INTERNATIONAL LAW: THE LEGITIMATION OF POWER IN WORLD AFFAIRS

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International law sits very uncomfortably in the law school curriculum. For legal professional requirements, it has until recently been treated as irrelevant and is still considered to be peripheral for UK practising lawyers. Law is mainly taught as private law governing relationships and transactions between individuals, and even public law tends to focus on the rights of the individual. Thus, coming to international law, which deals with the regulation of world affairs, students are forced to confront much more directly questions about the relationship between law and public power. These are especially hard to resolve from the traditional perspective of legal positivism, which sees legal norms as commands issued by a superior authority, rather than as growing out of and being rooted in social relationships and institutions.

The result is that 'international law' is still commonly regarded as a contradiction in terms, and therefore not 'real law'. Its precepts are either considered to be rationalisations of the interests of the powerful; or they are seen as idealised aspirations for world peace, human rights, or saving the planet, which are flouted by the powerful. In fact, international law manages to be both of these, due to the ability of law both to articulate power and to legitimise it.

Public international law is defined as law between states. Hence, it is impossible to make much headway in understanding it without grasping the nature of the state. Usually however, both international lawyers and international relations specialists treat the state as a subject, that is to say they reify or personify the state . It is treated as a unit, and international society is referred to as a 'community of states'. Discussions about international law therefore focus on the special characteristics of this community, which are said to explain the peculiar nature of its law. Since there is no supreme authority in 'the international community', there are no compulsory procedures for law-making, dispute-settlement, or enforcement, and therefore from the viewpoint of pure legal positivism it has no 'law' at all. Others regard international law as law of a peculiar kind, generally as that of a less-developed or primitive society, reliant on self-interest, reciprocity and decentralised sanctions for its enforcement. Enthusiasts for international law, on the other hand, consider that these features are in fact its strengths: the behaviour of states is said to show at least an expectation of compliance with commonly-accepted rules, and these rules are argued to be effective most of the time, due to their relative determinacy and coherence, their power of symbolic validation, and general adherence to them (Franck 1990).

The modern territorially-defined state is at the intersection of the distribution of political power. Its authority to assert an internal monopoly of coercion depends upon and interacts with the international normative framework. The state consists of public bodies asserting exclusive authority over a territorially-defined space, but the extent of that authority is limited by the international context. The main limitation is exerted by the existence and possibilities of international contacts, transactions and flows across state borders. In the pre-modern state, authority was personal and trade was long-distance, between communities which regarded each other as exotic. Imperial China built the Great Wall to keep out the hordes, and gave European merchants special rights of access, requiring them to live in enclaves where their own laws applied (the classic system of 'extraterritoriality'). In Europe also, the political

structures were vertical, built on the personal ties of allegiance of the subject to a superior 'sovereign', and not defined primarily by territory. Such sovereignties could be piled one atop the other; only gradually was the absolutist concept of the power of a liege converted into a notion of exclusive legal power. In contrast, the post-Napoleonic state claims exclusive authority over a defined territory, but that authority is not absolute, either internally or externally.[1] Internally, the exercise of the modern state's authority is legitimated through the abstract and impersonal processes and symbols of law, and this is counterpointed externally by the norms and rules of international law which regulate the interrelationships of those public sovereigns. It is this interaction of state sovereignties and its changing nature that underlies the development of international law, and current debates and struggles over its transformation.

Critiques of International Law

Significantly, the new wave of debate in the 1980s, as writers from various perspectives have sought to rethink the nature and role of law in international affairs, pre-dated the major changes in inter-state relations which occurred in the 1990s. Much of the writing on international law in the 1970s accepted a functionalist and even instrumentalist view of law, arguing for an adaptation of law to the changed 'realities' of international society, especially the creation of many new states by decolonization. Equally major upheavals have transformed the political landscape since 1989: the collapse of state socialism in eastern Europe, the end of the Cold War, and the disintegration of the Soviet Union and of other states created in 1917-21. Yet the new concern with re-evaluating international law has not been a direct response to these changes in the character and number of states, but has deeper roots in the broader global crisis. Despite immense advances in productive potential in the international economy, we still do not have minimum tolerable standards of housing, sanitation, health, education or even food for the vast majority of the world's peoples. Even more agonisingly, continuing violence and even desperate warfare has symptomised the continuing disintegration of the European-inspired nation-state, in many parts of Europe itself as well as of Africa and Asia. Yet the sharpening of these contradictions has generated a widespread sense of powerlessness.

It is this which is reflected in the current ferment of intellectual debates about the possibility and limits of reason, order and justice in society. In earlier periods dissatisfaction with traditional perspectives and explanations led either to projects for a new world order, or at least to critiques of the existing bases of social power, aiming to empower the oppressed. In contrast, the postmodern pessimism of the recent period makes its challenge not just to the existing order but to the possibility of any order, or of any objective basis for universal or even generally acceptable principles of law governing conduct in international society (Carty 1986; Kennedy 1989; Koskenniemi 1988, 1991a). Yet in relation to the central issue of the changing nature of the state and of the global system, some of the critical and theoretical approaches which are confined to linguistic deconstruction of the conceptual framework of international law have serious limitations. Thus, Carty refers to the state as a 'metaphysical entity' (Carty 1991: 94), and Allott argues for dissolving the state as an illusion preventing the proper self-awareness of individual human beings as part of world society. In contrast, Koskenniemi has pleaded that we must 'take statehood seriously' and has opted for formal

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[1] An excellent account of the simultaneously national and international nature of the modern state system, combining a theoretical analysis with a historical account, has recently been provided by Joshua Rosenberg (1994).

statehood as a necessary (although second-best) protection from the anarchy of global diversity (Koskenniemi 1991a: 42, 1991b: 397; 1994).

The new concern with the basis of normativity in international society has led to the rethinking of the conceptual structure and ideological effects of international legal rules, whether by those who wish to explain and justify their efficacy (Franck, Kratochwil), those who seek a reconceptualization (Allott), or the deconstructionist critics (Kennedy, Koskenniemi, Carty), who reject the pretence or deception involved in maintaining the possibility of a universal system of rules. In general, however, there seems to be a large gulf between the debates within theory and any engagement with or attempt to understand the changes taking place in international society. As a first step, it is certainly important to abandon the simplistic positivist belief in law as rules, and view it as a social process, which helps to structure and mediate political and economic relations. Rosalyn Higgins, recently elevated to the International Court of Justice as its first woman judge, has pointed out that at least in this emphasis on law as process some of the critical legal studies (cls) perspectives resemble the 'policy-science' school pioneered at Yale and of which she is an adept exponent. However, the cls writers view law as radically indeterminate and contradictory, so that international legal arguments cannot be evaluated except by going outside the law -- yet the realm of politics is not one in which the postmodern critics are generally comfortable. The policy-science school, on the other hand, argues that legality entails ensuring 'that decisions are made by those authorised to do so, with important guiding reliance on past decisions, and with available choices being made on the basis of community interests and for the promotion of common values' (Higgins 1994: 9). However, this perspective offers little theory or analysis of society, viewing politics essentially as a process of decision-making based on values, without reference to social structure or organisation and therefore evading questions of inequality and power. Thus, especially in the hands of the dominant Yale theorists of the Lasswell-McDougall school, it tends to result in apologia for the perspectives of authoritative decision-makers, and especially of US foreign policy-makers, cloaking their policies in value-justifications based on generalised concepts of the human good.

Although traditional approaches, whether positivist or realist, can be criticised for treating international politics merely as an objective realm of 'pure facts' which can be quarried to provide evidence of the observance or non-observance of international law (Koskenniemi 1991a: 37-39), not all sociology or social inquiry is positivist. Theoretical reflection can provide a basis not only for understanding but also for committed interventions in social practices; while a critical interpretation of these practices in turn should contribute to the construction of a reflexive theoretical standpoint. No individual can claim to have privileged knowledge of the truth, but social inquiry takes place as a process of interaction, which is also bound up with broader social and political processes. Thus, a social-science methodology based on a reflexive perspective and self-aware political practice must take into account that necessary interaction, and help the intended audience make its own inter-subjective evaluation.

'Globalisation'

Our objective should be to seek a better understanding of the role of law in the global political economy, and especially its relation to power. This is especially so now, in the closing decade of this century, with major changes and conflicts in the global system, in which international law is being revamped and pressed into playing an increasingly important role. These changes are often summarised by reference to the much-contested concepts of 'globalisation', and the 'new world order'. The terms are misleading, since a glance at the daily news shows that the

world is not moving either towards a stable order or increased global unity. These are also ideologically-loaded terms, often used to present a particular vision as inevitable.

Nevertheless, there have undoubtedly been major transformations in the global political economy, especially since the disintegration of the Soviet bloc and of state-socialism. A major feature has been the opening up of markets and societies to global competition, through the drive to eliminate all barriers to economic flows and to give market access for all kinds of trade and investment. While this has increased the potential for such international flows, and their volume has increased in absolute terms, they are not generally greater when considered as a proportion to internal flows within national socio-economic space (Thomson and Krasner 1989). The effect has rather been to increase competitive strains, so that every aspect of social life is now more exposed to pressures from world markets. This internationalisation of markets does not create an inevitable trend to global homogeneity, but fosters a greater awareness of diversity and difference, and a tension between the tendencies and strategies towards homogeneity and those towards heterogeneity. There are certainly manifestations of the same consumer culture everywhere from Birmingham to Beijing, symbolised by the arrival of MacDonalds in Red Square. At the same time, there is greater awareness and appreciation of cultural diversity, for example in world music or cuisine, as well as a resurgence of local pride and often aggressive nationalism or sectarianism, from Belfast to Bosnia.

The crises of identity resulting from these tensions are widely familiar, but less discussed is their very unequal impact. Certainly, people everywhere are being increasingly exposed to the possibilities of international flows and contacts, but for most they are mainly a threat. A coffee-grower in Colombia, a tuna-fisher in Peru, or textile-worker in the Philippines are vulnerable to globally-interconnected forces over which they have little control. Only for a relatively small elite does 'globalisation' create improved opportunities, greater choice, and more control based on improved information. Yet even these are only possibilities, offering challenges: for example, the availability of a wide range of global information sources from TV, newspapers or the Internet does not necessarily improve its quality. The ease with which the attention of millions can quickly be focused on a global drama such as an oil spill, a famine, or a civil war, does not necessarily facilitate a sustained and profound understanding of global issues, but can foster sound-bite politics. It certainly increases the political importance of control of access to information-diffusion networks: the first thing the French military did when they boarded the Greenpeace ship taking action against the Mururoa nuclear tests was to disable its satellite-transmission equipment.

In many ways such changes, now described as 'globalisation', are a heightening of contradictory tendencies present in the international system for the past hundred years or more. Although they are often said to herald the demise of the nation-state, as its capacities for effective action are undermined by the pressures of global forces, it can equally justifiably be said that control and regulation of global market forces still essentially depend on states. However, the very character of the state, and in particular of the international state system, are undergoing some major transformations, as part of the changing pattern of local-global links.

Universalist and Statist Views of International Law

The underlying concern in contemporary debates about international law is what sort of legality is possible or appropriate in a world which has become increasingly diverse, complex and conflictual, and at the same time increasingly interdependent. Although this dual centripetal and centrifugal process has become increasingly acute in the past decade, it has marked the history of this century. The attempt to grasp the tensions created by this dialectic

of increased diversity and interdependence has also polarised international relations theorists. This relatively new discipline has, virtually since its inception, been broadly split between the realists or neo-realists who, continuing the tradition of diplomatic history, have focused primarily on inter-state (meaning essentially inter-governmental) relations, and on the other hand a variety of neo-functionalists who have preferred to emphasise the 'spider's web' of social relations in 'world society' which cut across the 'billiard-balls' of the territorially-defined nation-states (Burton 1972). This latter approach has appeared in successive manifestations as interdependence theory, transnational relations, régime theory (Krasner et al. 1982; Levy et al 1995), and currently 'policy networks', 'epistemic communities' (Haas et al. 1992) and 'global civil society' (Lipschutz 1992; see generally Groom & Taylor 1990). They have recently been reinforced by sociologists and social theorists generally, who have discovered the issue of 'globalisation' (e.g. Sklair 1991), discussed in the previous section.

For international lawyers these debates strike a familiar chord, since for most of this century they have been wrestling between statist and universalist conceptions. On the one hand the state-centred view has retained its power, emphasising the autonomy and sovereignty of the nation-state, and therefore a strict dualism between international and municipal law and a reluctance to accept that international legal obligations restrict state autonomy unless very clearly accepted through the 'consent' of sovereign states. Against this there has been a pull towards a new universalism, involving a close interaction or symbiosis between international and national law, accepting that international law can create rights and duties not only for states but also for individuals and transnational corporations, and arguing for global legal regimes covering matters as diverse as human rights, the protection of the natural environment, and international business or commercial transactions.[2]

The tension between these two perspectives underlies much of the theory and practice of contemporary international law. It also cuts across jurisprudential divisions such as divide positivists and naturalists, as well as the different political standpoints and economic interests of rich and poor, developed and underdeveloped countries. Thus, in Britain there has been a neo-Grotian revival, initiated by figures such as Hersch Lauterpacht and Wilfred Jenks, who wrote of the Common Law of Mankind; while in the USA, teachers in the major law schools from the 1950s began to combine elements of private and public international law, together with comparative, constitutional, but most importantly corporate and commercial law, into what Philip Jessup as long ago as 1956 named Transnational Law. It was this approach that helped revive US international law from a neglected sub-field to an important place in their law schools, nearly all of which now have their own journal of the law/politics/economics of inter- or trans-national transactions. This combination of international and business law has also helped equipped US corporate lawyers to play a major role in building the new fields of international legality (Dezalay and Garth 1995, Trubek et al. 1994).

By contrast, in Africa, Asia and Latin America, where so many new states had been formed the postwar process of decolonisation, the politics of nationalism led to a strong emphasis on

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[2] David Kennedy, in his re-evaluation of the writings of the 'primitives', from Vitoria to Grotius, contrasts them with the 'traditional' international legal scholarship of the post-Westphalia period, and the "modernists" of the 20th century. Indeed, although he is scrupulous to read the primitives on their own terms, his interest is to contrast their ideas with the subsequent perspectives: in his reading, the traditional scholars emphasise state sovereignty and make a sharp distinction between international and national law, while the "modernists" attempt in various ways to overcome this, without returning to the naive universalism of the "primitives". His essay (Kennedy 1986) itself thus attempts to chart modern concerns by re-reading the past.

state sovereignty. Although during the independence movements and in the first flush of the post-colonial dawn the principle of self-determination was seen by some to entail the rejection of imposed colonial boundaries, it quickly became apparent that the political basis of the nation-state owed more to the lengthy historical experience of administration of territorially defined entities than it did to ethnic ties. Thus, the African states quickly followed the historical precedent of Latin America in adopting the *uti possidetis* principle,[3] and the grander projects of overcoming these divisions through a process of African unification were rapidly eclipsed by the consolidation of a nationalism which was both quick-growing and tenacious. The more recent experience of eastern Europe again emphasises that viable statehood requires a delicate combination of a culturally constructed national identity linked to a territorially-defined unit, even if this be an administrative unit of a previously federal or unitary state.[4] The long agony of former Yugoslavia shows the damage which can result from ethnic, racial or linguistic consciousness alone.

However, the granting of independent statehood to peoples who had been colonised and dispossessed also implied the creation of a more egalitarian international society and the ending of historical injustices which had been fostered or tolerated by a Euro-centric legal order. It also soon became clear that this was not simply a case of rewriting legal rules to catch up with social changes, but involved complex interactions between the law and political and economic power. The drive towards political self-determination was quickly reinforced or complemented by pressures for economic self-determination, which mainly took the form of the assertion of a right to sovereignty over natural resources, and then the broader programme for a New International Economic Order. Thus, the very strength of the pressures for national political sovereignty nevertheless engendered the paradoxical effect of a heightened awareness of international interdependence. Nevertheless, the political elites in poorer and weaker states, both those in power and the oppositional currents, have generally continued to stress the

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[3]   Benedict Anderson has stressed the historical significance of the fragmentation of the Spanish empire into 18 states at the end of the 18th century. Although the geographical and economic factors which moulded Spanish policies helped turn the arbitrarily-defined territorial units into economic zones, Anderson argues that the decisive force was the generation of a national consciousness involved in the formation of a specific creole culture (Anderson 1991, ch. 5). Although the 20th century nationalisms of the Asian and African colonies had their own distinct social roots (also since, following a century of state-formation, there was an established model for their aspirations), Anderson argues that the cultural patterns which formed the key strata of nationalist intellectuals were again rooted in the fatal racism of colonialism, which offered those intellectuals access to metropolitan civilisation, but only to a limited and circumscribed extent: ibid. ch.7.

[4] The principle of self-determination has operated most strongly to legitimise the independence of colonial dependencies, but the break-up of the USSR, Yugoslavia and Czechoslovakia show that it has broader application. Although the people of Eritrea had a longer struggle they also vindicated a right which was based on their long independent history, and the same claim can surely be made for others such as the people of West Sahara and East Timor. The detailed statement of the principle of self-determination contained in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States strongly opposed 'any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states'; however, this was subject to the important qualification, 'conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'. This recognised a link between internal human rights and the right to self-determination as a separate state, and this has been more explicitly stated in the EU's Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union of 1991. However, the Yugoslav experience also shows that unless the claim to self-determination can be identified with an existing territorially-defined administrative unit, it is likely to spark off the vicious circle of inter-ethnic conflict seen not only in Bosnia but Cyprus, Northern Ireland and elsewhere.

formalist legal concept of the sovereign equality of states. In a world in which social and political inequalities are also expressed as inequalities between states, national sovereignty is seen as a bulwark against the threat of political intervention from more powerful states, while the poorer states can try to rely on their numerical strength within international institutions to attempt to bring about the transformations in the international system which could overcome the massive international disparities and inequalities which were the heritage of colonialism.

The difficulty is that formal legal sovereignty without economic or political strength is an empty vessel, as is shown by the experience of over three decades of negotiations between the Group of 77 countries and the developed states, in various forums. For example, while the latter have been stubborn in protecting their markets against imports of manufactured goods in which poorer countries are competitive, notably textiles, they have insisted on liberalisation and removal of barriers even where there is total lack of reciprocity, for example patents and other intellectual property rights. The setting up of the World Trade Organisation brings this to its logical conclusion, by tying together many of the key issues of international economic relations within an institutional framework dominated by the bargaining of market-access, which creates a ratchet-effect in favour of the rich. States now find themselves very directly subject to the pressures exerted from the world economy, or 'market forces', and even the most powerful sovereigns find themselves unable to impose national political controls which can stand up to the relentless pressures of global competition.

The Nation-State, Sovereignty, and Jurisdiction

Much of the confusion about the implications of globalization for the nation-state is due, as already mentioned above, to the reification of the state, reinforced by the concept of 'sovereignty'. The modern form of state, which emerged in the post-Napoleonic period, is a particular form of governance, in which the overt elements of coercive power are removed from personal relations and vested in autonomized institutions with a public character. The scope of the formal power of these institutions is defined in terms of territory, as opposed to the personal ties of allegiance which delimited the powers of the feudal and absolutist sovereigns. However, the foundation of modern states took place through political processes central to which was the cultural conception of the national community. Thus, the 'nation' of the nation-state is not a natural, pre-defined ethnicity but a powerful ideological construct, an 'imagined community' (Anderson 1991).

The notion of supreme or untrammelled power embodied in the concept of sovereignty has two aspects, internal and external. Internally it legitimizes the assertion of the state's monopoly of coercive force. A key prop in this legitimation is a particular form of legality, based on abstract and universalist principles, which claims to underpin and guarantee the formal equality and freedom of legal subjects facilitating capitalist economic exchange. Externally it is the states themselves that are free and equal legal subjects, interacting in a community of a different order and on a higher plane, with no overarching authority but God.

Thus, the concept and discourse of sovereignty functions as a particular way of legitimating the distribution of political power. The exercise of power is legitimated within the state by the generation of consensus around the national common interest through the institutions and processes of political participation involving all citizens on a basis of formal equality. Some restrictions on the apparently unlimited power to adopt national policies in the common interest are accepted as resulting from the need to bargain with other formally equal sovereigns on the basis of the national interest of each for reciprocal benefits or to secure

mutual or common interests. The fiction of unlimited internal sovereignty is complemented and sustained by its corollary, the sovereign equality of states.

The concept of state sovereignty, the unlimited and exclusive powers of the public authorities within the state's territorial boundaries, appears to be fixed and unchanging. Looked at more closely, however, its content and character are highly flexible, and have changed and developed together with the very form of the state as well as the changing nature of social relations. This can be seen very clearly when one focuses on the functional content of sovereignty, state jurisdiction. Jurisdiction may be defined as the scope within which the power of public or state authorities can **effectively** and **acceptably** be exercised. The emphasis on effectiveness and acceptability, usually ignored by formalist perspectives, is essential for an understanding of the limits of jurisdiction and therefore of sovereignty. In the modern state, the scope of sovereignty is said to be territorial: 'the right to exercise (in regard to a portion of the globe) to the exclusion of any other state the functions of a state' (Judge Huber, *Island of Palmas case*,1928, p.92).

However, this exclusivity can only be fully effective if the state prohibits all transborder interactions. Since transborder social and economic activities entail multiple geographic contacts, even if states exercise their powers purely territorially there will be considerable overlapping and interaction in states' exercise of jurisdiction. The identification of the state with the 'nation' further transforms the basis of the exercise of state sovereignty into the more flexible and elusive notion of national jurisdiction. While the state has generally imposed obligations on all those resident within its borders, the privileges of citizenship have been bestowed on a more restricted category, its nationals. Nationality, again, is a variable concept, so that different national cultures have given varying importance to ties of blood, birthplace, or loyalty, in the conditions for grant of nationality or of discretionary 'naturalisation'. These bonds between its nationals and the state have also been used to justify the extension of state jurisdiction, as citizenship is considered to carry a nexus of obligation, by most states in some degree, to their nationals' activities abroad.

It can be seen, therefore, that far from being circumscribed in precise and mutually exclusive terms, the scope of exercise of states' powers defined by their jurisdiction, which is the substance of 'sovereignty', is flexible, overlapping, and negotiable. This is especially so in relation to jurisdiction to regulate business activities, since the claim to jurisdiction over nationals has been extended to the fictitious legal personality bestowed on the business unit, in particular the company or corporation. Jurisdiction over a corporation can be based on the fictions either of its nationality or residence, and can vary for different purposes, using as criteria either the law under which it is formed, the location of its 'seat' or head office, or the place from which central management or control are exercised. A 'control' test may be used to justify a claim to jurisdiction over the worldwide activities of transnational corporate groups or Transnational Corporations (TNCs), on the grounds that foreign subsidiaries are subject to ultimate control by their dominant shareholders or parent company, and states have increasingly asserted such jurisdiction over 'foreign' companies especially to defeat or prevent regulatory avoidance by the use of 'foreign' subsidiaries incorporated in jurisdictions of convenience.

Thus, it is not surprising that the dual pressures on the state discussed above have increasingly brought to the fore the problem of jurisdiction. The overlap of jurisdictions has become greater with the interpenetration and globalisation of markets, while the increased regulatory role of the state has rendered ineffective the traditional mode of accommodating jurisdictional interaction based on 'comity' (Picciotto 1983). Initially this led to jurisdictional conflicts and

accusations of 'extraterritoriality', followed by attempts to moderate the exercise of jurisdiction (OECD 1987), and the growth of arrangements for coordination or cooperation in the exercise of jurisdiction. More recently, the pressures towards global market liberalisation have virtually created a market in state regulation, as states compete to attract investment by offering the most advantageous regulatory regime (Bratton et al. 1996).

Changing Forms of International Law

International law was born as a form of regulating relationships between sovereignties which were both autonomous and interacting. Hence, the tensions traced in the earlier section in the postwar representations of international law between statism and universalism merely rearticulate in new forms issues and themes which go back to the very origins of the system. However, the personification of the state and the emphasis on a unitary concept of sovereignty have helped to conceal the very major changes that have taken place in the nature of states, and therefore in the character of their interaction and the role of law within and between states. The procedures, institutions and concepts of international law have undoubtedly become far more complex and diverse over the past few decades, as the expectations and demands on states have grown, while at the same time the range and variety of issues identified as global or international have also increased exponentially.

Probably the most significant change, but one strangely neglected by international lawyers, is the development of a vast international institutional framework for international relations. Certainly, lawyers acknowledge the centrality of the United Nations system, but this is usually presented in the curious form of the debate about whether General Assembly resolutions are a 'source' of international law. Beyond that, and a chapter on the 'peaceful resolution of disputes', many international law books do not venture, although the practice of the discipline, certainly by state officials, now largely takes place in and through such organisations. This means not only the major and relatively visible intergovernmental organisations, of which there are now estimated to be many hundreds, but an even largely network of bodies ranging from relatively formalised institutions with written constitutions and a permanent secretariat, to committees of diplomats or officials meeting when required.

Such bodies now deal with matters involving a vast range of state functions, and their importance often varies inversely with their visibility or degree of formalisation. For example, in 1950 an informal Consultative Group was set up at the initiative of the US, which operated for several decades as a means of coordinating the embargoes on trade in military items and related technology by its members, consisting of representatives of the NATO countries with the exception of Iceland and the addition of Japan. The Group has apparently met rarely at Ministerial level, but functioned continuously through the so-called Coordinating Committee, or CoCom, consisting of midlevel diplomats and technical military specialists, whose task was to establish and then revise and review the comprehensive lists of embargoed items. CG-CoCom was apparently not based on any treaty or other formal legal instrument, but operates as a 'gentlemen's agreement', yet was nonetheless effective. Although it was wound up in 1994, after the end of the Cold War, it is being reborn in a similar form, to coordinate trade in militarily-sensitive technology to destinations deemed to be politically undesirable. An equally important and informal body is the so-called 'Paris Club', which is simply a procedure for the multilateral renegotiation of government debt by creditor countries when they are in a situation of 'imminent default'. It has no fixed members, but consists of meetings convened and chaired by a French Finance Ministry official on the request of a debtor country and involving all its official creditors. As with the CoCom, agreements under its auspices are not considered to be legally binding, but establish a framework for formal bilateral pacts. Just as CoCom operated

in the shadow of NATO, the Paris Club depends on the IMF, since its participants reschedule their bilateral debt only after a creditor state's acceptance of the 'conditionality' terms laid down by the IMF for its credits. Both bodies coordinate international negotiations on important issues of power (the one military-industrial, the other economic-financial), and utilise primarily technicist and bureaucratic techniques. Yet, although their formal status is quasi-legal at best, law also plays a part: there is precedent and reasoning by analogy, there are documents and rules and agreements to be drafted, and above all they deal with legal concepts and ideas such as liability, prohibition, obligation and sanction.

Thus, behind or below the highly visible and formal structures of the major intergovernmental organisations, the United Nations and its specialised agencies, the IMF, World Bank and others, there is a much denser network of less formal but in many ways more functional arrangements for coordinating state policies and actions. Their ambiguous status in international law is because they are established or operate essentially as an arena for the interaction, below the level of Foreign Offices and diplomacy, of officials or a more general policy community concerned with specific areas of state or quasi-state activity. Even Interpol, which facilitates international cooperation in a function as central to state sovereignty as policing, has long tried to resist formalisation as a treaty-based inter-governmental organisation, preferring to operate as a club for policemen without political 'interference' (Anderson 1989, esp. ch. 3). More easily accepted as a nongovernmental organisation is IOSCO (International Organisation of Securities Commissions): although its members are the official regulators of securities markets, in many cases from national Finance Ministries, they also include designated self-regulatory associations such as stock exchanges, which are not direct branches of the state.

Such bodies in any case often act not as a means of achieving formal international agreement but as a stage or arena for multilateral negotiation of standards or arrangements, perhaps supplementing or reinforcing networks of bilateral contacts and agreements. Thus, a working group of IOSCO's key body, the Technical Committee, produced two detailed reports in 1990 analysing the problems (mainly legal) experienced in developing international exchanges of information by the regulators on the basis of MOUs or Memorandums of Understanding. These arrangements are examples of the growth of international administrative cooperation involving officials, regulators, and policy communities of many kinds. Since they involve the interaction of national systems of law and administration, they attempt to resolve the often complex problems of conflict and coordination of national laws as applied to transnational transactions: for example, whether the enforcement powers of a national regulator may be used to collect evidence of breach of another state's laws. As international agreements, they are certainly drafted using legal form and terminology, but explicitly disavow an intention to create legal obligations between the signatories, let alone their states.

Nevertheless, these MOUs illustrate very clearly that international agreements are today not merely pacts between rulers, but increasingly establish systems of coordination between national legal regimes. Due to the very wide range of state functions and activities with which they deal, international agreements can take a wide variety of forms, ranging from these MOUs establishing administrative cooperation among national regulators, to the comprehensiveness of the multilateral framework established to coordinate regulation of the uses of the world's seas by the 1982 UN Convention on the Law of the Sea (UNCLOS III). Indeed, the UNCLOS diverges from the standard image of a treaty as much, although in different ways, as the MOUs. UNCLOS does not establish a set of rules merely to be obeyed by states, but a framework of principles which have evolved over the 15 years it took to negotiate the Convention, as well as in the further dozen years until it entered into force in

1994. Indeed, the post-signature period was one of continued negotiation, mainly due to the USA reopening the compromises embodied in the text, due to the Reagan government's opposition to the deep-seabed mining regime provided for in Part XI. Although this conflict was resolved by the adoption of an Agreement on Implementation of Part XI which effectively modifies UNCLOS,[5] many of the principles both of the modified Part XI as well as of UNCLOS as a whole, will provide a focus for continued debate and bargaining. Thus, the requirement that the Enterprise set up under Part XI to conduct deep-seabed mining operations should do so in accordance with 'sound commercial principles', or that the transfer of technology to it should be 'on fair and reasonable commercial terms',[6] may establish some parameters but clearly still leave considerable scope for discussion and negotiation. This is even more obviously the case for other important issues, notably the delimitation of international maritime boundaries, which has exercised negotiators and adjudicators for several decades, especially since the rejection by the International Court of Justice of the equidistance rule and its affirmation that delimitation is based on 'a rule of law which itself requires the application of equitable principles'.[7]

Law, Power and Legitimation

This imprecision or indeterminacy of legal rules creates unease, especially among positivists,[8] for whom legal rules must be capable of clear and logical application to fulfil their function of providing certainty and predictability. On the other hand, it is the focus of critical legal scholars, who from their various perspectives seek to demonstrate that the indeterminacy of law means that the substantive content of legal rules is supplied from politics,[9] and hence law's autonomy is a sham. As mentioned in the opening paragraph of this essay, international law is especially vulnerable to this charge, since the lack of compulsory adjudication leaves it without guaranteed procedures for the authoritative interpretation of its rules.

My own view is that it is important to understand and appreciate the relationship of law to politics and economics, and the particular role it plays in mediating social relationships. To say that those relationships are relations of power and often of exploitation, and that law generally helps to legitimise them, is neither to denounce law as illusory nor to deny its civilising role. After all, relations of power are of many sorts, and involve degrees of consent and coercion, and power legitimised through law is far better than that exerted by the barrel of a gun. It is nevertheless also important to probe and expose the limits of law's capacity to legitimise, and to see how this can be strengthened, as part of a more general process of achieving social and economic justice. In particular, merely to denounce liberal legal

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[5] Annex to UN General Assembly resolution 48/263 of 28th July 1994.

[6] Agreement Relating to Implementation of Part XI, sec.2.2 and sec.5.1.

[7] *North Sea Continental Shelf Cases* (1969) ICJ Reports 3, at 46-7; see generally Charney 1994.

[8] See the discussion by R.Higgins of the ICJ's use of the doctrine of equity especially in the maritime boundary cases, Higgins 1994: 219-228; despite her orientation towards policy-jurisprudence, Prof. Higgins is also uneasy about the uncertainty produced by the ICJ's use of a notion of equitable principles, on the grounds that only a series of disparate criteria have been enunciated, with no evaluation of their relative weight: ibid. p.227.

[9] See, e.g. Koskenniemi 1990: 28, where he specifically refers to UNCLOS as having no real rules but allocating decision-making power elsewhere by the use of equitable principles. For a discussion of cls views on indeterminacy see Kelman 1987.

principles for their indeterminacy is perhaps to overlook that it is precisely this fluidity and flexibility that enables them to fulfil their role of mediating social relations of power.

The main problem for international law is the extremely weak nature of the international political system, which creates a great burden or dilemma for international law. If sovereignty, or political legitimacy, resides only in nation-states, then the content of international law can only be supplied by the reciprocal bargaining of 'national interests' between government representatives. If however there are higher global interests at stake, in peace, in the preservation of the ecological balance, in economic development or at least the satisfaction of basic needs for the world's population, then how and by whom are those interests to be expressed? This, surely, is the dilemma of the international lawyer, which Koskenniemi has articulated as the alternative of becoming the apologist for diplomacy or power-politics, or of projecting utopian designs for world order. What needs to be recognised is that this is not a dilemma the international lawyer can solve alone, although there are certainly important contributions to be made from that perspective. A major step is to look behind the distorted or partial legalistic perspective, to try to understand law's relationship to broader social changes.

As I have tried to indicate in this short paper, the central limitation of international law lies in the personification of the state, which draws a veil over the very real contradictions and changes that have been taking place in the nature of the state and the international system. What is more, it impedes an adequate appreciation of international law itself. I have argued that the main feature of the past few decades has been the increasing demands made on the state, while at the same time states have become increasingly interdependent. As a result, it is hardly surprising that there has been a process of fragmentation of the state, both internally and internationally. This can be seen also in the many changes that have been taking place in the role of law in international relations and activities. The horizontal and vertical axes of law have become intermingled, so that new categories of transnational and supranational law have been devised. Perhaps less often noticed, the very category of law itself has become more diffuse, and forms of quasi-law or 'soft' law have come to play a part in mediating different aspects of international relations. However, underlying all these changes in the forms and functions of international law are the increasing pressures under which it has come in attempting to provide legitimation for the acute tensions in a world community characterised primarily by the very great inequalities within and between states.

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