CHAPTER IX

THE MYSTIQUE OF THE LAW

A still Unsettled Question

It is necessary, if we would understand the social universe, that we appreciate the status within it of international law. In learned writings on this question the core of the matter has not always been approached. It is this core of the matter that there will now be an attempt to expose. And let it be insisted, lest there be any misconception on the point, that the question for inquiry is the nature of human society and the status of an element within it, and not just the uses of a word. Semantic analysis has its importance but linguistic conventions are not the only significant facts of social life.

A World that Never Truly Was

Let the reader conceive a world consisting of self-contained kingdoms, each ruled despotically by a king, and each as separate, constitutionally, from the others as, geographically, are islands in a sea. Let him imagine those kings the members of a club for kings, their membership being, of course, subject to their recognition, as binding upon them, of the rules. Within his own domain each king exercises sway through ministers who, acting together, run also a system of official representation abroad. A king falls ill: but his ministers carry on doing things in his name. He becomes a chronic invalid. Still they carry on. He dies without an heir. His subjects ask his ministers to remain in office, becoming responsible now to them collectively instead of to the no longer existing king. The representatives abroad now represent not the king but the kingdom. The idea catches on. And presently, the other kings also disappearing, the club carries on as a club, not for kings, but for kingdoms. For purposes of club membership the kingdoms are conventionally conceived of as

persons, persons of like passions in the main with the kings they supersede, and, like the kings, having things done for them by ministers, and representatives appointed by these ministers, in their name.

In place of the kings we see two sorts of personified abstractions. Two sorts, not one. This is the important point. Represented abroad are the personified kingdoms, standing in the stead of those persons, the kings. Served by the ministers at home are the personified peoples, standing likewise in the stead of those same persons, the kings. The kingship in its external application has passed to the kingdoms. In its internal application it has passed to the peoples. In its external application, kingship meant and means simply eligibility for membership in the club. In its internal manifestation it meant and means ascendancy, supremacy, top-dog-ness. Kingship in these two independent meanings, being now vested in different abstract entities, becomes two different factors, in the one case a characteristic of a country, in the other of a people. Two different factors, both called kingship. 'Kingship' thus has now two different meanings, which no one need confuse. And the point of the story? The point of it is that that is also what has happened to the term 'sovereignty'. It has now two different meanings, which no one need confuse.

A Law for Sovereigns

To say that no one need confuse these two meanings of sovereignty is not to say that no one ever does. In particular, people ask: Given that sovereignty means topness, how can all the members of a club be sovereign? How can they all be top? We must be careful at least not to fall into that one! Fitness for membership in a club for top-dogs is easily described. Being dogs, being top (in their own kennels), being all equally dogs, all equally accepting the conditions of membership of the club. Or alternatively, not being physically dogs, but only notionally—being deemed to be dogs, conceived of as if dogs, having dog-ness ascribed, imputed, to them.

Countries, whether kingdoms or not, being deemed to be persons, conceived of as if persons, having personality imputed to them—these are duly qualified for membership of the club, under all the conditions attaching thereto—and especially the

condition of subjection to the rules, to the system, that is, of international law—the law described by Vattel as a law *for* sovereigns.

Membership of a club is not a physical condition, it is a social status: and its implications can be known only by knowing the nature of the club. What it means to be a sovereign state is understandable only incidentally to an understanding of the nature of international society. As membership of a club depends on acceptance as a member by the other members, so does membership in international society, the club, the 'international', that is, of sovereign states; and in this society membership is understood not as sovereign statehood merely, but as sovereign statehood subject to international law. The possibility of a recognised sovereign statehood, divorced from subjection to international law, no more arises than does that of membership of the Stock Exchange divorced from subjection to the rules of the Stock Exchange. It is technically unthinkable. That is why you never find it thought of, by sovereign states. What they do think of is how, consistently with their continued technical subjection to international law, they can most successfully pursue the aims they have in view. In this sense they resemble business men with a reputation to safeguard or to lose.

Necessity the Mother?

A sizeable library might be filled with the writings of those —most, if not all, of them men of great learning and high repute—who on one side or the other have contributed to the great debate about the basis, and nature, of the binding force of international law, as law. On the one hand there are those who see it as somehow binding by the dispensation of Nature. As physical necessity expressed itself, or was supposed to express itself, in the laws of physical nature, so social necessity, or moral necessity, or jural necessity, or biological necessity, or necessity-just-like-that expressed itself in the law of nature and of nations. *Pacta erant servanda.* Pacts were binding, because—well, because they *were*—in the nature of things.

But were they? Are they? In the nature of things? Is it not rather that they derive their binding character from their status in the sight of the law? Is it not the law, rather

than Nature, that makes them binding, legally (not just naturally, and perhaps not naturally at all—but non-naturally, legally, in the sight, not of nature but of law)? The cart being drawn by the horse, it is implausible to say that the horse moves forward because pushed by the cart. What moves the horse? What gives its binding force to that law which gives their binding force to those pacts which, under its mysterious aegis, are concluded? In opposition to those who so inconclusively have argued that law as such is binding by nature, there are those who have seen it, by contrast, as binding by virtue of consent. The positivists, to give them their accepted name, see the states as having in effect, constructively, if not historically and in fact, agreed that there should exist a legal system binding upon themselves as sovereign states. This is not the same as saying that the system is made up of provisions all severally so consented to: for it is the system, surely, which lends its legal force to that consent. It is the system itself, as such, that is being held to have derived its binding character from some sufficient sort of consent. What remains of course a mystery is how any sort of consent could in fact be sufficient to give binding force to a system, as a system, of law.

Holmes the Homeless?

The fact however is, is it not, that in asking how in fact a legal system comes in fact to be a binding system, both schools, backers on the one hand of Nature and of consent on the other, have made what it is now the fashion to describe as a category mistake. One does not ask where, as a matter of history, Sherlock Holmes had his home—still less where his maternal grandmother had hers. The way of life of any character in fiction is, as such, a matter not of fact but of fiction. Where in fiction, where in the story, the fictional character had his home, if any, or his grandmother, if any, hers, if any, is a question to which the sufficient answer, and so the correct, though scarcely the true, answer, is a matter of fiction. And as things can correctly be said in terms of fiction concerning what exists in fiction, so in terms of doctrine may things be correctly said concerning what exists in terms of doctrine. The answer, if any, to a question concerning something which is so in point of doctrine will be correct, or incorrect, in point of doctrine.

And if, like the question concerning Sherlock Holmes's grandmother the question is difficult to answer even in what would be the appropriate terms, in terms of *fact* it is no more susceptible of an answer, either accurate or otherwise, than is a question of fact concerning what has existed only in point of fiction. That the law exists is a sound enough assertion if by sound we are understood to mean sound in point of doctrine. That the law is thus, in terms of the relevant doctrine, *deemed* to exist—that too is a sound, probably even a true, assertion in point of fact. But what is not sound, because it cannot be true, in point of fact, is that the law exists in point of fact. For in point of fact law as such exists only in point of doctrine. And to ask or offer an answer in terms of fact to a question arising, if it arise at all, only in terms of doctrine is to fall into a category mistake. Anyone who makes this mistake in respect of the binding force of international—or of any other kind of law—has the consolation of knowing that in doing so he is in a numerous and illustrious company: but that does not render him right.

Worlds Distinct but not Apart

Any question presupposing that the legal relations between banks, or the legal relations between brothers, for that matter, are elements in the world of fact as distinct from that of law, involves similarly a category mistake. And while social relations between brothers, as distinct from legal relations, may be said to subsist in fact, between banks as distinct from the bankers, even the social, no less than the legal, relations subsist essentially only in idea. In the theory, the doctrine, the idiom, the way of thinking, that prevails in the relevant society, the banks are persons, having relations *inter se*, just as brothers in fact are persons having relations *inter se*. And over and above these, their social relationships, subsisting, in principle, as matter of fact, the brothers may also have legal relationships, subsisting in principle, as matter of legal idea. We may speak of course of happy relations existing *de facto* between banks, meaning *de facto* between the bankers. We may speak of friendly relations between countries, meaning absence of animosity between their peoples. But the formal relations between banks, as such, independently of the bankers, and of

the states, as such, independently of the statesmen, are relationships subsisting not, in principle, in the world of fact, but in the realm of official idea. The relations officially conceived of as obtaining between what are officially conceived of as persons distinct in principle from their populations, whether individually or as human aggregates, are relations officially conceived of rather than relations obtaining in fact. Loose language however suggestive of, is not necessarily conclusive of, a category mistake having been made: for those who get their language picturesquely oversimplified may nevertheless be keeping their mental pictures realistic and precise. Not always is there a mistake being made. The point is that there often is one, and that when this is so, it is likely to be in the nature of a category mistake: for it is likely to be a question worded as arising with respect to the world of fact when in strictness it has arisen only with respect to the position in a world of doctrine—of legal doctrine, of social doctrine or, above all, of diplomatic doctrine. To show, or to question, something's existence in diplomatic doctrine it may be suggestive, but is scarcely sufficient, to point to something as existing in the world of fact.

A Set of Ideas

Law is a factor in the social scheme of things, consisting of a set of ideas in principle belonging together as elements in a logically coherent system—a system deriving its character as law not from the quality of its component ideas but from its status as a factor in the social scheme. For law is not simply a set of ideas, it is a social institution, not even conceivable—as law—in separation from the social milieu in which it has the status which is the very essence of its 'law-ness'. And, as law—that is as being, by status, law—it is, by status, *binding* law—for as little can one conceive of a law that is not binding law as one can conceive of a circle that is not circular. It is of the very nature of a circle to be circular, and of law to be binding. The imputation to it by the society it serves of its status as law is by the same token an imputation to it of binding character. Not naturally, but in point of status, it is binding. So far from the members of the society having rendered it binding upon them by any virtual equivalent of a formal

consent, the membership to which they lay claim in the society in question is a membership in subjection to the law of that society, for such is the nature of that society. It is a society which has, historically, taken shape as a society of members subject to that law. Their subjection to it is no more detachable from their membership than is its binding force from its character as law. And to ask for evidence of their subjection, or of its binding character, or indeed of the existence of such a society—if this means asking for evidence of a *fact*—is, as it happens, a category mistake.

A Faded Myth

The student should know now to listen very critically to anyone who thinks to persuade him that international law is essentially a form of 'natural' law. Unless either the one term or the other is so defined as to make the statement tautological, the statement is incorrect. But it is worse than that: for while intrinsically false it has something of the appearance of being true. If international law were natural it would not be law—not in the sense in which the law obtaining in any modern civilized country is law. For law, let us say in England, is a human achievement, as much indeed as is the invention of games—with which it has not a little in common. The playing of games is possible because man's mentality lends itself readily to association on a basis of make-believe. The players in a game are living as it were in a little world or sub-civilisation of their own. And what makes their behaviour rationally intelligible is their acceptance, conventionally, of assumptions not true of the world of common day. And if this is true of the game as a sub-civilisation so also is it true of civilisation in general. Man by virtue of his game-playing capability lends himself readily to life in an environment other than the merely natural.

The Basis of Social Co-existence

Conceiving themselves as living in a society, the sovereign princes conceived themselves as living under law. This was analogous to a company of friends hitting upon the idea of indulging in a new kind of game. Some newly invented games do not take on. Others one will see being played. The game of let's-play-international-law took on, got going and is going

on still. And the same may, with non-essential differences, be said of any other operative legal system. Once we remember that social co-existence, like the playing of a game, proceeds in the light not of things as they are, but of assumptions of a conventional character—in the light of how they shall be *deemed* to be—we see in what sense it is that law of any kind exists, and on what terms its existence is feasible.

What matters for the possibility of such a 'game' is not that the players should be all of a single heart and mind on what makes the game worth playing. On the point and purpose of their playing they need by no means be at one. Enough that their outward behaviour be in close enough accord with the requirements of the theory. But with respect to the status and content of the theory, given that they are men, not ants or bees, a certain semblance of agreement among the players, some approach as Boulding might put it, to the sharing of a public image, would seem to be a *sine qua non*. For it is on their sharing of such an image, of what they are involved in, that their co-existence and co-operation in community are basically dependent.

Why no Orthodox Answer?

On the function of law in the national community Karl Marx propounded a quarter-true idea, the error of which is made particularly apparent if the attempt is made to apply it by transference to the explaining of the function, internationally, of international law. Marx represented law as essentially, and not merely in special instances, an instrument of exploitation and oppression. What is true of Marx's idea is true likewise of any other theory which likewise makes law to be necessarily something imposed. Is there—and if not why is there not—an orthodox answer, to this question on which Marx's answer has above been described as only quarter-true? On what level of inquiry does this question arise? Is it on the level of legal theory? On the level of the physically real? No, it is on neither of these levels.

Where Have Law, and Music, Their Being?

Our question does indeed arise on the level of reality—but it is on the level of social, not of physical, reality—and our

inquiry is sociological in type. Here sees the student of social phenomena a going concern. In this going concern an evidently important component element is law. What function, he may ask himself, can law be observed as fulfilling within the structure of this going concern? An analogous question suggests itself. What function does the musical composition fulfil within that going concern which we know as an orchestra performing a symphony? Physically there is a good deal going on, and what is physically happening is far from pointless. What gives it its point is however its relationship to something not physically existent in the world of tangible fact. For, in what sort of a world does the composition have its existence? In what sort of a world exists any piece of music while not in process of being performed? Or any poem not presently being recited or recalled to mind? Or any story not presently being told? Or any slander not presently being repeated? Or any recipe not at the moment being used? The legal formula is preserved on paper: yet its preservation on paper is not the same thing as its existence. Need a story, in order to exist, be available on paper? Need it even be remembered? How many stories have existed and then been lost? Do they in being lost so cease to exist? What if the same story should tomorrow suggest itself to someone anew? Will it now be the same story—or only another exactly like it? Such questions are not all as trivial, or as playful, or as impertinent, as they may seem.

As the orchestra operates in terms of a creation say of Beethoven's, so does English society operate in terms of the English Common Law, and so does the supra-national diplomatic society of sovereign states operate in terms of International Law. International, like domestic, law is not a policeman, or a prison, or a gallows, or a judge, but a set of ideas. Like domestic law it is binding. Like domestic law it is, as it were, being played. Just as a game, a composition, a play, is at a given moment being 'played', so also at this moment in history are a multiplicity of systems of law, each of them a distinct set of ideas, being played—among them the international system.

Whence the Circularity of the Circle?

What gives to International Law its binding force is what gives it its very existence—namely the thinking, that is, the conceiving, which makes it so. Men, in order to play law, need to conceive law and to conceive it *as* law, to conceive it as binding. For law, *as* law, *is* binding. By definition therefore International Law, *qua* law, 'is' 'binding'. The system is, *qua* law, a binding system.

And now, given this binding system, what of its detailed requirements? How came they to be law? How came they to be binding? How otherwise than simply by coming to be severally included as its component elements in the given, functioning, legal system? Coming so to be included means becoming law. As the promise which I give in a contract becomes binding in terms of the theory of the contract, so the contract as such is binding upon me in terms of the theory of the law. And the law? The law as such is binding on me in terms of the theory of the Constitution. And the constitution as such is binding in terms of . . . what?

Whence the Orthodoxness of the Orthodox?

As the idea of the binding force of contract as such is logically 'pre-' any particular contract, so, that of the law as such is logically pre-legal, and that of the constitution logically pre-constitutional. The idea of the possibility of a binding constitution is a logically pre-constitutional idea: and it is at the logically pre-constitutional level that the question, How *comes* the constitution to be binding? may arise. It is on that level that, if it is to be answered at all, this question must be furnished with an answer. The difference between this question and the question: How comes the contract to be binding? is not that the one question can be answered and the other not, but that the one can be given an orthodox answer, while the other cannot. There is no orthodox answer to the question: How comes it that the constitution as such is binding? There may of course be plausible answers, palatable answers, popular answers. But the binding force of the constitution, while orthodoxy assumes it, is not something that orthodoxy explains. It is matter of basic social dogma. It is the dogmatic premise

of the functioning of the constitution, its existence, that is, as a going concern. And as the orthodoxy of the idea of the constitution's orthodoxy is basic to the constitutional process, so to the diplomatic process is basic the idea of the orthodoxy of the diplomatic theory in terms of which international law is binding on the sovereign state. The idea of the existence of states as persons, of their sovereignty, of their constituting a society, of the existence of international law and of international morality, and of these being binding upon the sovereign states —such are the dogmatic premises of that on-going game of diplomatics whose playing at the supra-national level is fundamental to the maintenance of such rudiments of order as men presently enjoy in their global affairs.

Does Enforcement Create, or Does it Presuppose . . .?

What is it that accounts for—and what exactly is it that constitutes—the actual playing of a game of law? What, for instance, in the case of the Law of England? English law is not merely enacted, interpreted, applied: it also is in some degree enforced. Is English law being played merely in that it is being enforced? Or is it being enforced by virtue of its being played? A society playing a system of law seeks to enforce it upon any marginally co-operative members, just as an orchestra might scowl at a performer who was getting out of time. What accounts, however, for the music's being played is not the scowling, but the disposition of the members in general to play, and if need be to scowl. Had a functioning society to be thought of like that of a lion-tamer whipping his lions around in a cage—then international law just would not fit into the picture. So much the worse, must we not then say, for such a version of the picture? But if it be likened to a *game in progress*, it does. Imagine international society like a game in progress, the players being the sovereign states. Imagine the game as blending the characteristics of chess, of poker and of American football. Realise that, as the notion of law implies the notion of binding force, so the notion of disposition to play the game implies disposition to submit to the referee, that incarnation of the rules of the game, of the theory, that is, determining what is proper and what improper and what obligatory in the playing of the game. The game

goes on because, the players being agreeable to its going on, enough of them are continuing in submission to the rulings of the referee. The international game goes similarly on because the players, the states, continue in principle, in profession and purportedly, to subject themselves to the requirements of international law. Even after entering the Rhineland in March 1936, Hitler was at pains to contend that in doing so he had not got 'off side'. The absence of a referee might be fatal to the playing of rugby football: but it is not quite fatal to the playing of the game of diplomatics. What happens is that the game goes on and the argumentation about alleged past infringements of the rules goes on as well.

Is a Light, when not Alight, a Light?

When is 'law' not properly speaking law? One answer might be, when it is not functioning as such. The same hat formerly fashionable may be now no longer in the fashion. What was a fashionable hat is no longer a fashionable hat. The same idea, formerly erroneous, may now have become correct (e.g. that Queen Anne is dead). The same fact once unknown may now be known. The same idea once heretical may now be orthodox. The same rules once not in force may now be in force. In virtue of their being now in force, legal ideas have now a certain sort of orthodoxy. They are the orthodox answer to the question, What, on such and such a point, is the law? The question arises: Are they the orthodox answer because they are the law, or are they the law because they are the orthodox answer? It is confidently submitted that their being orthodox flows from their being the law, rather than the other way about.

Why, when Playing Ball, do People Play at all?

Having thus considered in what sense international law is binding, it still remains to discuss why it is not only recognised, but treated, as binding. Why, though not necessarily enforced, is it at all complied with? The answer is: Because the on-going global diplomatic process is indeed like a game, and like any other game, it has to have rules, and compliance with those rules. The question: Why in practice is the law respected? may be met with another question: Why on a football field is the referee obeyed as he is?[1]

It is after all not in the nature of the law, but in the nature of the international society, that one must look for the answer to the question: Why in practice do states obey the law?

[1] Every large-scale society, be it free-democratic or totalitarian, or be it the society of states, has its own particular 'game'—played, or misplayed, in accordance with its own conventions—save in terms of which its functioning will not be understood.