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## THE CONTRIBUTIONS OF LAW TO CONTEMPORARY WORLD ORDER

### THE DISTINCTIVENESS OF THE INTERNATIONAL LEGAL SYSTEM: COMPARISON AND CONTRAST

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#### I

In order to write on the distinctiveness of the international legal order by comparison and contrast, it is, first of all, necessary to clarify the meaning of this problem. Such clarification again presupposes a firm theoretical basis from which to start. A sketch of this writer's views on these preliminary problems will be given here by way of introduction.

With which legal orders do we compare and contrast the international legal order? Most writers, such as John Austin, believe the comparison can only be made with advanced municipal legal orders, but that constitutes an unjustified narrowing of the concept of law. Primitive law is law, too. If we take into consideration also constitutional and administrative law, the distinctiveness of international law appears in a different light. It has correctly been stated that many problems of modern labor law can be analogized to problems of international law.

All that presupposes a basic concept of what law is. For this writer a legal order is a system of norms, prescriptive in nature—a coercive order which regulates human conduct in such a way that under certain conditions prescribed by law a legal sanction, as determined by law, ought to follow; the particularity of a legal sanction, as compared, *e.g.*, with a moral sanction, consists in the fact that the sanction, prescribed by law, ought to take place on this earth<sup>1</sup> without or against the will of the person against which it is applied and

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<sup>1</sup> Sanctions of religious norms are transcendent.

ought to be executed if necessary by the application of physical force.<sup>2</sup> This delimits a legal norm, not only against the "laws of natural science" which are statements of facts linking cause to effect, but also against norms of other normative systems, such as moral, religious or conventional norms. Whatever the "realists" may tell us, it is obvious that the corresponding norm of criminal law does *not* predict that a murderer *will* be hanged—which is often not the case—but that he *ought* to be hanged. Laws of natural science, including sociology, can only be true or false; legal norms can only be valid or not. Nevertheless, the "oughtness" is not without links to "isness" and the norms of law are standards of valuation of the *real* conduct of men; a norm must be valid, but it must further be, by and large, effective. Mere paper rules are not legal norms.

This analytical definition of a legal norm does not overlook either the contents of the norm or the fact and values. The *making* of the law is, of course, a political, sociological, and historical problem; a problem in the realm of "isness." But the norm thus created is the objective meaning of the norm-creating act—a prescription in the realm of "oughtness." This writer has always insisted that a knowledge of all three elements—norms, facts and values—is necessary in order to understand a given legal order fully. One must not only study the legal norms analytically; one must also know how they were made, the political and sociological environment from which they arose, the basic values on which they are based, the ultimate ends which they want to realize—all that is of particular importance with regard to international law.

One must further take the *whole* legal order into consideration. Continental lawyers restrict the "law" often to the constitution, statutes and ordinances; whereas, contracts, judicial, and administrative decisions are for them not "law," but only "application" of law. American "realists," on the other hand, see only Court decisions and sometimes deny even the existence of general legal norms. For Continental lawyers, there are only general legal norms, for "realists" there are only individual legal norms. This stand is certainly a consequence of the history of the two legal systems: the codified law, based on Roman law, where the legal hero is the legislator (and, perhaps, the savant), whereas the judge remains in anonymous obscurity; and the "judge-made" Common Law. But both standpoints are theoretically untenable. A legal order is a dynamic system which itself regulates the creation of the law—a "pyramid" consisting of general as well as individual legal norms. It is not possible to strictly delimit "creation"

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<sup>2</sup> See Josef L. Kunz, "Sanctions in International Law," 54 Am. J. Int'l L. 324 (1960).

and "application" of law. Just as the legislator creating a statute, at the same time applies constitutional norms, thus a judge is never merely an automatic "applier" but always also a creator of law, creator of an individual legal norm, and under some legal orders, also a creator of general legal norms.

We must, further, not only know with what we have to compare and contrast, but we must know also what is meant by the "international law," which is to be compared and contrasted. It is clear that such international law as may have existed earlier<sup>3</sup> has no historical connection with *our present-day* international law with which we are to deal. *Our* international law is strictly a historical creation of Western Europe; it is, therefore, not necessarily *the* international law, but only one of the possible international laws. It came historically into being among the Christian States of Western Europe. It presupposes in consequence a plurality of sovereign states having a certain community of culture and interests and being in contact *inter se*. There is already here a certain distinctiveness: there must not always be an international law in our sense, namely where these presuppositions do not exist; thus, there was no international law in the Imperium Romanum, nor between Medieval Europe and the Inca Empire.

Nor is there any guarantee that our international law will continue to exist in the future. Like any historical creation, it may come to an end and be replaced by something else. There is a theoretical, although at this time no practical, possibility of a World State. Whether it would be created by one Power or as a World Federal State, it would mean that our international law has come to an end and been replaced by "world law," *i.e.*, the municipal law of the World State.

There is a further distinctiveness. From the moment that our international law came into existence up to the present day, its legal character has been challenged, whereas ancient, primitive Germanic law, or the primitive law of African tribes has always been recognized as law. Now, if international law were not law, it would make no sense to compare and contrast it with other legal orders; one would only have to delimit it from law, as Austin did, who saw in international law not law, but only "positive morality." Naturally, this fundamental problem of whether international law is law at all cannot be investigated here. For this writer it *is* law, although primitive law. As our international law is based on the practice of states, it seems to us sufficient here to point out that the practice of states has treated international law at all times as law in the legal sense and carefully and sharply distinguishes it from other international normative systems, such as "international ethics" and "courtoisie internationale."

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<sup>3</sup> *E.g.*, Inter-Hellenic law, ancient Hindu, ancient Chinese "international law."

## II

The international law to be compared and contrasted is the historical creation of Western Europe. Although it has its roots in the Middle Ages of Catholic Western Europe, in the "Communitas Christiana,"<sup>4</sup> it is exactly through the decentralization of this medieval Christian Community that both the single sovereign States and our international law came into being. It was a new law—a fresh start. A legal order must not only have a structure, but also a content; legal norms must be created, and the creators of law cannot shape its contents *ex nihilo*. The creation of early international law was done by Catholic theologians, and later by lawyers based on the Roman Law. That explains why many rules of international law,<sup>5</sup> some of them still valid today, are mere transplantations of norms of Roman private law into the international sphere. That explains also the great role of "natural law" in early international law, as this "natural law" came from Roman Law—which itself was regarded on the Continent as "ratio scripta"—and the dogmas of Christianity. This early international law was valid only for the Christian states of Western Europe and the Holy See.<sup>6</sup> This early international law was exclusively based on the values of the Greek-Christian, Occidental culture.<sup>7</sup>

Now, this early international law has seen, from the fifteenth century to the end of the First World War, a great development, both as to its contents and to the territorial sphere of its validity. In the latter respect, the United States and the Latin-American Republics became members of the international community, and later other states, like Australia and New Zealand, based primarily on the Occidental culture. To this geographical expansion outside of Europe came an expansion outside of the Occidental culture. In 1856 Turkey was

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<sup>4</sup> This "Communitas Christiana" was wider than the Holy Roman Empire of the Germanic Nation, for England and Scandinavia never belonged to this Holy Roman Empire. There were, on the other hand, co-existent cultures, outside the "Communitas Christiana": the States of the Byzantine culture of Eastern Europe and the Arabic-Islamic world.

<sup>5</sup> *E.g.*, acquisition of sovereignty by occupatio of terrae nullius, pacta sunt servanda, rules, concerning alluvio and avulsio, international servitudes, state succession, and so on. Roscoe Pound stated recently "Grotius wrote to a picture of two second-century Romans owning adjoining land" "A World Legal Order," Fletcher School of Law and Diplomacy. 1959. p. 10.

<sup>6</sup> That the Holy See, contrary to all other churches, has been and is up to the present day, a permanent member of the international community, has a historical explanation. See Josef L. Kunz, "The Status of the Holy See in International Law," 46 *Am. J. Int'l L.* 308 (1952).

<sup>7</sup> "Existent international law is the creation of but one historical portion of one living culture." Northrop, "Contemporaneous Jurisprudence and International Law," 61 *Yale L.J.* 636 (1952).

admitted into the international community; from that time on to 1914, and in League of Nations times, international law, originally a "regional" law of Christian Western Europe, became valid for nearly all States, regardless of continent, religion, culture, race and so on; it had become universal. The world-wide expansion of our international law was strictly a historical phenomenon. Hence, just as there is no guarantee that our international law will be valid in all future times, there is no guarantee that it will retain its universal validity at all times.

Another fundamental remark has to be made. While international law, although primitive in structure and content, has seen this great development as to its content and as to its territorial validity up to 1914, this development of international law has shown, contrary to many advanced municipal legal orders, a remarkable stability and a clear continuity, and no revolutionary change as to its basic structure has occurred. It remained based on the same sociological foundations, on European legal systems—rather pre-dominantly Roman Law—anchored exclusively on the values of the Occidental culture, notwithstanding its universal validity. It was the law of a world in which Europe and the United States, equally of the Occidental culture, dominated in all fields; of a world in which Europe, through colonies, protectorates, and many other devices dominated Asia and Africa. This period of hundreds of years, up to 1914, may be called, for reasons of brevity, the period of the "classic" law of nations.

But since the end of the First World War, and particularly since 1945, international law has been in a period of uncertainty, constant flux, transformation and crisis; we may speak, for reasons of brevity, of the "new" international law. But while 1914 constitutes a turning-point in the development of our international law, it does not constitute a break; it is only a new phase of the development of *our* international law. This insight dictates the approach to writing on the distinctiveness of the international legal order by comparison and contrast: first, this distinctiveness of the "classic" international law must be briefly investigated; then, the difference between the "new" and the "classic" law of nations must be briefly stated, showing that, in spite of this difference, the distinctiveness of international law, whether before or after 1914, compared with other legal orders, has only changed in degree, but not in kind.

### III

If we compare "classic" international law with *all* other legal orders, it *is* law. If we compare it with the advanced municipal legal orders of sovereign States and, particularly, with private law, it is law, but a law of a different type. If we, finally, compare it with cer-

tain fields of advanced municipal law, such as constitutional law or modern labor law, this difference becomes somewhat deminimis. This difference between "classic" international law and advanced municipal legal orders has two different sources; the primitiveness of structure, and certain particularities of a sociological nature.

From its beginnings up to 1914, our international law was nearly exclusively<sup>8</sup> the law "between" sovereign States, first between those of Christian Western Europe, then by 1914, between nearly all sovereign States. Its definition as "the body of customary and treaty rules which are considered legally binding by States in their intercourse with each other"<sup>9</sup> was correct. Our international law came into being, as stated, together with the coming into existence of national, territorial, and sovereign states through the decentralization of the "Communitas Christiana." That explains that these sovereign States, as well as the international community, are primarily territorial communities. Modern municipal law, as well as international law, are legal orders on a territorial rather than on a personal basis. That explains that certain principles came into existence which, more or less, have remained basic up to the present day—the sovereignty of states, their equality and independence, their jurisdiction within the territorial limits of the state. It was the claim to sovereignty, with which the "divisio regnorum" started; Bartolus' definition of sovereign states as "civitates superiorem non recognoscentes" lead to the definition of Bodin. The bearer of sovereignty has changed—originally "the prince," since the French Revolution "la nation," and since the nineteenth century "the State." But sovereignty has remained basic for international law. In the sense of Bartolus' definition it has had and has "no superior"; it is a "law inter pares," a "law of coordination," not, as advanced municipal legal orders, a law of subordination.

Primitiveness is not a feature of international law alone, it is characteristic for all law, whether municipal or international, at a certain stage of its development. The primitiveness of any legal order is a consequence of its lack of organization, of its lack of centralization. "Classic" international law was—and international law is still today—a highly decentralized legal order. It is decentralized dynamically by its lack of special organs for the making, application and the execution of its norms. As in any primitive law, all these functions must be exercised by the members of the legal community, here by the sovereign states. There are no special organs for the creation of norms of international law, there was and is no international legislature; hence,

<sup>8</sup> Exceptions: The Holy See, and insurgents, recognized as a belligerent party.

<sup>9</sup> Thus, the first sentence in I Oppenheim-Lauterpacht, *International Law* 5 (8th ed. London. 1955).

the sovereign states are not only the nearly exclusive subjects, but also the creators of the rules of international law; the methods of creation—custom and treaty—are highly decentralized. General international law, binding on all the states of the international community, has been created only by custom. Treaty law is always particular international law, binding only on the states which have ratified the treaty. To that extent the norms of general international law created by custom are relatively few whereas the bulk of modern international law consists of treaty law binding only on certain states. The small range of international law, up to 1914, is not only to be explained by the lack of an international legislature, but also by the fact that “classic” international law dealt nearly exclusively with the rights and duties of sovereign states and that many problems, although of the highest international importance, were excluded by “sovereignty” and exclusive jurisdiction of the members of the international community.

International law was decentralized dynamically by the fact that its norms oblige only states, not individuals. An international norm prescribes what is or is not to be done by a “state,” and delegates to the municipal legal orders the function to designate the persons who, as organs of the states, have to do it. The acts of these individuals are imputed by international law not to them, but to the states, on behalf of which they act. Treaties, granting certain advantages to the citizens of the contracting parties, must first be “transformed” into municipal law. International law is, therefore, not only a primitive, but also an *incomplete* legal order which needs the municipal legal orders for the completion of its own norms.

There are no special organs for the application of international law. Thus, there are no special international organs to ascertain objectively whether a territorial community has fulfilled the conditions laid down by international law for the coming into existence of a new sovereign state; hence, the “recognition” of new states is left to the existing sovereign states. In consequence of the lack of special international organs, sovereign states, under general international law, have the right of auto-interpretation of the treaties which they have concluded, although this right ought to be exercised in good faith. For the same reason, sovereign states, under general international law, have a right of auto-determination of the existence of an international delinquency as well as of its legal consequences. As there is, under general international law, a complete lack of collective sanctions, neither special organs nor a monopoly of force are at the disposal of the international community. General international law, like any primitive law, must rely on the principle of self-help under general international law, reprisals, and war.

General international law recognizes the validity of certain treaties, even if they are imposed by force upon the other party; it does not distinguish delinquencies into torts and crimes; it makes no distinction as to sanctions between civil execution and criminal penalty; it does not know individual responsibility for fault, but only absolute, collective responsibility. The primitiveness of "classic" international law is emphasized by the great importance which the principle of effectivity bears.

The tremendous disadvantages of "classic" international law as a primitive law are obvious; it was, primarily, a static law. It was impossible to state with legal authenticity which state in an international conflict was legally right and which legally wrong. In the case of the application of force, it was again impossible to state objectively which state acted legally. Custom, as the only way of creating norms of general international law, often rendered "classic" international law inadequate for the needs of the times. The right of auto-interpretation of treaties, of auto-determination of international delinquencies, of what state is responsible for them, and of the legal consequences all gave great advantages to the powerful States. The absence of international courts with compulsory jurisdiction made the peaceful settlement of international legal conflicts impossible except by agreement. The absence of an international legislature rendered the problem of "peaceful change" again only possible of solution by agreement. "Classic" international law made the resort to war never an international delinquency; war served not only as a sanction by way of self-help, but also as a revolutionary means to change the law. The principle of effectivity emphasized the role of the *fait accompli*. The principle of sovereignty emphasized the "vital interests" of the members, regardless of law. "Classic" general international law was a primitive and a weak legal order.

Notwithstanding its primitiveness and its weakness, international law, if one accepts it to be law, is necessarily a law *above* the states—a "law inter pares." A "law of coordination" is necessarily above the pares otherwise it would not be law at all. All law is by nature heteronomous, or "vertical."

#### IV<sup>10</sup>

"Classic" international law had necessarily to delimit its own competence from that of the sovereign states. Whereas the sovereignty

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<sup>10</sup> As to the problem dealt with in this Chapter, see the full discussion in this writer's study in Spanish: "Teoría del Derecho Internacional." Inter-American Academy of Comparative and International Law. Havana. II Cursos Monográficos 331-444 (1952).



of states is limited by norms of international law, the spheres of validity of international law are, in principle, unlimited. It is international law which determines by its norms which entities are "persons in international law." The temporal sphere of validity is, in principle, unlimited in the sense that general international law does not contain norms by which its rules would be limited as to their temporal validity; treaty norms, on the other hand, often contain rules limiting their validity in time.

Unlimited also was the territorial sphere of validity of "classic" international law. It included, by 1914, not only the territories of nearly all the sovereign states, but, in addition, the high seas, the air space above the high seas, and the *terrae nullius*.

The material sphere of validity of international law is also unlimited. There are *no* matters which, by their nature, can *only* be regulated by municipal law. International law has the "compétence de la compétence"; it may, at any moment, regulate matters which hitherto have been regulated only by municipal law. In a federal state federal law is above the law of the states of the union, but this superiority says nothing about the actual division of competences, thus, the "compétence de la compétence" of international law says nothing as to the actual division of competences between international law and the sovereign states. This actual division of competences can always only be stated on the basis of the analysis of the positive law actually in force. Such analysis of "classic" international law shows that the majority of competences and the most important ones were actually given by international law to the sovereign states. This explains the relatively small range of the norms of general international law and is one of the reasons for the weakness of the international legal order.

Medieval Catholic Western Europe had its Constitution in the "Communitas Christiana" with its two highest powers, Emperor and Pope. Beginning in the late Middle Ages, the gradual decentralization of this Christian Community brought about the appearance of the national, territorial, sovereign states and the "international community" as the successor of the Medieval Christian community as a loose union, now consisting of sovereign states, which disclaimed any allegiance to Emperor and Pope. Their sovereignty was derived, as Bodin stated for the King of France, "par Dieu et son épée." This would have brought about a situation of anarchy and constant threat of war. To prevent that, international law came into being to guarantee relative peace among the now sovereign states. It must also not be forgotten that these new states, insisting on their sovereignty, recognized the sovereignty of the other members of the Western-European Christian international community. The first and most urgent task of the

new international law was, therefore, to secure the relatively *peaceful coexistence* of the sovereign states of Christian Western Europe. This was done by delimiting the jurisdictions of the sovereign states and their legal orders inter se through rules of general international law created by custom. Every legal norm and order has a fourfold validity: as to time, as to matters, as to territory, and as to persons.

General international law delimited the validity of the legal orders of sovereign states in time.<sup>11</sup> It delimited their material validity, a problem of jurisdiction, by granting to the sovereign states in principle the highest and nearly exclusive jurisdiction within the territorial limits of the state; later general international norms came into being, limiting this jurisdiction in particular aspects.<sup>12</sup>

The sovereign states and the international community are, primarily, territorial communities; territory is, therefore, of the highest importance. The states looked for territorial expansion; jurisdiction was within the territorial limits of a state; territorial international conflicts have been and are today the most dangerous international conflicts and particularly likely to lead to war. It was, in consequence, of the highest importance for general international law to delimit the territorial validity of the legal orders of the sovereign states inter se by *norms of contents*. Thus, the norms concerning acquisition and loss of territorial sovereignty came into being. During the seventeenth century the fundamental norm of the freedom of the high seas and, simultaneously, the law of territorial waters came into being.

As the sovereign states and the international community were, primarily, territorial communities, the delimitation of the *personal* validity of the legal orders of the sovereign states was of lesser importance. This explains why the delimitation of the personal sphere of validity was not, as in the case of territory, done by general international *norms of contents*, but only by general international *norms of competence*. International law delegated to the sovereign states the competence to regulate, in principle, the acquisition and loss of their nationality by norms of their domestic law as they pleased. Thus, the granting of nationality has remained, up to the present day, in principle a "matter of domestic jurisdiction." But it is theoretically untenable to assert that this problem is *not* regulated by international law; it *is* only regulated by international norms of competence and the states are given this right by the international norm. But mere international rules of competence could not bring about a clear division of

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<sup>11</sup> Coming into being and end of a sovereign state, problems of state succession, identity of states under international law.

<sup>12</sup> E.g., Immunity and privileges of foreign diplomatic agents; the right of "innocent passage" through territorial water; later the norms for the protection of citizens abroad.

individuals between the different sovereign states. This state of things finds expression in the recognition by international law of multiple nationality as well as of statelessness.

In addition to delimiting the jurisdiction of sovereign states inter se, it was of primary importance to create norms for the official intercourse of sovereign states. The international law, concerning privileges and immunities of diplomatic agents, purely customary general international law, is among the oldest and best observed parts of general international law and even today in this highly divided world is least attacked.

As there was for every state a right to go to war, the regulations of the *laws of war* dominated the interest of early international law. It is no hazard that in Grotius' "De jure belli ac pacis" the laws of war come first.<sup>13</sup>

All that the basic development of general international law tried to solve was the first great problem, the problem of peaceful coexistence. But international law has a second great task—*international cooperation of sovereign states*. Here, general international law furnished an excellent instrument in the international treaty and the norm that sovereign states are free to conclude treaties, in principle, on any subject matter.

## V

We have seen that "classic" general international law is primitive and unorganized," but the word "unorganized" has to be taken *cum grano salis*. Any community *must* have organs through which alone it can act. The international community is not "unorganized" in the sense of having *no* organs; it is only primitively organized. International law *has* its organs, it also has *its own* organs; but it has *no special* organs. Hence, the organs of the state have also to function as international organs. It is this phenomenon, to a great extent basic up to the present day, which Georges Scelle, with great insight, has called "le dédoublement fonctionnel."

The primitiveness, the "unorganized" status of general international law could, even in the times of the "classic" law of nations, be tempered by norms of particular international law created by treaty. The treaty can create also special international organs; the treaty can serve for achieving the second great task of international law, international cooperation between sovereign States. With the advance

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<sup>13</sup> Prior to Grotius "seul le droit de la guerre se développe sérieusement; il forme le noyau du droit international" E. Nys: *Le droit de la guerre et les précurseurs de Grotius* (1882), p. 7. "The most important as well as the first to spring into existence was that (part of international law) which occupied itself with the laws of war" T. E. Holland "Studies in International Law" p. 45 (1898).

of time, and particularly in the nineteenth century, it became obvious that the primitive unorganized international law was wholly inadequate for the needs of the times. The wish was to make international law a more advanced law. Taking the development of municipal legal orders from primitive to advanced ones as a model, it can be seen that this advancement had to be brought about by centralization. But here again a curious distinctiveness is shown. Were it possible to centralize international law in the same way as advanced municipal legal orders, then the international community would be a relatively centralized community, which we could call a sovereign state; hence, international law would come to an end and would be replaced by the municipal law of the World State. In consequence, it was tried to advance and centralize international law only so far as not to infringe the sovereignty of the members.

The idea of "organizing" the world—first the Western European international community—is old in Occidental thinking. Just as general international law had to solve, first, the problem of peaceful co-existence, these early thinkers thought first of "eternal peace" and only second of international cooperation. There is a long line of utopian proposals for "eternal peace" by international organizations from the beginning of the fourteenth to the end of the eighteenth century in Occidental Europe.<sup>14</sup> But all of them show the typically European, Occidental idea, that peace can be guaranteed by a loose confederation of sovereign states and that, therefore, a World State is not only impossible but not even desirable.<sup>15</sup> This idea was adopted by Simon Bolivar and tried unsuccessfully in the First Pan Americanism. On *this* idea the League of Nations, as well as the United Nations is based. Not only general international law, but also international organization, even at the present time, is based on ancient Western European ideas.

With this basic idea—no World State—in mind, the nineteenth century recognized that the advance of international law lies in international organization. The treaty, as stated, is an excellent instrument for international cooperation and can also create special international organs. The treaty holds, therefore, a very important place in international law and has seen a great development: from the bilateral to the multilateral and quasi-universal treaty; from the treaty, concerned with a single problem, lying in the past, and giving a settlement, creating only individual international norms, to the so-called "law-making treaty," creating general international norms *pro futuro*,

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<sup>14</sup> Pierre Dubois (1305) to Abbé de St. Pierre (1716); Kant: Zum ewigen Frieden (1795).

<sup>15</sup> See Walter Schiffer, "The Legal Community of Mankind," 1954.

or creating even a Constitution of an international organization. It is certainly theoretically incorrect, even today, to speak of "international legislation," but it is true that in the absence of an international legislature the treaty is still the best substitute.

We see, further, under "classic" international law the great development of the International Conference: Peace Congresses, "to remake the map of Europe";<sup>16</sup> *ad hoc* political Conferences,<sup>17</sup> Peace Congresses, creating also some general rules of international law *pro futuro*;<sup>18</sup> international conferences, convoked in time of peace, exclusively for the purpose of creating general norms of international law<sup>19</sup> or for writing the constitution of a new particular international organization; international conferences as permanent organs of international organizations.<sup>20</sup>

There were attempts at regional organizations; Simon Bolivar, in this respect the forerunner of Woodrow Wilson and of the League of Nations and then the second Pan-Americanism since 1889. There was an attempt at a political Government for maintaining peace in Europe through the hegemony of the Great Powers, by the Holy Alliance and the Concert of Europe, although wholly political rather than legal. Some ideas of this European experience re-appear in the Security Council of the U.N. as it was planned by the makers of the U.N. Charter at San Francisco in 1945.

Since 1772 we see a revival of international arbitration, although the latter remained primitively organized and was, at the end of the nineteenth and the beginning of this century, strongly over-estimated as the principal way of insuring international peace. The principle of compulsory jurisdiction of international tribunals was, just as today, rejected by sovereignty. There was even the first pre-established permanent international court, the Central American Court of Justice. The court, although restricted to Central America, of short duration and of no outstanding achievements, was the first of its kind in history.

There was, as the climax of "classic" international law, the system of the Hague Peace Conferences which partially codified the peaceful settlement of international conflicts, the law of war and neutrality; but no one dared even to question the right of unlimited resort to war by the sovereign states.

Multilateral treaties, sometimes quasi-universal, were concluded for international non-political cooperation in the fields of communi-

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<sup>16</sup> Westphalia, 1648; Utrecht, 1713.

<sup>17</sup> Berlin, 1878; Congo, 1885.

<sup>18</sup> Vienna, 1815; Paris, 1856.

<sup>19</sup> Hague Peace Conferences, 1899 and 1907.

<sup>20</sup> International Conferences of American States.

cations, economics, cultural cooperation, and the protection of men (against slave trade, for the suppression of traffic in women, beginnings of an international labor law). Even more important, some of these multilateral treaties created special international organs. There were the International River Commissions and particularly important, from the point of view of organization, the European Danube Commission which was empowered to make Ordinances for the navigation of the lower Danube immediately binding on those who navigated this stream. The Commission which had its own courts, was independent and neutral from the country in which it sat, and had its own flag. Of the highest importance were the International Administrative Unions.<sup>21</sup> They survive and some of them have become U.N. Specialized Agencies. Here we have permanent, special international bureaucratic organs; here are the beginnings of an "internal law of international organization," the beginnings of an "international civil service." The typical, tripartite organization of these Unions has served as the model for all later international organizations, whether big or small, universal or regional, general or specialized. Here we see already the fact that these international organizations for non-political cooperation were much more successful than the attempts at international political organizations for maintaining the peace.

## VI

The distinctiveness of "classic" international law by comparison and contrast lies in the fact that it is, in general, a primitive legal order. But there is also another source of distinctiveness, particularities of a sociological nature, as writers like Max Huber, Dietrich Schindler and the late Professor Brierly<sup>22</sup> have shown. Such sociological factors are, quite apart from primitiveness, also important reasons for the distinctiveness of the international legal order.

There is, first, the relatively small number of "persons" under "classic" international law—only the limited number of sovereign States—and each State is unique. It is, therefore, very difficult for general international law to create general, abstract norms contrary to municipal legal orders which can much more easily make norms for transactions, *e.g.*, contracts, which happen innumerable times between individuals whom the law has typified and schematized into "persons."

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<sup>21</sup> See Josef L. Kunz, "Experience and Technique in International Administration," 31 Iowa L. Rev. 40 (1945).

<sup>22</sup> J. L. Brierly, "The Law of Nations" (4th ed. Oxford. 1944). See also, Charles de Visscher, "Theory and Reality in Public International Law," Princeton. 1957 (English translation).

There are not only few "persons" in "classic" international law, but each is also "sovereign" and "equal" and disposes of power, whereas the international community has not only no monopoly of force, contrary to advanced municipal legal orders, but practically no power at all. This sociological fact, the individualistic distribution of power among the members, even small ones, and particularly the Great Powers, is fundamental for the distinctiveness of the international legal order, as Charles de Visscher has stressed.

In addition, the international community, even under "classic" international law, was, in the terms of German sociologists, as Brierly has underlined, not a community, but only a society; the French term for the League of Nations: "Société des Nations," society of states, was correct. There was, even prior to 1914, no real common axiological foundation, and, in general, no loyalty of individuals toward the international community. The lack of a common system of values makes a legal order weak. This weakness, Brierly has stated, goes deeper than the problem of sanctions; it is, he states, not the existence of a police which makes a legal order strong, but, to the contrary, it is the vigor of the law which makes a police force possible.

Finally, whereas advanced municipal law regulates the conduct of individuals who are powerless as compared with the monopoly of force at the disposal of the community, international law regulates the conduct of "sovereign states," *i.e.*, of enormous groups of individuals, disposing of power. This is the great difficulty of international sanctions, the importance of "vital interests."

This is a great source of distinctiveness of international law by comparison and contrast. But in order not to lose the right perspective for this distinctiveness, two things must not be forgotten. First, even "classic" international law functioned very well in the everyday problems of the conduct between sovereign states and in minor conflicts and it was only in the big problems of war and peace, that it often failed.<sup>23</sup> Second, on the other hand, this distinctiveness shows itself only fully when comparison is with advanced municipal legal orders and in normal times. This distinctiveness is much less, in comparison with states where there is no common system of values, but internal strife. There is also, even under advanced legal orders, the possibility of insurrection and civil war. Here, like in international affairs, it is military victory which is also legally decisive; what, in the event of failure, is treason,<sup>24</sup> becomes in the event of success, the start-

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<sup>23</sup> That is why the late Sir Hersh Lauterpacht applied to international law the contrary of the old Roman Law proverb: "In maximis non curat praetor."

<sup>24</sup> An old little English verse states ironically:

"Treason cannot prosper; what's the reason?

For *if* it does, who would dare to call it treason?"

ing-point of a new constitution of a new country. The problem of a military execution by a Federal State against a state of the union, is as delicate an operation, as an international military sanction. Where a great mass of workers, disposing of power, strike, it is often preferred, whether they are legally right or wrong, to negotiate rather than to go into court.<sup>25</sup> The problems of international law, whether in consequence of its primitiveness or on account of sociological particularities, are not unique with international law. The distinctiveness of "classic" international law, as compared with and contrasted against advanced municipal legal orders, is very great but it is not absolute.

## VII

After the First World War the attempt was made to develop international law much faster, to make a big leap forward by way of centralization, *i.e.*, by international organization. It was a turning point for, but not a break with, "classic" international law. This "new" international law has gone, and is going, up to now, through two periods: the period between the two World Wars, or the period of the League of Nations, and the present period since 1945, the period of the United Nations.

The League of Nations was the first successful attempt to set up in positive law a quasi-universal international organization which did not only successfully expand machinery for international, non-political cooperation<sup>26</sup> but dared also to regulate problems of "high politics": partial restriction of the right of sovereign states to go to war, declaring certain matters as being of "international concern," the system of "collective security" through collective sanctions, and reduction of armaments. But the continuity with "classic" international law was, from the beginning, obvious. The League was based on the sovereignty of its members, on the Occidental idea of keeping the peace through a mere loose confederation of sovereign states; it strongly rejected in its beginnings the idea of being a "super-state" and, most certainly, it was not. Its gradual decline and its final disappearance in the holocaust of the Second World War brought an illusion to an end. The individualistic distribution of power among the members remained untouched. Europe retained its hold on great parts of Asia and Africa

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<sup>25</sup> *Macchiavelli* wrote in his "Il Principe," that "from superior to inferior one commands; but between equals one negotiates."

<sup>26</sup> Particularly the International Labor Organization, the only part of the League of Nations which survived in 1946; also the "Institute of International Intellectual Cooperation" at Paris, succeeded by UNESCO. For the international protection of persons or groups see the system of *mandates*, the Anti-Slavery Treaty of 1926, The Nansen Office of Refugees; the new, particular international law for the protection of national, linguistic and religious minorities.



and the exclusive values of the Occidental culture as the basis of international law continued. The League became, more and more, a preponderantly European organization, run by Great Britain and France. The United States never was a member.

After the apocalyptic events of the Second World War a period of much greater change of international law started in 1945. The "new" international law of the present period is one of flux, change, uncertainty, and crisis. But not only is the connection with the League of Nations period clear, but, up to now, no break with "classic" international law has occurred. There are many reasons for this far-reaching transformation and crisis of international law, reasons which can here only be briefly listed:<sup>27</sup> the complete change of general conditions; the coming of totalitarian governments; scientific and technological advances; the coming of the atomic and the space age; the appearance of new forms of political warfare; the complete change of the strategy, tactics, and goals of warfare; the relative decline of Europe, creator of the Occidental culture and of our international law; the "bipolarity" of the present world to which China may soon have to be added besides the "uncommitted" and "neutralist" States; the deep ideological split between the democratic and the communistic world, each led by one of the two Great Powers; the "cold war" and the continuous political crises on a world-wide scale; the "anti-colonial" rebellion; the entry on the international stage of non-Occidental cultures; the "rebellion of rising expectations"; neo-Malthusian fears; often expressed in the pessimistic slogan of the "population explosion"; growing nationalism; an upsurge of sovereignty; signs of a weakening and decline of our Occidental culture from within; a decline of the respect for law. It is only natural that the combined influence of so many far-reaching causes in this terribly dynamic, rapidly changing world, in this revolutionary period of transition, can hardly make the present status of international law a happy one. Let us briefly sketch the consequences of these causes, in order to arrive, by comparison and contrast, at a judgment on the distinctiveness of present-day international law.

1. There is, first, a very important change since 1945, as to the composition and the value-system of the *international community*. Even prior to 1914, the international community, as stated, was hardly a true community; the expansion of international law in its territorial validity, although it remained based exclusively on the values of the Occidental culture, was brought about at the cost of a dilution

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<sup>27</sup> For a full discussion see this writer's lectures in French at the Hague Academy of International Law, held in 1955: "La Crise et les Transformations du Droit des Gens" (88 Recueil des Cours, 1955, II, 1-104); see also this writer's article, "The Changing Law of Nations," 51 Am. J. Int'l L. 77 (1957).

of its contents. Since 1945 the existence of an "international community" has become problematical and whatever unity of values may have existed before has been lost. This is, first, a consequence of the deep ideological split between the democratic and the communistic world, led by the Soviet Union, and of the "cold war." Some ideas, goals and procedures of the Soviet Union are clearly incompatible with the values of the Occidental culture. The real split is not between the different economic systems, but is a spiritual abyss between the Occidental culture for which human dignity and liberty is basic, for which the State exists only for the individual, and collectivism, for which the individuals exist only for the State. To that extent the Soviet Union has openly admitted that its ultimate goal is a world dominated by communism and constantly expresses its deep conviction that this goal will be reached, although it expresses also its hope that this goal can be reached without a third world war. Hence, "a peaceful co-existence"<sup>28</sup>—it has been clearly stated<sup>28</sup>—is only an instrument for the interim period, a more perfect form of the "class struggle," the correct path to the "triumph of communism on a world-wide scale."

On the other hand, there is the appearance of many new states in former colonial or quasi-colonial areas of Asia and Africa, the appearance on the international stage of many non-Occidental cultures.<sup>29</sup> Since 1945 the international community has become, for the first time, truly international and no longer primarily dominated by states of the Occidental-Christian culture.

Both these developments have far-reaching consequences, not only as far as the unity of the international community is concerned, but also with regard to the universality, to the contents, and to the certainty of the norms of international law.

2. The international community has also been changed since 1945 by the *expansion of international law, as to its subjects*. The present-day international community, and its law, is no longer exclusively restricted to sovereign states, although the latter remain, and probably will remain for any foreseeable time, not only the most numerous, but also by far the most important subjects of international law. But there are now many other subjects of international law, although, by no means, necessarily with the same legal status as sovereign states. There are "partial" subjects of international law, such as certain states of Federal Unions (Bielorussia, Ukraine), colonies, and territorial communities, created by treaty, such as the "Free Territory of

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<sup>28</sup> Statement by leaders of 81 Communist parties at the Moscow Meeting The New York Times, 7 December 1960, pp. 14, 15.

<sup>29</sup> See this writer's article, "Pluralism of Legal and Value Systems and International Law," 49 Am. J. Int'l L. 370 (1955).

Trieste" had it come into existence. There is the evergrowing number of international organizations, many of which have international personality. There is the attempt to make the individual a direct subject of international law; either a direct subject of international duties and responsibility—the attempted "international criminal law"—or the direct subject of international rights—the attempted law for the international protection of human rights. This development sometimes brings about doubts and uncertainty as to the contents of this "international community." There has not only been an expansion of the subjects, but also of the *contents* of international law. It no longer deals exclusively with the rights and duties of sovereign states; its scope includes today also stateless persons and refugees, indigenous populations of trusteeship territories, international labor problems, the solution of international social, financial, economic, health, communication, educational problems, economic and technical aid to underdeveloped countries, and many more topics.

3. Even "classic" international law was to a great extent incomplete, inadequate and uncertain. The present-day international law under the influence of all these causes of transformation and crisis is characterized by *rapid change* and a high degree of *inadequacy* and *uncertainty*. Even the present-day international law is, as to the making of norms of international law, basically as "unorganized" and primitive as "classic" international law.

Great violations of the laws of war and neutrality in two world wars, the influence of the illusion that "war has been abolished," the coming of new and terrible arms of mass destruction, atomic and hydrogen bombs, international ballistic missiles, gas and bacteriological warfare, and the complete change of forms and goals of warfare have brought about since 1945 a chaotic state of the laws of war. Although in these last years some progress has been made, the laws of war remain to a high degree incomplete, inadequate, and uncertain. This is also true as far as the international law of neutrality is concerned. This uncertainty of present-day international law covers about one half of "classic" international law.

Not only the forms and techniques of actual warfare, but also those of political struggle in a deeply divided world have changed considerably. Political propaganda, psychological warfare against other states by means of powerful media of mass-communication, the system of "iron curtains," prevention of the free flow of men and ideas, the fact that political parties in many countries are controlled, financed, and dominated by foreign, ideologically opposed states, highly developed techniques of subversion, veiled intervention, civil wars with foreign intervention, the use of "resistance movements" and so-called

"volunteers," "wars by proxy," delivery of technical, economic, and military aide to rebels in foreign countries for subversive purposes, have made norms centering around the "prohibition of intervention" highly insecure.

The strong expansion of economic activities by states has made uncertain not only many norms of the laws of war and neutrality, but also many other norms, *e.g.*, concerning "sovereign immunity."

A great deal of inadequacy or uncertainty of rules of international law is the consequence of new scientific and technological advancements such as the norms of aerial warfare, the use of weapons of mass destruction, the law of aviation, the atomic law, the law of outer space. Nearly all these problems have importance for peaceful as well as for military purposes.

Furthermore, we are faced with the ideological split between the democratic and the communistic world and the attitude of the new States of non-Occidental cultures. That renders even old rules of international law hitherto not questioned, uncertain and doubtful. The Soviet Union feels that certain rules are unacceptable, as being an expression of "capitalism," or must be "re-interpreted"; hence, her reliance primarily on treaties concluded by herself. On the other hand, the new states, arising in former colonial or quasi-colonial territories, feel that most of general international law has been made by "colonial" powers exclusively in their own interest, not taking into consideration the interests of these new states. In addition, as they had no part in making these rules, they have never freely given their consent. It is interesting to note that some states of Latin-America, although independent for one hundred and fifty years and belonging to the Occidental-Christian culture, have now, because of their economic backwardness and in consequence of the "revolution of rising expectations," sometimes joined Communist or Afro-Asian states. This has led to a serious weakening of the Organization of American States. From all these reasons, it is easily understood that great departments of general international law of the highest importance, such as the norms, concerning the sanctity of private property, the protection of citizens abroad, denial of justice, espousal, confiscation, nationalization, expropriation, fulfillment of contracts, concluded for the economic development of a country between a state and a foreign corporation, are in a status of high uncertainty.

4. All these developments have brought about a tremendous *growth of nationalism*, an *upsurge of the feeling and demands of sovereignty*, not only among Communist and new states, but also among democratic states. This explains the uncertainty now surrounding the fundamental principle of the freedom of the high sea, and the new

norms, concerning the continental shelf, the unilateral claims as to the width of territorial waters, contiguous zones, fishing rights, and so on. Also uncertain are the international norms concerning the use of great international streams for purposes other than navigation, such as irrigation or hydroelectric power.

This nationalism and upsurge of sovereignty has also intensified the wish of many states to be *judex in causa sua*, the rejection of third-party judgment. Communist States never submit a case to the International Court of Justice for they see in it a "loss of sovereignty." But the distrust in the present "capitalistic" international law, in the Court, the majority of the judges of which came from "capitalistic" countries, is also a prominent factor; only an angel, said Molotov, could be impartial in a case between "capitalism" and "socialism." For similar reasons, distrust of international law made by "colonial" powers, and distrust of the bench made up of a majority of judges coming from "colonial" powers, as well as the uncertainty of international law, keep the new states from going to the International Court of Justice. But the upsurge of sovereignty, even among democratic states, can be seen in the relatively small business of the Hague Court, the declining number of states accepting the "optional clause," the growing number of reservations, and the use of reservations as to contents and as to time limits which practically annul the effect of the optional clause. Not only has it not been possible to accept the principle of compulsory jurisdiction of the international court, but the role of this Court has declined as compared with League of Nations times. International law has not only no sanctions, but an extreme scarcity of legal remedies.

5. Add to the above "Marxist dialectics" which makes communication between the democratic and the communist world even more difficult; the same words of basic norms, as *e.g.*, "aggression," are interpreted in the opposite sense, so that the two leading Great Powers, invoking the same legal norm, can blame each other for "aggression."

The very weakening of the Occidental culture from within has led to a decline of law in general, and of the international Rule of Law in particular.

6. The rise of *international organizations* is a distinctive feature of the present period. There is no doubt that the growing number of specialized organizations, general and regional, is not merely a fashion, but deeply corresponds, even in the present-day divided world, to a true necessity. While it has not yet changed the basic structure of the international community, there are possibilities of fruitful development. It is recognized by states of all types of ideology that these international organizations are necessary. It may well lead to an inter-

national community still based on sovereign states but in which many functions, hitherto in the hands of single sovereign states on a territorial basis, may be delegated to international organizations on a functional basis, but transcending the territories of the member-states either on a world-wide or a regional scale. There are not only the "international" organizations in the traditional sense; there are also the highly interesting "Public International Corporations"<sup>30</sup> and there are "supra-national" organs.<sup>31</sup> The expansion of international organizations has brought many new and progressive norms of international law: international organizations as subjects of the international community, norms in the field of international treaties, privileges and immunities, responsibility, capacity to claim indemnities. While international organizations are based on general international law, they have also influenced the latter.<sup>32</sup> The international organizations have led to new departments of international law such as "the internal law of international organizations," the "international law of the international civil service." In these cases as well as under the hypothesis of a trusteeship exercised directly by the U.N. itself, we have to deal with norms which, as to their origin, function, and sphere of validity, are strictly international norms, but which, as to their structure (directly binding on individuals, direct sanctions and so on), are not different from the norms of advanced municipal legal orders.

There has been progress concerning the U.N. Charter since 1945: the prohibition of the use of threat of force in international relations, collective security, the Security Council as an international organ which can decide and act with legally binding consequences for the members, the intended international protection of human rights. But basically the U.N., even as designed, is not more than a second League of Nations, based again on the Occidental idea of international organization—a mere loose confederation of sovereign states with the remaining individualistic distribution of power among the sovereign states. The combined influences here discussed have, of course, made the U.N. in 1961 into a very different organization from what the makers of the Charter had intended. On the other hand, contrary to the League of Nations, the prestige of the U.N. has hitherto remained great. All new states immediately apply for membership. No state, up to now, has withdrawn from the U.N. Although collective security has proven again to be an illusion, although the U.N. is admittedly incapable of maintaining international peace, although not much has been achieved as regards the international protection of hu-

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<sup>30</sup> See H. T. Adam, *Les Etablissements Publics Internationaux*. Paris. 1957.

<sup>31</sup> See this writer's article, "Supra-National Organs," 46 *Am. J. Int'l L.* 690 (1952).

<sup>32</sup> See this writer's article on that topic in 47 *Am. J. Int'l L.* 456 (1953).

man rights, although the breakdown of collective and the prohibition of individual sanctions has rendered international law practically devoid of any sanctions of its norms, it retains great international usefulness. But even that is threatened in the present crisis: the uncertain operation in the Congo, the heavy attacks, particularly against the Secretary General by the Soviet Union and the Communist bloc, the danger of financial bankruptcy, the strong indictment by the President of France who refused not only to make payments for the Congo operation, but spoke of the "global incoherence" of this "disorganization" and of the General Assembly as "tumultuous and scandalous meetings in which it is impossible to arrange an objective debate," make the future of the U.N. uncertain.

7. As every period of transition and crisis, the present period is full of contradictions and paradoxes. While the U.N. Charter rests on peace, tolerance and good-neighborliness, the present world is one of the most bitter struggles for life and death. While there is the wave of anti-colonialism, the Soviet Union in the words of General de Gaulle has set up "the greatest imperialism which the history of the world has seen." While the U.N. Charter preaches the maintenance of human dignity, of human rights and fundamental freedoms, humanity has suffered in the last thirty years more cruel suppressions than at any time before. While there is the tremendous longing for independence by small and unprepared communities, there is also a tendency of states to go closer together in regional or supra-national unions. Whereas the U.N. Charter is based on respect for international law, there is a great deal of international lawlessness in the present-day world. Whereas the U.N. Charter wanted to bring collective sanctions, international law is today practically without any sanctions. Whereas the U.N. Charter forbids the use or threat of force to render the world more lawful, this prohibition, coupled with the political possibilities of the "cold war," has had the effect of making even smaller states more lawless and has had the effect of creating an unwillingness in small states to submit to the jurisdiction of an international court. Whereas the U.N. Charter was designed to severely restrict the sovereignty of the members with the exception of the permanent members of the Security Council, there is everywhere an upsurge of sovereignty. Sovereignty, independence, equality, and non-intervention seem to be the only rule on which democratic, communist and new states are in agreement. Whereas peace should rely on law and on collective security, such "peace," as we have today, is based on the precarious "balance of terror"; the most uniting fact of the international community seems to be common fear of annihilation.

The general decline of law has made the Rule of Law, contrary

to the League of Nations, of little importance in the U.N. Legal arguments are seldom used. In this period of uncertainty there is distrust and disrespect of law and legal considerations are being treated under the contemptuous and pejorative term of "legalistic." The place of law has been taken by politics.

Many of the progressive rules of the "new" international law are uncertain, ineffective, experimental and, in some cases, ephemeral.

The present situation of the world makes the most important issues of political tension unfit for a peaceful solution. In such a period not much real progress of international law can be expected; developments may be absolutely necessary, but they are impossible of achievement.<sup>33</sup> While a scientific analysis of the present situation of international law must by necessity be pessimistic, the same objectivity views more hopeful signs such as, in addition to those named earlier, the successes of codification by the International Law Commission, the Geneva Conventions of 1949, the Geneva Conference of 1958, the Second Vienna Congress, the International Geophysical Year, and the Treaty on Antarctica. There is also a strong hope that man, after having invented the weapons for his own self-destruction, will be unwilling to make use of them. It is difficult to say whether international law, seen as a whole and compared with former times has progressed or not. But as it stands today, there is no break yet, either with the League of Nations period or with "classic" international law.

Apart from the advances and retrogressions, the crisis and dangers, the distinctiveness of international law is the same as before. It is based on (1) primitiveness (no superior, international legislature, highly decentralized, hardly any sanctions, no international courts with compulsory jurisdiction) and on (2) the sociological peculiarities (dealing with enormous groups of persons, sovereignty of states, vital interests, less a community than before, even a certain disintegration of the international community, a threat to the universality of the validity of international law, the same sociological foundation in the individualistic distribution of power among the sovereign states.)

This distinctiveness is great, but not absolute, by comparison with, and contrast against, other legal orders. The distinctiveness is greatest in comparison with the private law of advanced municipal legal orders, particularly in advanced and politically stable states; it is less in comparison with primitive municipal legal orders for here the primitiveness is a common factor. It is also less by comparison with certain fields of public law of advanced municipal legal orders, because they have some of the sociological particularities in common.

It is very possible that the present period of struggle, uncertainty,

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<sup>33</sup> See Julius Stone, "Law and Policy in the Quest for Survival," (Sydney 1960).



transition and crisis will go on for the rest of the present century. It is, therefore, impossible to predict the future of international law. The sentence which the President of the United States<sup>34</sup> applied to the present world situation, applies also to the present status of international law, a "Time of rising dangers and of persistent hope."

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<sup>34</sup> President Kennedy's Special Message to Congress on Defense Spending, *The New York Times*, March 29, 1961, p. 16.