding, it never was the law that provided a framework, even in the most metaphorical sense, for international politics, but always the other way about. At any moment international law is what it is because the facts of international politics are what they are. It is the political framework which reflects itself in the law—and not the law which determines the political framework. By contrast, though a national constitution is ultimately amendable, it is normally the constitution that sets the ground rules in terms of which the domestic political game is played. What basically has suffered a change in recent times is the style, tone and temper of international politics, and its aptness for supporting, and utilizing, a realistically relevant system of international law.

If international politics occur within and in terms of a framework, it is scarcely within a framework of law. At most it is within a framework of shared diplomatic assumptions, the common premises of all international debate. And this framework, as it happens, cannot fundamentally be considered to have changed. The shared assumptions are still the traditional ones—namely, that there exists an international so-called society, whose members are sovereign states; that these sovereign states, being, as such, each constitutionally insular, are, in principle, independent of the authority of any other sovereign state; that international law exists as essentially a legal system; and that sovereign states as such are subject thereto. Within this framework of shared assumptions, the sovereign states still coexist and play

19. J. L. Kunz, op. cit., p. 43.

their quasi-game. And for this purpose they have progressively elaborated that complex of more or less detailed understandings which is known, and on the whole deferred to, as international law.

Even if we persist in thinking of international law as, metaphorically, a framework for international politics, we shall do well to remember that it cannot be the same sort of framework as law is thought of as providing for life in the domestic setting. For in the domestic domain law is the *alter ego* of government, and it is the two together that furnish the formal framework for community living. International law, while authentically law, cannot, unassociated as it is with government, furnish the kind of framework which, were it coupled with government, it might be expected to provide.

From the familiar association of law with government it might superficially be inferred—as indeed it often is—that save in association with a sustaining system of government no system of law could obtain. But if the mind confronts coolly the evident absence, internationally, of government, along with the evident presence, internationally, of law, it may so become able to free itself from its hampering preconception about the necessary relation between government and law, and to look—unimpeded by misleading suppositions—for the explanation of international law's existence as we have it. And thus does it come to be seen that, while the two kinds of law—the international and the municipal—are emanations each of them from a milieu, it is from two different kinds of milieu that they respectively are emanations: being in consequence two different kinds of law.

The difference between an international, and a municipal, legal order is a difference in kind, but it is not the difference between a legal order and an order only metaphorically speaking legal. Were the international legal order to become associated with a governmental order of equivalent, global, comprehension, it would still be a legal order, but now a legal order of a different kind. It is, submittedly, more realistic to see international law as law of a different species, than as merely a more primitive form of what is destined some day to have the nature of a universal system of non-primitive municipal law. Today there are many world conditions which might be judged to render desirable a world system of law: but international law as we know it is not even in principle what so is required.

Meanwhile the fact that there is now a disturbing amount of international lawlessness is a reflection as much on the state of international society as on the inadequacy of international law. Given the altered aspect of the international political landscape, the wonder is not that

international law has now so little obvious impact on international happenings but, on the contrary, that it has even today so much. But not as the all-sufficient standby for the settlement of dangerous differences.[20]

Not that this is wholly attributable to the altered aspect of the overall political scene. More directly it is due to the altered, because deepened, academic and professional understanding of what international conflict is about. We are getting used in these days to hearing that this or that is to be rejected as 'irrelevant'. It was a full quarter-century ago that, in his essay *Scientific Man versus Power Politics*, Hans Morgenthau questioned the relevance of international law to the appropriate treatment of major crises in international affairs.[21] His book is little referred to, but has not, in my opinion, been improved upon. The stress placed today on 'crisis management' is perhaps in part a testimony to the contribution that it made. Law is relevant to the settlement of disputes within a governed society in a sense in which it cannot equally be relevant in a quasi-society whose context is an ungoverned social cosmos. In a governed society law is, in principle, always relevant to the settlement of intrinsically justiciable disputes,[22] whether acceptably to all the parties or not. In a non-governed quasi-society, law is, by contrast, relevant, even in principle, to the settlement even of intrinsically justiciable disputes only in so far as, to the sovereign members of such quasi-society, it is for that purpose, acceptable. And even in these conditions the relevance of law remains a matter of degree.

V

The aspect of law just touched upon would merit a much fuller treatment. But perhaps it will here suffice to mention two currents of modern thinking which seem to have some bearing on the matter. First, that existentialist philosophy of which so much was heard about a generation back. What this publicized and established—in the consciousness of all who seriously exercised themselves about the human predicament—was the inadequacy of moral philosophy,

20. Alan James is himself a specializer in the sociology of international law. Yet, in his full-scale study, *The Politics of Peace-keeping*, London, 1969, international law has not so much as a mention in the index.

21. Hans J. Morgenthau, *Scientific Man vs. Power Politics*, Chicago, 1946.

22. A justiciable dispute is, submittedly, one involving one or more disputed justiciable issues. These are such as in a domestic setting might suitably be taken to a court. They are, in general, of three kinds: issues of fact affecting rights, issues of law, and issues of mixed fact and law.

conceived as if a code of generalizations, for clarifying those problems of moral choice, so frequent in life, in which the peculiarities of the concrete situation defy analysis in terms of categories born of reflection on *types* of situations experienced in the differing conditions of the past. What this philosophy so called into question was the belief that wisdom in life was merely a question of living according to the right apparatus of rules. It was characteristic of the standpoint of the existentialist thinker that his message was often most effectively conveyed in the guise of a short story or a play. Law, on the other hand, was in principle a matter of the grouping of possible situations into categories, so that the determination of the legally correct solution could lie in finding and applying to it the appropriate rule. When Morgenthau and Kennan inveighed against the legalistic-moralistic approach to international politics, it was essentially as fellow-voyagers with this existentialist philosophy that they spoke. What is needed in politics is the opportune treatment, which is not necessarily the treatment according to some book. For the opportune treatment is even in principle to be arrived at only by way of a diagnostic insight into the uniqueness of the situation demanding to be met.

The other line of thought referred to above is that echo of Marxist teaching which sees an ideological distortion in every attempted judgement of what is right. It is true that law favours stability, continuity, and predictability, and that society is divisible into those who have and those who have not, thanks to their situation, an interest in these. So that prejudice in favour of law as a social institution is in a sense ideologically determined. And ultimately there is no test of superior rightness as between a disposition to defend and a disposition to subvert the established order of things. But to say this is not to refute the proposition that law, as such, is simply one social institution among others. When Judith Shklar of Harvard describes international law as itself an ideology, she goes further than one would wish to accompany her. Yet her point is well taken when she shows why the value of law, axiomatic to some, is ambiguous for others. Her book, *Legalism*, provides useful light upon the question of the relevance, to difficult international problems, of international law.[23] What this discussion adds up to is once again an emphasis on the difference that there sometimes may be between inquiry into that which is legally indicated, and that which is therapeutically propitious, in respect of real-life political issues.

23. Judith N. Shklar, *Legalism*, Cambridge, Mass., 1964. Introduction, 'Law and Ideology'.

It is true that fanatical insistence upon the sanctity of law may well have about it an ideological smell. And certainly it is in the nature of law to underpin that stability in which others are more interested than some. But this is not the fault of law, which has its distinctive part to play. It only means that we shall, if we are wise, take a realistic, possibly disillusioned, view of just what part that is.

For life, including international life, goes on, and mostly it is indeed a matter of routine. And it is here, in the partial prefabricating of the hundred and one decisions that make up the daily round for the normal middle-of-the-road sovereign member of international society, that international law performs its most characteristic service. The law of reciprocity and the law of community—these are being supplemented by new international agreements all the time. In point of legal theory every legally binding stipulation is formally as binding as any other. And things proceed upon the assumption that in general what is bindingly provided for will duly be performed: as in the main it is. And this despite the absence of a court around the corner before which the state defaulting on a promise may be haled. This need be surprising only to those who think of law as that from whose un-wished-for interference with his life everyone would be escaping if he but could. In practice states in general fulfil their undertakings, even though to their own inconvenience. And the reasons for this are not really very far to seek.

An essential fact about statehood is that a state is something 'constituted'. It has, that is, a 'constitution'. It is an organization whose structure that constitution articulates. The functioning of the sovereign state as a member of international 'society' is a question of the decision-making process relevant to its role. Individuals also make decisions, many in the course of a day. Broadly it may be said that these are conditioned by the individual's appetites, his ambitions, and his beliefs. Now the sovereign state may have its appetites and its ambitions, but not so obviously its beliefs. In so far as it is at all a quasi-*homo*, it is homo *ludens*, not homo *credens*, that it the more suggests. Let-us-play and Let-us-pray are very different proposals. He who plays typically does so because it suits him. He who prays, because he cannot but. And it may be assumed that if the sovereign state respects the law, this is not because anything that could be called its credo requires it to, but simply because it suits its book. Why, so often, even when other things are far from equal, do states comply with law? The reply to this question could be a very long one indeed. But the short answer to it is that, like the individual, the state conducts itself in the presence of a cloud of

witnesses, comprising a diversity of what to the social psychologist are known as reference groups. And, as often as not, if it be wondered why a state has done this or that, and no more obvious explanation avails, the answer is that, in doing this or that, it was meeting the expectations of some politically or diplomatically consequential reference group. So, as the child will do approved-of things to retain its mother's affection, a state will do burdensome things to be of service to its 'friend'. Political obligation is what constrains state A, whose back state B might be available to scratch tomorrow, to scratch today the latter's back. One speaks of legal, of moral, and of political, obligations. But all three sorts are political in the end. Moral obligation, it is true, may tend to speak—legalistically—of sorts of states in sorts of situation. But political obligation is typically rooted in the relationships in particular situations of particular pairs or groups of states. If regard for legal obligations were not expected by the reference group, legal obligations might not count for much.

Punctilio in state behaviour is thus not so much a function of national virtue as of what is expected by the 'public' relevant in the situation. Domestic society is familiarly made up of 'worlds'. There are a golfing world, a stock exchange world, a betting world—in each of which there obtains a more or less well-defined ethos, such that whoever looks to his continued beneficial membership has no effective choice but to make at least a show of acceptance of the current standards of that world. And the multi-sovereignty system is in very much this same sense a particular 'world', with this exceptional characteristic: the individual participant, that is, the member state, has no effective alternative but to remain a member. If international law is currently losing its hold, it is not that the style of international politics need be said to have basically altered. Life in a multi-sovereignty system has always been a struggle for survival, at times palpably so, at times only beneath a surface calm of formally amicable live-and-let-live. The conduct of foreign affairs has always been a succession of day-to-day decisions, arrived at each on the basis of a weighing against one another of relative desirabilities and comparative risks. In each new situation the choice of practicable courses of potentially useful action is likely to be narrowly confined. Nor is it that the absence of formal sanctions is only now coming to be generally noticed. Rather it is that the reactions of the reference group to breaches of the law are losing their terrors; and this because those reactions are losing their fierceness and authenticity. The less your indignation, the less my self-restraint. So muted, after Goa, was the international establishment's manifestation of dismay that its impact,

at the receiving end, must have felt like a cousinly pat on the back.[24]

Again here we have the analogy of the game. Even under the direction of a firm referee, there are rugby matches where the standard of manners among the players becomes difficult to maintain. The quasi-game of international politics is played without a referee. And here even more surely than on the football field the standard of the least well-disciplined tends to become that of the many, if not of one and all. It is because others so often are with apparent impunity getting off-side that it is difficult for anyone to remain consistently within the rules.

These past five decades have been not unlike a match which, beginning with presentations to Her Majesty, has degenerated into something of a free-for-all. Over the years, more and more transgressions have been perpetrated without attracting penalties, and with less and less obvious compunction on the part of the offenders. Juvenile delinquency is a function as much of the local environment as of the native proclivities of the individual child. If standards, internationally, have deteriorated, the key is to be looked for not in the worsening dispositions of the rule-breakers, but rather in the growing laxness of the relevant reference group.

Given, then, that in more recent years standards of strict insistence on the observance of international obligations have declined, the question that immediately suggests itself is—Why? And to this the possible answers are many. Law as such—fairly generally in the world—has for instance lost something of its awesomeness with the spread of social science. The limits of what international law should at best be asked to do for international peace and order are now better comprehended, so that the importance of upholding the sanctity of law is no longer so resolutely stressed. But perhaps the simplest explanation lies in changes in the circumstances in which the question for statesmanship, of whether or not to overstep the legal line, falls to be considered. In the struggle for survival which is international politics, correctness of behaviour can become such a luxury as only the most fortunate and secure can afford.

What factors in the case of the individual affect his decisions in daily life? And among these factors what part does legal scruple typically play? No two situations are identical. Different citizens behave differently, as do the same citizens at different times. But in general the inducements that a citizen has for complying with, say, the terms of a contract may be assumed to include (a) his interest in his future relationships with the other party, or parties, to the transaction; (b) his

24. For a just comment on the Goa episode see J. L. Kunz, op. cit., p. 176n.

interest in his future standing in society at large, as well as in particular groups in which he is known; (c) his temperamental disposition to conform, in general, with the law as law; (d) his distaste for the risks to be run by those who flout the law, and (e) his personal self-image, in so far as it is that of a man of conventional virtue. This last inducement has affinities with (c) in that (c) may involve an element of private self-esteem. But, while (c) involves the internalization of social norms, (e) represents the cult of the ideal of the decent fellow who does the right thing whether society happens to be demanding it of him or not.

In some, but not in all respects, a state's inducements to comply with the requirements of, say, a treaty are comparable with the above, having their parallels in (a), (b), and (d), though not so obviously in (c) and (e); for factors such as (c) and (e) might be thought to be absent in the case of an organization such as the state. Yet the state too has its self-image, so it too may have some (e) component in its response to a situation. Conversely (d) in the state's case involves the examination of a different order of risks: for those that individuals run in society are not the same as beset a state's existence in the quasi-society of states.

Such being some of the sorts of inducements inclining a state to meet the demands of law, it will of course be remembered that decision-making is affected by factors of others kinds too. The belief, it has been remarked, that a man's ideas are wholly the product of his economic setting is as fatuous as the belief that they are entirely independent of it. Something similar may be said of beliefs about the influence of its legal obligations upon the conduct of a sovereign state. Indeed, as with the individual, regard for the law's requirements may weigh but slightly in the decision-maker's scales. What further factors has one here in mind? They fall into such commonplace categories as the economic and financial, the strategic, the moral and ethical, and the like. These will seldom however outbalance the aforementioned political factors—calculations, that is, of the possible effects of what it is proposed to do or eschew upon relations between the state concerned and other states, upon the sympathies of sections of opinion at home and abroad, and particularly upon elements, whether at home or abroad, upon whose support the decision-makers would like to be able to continue to rely. (In a non-technical sense these all are 'quasi-electoral' considerations. Many moral and ethical factors, or what look like these, may be validly reducible to sops to the scruples of sections of a domestic or international public. If one's public are morally apathetic, one's hands are so much the more free.)

Where, then, among factors affecting decision-making, does inter-

national law appear to belong? In so far as international law has any relevance at all, what seem to call for analysis are the feelings and attitudes of particular decision-makers in particular contexts in respect of particular elements in the law. Even here it is not to be assumed that simple deference to law simply as law will play no part at all. But in the main it is only indirectly that decisions are likely to be influenced by law—*via*, that is, the importance attached by *others* to the law's correct observance, and the concern of the decision-maker not to incur or aggravate the displeasure of the cloud of witnesses, or reference group, within whose field of appreciation the action or inaction to be decided upon must occur. The judgement of the relevant reference group is, in short, a potent sanction for the efficacy of the legal rule.

Whether an individual or a state, one's standing in a given 'world' is conditioned by how one shapes in relation to the standards and the understandings which define the 'normal' in the comportment of those who there belong. Each world has its characteristic system of expectations.[25]

The game of international politics is, as previously suggested, one in which each player holds, as it were, at any given moment a given number of tokens, some of which it stands to forfeit each time it is revealed as having transgressed a requirement of international law. (For whatever a government may decide to do it will typically have sought from its legal experts some colourable justification in law.) It is not simply for the law's sake that respect is rendered to the law. It is rather for the sake of the credit of those who show it. When Britain went to war in 1939 this was, submittedly, not just for Poland's sake. But neither was it merely for the sake of international law. True, the *casus foederis* had unmistakably occurred for Britain to rally to Poland's aid. True, a failure to do this on Britain's part would have been a flagrant default. Yet will it have been solely from a sense of jural necessity that Britain fulfilled her promise? It seems reasonable to believe, that, though legal scruples will doubtless have told against the tempting alternative —an alternative so tempting that France, but for Britain's bludgeoning, might well have succumbed to it—it will not have been these that weighed most heavily in British deliberations. Whether it was the sense of strategic inevitability (since to retreat any further at that point must surely have meant the loss of everything) or whether it will have been

25. Rare is the individual and rare too must be the country in whose social attitudes of the passing moment thoughts of future reputation play no part. The sanction for h ones business today is the tradesman's intelligent interest in the goodwill of his establishment in the years ahead. And, while a grocer may be intending to retire, governments know that their country must remain where it is for an indefinite future.

anxiety for Britain's credit (for had she not solemnly pledged her word?) —whichever it may have been, of these latter considerations, that determined Britain's action, either of them, alone, would have served. It seems rather too much to suppose that mere legal scruples would of themselves have done so.

As in the past, so in the future, signatures will be given, and in principle and in general they will at least be worth more than the paper upon which they are put. But, while all promises, if made in due form, are equally binding, some may so to say be more equally-binding than others. For it is one thing to assert of solemn promises that they invariably bind: it is another to say that reliance can invariably be placed upon their implementation. Creditworthiness is an imponderable, and a matter of degree.

In a society of sovereign states it is on promises only—apart, that is, from preparedness—that a foundation for the future can be built. The more extravagant these, the less credible and dependable will they appear. What are wanted are promises of the more likely-looking, rather than the more extravagant, kind. A guarantee given to all against all may in real terms be worth no more than a refusal of any against any. In the past, belief in signatures was often such that the demand for them was pressed beyond what was diplomatically realistic.

The fact, then, that legal arrangements may be working smoothly is, on this view, not so much a testimony to the general efficacy of international law as to the special state of international relationships between the countries concerned. All states have some sort of interest in their standing with other states. There are so many benefits to be enjoyed, or forgone, according as friendships are kept sweet or suffered to wilt, that there must be few other states in its dealings with which a given state will be indifferent to what they may think of its behaviour. International law defines what a state can and cannot do without infringing the rights of others: but it is not the awe in which international law, as law, is held that determines whether or not they will in practice be respected. It is not from fear of the policeman that your clubman is regular with his dues. Even in times of tumult, when all is in flux, and everyone, with his thoughts on the position in which each will be found when the dust has eventually settled, is playing first and foremost for his own hand—even in times like these the relevance of international law will be apparent when arguments are started as to who is to hold on to what. Though the mighty are not always in the right, they sometimes will be, and they usually would prefer to be able to claim that they were.

When, early in 1940, the Royal Navy moved into Norwegian territorial waters to rescue the prisoners on the *Altmark*, Mr. Neville Chamberlain, broadcasting, admitted the technical impropriety of what had been done. A senior international lawyer, listening in, was disconcerted. 'He *shouldn't* have said *that*.' His meaning? That it was one thing to be seen to contravene the law, and a more serious matter to be having to admit it. It was in those distant days a more invidious thing to come down clean in this manner than now it seems to be, especially since President Eisenhower's display of frankness about U2.

The constraint under which a government finds itself (a) to pay formal deference to the authority of law as law, and (b) to make at least a pretence of respecting the law's requirements in a given situation, is not merely theoretical. It is a fact of life as lived by sovereign states as involved in the affairs of the multi-sovereignty system. It is not of course a physical compulsion. But it is more than a mere feeling of moral 'oughtness'. It is not a social compulsion in the sense characteristic of that social control under which the individual lives in a human society. It is less a matter of the disposition of international 'society' *vis-à-vis* its individual member than of the feeling of the individual member *vis-à-vis* its fellow members, severally and in general, of international 'society'. Basically it is indeed a true necessity. For it is a natural one, dictated by the nature of things in the relevant context. It is not a matter of natural obligation in the sense of that mythical 'natural law' in which so many used once to believe. Rather is it reminiscent of the necessity under which a man on a rope above a precipice must feel himself, to hold on. To call it 'moral' is liable to suggest the incorrect impression that it is on moral grounds that a state accepts it. It is 'moral' only in the sense that the state has no moral, in the sense of no effective, alternative to doing so. Its submission to it is thus morally, in the sense of virtually, that is, practically, inevitable. And such indeed it is; for the state has in fact, in this matter, no realistic option. It cannot but accept, and pay at least lip service to, the system. If, in abstract principle, it could withdraw from the game, it could not in practice choose to do so. It has, in short, no alternative but to remain a player. It elects to play as having no choice but so to do. *Coactus volt.* If a name must be found for this important element, perhaps one might best describe it as a situationally generated pragmatic inevitability!

States and their governments show formal deference to the law's requirements because only so can they have any international law; and this they choose to have because they simply have to have it. They cannot but. Flout it they may, and do. But defer formally to it they must. Players may persist in getting off-side. But their game could not proceed if they did not in principle acknowledge the possibility of their so offending. They could not so offend were there no such thing as getting off-side. And were there not any rules, binding upon them as players, there would indeed be no such thing.

Those who want to play a game do require to have rules of some sort, in order to make a game of it. They have them, therefore, for their convenience. In the case of states, the game is inescapable, and yet it is, in principle anyway, for their own collective benefit that they engage in it. And this merely underlines the point, already suggested, that international law is less an instrumentality of social control than a body of ideas in terms of which such states as may wish to can organize orderly relations *inter se*. As all in practice do.

VI

What then of the particular 'world' which is constituted by such an association of states as formerly the League and now the United Nations? RvW can remember how, peering, as a juvenile, into the future of mankind, he was almost content to ask, What does the Covenant prescribe? Nowadays even the simplest of innocent souls is more likely to inquire, Who in particular, to whom in particular, has promised precisely what, and with what degree of credibility? It may be remembered that the promises contained in the Covenant lost most of what then was left of their credibility with the fiasco of sanctions in 1936.

It may not be of enormous social importance whether the members of an exclusive gaming club cheat one another and systematically sin against their rule-book. All that is their affair. But what if those rules are embodied by Parliament in an Act for the regulation of clubs for gaming? Even then it may not matter very greatly if the rules are disregarded, behind closed doors and by common consent of the gamers. The United Nations, however, if in some respects like a club, is a part of the public life of mankind. Its ground rules, fixed by solemn treaty, are part of international law. And its proceedings, in general, are open to the world. Disregard, in the day-to-day life of such a club, of the rules by which it is supposed to be living, is a reflection on those rules, not merely *qua* rules of a club but *qua* legal rules whose flouting is a flouting of international law.

Wanted, a world unvexed by mutual fears. Needed, as presumptive means thereto, a programme of general disarmament, to be accepted,

and implemented by all. In prospect, therefore, a likely proliferation of solemn instruments, drafted, presented, discussed, amended, redrafted, agreed, signed, and brought, by ratification, into formal effect. Such was the line of thinking, after World War I. Where the interests of enough of the states are nearly enough concurrent, the conclusion of appropriate international conventions is never unthinkable. Genocide, for instance, has been formally outlawed. And it is hoped that the concerted suppression of hijacking may yet be achieved. But the scene is now so confused, and the political climate so ideologically complex, that the topics on which there is available the needed consensus are found to be frustratingly few.

And it is one thing to legislate, municipally, against say racial discrimination with the clear-eyed expectation that one's laws will be only perhaps eighty per cent effective—but at least will tend to discourage the habit of mind which might have condoned what one is rendering illegal. It is a different matter to stake one's very survival on the hoped-for effectiveness of a 'binding' agreement on, say, the non-use of nuclear weaponry, on like assumptions. Better perhaps to face from the outset one's ultimate dependence, for the hope of one's continuance in existence, upon other than formal restraints.

Law *per se* is not a means of rendering impossible what is considered anti-social. It is simply a placing of the stamp of a certain sort of impropriety upon what it is wished to discourage. Whether it be the rules of general international law, or the provisions of such instruments as the Covenant and the Charter, the questions to be asked concern not the means to their institutionalized enforcement, but the extent of their observance, and the likely diplomatic repercussions of their infringement when it occurs.

The reproach was earlier implied against the United Nations that it had chosen, in some of its practice, to be a law unto itself. If the organization was not going to take its Charter seriously—but merely to pick and choose among its provisions those at this moment or that which might best suit its book—who else was likely to do so? Just as between the wars effective deference to international law on the part of its member states was fostered and reinforced by deference to it on the part of the organs of the League, so, conversely, since 1945 the standard of permissiveness in respect of international legal requirements is apt in practice to be the one set by organs of the United Nations.

In the sense that, for legal purposes, the substance of any agreement is its legal substance, the terms of the agreement being law for the parties thereto, the quantum of international law 'in force' is being

augmented every day. And in point of legal theory every binding provision is formally speaking as binding as any other. But, in point of moral, political, and diplomatic effectiveness, terms in agreements may vary very greatly; and except when the matter is before a court, it is the effectiveness, rather than the formal validity, of a given provision, that politically counts.

Meanwhile, that international law is still commonly assumed to count is evidenced by the interest that still is shown in the possibility, or impossibility, of effecting desired additions to its content. In part, the crisis of international law derives from the fact that it is not easily altered. Domestic society has its routine procedures for effecting in municipal law changes favoured by some, even though not by all. Internationally it continues to be otherwise. International law is thus more protective than municipal law of the vested interests of the few. If might indeed is right, internationally, in the sense that war makes changes in the law, in the municipal sphere it is so in the different sense that constitutional power allows the enactment of any legislation, no matter how morally dubious.

Foremost among the subjects on which many ardent people might have liked the United Nations to be able to legislate, is the emotionally-loaded problem of South Africa's policy of 'separate development'. If this policy were demonstrably offensive in the eyes of international law, the demonstration would long since have been furnished by its critics, and proclaimed with all the reiteration that has marked their voicing of the abhorrence with which they officially view it. But the apartheid programme is no more illicit in terms of international law than is Britain's for the rehabilitation of the Highlands. If then it is to be condemned as legally impermissible it must be rendered so, in order that it may. The problem thus is one of peaceful change—change, without violence, in the content of international law.

VII

Not a little has in recent years been written by authors of distinction in development of what is, on the face of it, a definitely revolutionary theory—the thesis, namely, that, if a position not previously known to the law once comes to be reflected with sufficient reiteration in the wordings of the United Nations, there so is engendered, if not indeed within months, then over the years, a quite new norm of customary international law. Evidence for its emergence is not of the kind traditionally looked for—cumulative observance, in the actual practice of states,

of the rule in question, coupled with the belief in its having already the force of law. Instead what you have is the enunciating, in suitable circumstances and sufficiently often, of a widely shared opinion—and the treating, and citing, of this opinion, by those who share it, as though it were a legal rule. Its endorsement, sufficiently frequent, by representative bodies, is construed as if imbuing it with the quality of bindingness. 'All falls very adequately into place,' writes Dr. Clive Parry, 'as part of the practice of States.'[26]

One can understand the notion, and the possibility, of practice providing evidence of opinion—changing practice of changing opinion. What is less easy to absorb is the idea of changing opinion, and the voicing of it, as constituting evidence of changing practice, except in the trivial sense of changing practice in the particular matter of the expressing of opinion. The fact that anyone should find it necessary to discount the difference between practice in the sense of doing things and practice in the sense of saying things, or even voting for things, is eloquent of the difficulty in which those publicists must be finding themselves who would like the law to be what a majority of states would perhaps like it to be, rather than what a minority of states are still quite correct in assuming that it is.

But is it being done—this treating, and citing—by the governments of sovereign states? What is never provided—though nothing in such a context could be more conclusive—is evidence of the reception of this novel doctrine by those on whom new obligations have in this manner been sought to be imposed. Ink might for instance have been spared if just one case could be adduced of, say France, or Russia, having acted upon this theory, conceding the status of new customary law to elements developed, to her disadvantage, in this way.

Once this new theory became official, it would only be a matter of the streamlining, mechanizing and accelerating of United Nations procedures—up to say a capacity for so many resolutions a minute—and the late President Kennedy's vision of a world made safe for diversity would have gone the way of Hitler's thousand years Reich. Or *would* it? Perhaps—as an alternative possibility—it is the claims to moral authority of international law itself that would have been given the aspect of an ailing joke. For so the internationalist's problem number one—of legislation by the many at the expense of the resistant few—

26. Clive Parry, *The Sources and Evidences of International Law*, Manchester, 1965, p. 113. Be it noted that no one is yet suggesting that an isolated New York resolution on, say, the impropriety of apartheid might have served. No single grain of sand need suffice to tip a balance. But enough grains, enough resolutions, enough anathemas?

would purport to have been solved: if, that is, the theory had won endorsement, in due time, by the International Court—before which it was in fact energetically canvassed by Counsel for the Applicants in the South West Africa case. Though Judge Tanaka may have hinted that he personally had some sympathy with it,[27] Judge Jessup quite explicitly had not.[28] And there was little to suggest that any of the other judges, except possibly the Mexican,[29] had.

It is on a further aspect of that strange South West Africa case that this essay may now be brought to a close. It concerns the possible solving of problem number one, if not through the doings and the sayings of delegates in New York, then—why not?—through the opinings of judges at the Hague.

In the circumstances following World War II there was but one way whereby the territory of South West Africa could have become a responsibility of the United Nations. It could only have happened if South Africa herself had freely chosen that it should. And this precisely was what South Africa had made it plain that she was opting not to do. Yet in 1950, in their Advisory Opinion, a majority of the Hague judges took the position that South Africa had in fact, by implication, accepted United Nations supervision in this matter. In the subsequent proceedings between 1962 and 1965 South Africa presented evidence in plenty that this had been a misreading of the relevant events. It was on this important question that the world now awaited from the Court what must at last be no mere opinion, but a binding decision. In the event, however, the case having unexpectedly collapsed on a preliminary issue, the question of the possible competence, in respect of mandates, of the United Nations, was not after all pronounced upon by the Court. Of the seven dissenting judges, two, even so, the Japanese and the Chinese, disclosed incidentally what on that point they respectively would have liked the Court to do.

In caricature, the position of Judge Tanaka on this question boiled down in effect to this. 'Up to a point I agree in this matter with South Africa: but thereafter we part company. South Africa contends that, in the law as now it stands, and contrary to what the Court said in 1950, as well as to what the Applicants have argued here, there exists no explicit present basis on which the United Nations can legitimately concern itself with the question of South West Africa. And on this point, namely, the *existing* competence of the United Nations, South

27. International Court of Justice, *South West Africa (Second Phase) Judgment*, 1966, pp. 291–4.

28. Ibid., pp. 432, 441. 29. Ibid., p. 467.

Africa is, in my own opinion, formally speaking, right. But from here on our opinions, hers and mine, diverge. For, whereas South Africa is saying—*Ergo*, on this crucial point it is incumbent upon the Court to accord the victory to *us*, what I on the contrary am saying is quite different. In substance, what the Court should in my opinion be saying is this: Inasmuch as it is in our view essential that the United Nations should be in a position to take action in this matter, and inasmuch as there exists in the law as it presently stands no express basis on which it can do so, it is incumbent upon us as a Court, endowing ourselves to the necessary, limited, extent with powers like those of a lawgiver, to create for the United Nations the legal footing upon which it so can act.'[30] The reader will at least be well-advised to note that, if among his fellow-judges there were any who shared with Judge Tanaka this untraditional view, they forbore to mention it.

As for Judge Wellington Koo, he in particular would have found no such need for the Court to deal creatively with the law. Simpler, as he saw it, would it have been for the Court to deal artificially with the facts. True, South Africa continued to deny having herself, in acting as she had in the 1940s, envisaged the attribution to the United Nations, with respect to mandates, of the functions formerly exercised by the League: but it was not now for South Africa to be determining the proper interpretation of what she then had done![31]

Given that the Court, so far from having in fact proceeded to the kind of quasi-legislative action that Judge Tanaka would apparently have favoured, had done nothing of the sort, one inference at any rate seems sufficiently plain: regardless of what others may be claiming for the course thereafter resorted to by United Nations bodies with respect to South West Africa, this must, in the Japanese judge's view, have been of doubtful efficacy in point of law. Which, naturally enough, is South Africa's opinion too.

But it is not the view of the International Court of Justice, composed as this has in the meantime come to be. By thirteen votes to two (those of the British and French judges) the Court, in its Advisory Opinion of 21 June 1971, affirmed the validity of General Assembly resolution 2145 of 27 October 1966, affecting to terminate the South West Africa mandate, and so to render no longer lawful South Africa's presence in the Territory.

30. Ibid., pp. 276–8.

31. Ibid., p. 236. It is ironical that, quite independently, there should at about this same time have appeared in the periodical *Encounter* a contribution on 'The Chinese Art of Make-believe'.

But though the Court might not share South Africa's opinion, others, and in particular Britain, do. And on proper occasions Britain has been unequivocal in the matter. So, for instance the Under-Secretary for Foreign Affairs (Mr. Anthony Kershaw):

> We attach the greatest importance to the rule of law . . . And we have given the most careful consideration to this advisory opinion. As an advisory opinion only, it is not . . . binding, but it is of course entitled to the very closest consideration and respect. After giving it that consideration, we have concluded that, on the basis of the law as we understand it in this country, we must reject the Court's opinion.[32]

It may be that even were the Hague Court to squander irretrievably the confidence and regard of the world of legal scholarship, the mystique and moral authority, in the eyes of mankind, of international law as such might remain relatively unaffected. There is probably after all something pretty well indestructible about international law, as a needed idea.

But what meanwhile are we now being asked to believe by so enviably well equipped a mentor as Dr. C. Wilfred Jenks?[33] Judge Tanaka having, in his 1966 dissenting opinion, in substance maintained not only (a) that the Court's 'majority' judgement was wrong in point of law, but also (b) that judges should, where necessary, play the part of lawgivers—Dr. Jenks reports those six of this judge's colleagues who had been with him on (a) as having been with him on (b)! A breakthrough indeed that would have been. And so, on Dr. Jenks's showing, it was.

If on the other hand it once came to be *accepted* that judges were to allow policy considerations to influence their approach to the interpretation and application of the law, legal argument before a court would cease to be strictly such in anything but name, for litigants would be committed willy-nilly to a political rather than a merely legal confrontation—a debate not about what the law should be understood as having been at the time to which their difference referred, but about what form of accommodation as between their competing standpoints should be opted for by the judges in their role as freelance practitioners of manipulative social therapy, for articulation in the language of the law. What, after a little of that sort of thing, would be left of the so-called legal framework is easy, but dispiriting, to conceive.

32. H. C. Debates, Vol. 823. Col. 681 (19 October 1971).

33. C. Wilfred Jenks, *Law in the World Community*, London, 1967, p. ix.