Elements of the Sociology of International Law

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It is not a profound observation today to state that the social environment of man influences the development of the rules of legal systems. To what extent this truth applies to international law has so far, however, not been explored as elaborately and in such detail as in the case of domestic law. Yet it is not a subject that has failed to receive attention. Indeed, in the last fifteen years a number of important books have been devoted wholly or partly to the interaction of sociological forces, on the one hand, and of the process, on the other hand, of the formation of international law.[1] Moreover, with direct relevance to the matter are certain recent specialist works on the theory of international relations.[2]

The object of the present article is to outline, briefly and tentatively, the elements or postulates of a sociology of the system of international law. Any such ambitious aim as to attempt a full explanation of the social context of the system is however disclaimed.

Can there be a "sociology of international law"?

At the threshold, there is the point whether there can be any such separate branch of study as the sociology of international law; wrapped up with this point is the question whether such a title can be legitimately bestowed upon it.

Precisely the same problem arose in relation to domestic law, with certain writers disputing the validity of any separate discipline of the sociology of law, and maintaining, *inter alia*, that all or any inquiries concerning the social context of law must be regarded as belonging

1 See, e.g., P. E. Corbett, *Law and Society in the Relations of States* (1951); C. de Visscher, *Théories et Réalités en Droit International Public* (1953, tr. 1957); W. Friedmann, *Law in a Changing Society* (1959); K. S. Carlston, *Law and Organisation in World Society* (1962); G. Schwarzenberger, *The Frontiers of International Law* (1962); C. W. Jenks, *Law, Freedom and Welfare* (1963); E. B. Haas, *Beyond the Nation-State* (1964); and Rosalyn Higgins, *Conflict of Interests* (1965).

2 H. & M. Sprout, *Foundations of International Politics* (1962); I. L. Claude, Jr., *Power and International Relations* (1962); L. Halle, *Men and Nations* (1962); C. O. Lerche & A. A. Said, *Concepts of International Politics* (1963); G. Schwarzenberger, *Power Politics* (3rd ed., 1964; 1st ed., 1941); D. J. Hekhuis, C. G. McClintock & A. L. Burns (eds.), *International Stability* (1964); and cf. J. W. Burton, "Recent Developments in the Theory of International Relations", *The Year Book of World Affairs, 1964* (London, 1964), pp. 213-29.

exclusively to the science of general sociology. Such an approach seemed, and still seems somewhat doctrinaire, especially in the light of the clearly defined development during the present century of the school of sociological jurisprudence represented by jurists like Pound[3] who saw law-formation as a reflection or expression of the equipoise of sociological forces or interests. Besides, there is the fact that the expression "sociology of law", with its equivalent in other languages, has continued to be widely used,[4] while Pound himself seems to have given his express blessing to the legitimacy of the expression.[5] In regard to terminology, jurisprudence is necessarily dependent upon the extensiveness or generality with which certain expressions are used juridically by responsible persons, and where this has attained a substantial degree, it can rarely be within the province of jurisprudence, as a science, to pronounce judgment of condemnation on accepted nomenclature.

There are many precedents also for a part of a science or discipline detaching itself and by force of its substance and significance, acquiring as such the status of a separate branch of knowledge, although in a generic sense still capable of being regarded as belonging to that more generalized field of study from which it originated. So it is that endocrinology has evolved from physiology, and psycho-analysis as a distinctively separate branch, respectively, of psychiatry and of psychology. The determinant consideration is whether there has developed, in the sense stated by Professor Hearnshaw, a body of "systematized, organised, formulated knowledge".[6]

> "It is enough to give the quality of a science to a subject of study that it should be pursued with a single eye to the ascertainment of truth; that it should be marked by a diligent search for all relevant facts, that it should be built up with a critical judgment from which all presuppositions and prejudices have been eliminated; and that it should be, so far as its context permits, reduced to the simplicities of uniformities, categories, and laws."[7]

Judged by this test, a sufficiently substantial and identifiable *quantum* of learning has matured with a valid claim to the title, "sociology of law".

There is likewise little reason for denying the legitimacy of the name "sociology of international law" for the growing body of theory and thought on the sociological context of international law and of inter-

3 Cf. R. Pound, "The Scope and Purpose of Sociological Jurisprudence", 24 *Harvard Law Review* (1910-11), pp. 591-619, and 25 *Harvard Law Review* (1911-12), pp. 140-68, and 489-516.

4 Note e.g., E. Ehrlich, *Grundlegung einer Soziologie des Rechts* (Munich, 1913); B. Horvath, *Rechtssoziologie* (Berlin, 1934), H. Sinzheimer, *De Taak der Rechtessociologie* (Haarlem, 1935); N. S. Timasheff, *An Introduction to the Sociology of Law* (Cambridge, U.S.A., 1939); and G. Gurvitch, *Sociology of Law* (New York, 1942).

5 See his Preface to Gurvitch, *op. cit.*, at pp. XIV-XV.

6 See his "The Science of History", one of the sections in *The Outline of Knowledge* (London, 1931), at p. 775.

7 Ibid.

national legal institutions. True, most sociologists investigate social phenomena other than those appearing in the field of international relations, but sociological structures and patterns none the less characterize international intercourse. As for international law itself, one of its central features[8] may be regarded as having a sociological setting, namely that it governs the relations between States, that is to say, groups or collectivities of individuals. To object to the expression "sociology of international law" is virtually to deny that international intercourse, as governed by international law, involves any matters that can be the object of sociological enquiry. In this connexion, it is worth referring to Morgenthau's description of "international relations" as "the totality of *social phenomena* transcending national boundaries"[9] (italics supplied).

To sum up, it is believed that the expression "sociology of international law" is legitimate, and that it validly applies to an identifiable and significant field of study.

The international community and the international legal order

Does there exist an international community correlative to the international legal order in the same way as there is a recognizable society of individuals subject to the law of a sovereign State?

Many writers on international law either affirm or assume that there is such an international community. If so, it is clearly different from the organized, integrated society normally subject to State law. It is essentially a *Gesellschaft* type of society, the component member States being "essentially separated in spite of all uniting factors",[10] as contrasted with the *Gemeinschaft* category of groups, where the members are "essentially united in spite of all separating factors".[11]

Thus, sociologically speaking, apart from the lack of agreement concerning the precise connotation of the term "community",[12] it may well be necessary to discard the expression "international community". After all, international lawyers and publicists tend to use the expression more or less as a metaphor, without attaching to it any *Gemeinschaft* significance. The present debate between those who subscribe to the view that international law should give expression to principles of "peaceful co-existence" and those who do not[13] would

8 Leaving aside the fact that it applies also to international organizations, certain non-State entities, and individuals, in special cases.

9 H. J. Morgenthau, "The Nature and Limits of the Theory of International Relations", in Fox (ed.), *Theoretical Aspects of International Relations* (1959), at p. 15.

10 F. Toennies in *Gemeinschaft und Gesellschaft* (1887), cited by E. Kamenka, *"Gemeinschaft* and *Gesellschaft"* 17 *Political Science* (Victoria University of Wellington, 1965) at p. 3.

11 Ibid.

12 Cf. R. A. Nisbet, *The Quest for Community* (1953).

13 See Sir Francis Vallat, "International Law—a Forward Look", *The Year Book of World Affairs, 1964* (London, 1964) 248, at pp. 249-58, and Rosalyn Higgins, *op. cit.*, pp. 101-32.

not have continued over the last decade and be still current if there were any sense of community to the extent implied in the expression "international community".

The intractable sociological fact that the chief units or entities governed by the international legal order are sovereign States made de Visscher sceptical about the existence of an international community.

> "The State by its mere existence conduces to the intransigent assertion of sovereignty. It is therefore pure illusion to expect from the mere arrangement of inter-State relations the establishment of a community order; this can find a solid foundation only in the development of the international spirit in men."[14]

This absence of an international community in a real sense may explain the predilection of recent theorists of international relations for the expression "international system". An unstable international community is virtually a contradiction in terms, but an "international system" can be both stable and unstable. Hence, there has developed what a group of writers[15] have called "the fundamental concept of international stability", which does not necessarily imply absence of change. But it does reflect the fact that in the interrelations of States, there is a propensity to instability.

Components of the international social order

Next for the sociology of international law to investigate is what are the components of the international social order, or if this expression be preferred, of the "international system".

This order or "system" is characterized above all by its heterogeneity.

First, it is an order in which stratification appears. There are, for example, the five great powers, the United States, the Soviet Union, the United Kingdom, France, and China, which as permanent members of the United Nations Security Council, may "veto" decisions of the Council on non-procedural questions (see article 27 of the United Nations Charter). So, also in the International Labour Organisation (ILO), of the 24 government members constituting the Governing Body, 10 must come from the States of chief industrial importance. Moreover, there is the distinction between developed and less-developed countries which is expressly recognized in the new Part IV of the General Agreement on Tariffs and Trade of 30 October 1947, added by the Protocol of 8 February 1965 (see the new articles 37 and 38).

Second, although the major components are States, the order includes non-State entities such as trust territories, and dependencies, and may even at a given time in the event of an internal revolution in a State, include the body of insurgents.

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14 De Visscher, *op. cit.*, at p. 92.

15 C. G. McClintock, D. J. Hekhuis, A. L. Burns, R. C. Tucker in *International Stability*, op. cit., p. 9.

Third, as between themselves, States have formed almost every imaginable species of grouping, political *blocs*, economic communities, free trade associations, regional security alliances, customs unions, and so on. Some of these groupings may set up formalized, institutional frameworks, others may dispense therewith.

But the components do not necessarily remain the same. They may merge, or if of the nature of non-State entities, may attain statehood. In this connexion, the problem of self-determination may pose itself for a particular people or particular peoples.

Then changes may occur as in the last five years of a somewhat drastic and far-reaching nature—a large increase in the number of States constituting the order, throwing new strains on that order. This is because many of these newly independent countries have emerged with "low states of technology, primitive economic systems, unstable governments, and restless populations".[16] The classical system of international law, applying in the nineteenth and early twentieth century, built up to cope with developed nation-States and their colonial appendages, must now adapt itself to embrace new types of States which need technical assistance, trade privileges, and every benefit that can be availed of from participation in *blocs'* associations, or institutions with a formal legal framework.

Thus, here is a situation somewhat different from that which confronted de Visscher in 1953[17] when he regarded the sovereignty of the modern nation-State as inconsistent with the conception of an ordered international community. Sovereignty has had to be conceded to newly independent countries who are far from effectually exercising it. In theory, they should be able by their own election to bind themselves by treaty or otherwise to comply with undertakings for the benefit of the whole international order; *de facto,* by reason of lack of administrators, technical under-development, and even doubtful ability to command the obedience of the population, the credibility of commitments assumed by them is open to question. Here is a sociological fact which would have further confirmed de Visscher's scepticism concerning the "international community". It is due to "the need for accepting groupings of persons within the nation-state system which do not have all the classical attributes of sovereignty".[18]

> "The legal fiction of sovereignty has had to be granted to all of the newly emerging States even though many of these are unable to meet the crucial tests of sovereignty of the classical system. Most of the governments of the underdeveloped areas cannot commit their people to courses of action in the same fashion as a classical State, for they are often in tenuous positions of power. Rapid changes in such societies not only alter the position of the existing elites, but also cause rapid shifts in policy."[19]

16 Lucian W. Pye in *International Stability, op. cit.,* p. 46.

17 De Visscher, *op. cit.,* at p. 92.

18 Pye, *op. cit.,* p. 48.

19 Ibid.

Formal organizations and associations within the framework of the international legal order

Another element of investigation in the international order is "the established forms or conditions of procedure characteristic of group activity"[20] within that order.

Reference has already been made to non-formal associations, but the present enquiry would have to deal with such phenomena as the United Nations and its specialized agencies, all institutions with a formal charter, and all expressly or impliedly deemed to be subjects of international law, and to be "capable of possessing international rights and duties".[21] The emergence of these organizations has, to quote the International Court of Justice, been dictated by the "progressive increase in the collective activities of States".[22] Then there is the problem of the formal relations of these organizations with States, as between themselves, that is to say, *inter se,* and with the individuals representing their staffs.

Besides there has been the growth of regional organizations, equally formalized, such as the European Economic Community, the Council of Europe, and the South-east Asia Treaty Organisation, with permanent organs and established procedures. These vary from the extreme of supra-national organizations to institutions which have only recommendatory or promotional powers.

The law-originating functions of all these institutions is a field of investigation in itself. Consider, for example, the remarkable activities in this domain of the Council of Europe, notwithstanding the absence of any legislative organs in any real sense.[23]

Non-formal groupings (not composed of subjects of international law)

Nor, sociologically speaking, can one overlook the impact upon international law of non-formal groupings, whether of individuals alone or of both individuals and corporations, or of corporations and other entities.

Upon a higher plane, and in most cases for more idealistic purposes, they can be regarded as the equivalent in the international field of domestic pressure groups.

Indeed, these international groupings may have access to decision-making organs, both in the domestic and in the international sphere. For instance it is expressly provided in article 71 of the United Nations Charter that the Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations, and pursuant to this power, approximately 300 organizations of this

20 R. M. MacIver and C. H. Page, *Society* (1949), p. 15.

21 Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations,* I.C.J. Reports, 1949, 174, at p. 179.

22 Ibid., pp. 178-9.

23 See the writer's "Note on the Regional International Law-Making and Law-Unification Activities of the Council of Europe", (1964), 38 A.L.J. pp. 136-7.

nature have been given varying rights of consultation (Category A, Category B, and registration for the purpose of *ad hoc* consultation). Category A organizations, which include such bodies as the International Chamber of Commerce, and the World Federation of Trade Unions, may propose items for possible inclusion in the Council's provisional agenda.

The influence of these non-governmental organizations upon the development of international law cannot therefore be dismissed as negligible, nor can they be excluded from sociological investigation in relation to that subject.

Relation of the individual to the international legal order

In a wide sense, the individual is a sociological datum of international law, no less inescapably than in domestic law. To quote Scelle:—[24]

> "... Judicial relations being social relations, they are not and never have been, in their materiality, anything but interindividual. These are the relations of exchange of all kinds: intellectual, of services, of objects, of powers; voluntary or compulsory, based on equality or hierarchical. ... Interstate public law by laying down the rules of attachment of nationals to such and such system of law, by working out treaties and Conventions the result of which is always to delimit the competences of private persons, of functionaries, or of rulers always regulates individual conduct."

However, in the narrower sense, of the relation of the individual or individuals ***as such*** to international law, three distinct aspects have to be considered: (a) whether the individual is an incumbent of rights and duties under international law; (b) whether the individual has the procedural privilege of access to machinery for the settlement of disputes or claims; and (c) to what extent his interests and welfare are protected by rules of international law.

The first aspect (a) has been thoroughly covered in the literature, and reference need be made only to the judgments in 1946 and 1948 of the Nuremberg and Tokyo International Tribunals in relation to major war criminals, to the Genocide Convention of 1948, and to the Geneva Prisoners of War Convention of 1949 as instancing a noticeable trend in international law to impose duties or confer rights *ex proprio vigore* upon individuals. The sociological forces which have conditioned this remarkable change in the technique of international law are clear enough.

Aspect (b) also calls for mention of modifications in the approach of international law. One of the most remarkable developments in 1965 was the opening for signature by the International Bank of Reconstruction and Development of the Convention for the Settlement of Investment Disputes, enabling private foreign investors to have access

24 "Some Reflections on Juridical Personality in International Law", in Lipsky (ed.), *Law and Politics in the World Community* (1953), p. 56.

to machinery for the settlement of their disputes with investment-receiving States.[25] On the regional level, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, as amended, with its provisions for machinery to investigate alleged breaches of human rights (namely, the European Commission of Human Rights and the European Court of Human Rights) has done much to mitigate the former doctrinaire bar on the receivability of, or on the jurisdiction of an international forum to deal with complaints by individuals.[26] Both the 1965 Convention and the 1950 Convention must however be viewed in a setting of the serious limitations and qualifications to which they are subject, reflecting to some extent a continuing emphasis upon the sovereignty of States.

It is in regard to aspect (c), the interests and welfare of individuals, that international law has made the widest advances in recent years. To a large extent, the United Nations and the specialized agencies are institutions for the promotion of humanitarian ends, and it is sufficient by way of illustration to refer to the numerous conventions and recommendations of the International Labour Organisation.

Worthy of analysis is also the point that some of the most important ***values*** of international law have been or may be formulated in terms of the interests of human beings. Thus in the preamble to the United Nations Charter, the signatories express their determination "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women" and "to promote social progress and better standards of life in larger freedom".

In this connexion, it is important to mention that the human rights provisions of the Charter, the Universal Declaration of Human Rights of 1948, and human rights programmes have had a reflex influence on relations between groups in the international order, to the extent of eliminating or mitigating race and group tensions.

The interests of the individual, in a humanitarian sense, come into account in a special manner in that part of the system of international law containing the laws and usages of warfare. As Luterpacht said:[27]

> "Most rules of warfare are, in a sense, of a humanitarian character inasmuch as their object is to safeguard, within the limits of the stern exigencies of war, human life and some other fundamental human rights and to make possible a measure of intercourse between enemies."

There has unfortunately intervened a change in the behaviour of nations, who appear ready to contemplate a depersonalization of war, through "push-button" missile and nuclear weapons. This, the very antithesis of the humanization of warfare, constitutes a grave threat to the very existence of the laws of war.

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25 See *Report* of the Executive Directors of the Bank, accompanying the submission of the Convention to States (1965).

26 For discussion of the Convention and of its working, see Waldock, *British Year Book of International Law*, 1958, pp. 356-63.

27 In Lipsky (ed.) *Law and Politics in the World Community* (1953), p. 93.

Enforcement agencies in the international order for international law

The relative absence of enforcement agencies for international law is another characteristic of the international order. The United Nations Security Council cannot be regarded as an enforcement agency comparable to those under domestic systems of law. Its decisions or recommendations are subject to the great power "veto", and in any event its enforcement action is limited to cases of a threat to the peace, breach of the peace, or act of aggression; if such cases relate to a breach of international law, it may to that extent be said to enforce international law, but it has no blanket powers for the enforcement of international law in general. It is a matter of query whether such institutional limitations must be regarded as altogether a weakness, or whether they establish rather "the rationality and usefulness of those rules, devides and institutions (i.e. elsewhere in the international order) which are designed to make certain that the danger point will not be reached; which provide for *peaceful* settlement; which at least can de-fuse problems that, if they were left unchecked, might escalate into catastrophe".[28]

The concept of justice in the international order

Although in a sense more relevant to social or political philosophy, the concept of justice in the international order is of sociological significance, and requires consideration.

First, there is the application of the Aristotelian dictum, "Injustice arises when equals are treated unequally, and also when unequals are treated equally". The former type of injustice is met, for example, by the concession of equal rights to States (see article 1 paragraph 2 of the United Nations Charter) and the more general recognition of the principle of the self-determination of indigenous peoples, while illustrations of avoidance of the latter type consist of the right of permanent membership of the Security Council enjoyed by the five great powers (United States, Soviet Union, United Kingdom, France and China), and the right of membership of the Governing Body of the International Labour Organisation which belongs to the ten States of chief industrial importance. The question of equal rights particularly affects discrimination against resident aliens; international law is moving in the direction of mitigating such discrimination.

Second, justice lies in giving States and their individuals their due. So, economic advancement should not be denied to less-developed States, while, so far as individuals are concerned, if they are subject to the jurisdiction of States of which they are not nationals, there should be no denial of justice to them. It is justice, with this meaning, that underlies the human rights programmes of the United Nations and of the Council of Europe.

Third, wrongs must be set right. This bears upon the adjustment or settlement of international disputes or situations (see article 1 paragraph 1 and article 2 paragraph 3 of the United Nations Charter).

28 John H. Fried, 21 *Main Currents in Modern Thought* (1965), p. 108.

Processes of integration, and integrative forces

The process of giving effect to justice is one of an integrative character. There are, besides, processes of ***functional*** integration in the international legal order, which may be directed towards: (a) global activities and functions; (b) regional activities and functions; or (c) a particular region as such (that is to say, region integration).

Thus, as an illustration of (a), the work of the Universal Postal Union (UPU) and of the International Telecommunication Union (ITU) is directed towards respectively the integration of world postal and world telecommunication activities. On the other hand, to take the case of a region, in Europe there are institutions such as the European Economic Community, the Council of Europe, and the European Atomic Community, whose purpose is the integration of different functions performed by the organs of the member States. It may be said of the Council of Europe that its aim is primarily the integration of the region of Europe, and the greater includes the less; that is to say, in the process of region integration, activities and functions are to be integrated. That region integration is the primary aim appears to be expressed in article 1 of the Statute of the Council of Europe, signed at London on 5 May 1949: —

> "(a) The aim of the Council of Europe is to achieve a greater unity between its Members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress.
> (b) This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realization of human rights and fundamental freedoms."

The processes for achieving integration vary with the activities and functions sought to be affected. Law unification, law harmonization, standardization of practices, removal of trade barriers and restrictions (as under the General Agreement on Tariffs and Trade of 30 October 1947) are among the techniques employed.

Integrative processes are one thing, integrative forces another. Those States which participate in integration are motivated by the end-benefits to be obtained, the greater efficiency, the mitigation of inter-State tensions, and the elimination of obstacles to the greater freedom and profitability of mutual trade and intercourse.

Yet beyond these materialistic motives there is an integrative force represented in what de Visscher called "the international spirit in men",[29] or what Henry R. Luce, in his address on 15 September 1965 to the Washington World Conference on World Peace Through Law referred to as the "ecumenical spirit":

> "The increasing use of the law, the increasing study of international law with its changing outlooks can, I think, be viewed as an aspect, an essential aspect, of the ecumenical spirit now at work in the

29 De Visscher, *op. cit.*, p. 92.

making of the new world. The ecumenical spirit is evident not only at Vatican II and at Geneva; it is also evident in business, which becomes every day more international; it is evident in the arts and in scholarship; and now it is clearly manifest in the law—present and future.

"I have called attention to the ecumenical spirit because that perhaps best expresses the way in which we and our successors need to learn to think about a new world to be shaped not by force of circumstance alone, but also, in goodly part, by the free will of free men.

"The ecumenical spirit requires tolerance and unity. But its tolerance is not indifference and its unity is not monolithic."

Values, goals and interests

The sociological values which condition the formal rules of international law are to some extent a matter of inference. However, they are frequently expressed in formal declarations or resolutions of international bodies or international conferences. Thus the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948 may be regarded as a manifesto of values. The Recommendations adopted by International Labour Conferences are also in effect value-setting instruments.

Values must be distinguished from goals, although adherence to a value may become a goal in itself.[30] Moreover, a goal may consist in the promotion or furthering of a value or set of values; for example, under paragraph *a* of article 76 of the United Nations Charter, a "basic objective" (i.e. a goal) of the trusteeship system is "to further international peace and security". In articles 1 and 2 of the United Nations Charter, stating the "purposes and principles" of the United Nations, values and goals are hopelessly intermingled.

Consideration must also be given to the interests of States and other components of the international order. The term "interest" is capable of a variety of meanings; it may mean intangibly a special object to which a State attaches particular importance (for example, its religious interest) or it may mean a purely economic interest or profit or advantage, including some claim or other, or it may relate to the acquisition of political power for some special purpose, for example, security. Conflicts of interest can arise, preventing the emergence of accepted rules of international law.[31] On the one hand, this may lead to the concept of a "common interest" which, if determined, can provide a foundation for international law. "The modern law of nations seeks to establish what is the common interest and to base itself upon it."[32] Apart from this, in the process of formulating new rules of international law by multilateral convention, there may have to be a reconciliation not only of the interests of States as between

30 Cf. R. K. Merton, *Social Theory and Social Structure* (1957), p. 155.

31 See *passim* Rosalyn Higgins, *Conflict of Interests: International Law in a Divided World* (1965).

32 Ibid., p. 7.

themselves, but of the interests of one State or group of States with the common interest of all States. This is well illustrated by the Geneva Convention of 1958 on the Continental Shelf, which involved not only a reconciliation of the interests of coastal and non-coastal States, but of the interests of coastal States and the common interest of all countries in the freedom of navigation and in the absence of disputes leading to international tension.

Other concepts of significance are those of the "special interests" and "vital interests" of States. Thus the "special interests" of the coastal State are recognized in the above-mentioned Geneva Convention of 1958 on the Continental Shelf, and in the Geneva Convention of the same year on Fishing and Conservation of the Living Resources of the High Seas. The concept of "vital interests" of States underlies the consensual nature of the process of international arbitration, and was reflected in the ultraconsensual character of the Convention of 1965 on the Settlement of Investment Disputes. It is further illustrated in certain of the reservations by States in the declarations lodged by them recognizing as compulsory the jurisdiction of the International Court of Justice in regard to disputes of a legal nature, as specified in Article 36 paragraph 2 of the Statute of the Court.[33] To quote Brierly, who dealt at length with the subject of "vital interests" in his book *The Outlook for International Law*:[34]

> "On the whole it still remains true to say that States have not yet shown that they are willing to have their conduct judged on the basis of rules of law unconditionally and in all circumstances. They still have certain interests or policies which they consider so 'vital' that they intend to be free to assert them, if necessary, whatever the law, or at any rate, whatever a court professing to interpret the law, may say about them."[35]

Power, capability and effectiveness

The role of power as a normative element, so much discussed by sociologists, is equally a matter for examination in the context of international law. Brief reference can be made only to some of the points. On one view there is the so-called "realist" theory that international law reflects the balance of power relationships between States. Any such passive camera-like function of international law has been rejected by certain writers, notably Eagleton,[36] who believed that the function of international law was to control and regulate power.

> "Power is always with us, a dangerous element, like fire, when uncontrolled. It is the purpose of law and government to provide controls for political power; to channel this power for the good of man

33 For declarations made by States, see *Yearbook* 1963-1964 of the International Court of Justice, pp. 218-41.

34 Pp. 33-60.

35 Ibid., p. 34.

36 For his criticism of the "realist" theory, see "The United Nations: A Legal Order' in Lipsky, *op. cit.*, pp. 132-4.

> rather than for the destruction of man. There is no necessary conflict between power politics on the one hand and international law or the United Nations on the other. In any human organisation there will be conflicts of power, just as there are within a State; the essential things are the controls which regulate, the rules under which the conflict must be waged."[37]

A new dimension to the role of power has been added by the acquisition of nuclear armouries. As distinct from a "power-politics" balance of power, there may be a balance of nuclear power, and the effect of this on existing rules of international law is a matter of controversy. Can a disturbance of this nuclear equipoise, largely favouring one of the nuclear-armed States, justify self-defensive activities, otherwise in breach of international law, by a State detrimentally affected by the tilting of the balance? This is one of the crucial issues underlying the problem whether the "quarantine" or "selective blockade" of Cuba by the United States in 1962 was or was not legitimate.

The use of the term "power" to cover influence exercised positively, in the formation of new rules of international law, or negatively, to oppose their development, is possibly justified.[38] If so, consideration would have to be given in this connexion to the part played by the great maritime States in the eighteenth and nineteenth centuries in the evolution of the law of the sea, and to that of the *bloc* of anti-colonial States, during the last five years, in accelerating the emergence of a principle of international law, recognizing the right of self-determination of indigenous peoples.[39]

"Power" may be too absolute a term in some cases, and perhaps the word "capability" may be appropriate in certain instances. For example, the latter seems more apt to describe the qualifications of a State to be one of the ten countries of chief industrial importance represented on the Governing Body of the International Labour Organisation, or to mark the line of distinction between a developed and a less-developed State.

The concept of "effectiveness" enters into account in international law in two ways: (1) First, it is relevant in determining whether a particular State or particular States should be conceded certain specific rights under international law, or alternatively denied such rights. So the effectiveness of a State's lodgment on, or control over territory is material to the question whether it has duly acquired sovereignty over such territory, or to the matter of correct boundary

37 Ibid., p. 134.

38 But cf. H. D. Lasswell and A. Kaplan, *Power and Society* (1950), at pp. 84, 98.

39 See Rosalyn Higgins, *op. cit.*, pp. 151-2, and J. A. Da Yturriaga, "Non-self-governing Territories: the Law and Practice of the United Nations", *Year Book of World Affairs, 1964* (London), 178, at pp. 209-11.

delimitation.[40] (2) Second, having regard to the institutional weakness of international law, can it be maintained that certain rules are no longer valid when by and large they have ceased to be effective in regulating the conduct of States?[41] Or, negatively, are acts contrary to international law validated by the circumstance that interested States do not effectively contest their legitimacy?

Both aspects of the concept find illustration, curiously enough, in the current situation concerning the orbiting of satellites through the upper strata of the atmosphere and of outer space. As to (1), there is the ineffectiveness of any control that can be exercised by subjacent States over the circling of orbital vehicles at immense speeds, while as to (2) there is the fact that subjacent States generally have taken no steps effectively to contest the legality of this crossing over their superjacent space, without permission. The problems posed by (2) go to the very root of the nature of international law.

Interaction and communication

Interaction in the international order is represented, *inter alia*, by the whole spectrum of international collaboration through: (a) formal or informal diplomatic relations; (b) consular relations; (c) the United Nations, the specialized agencies, and other international institutions concerned with "positive international collaboration";[42] (d) diplomatic conferences and "goodwill missions"; (e) the associations and groupings referred to in the earlier part of the present article.

Every international treaty and convention represents, in a sense, a focus of transnational interaction, particularly where the performance of the obligations of the parties calls for collaboration between the States themselves or citizens of the States. The treaty or convention concerned may even involve interaction in particular circumstances between a national of a State and another State; for example, as in the case of the Convention of 1965 on the Settlement of Investment Disputes.

An important point is that by improvements in the system of international law itself, transnational interaction can be facilitated, and rendered more satisfactory. In this context, the Vienna Conventions

40 See award of Arbitrator Huber in the *Island of Palmas Case* (1928), *United Nations Reports of International Arbitral Awards*, vol. 2, p. 829, as to territory; and the *Guatemala-Honduras Boundary Award* (1933), ibid., vol. 2, p. 1322 as to boundaries; and cf. critical comments on effectiveness by Lauterpacht, *British Year Book of International Law*, 1950, pp. 416-9. Reference should also be made to the principle of "effective" interpretation of treaties, namely that they should be construed in such manner as to enable them effectively to operate; see "Pollux", *British Year Book of International Law*, 1946, p. 69, and Lauterpacht, ibid., 1949, pp. 67-75.

41 See R. W. Tucker, "The Principle of Effectiveness in International Law", Lipsky, *op. cit.*, pp. 31-48.

42 An expression used by Professor Friedmann in *Law in a Changing Society* (1959), at pp. 460-1, where he also made reference to "co-operative international law".

of 1961 and 1963 on Diplomatic Relations and Consular Relations respectively must have made a valuable contribution towards the improvement of transnational interaction. Further progress can be expected when conventions are ultimately concluded on the basis of the draft articles on the law of treaties, and on special diplomatic missions now being prepared by the United Nations International Law Commission.[43]

In regard to communication, it may be helpful to classify the different kinds of communication which have been the subject matter of international law or international treaties, or of resolutions of international organizations, or as to which suggestions have been made for regulation by international convention:—

(1) Persuasive communication. This includes propaganda (cf. the United Nations General Assembly Resolution of 3 November 1947, condemning propaganda designed or likely to provoke or encourage threats to the peace, etc.) and "anti-prejudice" communication (cf. the Convention of 1936 concerning the Use of Broadcasting in the Cause of Peace, and the Declaration of 1937 on the Teaching of History drawn up by the Committee on Intellectual Co-operation of the League of Nations Intellectual Co-operation Organisation).

(2) Consultation (cf. article 4 of the North Atlantic Security Treaty of 4 April 1949, providing for consultation between the parties in the event of a threat to the territorial integrity, political independence, or security of any party).[44]

(3) Threat (cf. article 2 paragraph 4 of the United Nations Charter, obliging member States to refrain from threats against the territorial integrity or political independence of any State).

(4) Protest.[45]

(5) Negotiations, and diplomatic conferences.

(6) "Crisis" communication (cf. the United States-Soviet Memorandum of Understanding signed at Geneva, 20 June 1963, for providing a direct communication link—the so-called "hot line"—between Washington and Moscow for emergencies).

(7) International news transmission (cf. the three Draft Conventions on Freedom of Information, etc., drawn up at the Geneva Conference of 1948).

(8) Communication through communication satellites (cf. the Resolution of 20 December 1961, of the United Nations General Assembly, and the Agreement of 1964, prescribing interim arrangements for the

43 See *Report* of the Commission on the Work of its 17th Session (1965); and pp. 38-9 for draft provisions as to "high-level" special missions (e.g. those led by heads of States or Governments, Ministers for Foreign Affairs, and Cabinet Ministers).

44 See the discussion on consultation by Jessup in his paper, "International Security" presented to the League of Nations International Studies Conference (London, 1935) reprinted in *Collective Security* (1936), pp. 100-109.

45 See MacGibbon, *British Year Book of International Law*, 1953, pp. 293-319.

establishment and operation of an international commercial communications satellite system).

(9) Diffusion of ideologies (cf. the UNESCO working project on the mutual appreciation of Eastern and Western cultural values).

The ***absence*** of communication may be of international legal significance: (a) The absence of protest by an interested party may contribute to the establishment of a legal right in favour of the party asserting it; (b) absence of consultation may constitute a breach of a treaty of alliance; (c) an impasse or deadlock in negotiations may be evidence of a dispute between the parties, so as to attract the jurisdiction of an international judicial or arbitral tribunal.

Conflict control and resolution, and management of tensions

An important part of international law is directed towards the control and resolution of conflicts, and the management of tensions.

Chapters 6, 7, and 8 of the United Nations Charter deal with the subject. The special techniques of settlement (namely, judicial, by arbitral tribunals, good offices, mediation, and conciliation) have been classified by Professor Boulding under the three heads of: (a) reconciliation; (b) compromise; and (c) award.[46]

These objectives may be pursued indirectly; for example, the improvement of transnational communication and the process of regional integration may mitigate local tensions. Moreover, serious tensions and conflicts may occur because of grave disagreements concerning the rules of international law themselves; hence these can be attenuated if the applicable rules can be established to the mutual satisfaction of the disputants. Where there are conflicts in interest, there are two possibilities: (a) the parties in conflict may gravitate towards perception of a common interest, on the basis of which they are prepared to settle,[47] or which may form the basis of agreed rules of international law;[48] or (b) the conflicts in interest may be reduced by treaty or multilateral Convention.

One of the most significant developments of the twentieth century has been the legal regulation of the former unregulated privilege of States to resort to force or coercion, whether by war or non-war hostilities, or by the threat thereof. Also important is the development of the concept of collective security, importing as it does the notion of a general interest of all States in the maintenance of peace, and the preservation of the territorial integrity and political independence of States. It is therefore to be distinguished from an "individualist"[49] solution of the problem of security, such as a treaty of alliance or a mutual defence treaty.

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46 K. E. Boulding, *Conflict and Defense: a General Theory* (1962), pp. 310 *et seq.*

47 Ibid., pp. 314-7.

48 Cf. Rosalyn Higgins, *op. cit.*, p. 7.

49 A term used by Professor Bourquin; see *Collective Security* (1936), *op. cit.*, p. 161.

Peace and survival

Both peace and survival are accepted as major tasks of modern international law. The aim of survival, that is, the avoidance of a nuclear catastrophe, is perceptible in two important international instruments, namely the above-mentioned United States-Soviet Memorandum of Understanding of 20 June 1963 for a direct communication link ("hot line"), and the treaty of 5 August 1963 for banning nuclear weapon tests in the atmosphere, in outer space, and under water.

As to peace, there is first the important matter of clarifying the conception of peace itself. As Rudolf Pannwitz said:—[50]

> "We may have all possible reasons against war—but of what use is this if we cannot say what peace is, can be, shall be."

Certain theories of what peace is are reflected in the terms of the United Nations Charter, and of the Constitution of UNESCO, and these were acutely analysed by Professor Quincy Wright.[51]

Peace is not the absence of war, just as war is not the absence of peace. Under modern developments, nations can be involved in armed strife and yet not subject to a technical status of war, being engaged only in non-war hostilities, as in the case of the conflicts in Korea, 1950-1953, in the Suez Canal zone in 1956, and between Pakistan and India in 1965. Although there is no war, there is none the less no peace.

Nor is peace the absence of any international tension or conflict. There may be a state of peace, notwithstanding tension or conflict between States. The tension may become so acute as to threaten peace, but peace will still exist.

Primarily, peace is the absence of hostilities, that is to say of armed violence or coercion. Such hostilities may be between States or between other groups, as in a civil war. If there are no such hostilities, there is peace. By peace in its widest meaning, there is intended reference to a condition prevailing in the world as a whole. As distinct from world peace, the narrower sense is a condition existing between two particular nations, i.e. "bilateral" peace. On the basis of experience in the present century, one may formulate the working law that any threat to, or the breach of bilateral peace represents a threat to world peace. This is a more precise rendering of the maxim, "peace is indivisible", and represents a thesis accepted in the United Nations Charter.

As the quotation above from Rudolf Pannwitz shows, the concepts of what peace *is*, what peace *can be*, and what peace *should be* are different. The ideal—the peace that should be—is a condition of complete disarmament, of absence of tension or conflict, of peaceful settlement of disputes without recourse to armed violence or coercion, and of mutual acceptance of rights and values. Such a state of peace

50 In his book, *Der Friede* (Nuremberg, 1954).

51 See *Research for Peace* (Institute for Social Research, Oslo, 1954), pp. 56-67.

appears however to be beyond the capacity of mankind, inasmuch as nations will not cease to possess armaments, and tensions and conflicts of ideologies seem bound to continue. The world must settle for a peace which, in terms of quality, is less satisfactory and more uneasy. Yet is is accepted that the preservation of even such a less desirable peace is a continuous process; to use John Foster Dulles's phrase, it is necessary incessantly to "wage peace". This necessity is implicit in modern international law.

Finally, the different situations affecting the preservation of peace need to be recognized. There are, broadly speaking, three distinct immediate situations: (1) cases of tension or conflict not so acute as actually to threaten peace; (2) conditions involving a threat to the peace, where there is an impending possiblity of an outbreak of hostilities, or of an infringement of territorial integrity; (3) actual breaches of the peace. A frontier is crossed, hostilities break out, or war is actually declared. Beyond these conditions of immediacy, which are treated by the United Nations Charter as calling for peaceful settlement, or enforcement action, as the case may be.[52] a multitude of situations are recognized by the Charter and the Constitution of UNESCO[53] as capable ultimately of impairing the peace; for example, among others, the denial of human rights, the lack of social progress, the absence of mutual tolerance, and the failure to respect the rule of law.

New patterns of collective behaviour in the international order

It is trite to say, in conclusion, that any methodology to be adopted by a sociology of international law must be such as to accommodate foreseeably new patterns of collective behaviour in the international order.

This may not be easy, as is well illustrated by the changing pattern, since 1946, of the state of "cold war" between the Western powers and the Communist *bloc* countries. At times the "cold war" has erupted like lava into non-war hostilities, at other times become aggravated to the degree of brink-like tensions with intermediate phases of unfriendliness, marked *inter alia* by rivalry in hostile propaganda, and the procurement by one side of the defection of the diplomatic agents of the other.

It is extremely difficult to state with certainty what alterations in international law have been wrought by the "cold war", while the fluctuations in its intensity preclude analysis into any definitive postulates or criteria.

52 See, e.g., articles 34 and 39 of the Charter.

53 Quincy Wright, in *Research for Peace, op. cit.*, pp. 56-67.