

THE CONCEPT OF LAW

SECOND EDITION

BY

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With a Postscript edited by
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INTERNATIONAL LAW

I. SOURCES OF DOUBT

THE idea of a union of primary and secondary rules to which so important a place has been assigned in this book may be regarded as a mean between juristic extremes. For legal theory has sought the key to the understanding of law sometimes in the simple idea of an order backed by threats and sometimes in the complex idea of morality. With both of these law has certainly many affinities and connections; yet, as we have seen, there is a perennial danger of exaggerating these and of obscuring the special features which distinguish law from other means of social control. It is a virtue of the idea which we have taken as central that it permits us to see the multiple relationships between law, coercion, and morality for what they are, and to consider afresh in what, if any, sense these are necessary.

Though the idea of the union of primary and secondary rules has these virtues, and though it would accord with usage to treat the existence of this characteristic union of rules as a sufficient condition for the application of the expression 'legal system', we have not claimed that the word 'law' must be defined in its terms. It is because we make no such claim to identify or regulate in this way the use of words like 'law' or 'legal', that this book is offered as an elucidation of the *concept* of law, rather than a definition of 'law' which might naturally be expected to provide a rule or rules for the use of these expressions. Consistently with this aim, we investigated, in the last chapter, the claim made in the German cases, that the title of valid law should be withheld from certain rules on account of their moral iniquity, even though they belonged to an existing system of primary and secondary rules. In the end we rejected this claim; but we did so, not because it conflicted with the view that rules belonging to such a system must be called 'law', nor because it conflicted with the weight of usage.

Instead we criticized the attempt to narrow the class of valid laws by the extrusion of what was morally iniquitous, on the ground that to do this did not advance or clarify either theoretical inquiries or moral deliberation. For these purposes, the broader concept which is consistent with so much usage and which would permit us to regard rules however morally iniquitous as law, proved on examination to be adequate.

International law presents us with the converse case. For, though it is consistent with the usage of the last 150 years to use the expression 'law' here, the absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions have inspired misgivings, at any rate in the breasts of legal theorists. The absence of these institutions means that the rules for states resemble that simple form of social structure, consisting only of primary rules of obligation, which, when we find it among societies of individuals, we are accustomed to contrast with a developed legal system. It is indeed arguable, as we shall show, that international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules. These differences are indeed striking and the question 'Is international law really law?' can hardly be put aside. But in this case also, we shall neither dismiss the doubts, which many feel, with a simple reminder of the existing usage; nor shall we simply confirm them on the footing that the existence of a union of primary and secondary rules is a necessary as well as a sufficient condition for the proper use of the expression 'legal system'. Instead we shall inquire into the detailed character of the doubts which have been felt, and, as in the German case, we shall ask whether the common wider usage that speaks of 'international law' is likely to obstruct any practical or theoretical aim.

Though we shall devote to it only a single chapter some writers have proposed an even shorter treatment for this question concerning the character of international law. To them it has seemed that the question 'Is international law really law?' has only arisen or survived, because a trivial question about the meaning of words has been mistaken for

a serious question about the nature of things: since the facts which differentiate international law from municipal law are clear and well known, the only question to be settled is whether we should observe the existing convention or depart from it; and this is a matter for each person to settle for himself. But this short way with the question is surely too short. It is true that among the reasons which have led theorists to hesitate over the extension of the word 'law' to international law, a too simple, and indeed absurd view, of what justifies the application of the same word to many different things has played some part. The variety of types of principle which commonly guide the extension of general classifying terms has too often been ignored in jurisprudence. None the less, the sources of doubt about international law are deeper, and more interesting than these mistaken views about the use of words. Moreover, the two alternatives offered by this short way with the question ('Shall we observe the existing convention or shall we depart from it?') are not exhaustive; for, besides them, there is the alternative of making explicit and examining the principles that have in fact guided the existing usage.

The short way suggested would indeed be appropriate if we were dealing with a proper name. If someone were to ask whether the place called 'London' is *really* London, all we could do would be to remind him of the convention and leave him to abide by it or choose another name to suit his taste. It would be absurd, in such a case, to ask on what principle London was so called and whether this principle was acceptable. This would be absurd because, whereas the allotment of proper names rests *only* on an *ad hoc* convention, the extension of the general terms of any serious discipline is never without its principle or rationale, though it may not be obvious what that is. When as, in the present case, the extension is queried by those who in effect say, 'We know that it is called law, but is it really law?', what is demanded—no doubt obscurely—is that the principle be made explicit and its credentials inspected.

We shall consider two principal sources of doubt concerning the legal character of international law and, with them, the steps which theorists have taken to meet these doubts.

Both forms of doubt arise from an adverse comparison of international law with municipal law, which is taken as the clear, standard example of what law is. The first has its roots deep in the conception of law as fundamentally a matter of orders backed by threats and contrasts the character of the *rules* of international law with those of municipal law. The second form of doubt springs from the obscure belief that states are fundamentally incapable of being the subjects of legal obligation, and contrasts the character of the *subjects* of international law with those of municipal law.

2. OBLIGATIONS AND SANCTIONS

The doubts which we shall consider are often expressed in the opening chapters of books on international law in the form of the question 'How can international law be binding?' Yet there is something very confusing in this favourite form of question; and before we can deal with it we must face a prior question to which the answer is by no means clear. This prior question is: what is meant by saying of a whole system of law that it is 'binding'? The statement that a particular rule of a system is binding on a particular person is one familiar to lawyers and tolerably clear in meaning. We may paraphrase it by the assertion that the rule in question is a valid rule, and under it the person in question has some obligation or duty. Besides this, there are some situations in which more general statements of this form are made. We may be doubtful in certain circumstances whether one legal system or another applies to a particular person. Such doubts may arise in the conflict of laws or in public international law. We may ask, in the former case, whether French or English Law is binding on a particular person as regards a particular transaction, and in the latter case we may ask whether the inhabitants of, for example, enemy-occupied Belgium, were bound by what the exiled government claimed was Belgian law or by the ordinances of the occupying power. But in both these cases, the questions are questions of law which arise *within* some system of law (municipal or international) and are settled by reference to the rules or principles of that system. They do not call in question the general character of the rules, but only their scope or applicability in

given circumstances to particular persons or transactions. Plainly the question, 'Is international law binding?' and its congeners 'How can international law be binding?' or 'What makes international law binding?' are questions of a different order. They express a doubt not about the applicability, but about the general legal status of international law: this doubt would be more candidly expressed in the form 'Can such rules as these be meaningfully and truthfully said ever to give rise to obligations?' As the discussions in the books show, one source of doubt on this point is simply the absence from the system of centrally organized sanctions. This is one point of adverse comparison with municipal law, the rules of which are taken to be unquestionably 'binding' and to be paradigms of legal obligation. From this stage the further argument is simple: if for this reason the rules of international law are not 'binding', it is surely indefensible to take seriously their classification as law; for however tolerant the modes of common speech may be, this is too great a difference to be overlooked. All speculation about the nature of law begins from the assumption that its existence at least makes certain conduct obligatory.

In considering this argument we shall give it the benefit of every doubt concerning the facts of the international system. We shall take it that neither Article 16 of the Covenant of the League of Nations nor Chapter VII of the United Nations Charter introduced into international law anything which can be equated with the sanctions of municipal law. In spite of the Korean war and of whatever moral may be drawn from the Suez incident, we shall suppose that, whenever their use is of importance, the law enforcement provisions of the Charter are likely to be paralysed by the veto and must be said to exist only on paper.

To argue that international law is not binding because of its lack of organized sanctions is tacitly to accept the analysis of obligation contained in the theory that law is essentially a matter of orders backed by threats. This theory, as we have seen, identifies 'having an obligation' or 'being bound' with 'likely to suffer the sanction or punishment threatened for disobedience'. Yet, as we have argued, this identification distorts the role played in all legal thought and discourse of the

ideas of obligation and duty. Even in municipal law, where there are effective organized sanctions, we must distinguish, for the variety of reasons given in Chapter III, the meaning of the external predictive statement 'I (you) are likely to suffer for disobedience', from the internal normative statement 'I (you) have an obligation to act thus' which assesses a particular person's situation from the point of view of rules accepted as guiding standards of behaviour. It is true that not all rules give rise to obligations or duties; and it is also true that the rules which do so generally call for some sacrifice of private interests, and are generally supported by serious demands for conformity and insistent criticism of deviations. Yet once we free ourselves from the predictive analysis and its parent conception of law as essentially an order backed by threats, there seems no good reason for limiting the normative idea of obligation to rules supported by organized sanctions.

We must, however, consider another form of the argument, more plausible because it is not committed to definition of obligation in terms of the likelihood of threatened sanctions. The sceptic may point out that there are in a municipal system, as we have ourselves stressed, certain provisions which are justifiably called necessary; among these are primary rules of obligation, prohibiting the free use of violence, and rules providing for the official use of force as a sanction for these and other rules. If such rules and organized sanctions supporting them are in this sense necessary for municipal law, are they not equally so for international law? That they are may be maintained without insisting that this follows from the very meaning of words like 'binding' or 'obligation'.

The answer to the argument in this form is to be found in those elementary truths about human beings and their environment which constitute the enduring psychological and physical setting of municipal law. In societies of individuals, approximately equal in physical strength and vulnerability, physical sanctions are both necessary and possible. They are required in order that those who would voluntarily submit to the restraints of law shall not be mere victims of malefactors who would, in the absence of such sanctions, reap the advantages of respect for law on the part of others, without respecting it themselves. Among individuals living in close proximity

to each other, opportunities for injuring others, by guile, if not by open attack, are so great, and the chances of escape so considerable, that no mere natural deterrents could in any but the simplest forms of society be adequate to restrain those too wicked, too stupid, or too weak to obey the law. Yet, because of the same fact of approximate equality and the patent advantages of submission to a system of restraints, no combination of malefactors is likely to exceed in strength those who would voluntarily co-operate in its maintenance. In these circumstances, which constitute the background of municipal law, sanctions may successfully be used against malefactors with relatively small risks, and the threat of them will add much to whatever natural deterrents there may be. But, just because the simple truisms which hold good for individuals do not hold good for states, and the factual background to international law is so different from that of municipal law, there is neither a similar necessity for sanctions (desirable though it may be that international law should be supported by them) nor a similar prospect of their safe and efficacious use.

This is so because aggression between states is very unlike that between individuals. The use of violence between states must be public, and though there is no international police force, there can be very little certainty that it will remain a matter between aggressor and victim, as a murder or theft, in the absence of a police force, might. To initiate a war is, even for the strongest power, to risk much for an outcome which is rarely predictable with reasonable confidence. On the other hand, because of the inequality of states, there can be no standing assurance that the combined strength of those on the side of international order is likely to preponderate over the powers tempted to aggression. Hence the organization and use of sanctions may involve fearful risks and the threat of them add little to the natural deterrents. Against this very different background of fact, international law has developed in a form different from that of municipal law. In a population of a modern state, if there were no organized repression and punishment of crime, violence and theft would be hourly expected; but for states, long years of peace have intervened between disastrous wars. These years of peace are only

rationally to be expected, given the risks and stakes of war and the mutual needs of states; but they are worth regulating by rules which differ from those of municipal law in (among other things) not providing for their enforcement by any central organ. Yet what these rules require is thought and spoken of as obligatory; there is general pressure for conformity to the rules; claims and admissions are based on them and their breach is held to justify not only insistent demands for compensation, but reprisals and counter-measures. When the rules are disregarded, it is not on the footing that they are not binding; instead efforts are made to conceal the facts. It may of course be said that such rules are efficacious only so far as they concern issues over which states are unwilling to fight. This may be so, and may reflect adversely on the importance of the system and its value to humanity. Yet that even so much may be secured shows that no simple deduction can be made from the necessity of organized sanctions to municipal law, in its setting of physical and psychological facts, to the conclusion that without them international law, in its very different setting, imposes no obligations, is not 'binding', and so not worth the title of 'law'.

3. OBLIGATION AND THE SOVEREIGNTY OF STATES

Great Britain, Belgium, Greece, Soviet Russia have rights and obligations under international law and so are among its subjects. They are random examples of states which the layman would think of as independent and the lawyer would recognize as 'sovereign'. One of the most persistent sources of perplexity about the obligatory character of international law has been the difficulty felt in accepting or explaining the fact that a state which is sovereign may also be 'bound' by, or have an obligation under, international law. This form of scepticism is, in a sense, more extreme than the objection that international law is not binding because it lacks sanctions. For whereas that would be met if one day international law were reinforced by a system of sanctions, the present objection is based on a radical inconsistency, said or felt to exist, in the conception of a state which is at once sovereign and subject to law.

Examination of this objection involves a scrutiny of the

notion of sovereignty, applied not to a legislature or to some other element or person *within* a state, but to a state itself. Whenever the word 'sovereign' appears in jurisprudence, there is a tendency to associate with it the idea of a person above the law whose word is law for his inferiors or subjects. We have seen in the early chapters of this book how bad a guide this seductive notion is to the structure of a municipal legal system; but it has been an even more potent source of confusion in the theory of international law. It is, of course, *possible* to think of a state along such lines, as if it were a species of Superman—a Being inherently lawless but the source of law for its subjects. From the sixteenth century onwards, the symbolical identification of state and monarch ('L'état c'est moi') may have encouraged this idea which has been the dubious inspiration of much political as well as legal theory. But it is important for the understanding of international law to shake off these associations. The expression 'a state' is not the name of some person or thing inherently or 'by nature' outside the law; it is a way of referring to two facts: first, that a population inhabiting a territory lives under that form of ordered government provided by a legal system with its characteristic structure of legislature, courts, and primary rules; and, secondly, that the government enjoys a vaguely defined degree of independence.

The word 'state' has certainly its own large area of vagueness but what has been said will suffice to display its central meaning. States such as Great Britain or Brazil, the United States or Italy, again to take random examples, possess a very large measure of independence from both legal and factual control by any authorities or persons outside their borders, and would rank as 'sovereign states' in international law. On the other hand, individual states which are members of a federal union, such as the United States, are subject in many different ways to the authority and control of the federal government and constitution. Yet the independence which even these federated states retain is large if we compare it with the position, say, of an English county, of which the word 'state' would not be used at all. A county may have a local council discharging, for its area, some of the functions of a legislature, but its meagre powers are subordinate to

those of Parliament and, except in certain minor respects, the area of the county is subject to the same laws and government as the rest of the country.

Between these extremes there are many different types and degrees of dependence (and so of independence) between territorial units which possess an ordered government. Colonies, protectorates, suzerainties, trust territories, confederations, present fascinating problems of classification from this point of view. In most cases the dependence of one unit on another is expressed in legal forms, so that what is law in the territory of the dependent unit will, at least on certain issues, ultimately depend on law-making operations in the other.

In some cases, however, the legal system of the dependent territory may not reflect its dependence. This may be so either because it is merely formally independent and the territory is in fact governed, through puppets, from outside; or it may be so because the dependent territory has a real autonomy over its internal but not its external affairs, and its dependence on another country in external affairs does not require expression as part of its domestic law. Dependence of one territorial unit on another in these various ways is not, however, the only form in which its independence may be limited. The limiting factor may be not the power or authority of another such unit, but an international authority affecting units which are alike independent of each other. It is possible to imagine many different forms of international authority and correspondingly many different limitations on the independence of states. The possibilities include, among many others, a world legislature on the model of the British Parliament, possessing legally unlimited powers to regulate the internal and external affairs of all; a federal legislature on the model of Congress, with legal competence only over specified matters or one limited by guarantees of specific rights of the constituent units; a regime in which the only form of legal control consists of rules generally accepted as applicable to all; and finally a regime in which the only form of obligation recognized is contractual or self-imposed, so that a state's independence is legally limited only by its own act.

It is salutary to consider this range of possibilities because merely to realize that there are many possible forms and

degrees of dependence and independence, is a step towards answering the claim that because states are sovereign they 'cannot' be subject to or bound by international law or 'can' only be bound by some specific form of international law. For the word 'sovereign' means here no more than 'independent'; and, like the latter, is negative in force: a sovereign state is one *not* subject to certain types of control, and its sovereignty is that area of conduct in which it is autonomous. Some measure of autonomy is imported, as we have seen, by the very meaning of the word state but the contention that this 'must' be unlimited or 'can' only be limited by certain types of obligation is at best the assertion of a claim that states ought to be free of all other restraints, and at worst is an unreasoned dogma. For if in fact we find that there exists among states a given form of international authority, the sovereignty of states is to that extent limited, and it has just that extent which the rules allow. Hence we can only know which states are sovereign, and what the extent of their sovereignty is, when we know what the rules are; just as we can only know whether an Englishman or an American is free and the extent of his freedom when we know what English or American law is. The rules of international law are indeed vague and conflicting on many points, so that doubt about the area of independence left to states is far greater than that concerning the extent of a citizen's freedom under municipal law. None the less, these difficulties do not validate the *a priori* argument which attempts to deduce the general character of international law from an absolute sovereignty, which is assumed, without reference to international law, to belong to states.

It is worth observing that an uncritical use of the idea of sovereignty has spread similar confusion in the theory both of municipal and international law, and demands in both a similar corrective. Under its influence, we are led to believe that there *must* in every municipal legal system be a sovereign legislator subject to no legal limitations; just as we are led to believe that international law *must* be of a certain character because states are sovereign and incapable of legal limitation save by themselves. In both cases, belief in the necessary existence of the legally unlimited sovereign prejudices a question which we can only answer when we examine the actual

rules. The question for municipal law is: what is the extent of the supreme legislative authority recognized in this system? For international law it is: what is the maximum area of autonomy which the rules allow to states?

Thus the simplest answer to the present objection is that it inverts the order in which questions must be considered. There is no way of knowing what sovereignty states have, till we know what the forms of international law are and whether or not they are mere empty forms. Much juristic debate has been confused because this principle has been ignored, and it is profitable to consider in its light those theories of international law which are known as 'voluntarist' or theories of 'auto-limitation'. These attempted to reconcile the (absolute) sovereignty of states with the existence of binding rules of international law, by treating all international obligations as self-imposed like the obligation which arises from a promise. Such theories are in fact the counterpart in international law of the social contract theories of political science. The latter sought to explain the facts that individuals, 'naturally' free and independent, were yet bound by municipal law, by treating the obligation to obey the law as one arising from a contract which those bound had made with each other, and in some cases with their rulers. We shall not consider here the well-known objections to this theory when taken literally, nor its value when taken merely as an illuminating analogy. Instead we shall draw from its history a threefold argument against the voluntarist theories of international law.

First, these theories fail completely to explain how it is known that states *can* only be bound by self-imposed obligations, or why this view of their sovereignty should be accepted, in advance of any examination of the actual character of international law. Is there anything more to support it besides the fact that it has often been repeated? Secondly, there is something incoherent in the argument designed to show that states, because of their sovereignty, *can* only be subject to or bound by rules which they have imposed upon themselves. In some very extreme forms of 'auto-limitation' theory, a state's agreement or treaty engagements are treated as mere declarations of its proposed future conduct, and failure to perform is not considered to be a breach of any obligation.

This, though very much at variance with the facts, has at least the merit of consistency: it is the simple theory that the absolute sovereignty of states is inconsistent with obligation of any kind, so that, like Parliament, a state cannot bind itself. The less extreme view that a state may impose obligations on itself by promise, agreement, or treaty is not, however, consistent with the theory that states are subject only to rules which they have thus imposed on themselves. For, in order that words, spoken or written, should in certain circumstances function as a promise, agreement, or treaty, and so give rise to obligations and confer rights which others may claim, *rules* must already exist providing that a state is bound to do whatever it undertakes by appropriate words to do. Such rules presupposed in the very notion of a self-imposed obligation obviously cannot derive *their* obligatory status from a self-imposed obligation to obey them.

It is true that every specific *action* which a given state was bound to do might in theory derive its obligatory character from a promise; none the less this could only be the case if the *rule* that promises, &c., create obligations is applicable to the state independently of any promise. In any society, whether composed of individuals or states, what is necessary and sufficient, in order that the words of a promise, agreement, or treaty should give rise to obligations, is that rules providing for this and specifying a procedure for these self-binding operations should be generally, though they need not be universally, acknowledged. Where they are acknowledged the individual or state who wittingly uses these procedures is bound thereby, whether he or it chooses to be bound or not. Hence, even this most voluntary form of social obligation involves some rules which are binding independently of the choice of the party bound by them, and this, in the case of states, is inconsistent with the supposition that their sovereignty demands freedom from all such rules.

Thirdly there are the facts. We must distinguish the *a priori* claim just criticized, that states *can* only be bound by self-imposed obligations, from the claim that though they could be bound in other ways under a different system, in fact no other form of obligation for states exists under the present rules of international law. It is, of course, possible that the

system might be one of this wholly consensual form, and both assertions and repudiations of this view of its character are to be found in the writings of jurists, in the opinions of judges, even of international courts, and in the declarations of states. Only a dispassionate survey of the actual practice of states can show whether this view is correct or not. It is true that modern international law is very largely treaty law, and elaborate attempts have been made to show that rules which appear to be binding on states without their prior consent do in fact rest on consent, though this may have been given only 'tacitly' or has to be 'inferred'. Though not all are fictions, some at least of these attempts to reduce to one the forms of international obligation excite the same suspicion as the notion of a 'tacit command' which, as we have seen, was designed to perform a similar, though more obviously spurious, simplification of municipal law.

A detailed scrutiny of the claim that all international obligation arises from the consent of the party bound, cannot be undertaken here, but two clear and important exceptions to this doctrine must be noticed. The first is the case of a new state. It has never been doubted that when a new, independent state emerges into existence, as did Iraq in 1932, and Israel in 1948, it is bound by the general obligations of international law including, among others, the rules that give binding force to treaties. Here the attempt to rest the new state's international obligations on a 'tacit' or 'inferred' consent seems wholly threadbare. The second case is that of a state acquiring territory or undergoing some other change, which brings with it, for the first time, the incidence of obligations under rules which previously it had no opportunity either to observe or break, and to which it had no occasion to give or withhold consent. If a state, previously without access to the sea, acquires maritime territory, it is clear that this is enough to make it subject to all the rules of international law relating to the territorial waters and the high seas. Besides these, there are more debatable cases, mainly relating to the effect on non-parties of general or multilateral treaties; but these two important exceptions are enough to justify the suspicion that the general theory that all international obligation is self-imposed has been inspired by too much abstract dogma and too little respect for the facts.

4. INTERNATIONAL LAW AND MORALITY

In Chapter V we considered the simple form of social structure which consists of primary rules of obligation alone, and we saw that, for all but the smallest most tightly knit and isolated societies, it suffered from grave defects. Such a regime must be static, its rules altering only by the slow processes of growth and decay; the identification of the rules must be uncertain; and the ascertainment of the fact of their violation in particular cases, and the application of social pressure to offenders must be haphazard, time-wasting, and weak. We found it illuminating to conceive the secondary rules of recognition, change, and adjudication characteristic of municipal law as different though related remedies for these different defects.

In form, international law resembles such a regime of primary rules, even though the content of its often elaborate rules are very unlike those of a primitive society, and many of its concepts, methods, and techniques are the same as those of modern municipal law. Very often jurists have thought that these formal differences between international and municipal law can best be expressed by classifying the former as 'morality'. Yet it seems clear that to mark the difference in this way is to invite confusion.

Sometimes insistence that the rules governing the relations between states are only moral rules, is inspired by the old dogmatism, that any form of social structure that is not reducible to orders backed by threats can only be a form of 'morality'. It is, of course, possible to use the word 'morality' in this very comprehensive way; so used, it provides a conceptual wastepaper basket into which will go the rules of games, clubs, etiquette, the fundamental provisions of constitutional law and international law, together with rules and principles which we ordinarily think of as moral ones, such as the common prohibitions of cruelty, dishonesty, or lying. The objection to this procedure is that between what is thus classed together as 'morality' there are such important differences of both form and social function, that no conceivable purpose, practical or theoretical, could be served by so crude a classification. Within the category of morality thus artificially widened, we should have to mark out afresh the old distinctions which it blurs.

In the particular case of international law there are a number of different reasons for resisting the classification of its rules as 'morality'. The first is that states often reproach each other for immoral conduct or praise themselves or others for living up to the standard of international morality. No doubt *one* of the virtues which states may show or fail to show is that of abiding by international law, but that does not mean that that law is morality. In fact the appraisal of states' conduct in terms of morality is recognizably different from the formulation of claims, demands, and the acknowledgements of rights and obligations under the rules of international law. In Chapter V we listed certain features which might be taken as defining characteristics of social morality: among them was the distinctive form of moral pressure by which moral rules are primarily supported. This consists not of appeals to fear or threats of retaliation or demands for compensation, but of appeals to conscience, made in the expectation that once the person addressed is reminded of the moral principle at stake, he may be led by guilt or shame to respect it and make amends.

Claims under international law are not couched in such terms though of course, as in municipal law, they may be joined with a moral appeal. What predominate in the arguments, often technical, which states address to each other over disputed matters of international law, are references to precedents, treaties, and juristic writings; often no mention is made of moral right or wrong, good or bad. Hence the claim that the Peking Government has or has not a right under international law to expel the Nationalist forces from Formosa is very different from the question whether this is fair, just, or a morally good or bad thing to do, and is backed by characteristically different arguments. No doubt in the relations between states there are half-way houses between what is clearly law and what is clearly morality, analogous to the standards of politeness and courtesy recognized in private life. Such is the sphere of international 'comity' exemplified in the privilege extended to diplomatic envoys of receiving goods intended for personal use free of duty.

A more important ground of distinction is the following. The rules of international law, like those of municipal law,

are often morally quite indifferent. A rule may exist because it is convenient or necessary to have some clear fixed rule about the subjects with which it is concerned, but not because any moral importance is attached to the particular rule. It may well be but one of a large number of possible rules, any one of which would have done equally well. Hence legal rules, municipal and international, commonly contain much specific detail, and draw arbitrary distinctions, which would be unintelligible as elements in moral rules or principles. It is true that we must not be dogmatic about the possible content of social morality: as we saw in Chapter V the morality of a social group may contain much by way of injunction which may appear absurd or superstitious when viewed in the light of modern knowledge. So it is possible, though difficult, to imagine that men with general beliefs very different from ours, might come to attach *moral* importance to driving on the left instead of the right of the road or could come to feel moral guilt if they broke a promise witnessed by two witnesses, but no such guilt if it was witnessed by one. Though such strange moralities are possible, it yet remains true that a morality cannot (logically) contain rules which are generally held by those who subscribe to them to be in no way preferable to alternatives and of no intrinsic importance. Law, however, though it also contains much that is of moral importance, can and does contain just such rules, and the arbitrary distinctions, formalities, and highly specific detail which would be most difficult to understand as part of morality, are consequently natural and easily comprehensible features of law. For one of the typical functions of law, unlike morality, is to introduce just these elements in order to maximize certainty and predictability and to facilitate the proof or assessments of claims. Regard for forms and detail carried to excess, has earned for law the reproaches of 'formalism' and 'legalism'; yet it is important to remember that these vices are exaggerations of some of the law's distinctive qualities.

It is for this reason that just as we expect a municipal legal system, but not morality, to tell us how many witnesses a validly executed will must have, so we expect international law, but not morality, to tell us such things as the number of days a belligerent vessel may stay for refuelling or repairs in

a neutral port; the width of territorial waters; the methods to be used in their measurement. All these things are necessary and desirable provisions for *legal rules* to make, but so long as the sense is retained that such rules may equally well take any of several forms, or are important only as one among many possible means to specific ends, they remain distinct from rules which have the status in individual or social life characteristic of morality. Of course not all the rules of international law are of this formal, or arbitrary, or morally neutral kind. The point is only that legal rules *can* and moral rules *cannot* be of this kind.

The difference in character between international law and anything which we naturally think of as morality has another aspect. Though the effect of a law requiring or proscribing certain practices might ultimately be to bring about changes in the morality of a group, the notion of a legislature making or repealing moral rules is, as we saw in Chapter VII, an absurd one. A legislature cannot introduce a new rule and give it the status of a moral rule by its *fiat*, just as it cannot, by the same means, give a rule the status of a tradition, though the reasons why this is so may not be the same in the two cases. Accordingly morality does not merely lack or happen not to have a legislature; the very idea of change by human legislative *fiat* is repugnant to the idea of morality. This is so because we conceive of morality as the ultimate standard by which human actions (legislative or otherwise) are evaluated. The contrast with international law is clear. There is nothing in the nature or function of international law which is similarly inconsistent with the idea that the rules might be subject to legislative change; the lack of a legislature is just a lack which many think of as a defect one day to be repaired.

Finally we must notice a parallel in the theory of international law between the argument, criticized in Chapter V, that even if particular rules of municipal law may conflict with morality, none the less the system as a whole must rest on a generally diffused conviction that there is a moral obligation to obey its rules, though this may be overridden in special exceptional cases. It has often been said in the discussion of the 'foundations' of international law, that in the last

resort, the rules of international law *must* rest on the conviction of states that there is a moral obligation to obey them; yet, if this means more than that the obligations which they recognize are not enforceable by officially organized sanctions, there seems no reason to accept it. Of course it is possible to think of circumstances which would certainly justify our saying that a state considered some course of conduct required by international law morally obligatory, and acted for that reason. It might, for example, continue to perform the obligations of an onerous treaty because of the manifest harm to humanity that would follow if confidence in treaties was severely shaken, or because of the sense that it was only fair to shoulder the irksome burdens of a code from which it, in its turn, had profited in the past when the burden fell on others. Precisely whose motives, thoughts and feelings on such matters of moral conviction are to be attributed to the state is a question which need not detain us here.

But though there *may* be such a sense of moral obligation it is difficult to see why or in what sense it *must* exist as a condition of the existence of international law. It is clear that in the practice of states certain rules are regularly respected even at the cost of certain sacrifices; claims are formulated by reference to them; breaches of the rules expose the offender to serious criticism and are held to justify claims for compensation or retaliation. These, surely, are all the elements required to support the statement that there exist among states rules imposing obligations upon them. The proof that 'binding' rules in any society exist, is simply that they are thought of, spoken of, and function as such. What more is required by way of 'foundations' and why, if more is required, must it be a foundation of moral obligation? It is, of course, true that rules could not exist or function in the relations between states unless a preponderant majority accepted the rules and voluntarily co-operated in maintaining them. It is true also that the pressure exercised on those who break or threaten to break the rules is often relatively weak, and has usually been decentralized or unorganized. But as in the case of individuals, who voluntarily accept the far more strongly coercive system of municipal law, the motives for voluntarily supporting such a system may be extremely diverse. It may well be that any

form of legal order is at its healthiest when there is a generally diffused sense that it is morally obligatory to conform to it. None the less, adherence to law may not be motivated by it, but by calculations of long-term interest, or by the wish to continue a tradition or by disinterested concern for others. There seems no good reason for identifying any of these as a necessary condition of the existence of law either among individuals or states.

5. ANALOGIES OF FORM AND CONTENT

To the innocent eye, the formal structure of international law lacking a legislature, courts with compulsory jurisdiction and officially organized sanctions, appears very different from that of municipal law. It resembles, as we have said, in form though not at all in content, a simple regime of primary or customary law. Yet some theorists, in their anxiety to defend against the sceptic the title of international law to be called 'law', have succumbed to the temptation to minimize these formal differences, and to exaggerate the analogies which can be found in international law to legislation or other desirable formal features of municipal law. Thus, it has been claimed that war, ending with a treaty whereby the defeated power cedes territory, or assumes obligations, or accepts some diminished form of independence, is essentially a legislative act; for, like legislation, it is an imposed legal change. Few would now be impressed by this analogy, or think that it helped to show that international law had an equal title with municipal law to be called 'law'; for one of the salient differences between municipal and international law is that the former usually does not, and the latter does, recognize the validity of agreements extorted by violence.

A variety of other, more respectable analogies have been stressed by those who consider the title of 'law' to depend on them. The fact that in almost all cases the judgment of the International Court and its predecessor, the Permanent Court of International Justice, have been duly carried out by the parties, has often been emphasized as if this somehow offset the fact that, in contrast with municipal courts, no state can be brought before these international tribunals without its prior consent. Analogies have also been found between the

use of force, legally regulated and officially administered, as a sanction in municipal law and 'decentralized sanctions', i.e. the resort to war or forceful retaliation by a state which claims that its rights under international law have been violated by another. That there is some analogy is plain; but its significance must be assessed in the light of the equally plain fact that, whereas a municipal court has a compulsory jurisdiction to investigate the rights and wrongs of 'self help', and to punish a wrongful resort to it, no international court has a similar jurisdiction.

Some of these dubious analogies may be considered to have been much strengthened by the obligations which states have assumed under the United Nations Charter. But, again, any assessment of their strength is worth little if it ignores the extent to which the law enforcement provisions of the Charter, admirable on paper, have been paralysed by the veto and the ideological divisions and alliances of the great powers. The reply, sometimes made, that the law-enforcement provisions of municipal law *might* also be paralysed by a general strike is scarcely convincing; for in our comparison between municipal law and international law we are concerned with what exists in fact, and here the facts are undeniably different.

There is, however, one suggested formal analogy between international and municipal law which deserves some scrutiny here. Kelsen and many modern theorists insist that, like municipal law, international law possesses and indeed must possess a 'basic norm', or what we have termed a rule of recognition, by reference to which the validity of the other rules of the system is assessed, and in virtue of which the rules constitute a single system. The opposed view is that this analogy of structure is false: international law simply consists of a *set* of separate primary rules of obligation which are not united in this manner. It is, in the usual terminology of international lawyers, a set of customary rules of which the rule giving binding force to treaties is one. It is notorious that those who have embarked on the task have found very great difficulties in formulating the 'basic norm' of international law. Candidates for this position include the principle *pacta sunt servanda*. This has, however, been abandoned by most theorists, since it seems incompatible with the fact that not all

obligations under international law arise from '*pacta*', however widely that term is construed. So it has been replaced by something less familiar: the so-called rule that 'States should behave as they customarily behave'.

We shall not discuss the merits of these and other rival formulations of the basic norm of international law; instead we shall question the assumption that it must contain such an element. Here the first and perhaps the last question to ask is: why should we make this *a priori* assumption (for that is what it is) and so prejudge the actual character of the rules of international law? For it is surely conceivable (and perhaps has often been the case) that a society may live by rules imposing obligations on its members as 'binding', even though they are regarded simply as a set of separate rules, not unified by or deriving their validity from any more basic rule. It is plain that the mere existence of rules does not involve the existence of such a basic rule. In most modern societies there are rules of etiquette, and, though we do not think of them as imposing obligations, we may well talk of such rules as existing; yet we would not look for, nor could we find, a basic rule of etiquette from which the validity of the separate rules was derivable. Such rules do not form a system but a mere set, and, of course, the inconveniences of this form of social control, where matters more important than those of etiquette are at stake, are considerable. They have already been described in Chapter V. Yet if rules are in fact accepted as standards of conduct, and supported with appropriate forms of social pressure distinctive of obligatory rules, nothing more is required to show that they are binding rules, even though, in this simple form of social structure, we have not something which we do have in municipal law: namely a way of demonstrating the validity of individual rules by reference to some ultimate rule of the system.

There are of course a number of questions which we can ask about rules which constitute not a system but a simple set. We can, for example, ask questions about their historical origin, or questions concerning the causal influences that have fostered the growth of the rules. We can also ask questions about the value of the rules to those who live by them, and whether they regard themselves as morally bound to obey

them or obey from some other motive. But we cannot ask in the simpler case one kind of question which we can ask concerning the rules of a system enriched, as municipal law is, by a basic norm or secondary rule of recognition. In the simpler case we cannot ask: 'From what ultimate provision of the system do the separate rules derive their validity or "binding force"?' For there is no such provision and need be none. It is, therefore, a mistake to suppose that a basic rule or rule of recognition is a generally necessary condition of the existence of rules of obligation or 'binding' rules. This is not a necessity, but a luxury, found in advanced social systems whose members not merely come to accept separate rules piecemeal, but are committed to the acceptance in advance of general classes of rule, marked out by general criteria of validity. In the simpler form of society we must wait and see whether a rule gets accepted as a rule or not; in a system with a basic rule of recognition we can say before a rule is actually made, that it *will* be valid *if* it conforms to the requirements of the rule of recognition.

The same point may be presented in a different form. When such a rule of recognition is added to the simple set of separate rules, it not only brings with it the advantages of system and ease of identification, but it makes possible for the first time a new form of statement. These are internal statements about the validity of the rules; for we can now ask in a new sense, 'What provision of the system makes this rule binding?' or, in Kelsen's language, 'What, within the system, is the reason of its validity?' The answers to these new questions are provided by the basic rule of recognition. But though, in the simpler structure, the validity of the rules cannot thus be demonstrated by reference to any more basic rule, this does not mean that there is some question about the rules or their binding force or validity which is left unexplained. It is not the case that there is some mystery as to why the rules in such a simple social structure are binding, which a basic rule, if only we could find it, would resolve. The rules of the simple structure are, like the basic rule of the more advanced systems, binding if they are accepted and function as such. These simple truths about different forms of social structure can, however, easily be obscured by the obstinate search for unity

and system where these desirable elements are not in fact to be found.

There is indeed something comic in the efforts made to fashion a basic rule for the most simple forms of social structure which exist without one. It is as if we were to insist that a naked savage *must* really be dressed in some invisible variety of modern dress. Unfortunately, there is also here a standing possibility of confusion. We may be persuaded to treat as a basic rule, something which is an empty repetition of the mere fact that the society concerned (whether of individuals or states) observes certain standards of conduct as obligatory rules. This is surely the status of the strange basic norm which has been suggested for international law: 'States should behave as they have customarily behaved'. For it says nothing more than that those who accept certain rules must also observe a rule that the rules ought to be observed. This is a mere useless reduplication of the fact that a set of rules are accepted by states as binding rules.

Again once we emancipate ourselves from the assumption that international law *must* contain a basic rule, the question to be faced is one of fact. What is the actual character of the rules as they function in the relations between states? Different interpretations of the phenomena to be observed are of course possible; but it is submitted that there is no basic rule providing general criteria of validity for the rules of international law, and that the rules which are in fact operative constitute not a system but a set of rules, among which are the rules providing for the binding force of treaties. It is true that, on many important matters, the relations between states are regulated by multilateral treaties, and it is sometimes argued that these may bind states that are not parties. If this were generally recognized, such treaties would in fact be legislative enactments and international law would have distinct criteria of validity for its rules. A basic rule of recognition could then be formulated which would represent an actual feature of the system and would be more than an empty restatement of the fact that a set of rules are in fact observed by states. Perhaps international law is at present in a stage of transition towards acceptance of this and other forms which would bring it nearer in structure to a municipal system. If,

and when, this transition is completed the formal analogies, which at present seem thin and even delusive, would acquire substance, and the sceptic's last doubts about the legal 'quality' of international law may then be laid to rest. Till this stage is reached the analogies are surely those of function and content, not of form. Those of function emerge most clearly when we reflect on the ways in which international law differs from morality, some of which we examined in the last section. The analogies of content consist in the range of principles, concepts, and methods which are common to both municipal and international law, and make the lawyers' technique freely transferable from the one to the other. Bentham, the inventor of the expression 'international law', defended it simply by saying that it was 'sufficiently analogous'¹ to municipal law. To this, two comments are perhaps worth adding. First, that the analogy is one of content not of form: secondly, that, in this analogy of content, no other social rules are so close to municipal law as those of international law.

¹ *Principles of Morals and Legislation*, xvii. 25, n. 1.