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The Relationship Between International Law and Politics

I. The Influences of Politics and Power on International Law

A. General Aspects

Nowhere other than in international society have the lingering questions about the relations between law and power had such a great impact. At one end of the spectrum, simple power relations were affirmed;¹ while at the other end, pure legal analysis was clinically severed from political elements.² Both theories are excessive: law is not completely dissolved in power; and law cannot be realistically analysed in isolation from its social-political surroundings. It is more useful to carefully weigh the stakes and influences of power within the legal body, in the formative, implementing and modifying stages. The particular role power may play in a society deprived of a common superior has to be keenly taken into account. But first of all we need to address the definitional issues: What is power and what are politics? How do they relate to the law?

Power is exercised between human beings, individually or collectively. The power of one person over another is constituted by the sum total of the factors accounting for the ability of the first person to influence or to determine the conduct of the second person. The number of such factors is virtually unlimited. Some are of a moral nature, others are physical, for example prestige, moral influence, wealth, skills, natural authority, knowledge, capacity to manipulate, interests, fear, physical force, capacity to put in motion means of execution or coercion, etc. Power is by no means limited to superior physical force. There are a number of other factors allowing one person to exert an influence over another. David and Goliath's battle is quite instructive in this regard. *Politics* refers to those activities having the aim of organising social life and harmonising many particular interests, with a view

¹ See the discussion in A Truyol y Serra and R Kolb, *Doctrines sur le fondement du droit des gens* (Paris, 2007) 22ff.

² Vienna School, see, eg, Hans Kelsen.

to improving the common welfare of society, as it is perceived by the actor.³ High politics (*haute politique*) concern objects that touch on interests considered to be vital for a certain collectivity at a given time, or questions affecting the distribution of the most intimate aspects of power. Politics naturally seek support in power, ie in the capacity to influence. The latter is a condition of their success.

Power and law entertain a multitude of relationships. In its dimension as an 'ought to be', ie as requiring certain conduct, the law inherently contains an element of power. It lays down an injunction, it utters an imperative, which it intends to see followed; and it might punish deviant attitudes. Law's power is nevertheless only potential. In order to be realised, it must sometimes be backed by the social organs' meting out some concrete sanctions. The power put at the service of the law is therefore a twin of the latter; it is indispensable to the law for fulfilling its proper mission. From this perspective, power and law join forces in a vision of 'sovereignty of the law'. However, power has a larger scope of action. It is not always put at the service of the law; it also creates the law, directs it and limits its reach. Power is essentially a real or factual force; law is a normative phenomenon. There is hence a dialectic relationship between the two:

1. If power wants to last, it must organise and limit itself; it must seek legitimation, which only the law can fully provide (*oboedientia facit imperantem*); law appears here as the measure and limit of power.
2. Power as a fact may seek to liberate itself from the constraints of the law; it may create new facts and try to impose them contrary to the law as it stands; the most extreme example of such a new 'legality' is revolution.

The height of tension or opposition between power and law is attained in totalitarian regimes. Here, the very concept of legality intimidates the rulers. It is replaced by nebulous 'popular wills' or 'popular spirits',⁴ by the exigencies of the 'class struggle', by the 'necessities of consolidation of the revolutionary order' and the like.

Independently of these general typologies, it is possible to adopt a sociological perspective and to determine the many reciprocal, gravitational pulls between the two forces. Thus, for example, power is a factor that directs the configuration of a legal order. In feudal, rural, aristocratic, totalitarian, democratic societies and orders, the structure and content of the law will correspond to the described sociological and political basis.⁵ Its configuration shifts over time. For example,

³ The notion of politics as action for the benefit of the public collectivity (or which has a link to the governance of the State) has not found a single meaning over the course of history: see O Höffe, *Politische Gerechtigkeit* (Frankfurt, 1987) 63. The term 'politics' can also be used in a large sense outside the context of action in favour of a public collectivity: see H Henkel, *Rechtsphilosophie*, 2nd edn (Munich, 1977) 125. Politics linked to a particular collectivity gives rise to a political regime, ie a phenomenon of authority based on the distinction between the governing and the governed: see M Duverger, *Institutions politiques*, 9th edn (Paris, 1966) 13. See also the interesting monograph by J Darbellay, *La réflexion des philosophes et des juristes sur le droit et la politique* (Freiburg, 1987).

⁴ For Nazi Germany, see B Rütters, *Die unbegrenzte Auslegung* (Tübingen, 1968); M Stolleis, *Recht und Unrecht. Studien zur Rechtsgeschichte des Nationalsozialismus* (Frankfurt, 1994).

⁵ See the still interesting but somewhat too orthodox study by V Tuka, *Die Rechtssysteme* (Berlin/Vienna, 1941).

the mobilisation of land for industrial and commercial ends could not have been undertaken without the modern concept of property. This in turn triggered a shift from feudalism to modern atomistic-constitutional regimes. Thus, the legal and political system changed, passing from feudal law to the modern codifications.

The relations between *law and politics* are as variegated as those between law and power. Primacy of the law theoretically existed in the times of the Enlightenment, through the multiple doctrines of natural law. Politics had the main function of executing the dictates of reason as deduced from natural law. Politics were thus conceived as legal policies—and we therefore understand why a series of authors have insisted on the ideological functions of modern natural law, linked to the liberal State and the rule of law. The primacy of politics was conversely affirmed by doctrines of realism of various shades, inspired to some extent by Machiavelli. Law here reverted to being an instrument for and of political power. Using a more concrete typology, the relations between law and politics can be described as occupying three axes:

1. A certain policy seeks the support of the law to realise its aim, ie to direct social behaviour in the desired sense. From this perspective, politics always seek to some extent a transformation of their content into legal rules.
2. The law for its part needs an underpinning political order and the expression of some fundamental values, normally set out in a Constitution.
3. The law is a limit on political action when the regime is not based on the omnipotence of the government (in the extreme form through the maxim ‘government of law and not of men’). In addition, the law provides the political parties with criteria of legitimacy, if and when these parties want to remain faithful to the established constitutional order. This limitation of politics by law supposes a minimum degree of ideological convergence, that is, agreement on a set of constitutional norms and values by an overwhelming majority of the social body, and also a certain accepted autonomy of the law. These conditions are rarely realised in abnormal societies, scarred by deep ideological rifts, deprived of a constitutional-legal organisation of powers or still heavily decentralised. In such contexts, the weight of politics increases in the same proportion as the deficiencies of the legal system.

Law and politics present three essential differences:

1. In politics, the element of flexibility and dynamism predominates; law rather seeks support in stability and certainty. Politics are subjected and must react to constant fluctuations and changes. This fact gives rise to a certain element of opportunism. It is due to the need to react to quickly shifting social and political realities. There is a constant need for new answers to new problems. The major issue with which every society and all politics are confronted is that concerning the (re)distribution of goods, resources and wealth. But there are also various policies that are not dominated by this distributive issue, for example the recognition of some liberties to certain persons not implying cost

or the limitation of other persons' liberty (eg the recognition of non-classical partnerships). Law, on the other hand, seeks consolidation in institutions and regularities, consonant with the normative order. There is clearly also the need for legal adaptation, but there is always some time lag here, and thus a certain conservative tendency in the law.

2. Politics are orientated towards the concrete substance of things, appreciated through the freedom of ideological and other personal convictions. The law, for its part, is inseparable from a certain degree of formalism. There is a gap between spontaneous social activities and ideologies on the one hand, and the formalisation of legal rules seeking to ensure equality, simplification and security on the other.⁶ Legal technique is rooted in this formalism. There is some distinction between problem-orientated thought (politics) and category-orientated thought (law).
3. Politics is orientated mainly towards considerations of usefulness and opportunity, while law prefers to view considerations from the double perspective of justice/legal certainty.⁷ In politics, the tendency is to consider exactly what is useful or appropriate to the common good as it is perceived (*salus populi suprema lex esto*). In the law, the tendency is to consider, first, what flows from legality and equality (formal and material, *suum cuique*), and then what is generalisable and foreseeable.⁸ From these differences emerges a certain tension between the law and politics, between what is useful and what is just and legal: sometimes this tension is fertile; sometimes it results in 'thorns'.

B. International Power and International Law

The role of power in international law has hardly ever been underestimated, so evident is it.⁹ In fact, whatever the sometimes aggressive manifestations of political

⁶ C de Visscher, *Théories et réalités en droit international public*, 4th edn (Paris, 1970) 165.

⁷ See G Radbruch, *Rechtsphilosophie*, 8th edn (Stuttgart, 1973) 164ff, with the three main concepts and paradoxes influencing the law: justice, legal certainty, utility.

⁸ These concepts are often discussed in monographs concerning the art of legislation: see, eg, P Noll, *Gesetzgebungslehre* (Reinbek (Hamburg), 1973).

⁹ On the relations between international law and politics, see among others: E Giraud, 'De la valeur et des rapports des notions de droit et de politique dans l'ordre international' (1922) 29 *RGDIP* 473ff; C Bilfinger, 'Betrachtungen über politisches Recht' (1929) I (1) *ZaöRV* 57ff; V Bruns, *Völkerrecht und Politik* (Berlin, 1934); Q Wright, 'Law and Politics in the World Community' in *Essays in Honor of H. Kelsen (Law and Politics in the World Community)* (Berkeley/Los Angeles, 1953) 3ff; C de Visscher, 'Quelques réflexions sur la notion du politique en droit international public et privé' in *Essays in Honor of T. Perassi*, vol I (Milan, 1957) 401ff; C Rousseau, 'Principes de droit international public' (1958-I) 93 *RCADI* 381ff; E Giraud, 'Le droit international public et la politique' (1963-III) 110 *RCADI* 419ff; W Friedmann, *The Changing Structure of International Law* (London, 1964) 45ff; K Eustathiadès, 'Evolution des rapports entre le droit international et la politique étrangère' in *Essays in Honor of H. Rolin* (Paris, 1964) 80ff; A Hartung (ed), *Modernes Völkerrecht—Form oder Mittel der Aussenpolitik* (Berlin, 1965); A Tsoutsos, *Politique et droit dans les relations internationales* (Paris, 1967); C de Visscher, *Théories et réalités en droit international public*, 4th edn (Paris, 1970) 19ff, 33ff, 86ff, 130ff; JES Fawcett, *Law and Power in International Relations* (London, 1982); M Virally, 'Panorama du droit international

aims in international relations, the articulation between both aspects of law and politics is no less complex here than it is in municipal societies. There are questions that governments consider to be intimately linked to interests concerning the conservation or development of State power. In such contexts, the influence of political factors increases. This is the case, for example, as regards the use of force, the control of armaments or the transfer of sovereign powers to supra-national entities. There are other subject matters, much more technical in nature, where the law plays a greater role than political considerations, for example postal exchanges or world meteorology. The domain of 'vital interests' is itself shifting (and thus also shifts the weight of politics). Thus, the degree to which a multilateral treaty could be opened to universal ratification was a matter much debated in the 1960s,¹⁰ while today it has retreated to the realm of purely technical questions governed by legal considerations. Conversely, the question of the submerged, 'innocent' passage of military submarines through certain straits now subject to the regime covering territorial waters when the latter were extended to 12 nautical miles, immediately became a highly political matter. It touched upon the second-strike nuclear capability of the USSR and Western States. The point was that the submarine's position had to remain secret if such second-strike capability was not to be jeopardised. The legal rule requiring the submarine to surface and to hoist its flag when effecting innocent passage could not accommodate this need.¹¹ By the same token, questions relating to intellectual property, which in the past

contemporain' (1983) 183 *RCADI* 29ff; I Brownlie, 'The Relation of Law and Power' in *Essays in Honor of G. Schwarzenberger* (London, 1988) 19ff; M Byers, *The Role of Law in International Politics* (Oxford, 2000); G Niemeyer, *Law without Force: The Function of Politics in International Law* (New Brunswick, 2001); P Bargiacchi, *Contributo allo studio dei fattori giuridici e politici dell'ordine internazionale* (Milan, 2003); Y Onuma, 'International Law in and with International Politics: The Functions of International Law in International Society' (2003) 14 *EJIL* 105ff; A Oyeboode, *International Law and Politics: An African Perspective* (Lagos, 2003); SV Scott, *International Law in World Politics* (Boulder, 2004); C Reus-Smith (ed), *The Politics of International Law* (Cambridge, 2004); OA Hathaway and HH Koh, *Foundations of International Law and Politics* (New York, 2005); RH Steinberg and JM Zasloff, 'Power and International Law' (2006) 100 *AJIL* 64ff; M Koskenniemi, *La politique du droit international* (Paris, 2007); E Brimmer, 'International Politics need International Law' in E Jouannet (ed), *Regards d'une génération de juristes sur le droit international* (Paris, 2008) 113ff; C Reus-Smith, 'The Politics of International Law' in C Reus-Smith, *International Law* (London, 2008) 239ff; R Withana, *Power, Politics Law: International Law and State Behaviour during International Crises* (Leiden, 2008); JP Trachtmann, *International Law and Politics* (Aldershot, 2008); M Koskenniemi, *International Law and Politics, Cursos euromediterraneos bancaja de derecho internacional*, vol 8 (Pamplune, 2009); KH Kaikobad and M Bohlander (eds), *International Law and Power, Essays in Honour of C. Warbrick* (Leyde, 2009); S Sur, *International Law, Power, Security and Justice: Essays on International Law and Relations* (Oxford, 2010); A Orakhelashvili, 'International Law, International Politics and Ideology' in A Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Cheltenham, 2011) 328ff; M Parish, 'International Law and the Great Power Politics' in D Feldman (ed), *Law in Politics, Politics in Law* (Oxford, 2013) 203ff; M Klamberg, *Power and Law in International Society* (London/New York, 2015).

¹⁰ G Czerwinski, *Das Universalitätsprinzip und die Mitgliedschaft in internationalen universalen Verträgen und Organisationen* (Berlin, 1972); TO Elias, *The Modern Law of Treaties* (New York/Leiden, 1974) 15.

¹¹ RJ Dupuy and D Vignes (eds), *Traité du nouveau droit de la mer* (Paris/Brussels, 1985) 768–70, 784ff (contribution by T Treves). See also LW Kaye, 'The Innocent Passage of Warships in Foreign Territorial Seas: A Threatened Freedom' (1978) 15 *San Diego Law Review* 573ff.

were mainly technical matters concerning private interests, now tend to become increasingly political, in the wake of certain commercial practices of emerging far-eastern economies. On the whole, apart from vital interests, a sensible analysis of the relationship between international law and international politics supposes a careful inventory and meticulous scrutiny of various mutual influences.

On the general plane, it remains necessary to emphasise the absence of an international policy in the proper sense of the word. Policy means organising and reconciling particular interests for the common good. But what is commonly called 'international politics' is not a policy from and for the international society or community; it is an ever-changing basket of national legal policies. This is one of the reasons why political factors so often seem to stand in sharp contrast to the exigencies of the law. The policies are not in themselves a device for cohesion or community, as they may be in internal societies, where they are geared to the national interest. Quite on the contrary, internationally they may appear to be a continual cause of divisions. Any law grows and consolidates as a function of the increase in common values and interests. This mechanism is gravely inhibited in international society by the centrifugal configuration of politics. In short, the politics reflect a society other than that towards which they should be geared: they are in the service of national societies instead of international society. This absence of congruence is at the root of many problems:

1. On the international plane there exist common concerns and the resolution to tackle them, but the proper means to do so are lacking, due to the absence of an organised power able to respond.
2. On the municipal plane there is a glaring insufficiency of means to respond to increasingly global problems; but there is an organised and sometimes strong power, which acts in the particular interests of the State.

In short, on the centripetal plane, which establishes order and unity, there is a lack of any significant power; on the centrifugal plane, which is a factor of anarchy and individualism, significant powers exist. The two are caught in a chasm and rarely come together as they should. They more often than not pull in opposite directions. The effects are felt in particular in the field of the international law of cooperation. The essential challenges of the beginning of the twenty-first century are situated here.¹²

Even supposing that a truly international policy could see the light of day (ie a policy meant for the welfare of international society as a whole), for example as the result of the action of certain secretariats of international organisations¹³ or through the action of morally influential persons, this policy could really bear

¹² It has been said with much humour and some exaggeration that either there will one day be a world government, or there will no longer be a world: A Maurois, *Ce que je Crois, avec les objections faites par quelques lecteurs et les réponses à ces objections* (Paris, 1952) 67.

¹³ They have sometimes played eminent roles. See, eg, E Ranshofen-Wertheimer, *The International Secretariat, A Great Experiment in International Administration* (Washington, DC, 1945); J Siotis, *Essai sur le Secrétariat international* (Geneva, 1963).

fruit only if powerful States lent it their support. Only the States could effect significant changes in the international legal order. This is tantamount to saying that such a policy would immediately be viewed through the prism of each State's interests. Each State will consider its own interests and those of its people, and it will try to mould any common policy to these interests; if the end result is too far removed from the State's expectations, it will simply refuse to ratify the instrument embodying the policy choices finally made, or will fail to implement the common policy in full. The environmental protection conferences at Rio (1992), Kyoto (1997), Durban (2011) and even later graphically demonstrated this process. True international politics are proposed by persons without power, and real international politics are performed by powerful persons concerned mainly with national interests. From there flows the frequently voiced impression of the complexity, paralysis and ineffectiveness of international politics or of multilateralism. This whole state of affairs is inherent in the actual distribution of power, that is, in the word 'sovereignty' or (better in the plural) 'sovereignties'.

C. Theories on the Relations of Power and Law in International Society

Many different theories have placed emphasis on the role of political factors in international relations. Four conceptions may here serve as an illustration. Each one attempts to provide an overall answer regarding the degree of penetration of political factors into and the impact of policy on international law. However, there remain important doubts as to the utility of such totalising theories. The mutual relationships between law and politics are in reality placed on a spectrum of highly multifaceted influences. A simplifying approach obscures more than it illuminates the issue.

1. *International Relations Under the Exclusive Influence of Force*¹⁴

The law is here perceived as an *ex post facto* instrument of the stronger for imposing his victory on the weaker. This idea has an ancient lineage: we find it in Ancient India (Kautilya), in Ancient Greece (Calicles, Trasymachos, Thucydides) and in many other contexts of Western thought (eg Spinoza).¹⁵ That such doctrines could find a favourable foothold in international relations is not surprising. They were defended by two quite different categories of writers: on the one hand by theorists

¹⁴ For a short summary of these theories, see A Truyol y Serra, 'Cours général de droit international public' (1981-IV) 173 *RCADI* 105ff.

¹⁵ Power and law are here identified. One may also recall Spinoza's classic words, that the first rule of natural law is that the bigger fish eats the smaller one: *Tractatus theologico-politicus* (1677) ch XVI. On the international law conception of Spinoza, see A Menzel, 'Spinoza und das Völkerrecht' (1908) 2 *Zeitschrift für Völkerrecht* 17ff; A Verdross, 'Das Völkerrecht im System von Spinoza' (1928) 7 *Zeitschrift für öffentliches Recht* 100ff; H Lauterpacht, 'Spinoza and International Law' (1927) 8 *BYIL* 89ff. See also in general JB Whitton, 'La règle pacta sunt servanda' (1934-III) 49 *RCADI* 241ff.

fond of *a priori* categorisations of the concept of law; on the other hand by practitioners who adopted a conflictual ideology of international relations. Among the former was Adolf Lasson.¹⁶ His Hegelian faith pushed him to deny any authority or law superior to the State. Consequently only force could resolve disagreements between States. War became the historical vector of the progress and development of civilisation: the stronger overpowering the weaker. The theorists of the Uppsala School belonged to the same group, influenced by a mixture of positivism and realism (Lundstedt, Olivecrona).¹⁷ For them, the absence of centralised sanctioning mechanisms condemned international relations to remain ruled by force. States used force in pursuit of their own interests. Therefore the use of force to the detriment of the law outweighed by far the use of force in the service of the law. This was tantamount to saying that international relations were simply governed by force.

The group of practitioners espousing a conflictual ideology primarily included those involved in drafting the foreign policy of the Great Powers, who were convinced of the absolute primacy of ideology. This was the case as regards the drafters of the Marxist-Leninist doctrines of the 1920s, before it became clear that the Soviet Revolution would not be immediately exported and that some form of coexistence with capitalist States would remain necessary.¹⁸ This was also the case, at the height of the Cold War, as regards US neo-realists such as Hans Morgenthau¹⁹ and George F Kennan.²⁰ Power is the axis of international relations; international law cannot tame this primary force. Therefore, only diplomacy can create facts and contain enemies. To rely on the force of promises, rules and proclamations is at best to be gravely naive. The 1930s had furnished many examples of the breach of pledges. And the era of the Cold War was scarcely a favourable time for the continuation of the idealistic ‘peace through law’ doctrine, attached to international institutions of which the League of Nations had been the most prominent representative.

The same line of thought was defended by Raymond Aron, a famous French political scientist, when he wrote that international relations have always been dominated by power, except for some lawyers drunk with concepts.²¹ Overall, his

¹⁶ A Lasson, *Princip und Zukunft des Völkerrechts* (Berlin, 1871).

¹⁷ AV Lundstedt, *Le droit des gens, danger de mort pour les peuples* (Paris, 1925); K Olivecrona, *Law as a Fact* (Copenhagen/London, 1939).

¹⁸ There is an interesting analogy between the early days of the Soviet Revolution and original Christianity. Both started with a rejection of the State and the law, and both later had to revise their views. For Christian doctrine, see G Fassò, *La legge della ragione* (Bologna, 1964) 23ff. For Soviet positions, see K Gryzybowski, *Soviet Public International Law* (Leyden/Durham, 1970) 2; and I Lapenna, *Conceptions soviétiques de droit international public* (Paris, 1954).

¹⁹ H Morgenthau, *Politics among Nations*, 5th edn (New York, 1967).

²⁰ GF Kennan, *American Diplomacy, 1900–1950* (Chicago, 1951). On this school of thought: JL Kunz, ‘Der heutige Stand der Wissenschaft und des Unterrichts des Völkerrechts in den Vereinigten Staaten’ (1955/1956) 7 *Oesterreichische Zeitschrift für öffentliches Recht* 405ff.

²¹ R Aron, *Paix et guerre entre les nations*, 8th edn (Paris, 1984) 691. See also G Schwarzenberger, *Power Politics: A Study of World Society*, 3rd edn (London, 1964); G de Lacharrière, *La politique juridique extérieure* (Paris, 1983).

judgement was nevertheless more nuanced than these oft-quoted words suggest. A more recent version of such negationism can be found in the 'rational choice theory' of Goldsmith and Posner.²² The starting-point of their enquiry is concerned with the reasons why international law plays such an important role in international rhetoric while its real efficacy is subject to important doubts. Has it at least some moral authority? Reality shows that States act in a way to realise their interests of the moment to the greatest extent possible. They are not primarily concerned with respect for international law. The rules of international law emerge from the pursuit of personal interests, but they are definitely not a check on State interests. Consequently, international law is only one instrument among others utilised in the pursuit of interests. Thus, States will respect a treaty in accordance with *pacta sunt servanda* as long as their interests dictate that they should do so, taking into account the principle of reciprocity. In the end, international law may provide a faithful map of State interests at a given time, but it cannot exert a decisive influence on compliance. Each change of interests is reflected in a change of the law, and the latter cannot contain this change. Therefore, international law amounts to rhetoric, chimera and fantasy: what remains is politics.

All these theories insist on an undeniable truth: that international law does not occupy the role it could and perhaps should have in international relations. That power and force have frequently had the last word is attested to by history. But these theories are in error by over-simplifying the issues. They tend to confuse politics with high politics, interests with vital interests. It is only at the extremes that power generally has its way and law is brushed aside. The spectrum of vital interests, important and visible as it may be, is only a small segment of international reality. Moreover, many smaller States have an interest (perhaps even a vital one) in the strengthening of international law. Respect for the law can in itself be an interest; it is not simply a fetter on State interests.²³

It should be added that conceptions such as those of Goldsmith and Posner are drawn from the perspective of a Great Power (and in the case of both these authors, after the Twin Towers attack). For all the other States, the pull towards compliance presents itself wholly differently. It might be asked how intellectually honest it is to elaborate a theory on international law by taking as a basis (i) only a small segment of international life (vital interests), and (ii) only the situation of Great Powers (which can substitute power for law)? In the end, the multiple and subtle relations entertained by law and policy are here reduced to one extreme of the spectrum, and this is presented as the whole truth.²⁴ International practice shows a much more nuanced picture of mutual influences and of bridges between the political facts and the legal norm. Further, international law itself is manifestly

²² JL Goldsmith and E Posner, *The Limits of International Law* (Oxford, 2005). And see the critique by HJ Cremer, 'Völkerrecht—alles nur Rhetorik?' (2007) 67 *ZaöRV* 267ff.

²³ Thus, Switzerland most often respects treaties even when its interests are against its doing so: see the discussion in R Kolb, *Réflexions sur les politiques juridiques extérieures* (Paris, 2015) 63ff.

²⁴ It is as if the illness was considered to represent the whole story in health politics.

little understood by some authors, who do not have an intimate knowledge of its content and application. Non-lawyers often have some difficulty understanding the 'ought' properly; this is particularly so for political scientists, used, as they are, to the primacy of facts. They remain blind to the more subtle categories of the law. Lastly, the most profound reason why the human spirit refuses to see in these cynical theories the ultimate seal of truth is that they cannot point to any method for achieving the better organisation of the world. The sinister realisations of power and the accomplished actions of despots are presented as the final word for all time, and the baby is thrown away with the bathwater. Who can be fully satisfied by such a perspective?

2. *The Dichotomy Between the Law of Power and the Law of Coordination*

According to Georg Schwarzenberger, there are two distinct domains of international relations.²⁵ They translate into two concurrent legally normative circles, which remain mutually exclusive and irreconcilable. In the first circle (the law of power), power takes precedence over the law; in the second circle (the law of coordination), the law limits power more or less effectively:

1. *First circle—the law of power.* In each society there are various relations founded on power, such as between master and servant, capital and labour, the ruling class and the underdogs, and international relations are largely founded upon such power realities. In these domains, the function of the law is essentially conservative, that is, it helps power 'in maintaining the supremacy of force and the hierarchies established on the basis of power, and to give to this overriding system the respectability and sanctity law confers'.²⁶ This is the domain of customary international law: it spans the individualistic environment of State relations and presents itself as a form of *jus strictum* not tempered by considerations of good faith, reasonableness or equity.
2. *Second circle—the law of coordination.* The law of coordination is based on conventional relationships between States. By concluding an agreement, States exit the hostile environment of general international law. They deliberately approach others for the achievement of some common goal (which may extend to the creation of an international organisation). Here, considerations of good faith, reasonableness or equity have their place and impact. Conventional international law is the domain of *jus aequum*.

Here is the clear dichotomy: (i) the strict law, represented by customary international law, where States reject interferences bearing the hallmark of law; and (ii) equitable law, represented by conventional law, where States accept much

²⁵ G Schwarzenberger, *Power Politics*, 3rd edn (London, 1964). The author here still distinguishes three circles, adding a 'law of reciprocity', which need not concern us here.

²⁶ *ibid*, 199.

deeper penetration of legal ideas in order to achieve common aims.²⁷ It may be said that this interesting theoretical approach is not borne out by international practice, where this dichotomy is not found.

3. *The Theory of Social Authority*

According to Rolando Quadri, an eminent Italian international lawyer, the phenomenon of authority is the central fact around which all law crystallises.²⁸ Thus, there is the following chain: (i) *ubi societas, ibi auctoritas*; and (ii) *ubi auctoritas, ibi jus*. Society—authority—law. It is not decisive whether the society is organised vertically (central power) or horizontally (decentralisation), since authority is inherent in any society. It is manifested by the preponderance of certain entities or persons. Thus, law is first of all a fact, ie an effective power of decision (*jus est factum*). The legal rule draws its binding force from the command of the authority inherent in the social body. This authority may be diffuse, or consist in a Directory of Powers. It takes different shapes in different societies. Ultimately, this theory leads in international relations to the Great Powers as a ‘de facto international government’. Quadri insists on the fact that the smaller powers may contribute to the shaping of the decision, notably when the Great Powers seek their cooperation. We see the law here as flowing from power, more precisely from a power-orientated fact. This sociological theory is, however, quite reductive of the reality it seeks to depict. The essence of law and its role cannot be reduced to some powerful decision-making. A perusal of all the sources of international obligations demonstrates this quite clearly.

4. *New Haven’s Policy-orientated Approaches*

For the New Haven school of thought, dominated in international law by Myres McDougal, law is not simply reduced to power.²⁹ It has its own reach and dignity. But there remains the fact that law is a tool at the service of an ideology. The political facts and goals are criteria for the shaping and interpretation of the law. The lawyer is thereby transformed into the guardian of the political ideals of a society.

²⁷ See also G Schwarzenberger, *A Manual of International Law*, 5th edn (London, 1967) 28–29.

²⁸ R Quadri, *Diritto internazionale pubblico*, 5th edn (Naples, 1968) 27–31; R Quadri, ‘Le fondement du caractère obligatoire du droit international public’ (1952-I) 80 *RCADI* 622.

²⁹ M McDougal, ‘International Law, Power and Policy: A Contemporary Conception’ (1953-I) 82 *RCADI* 180ff. On this school of thought: C Schreuer, ‘New Haven Approach und Völkerrecht’ in C Schreuer (ed), *Autorität und internationale Ordnung* (Berlin, 1979) 63ff; DC Daniel, *Clarification and Appraisal of the Policy-Oriented Framework for International Legal Analysis* (Washington, DC, 1971); R Falk, ‘New Approaches to the Study of International Law’ (1967) 61 *AJIL* 489ff; B Rosenthal, *L’étude de l’oeuvre de Myres Smith McDougal en matière de droit international* (Paris, 1970); S Voos, *Die Schule von New Haven, Darstellung und Kritik einer amerikanischen Völkerrechtslehre* (Berlin, 2000). For a critique, see also G Abi-Saab, ‘Cours général de droit international public’ (1987-VII) 207 *RCADI* 35ff; C Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’ (1999) 281 *RCADI* 25, 53–55.

His or her role is mainly political. The principal characteristics of this orientation are as follows:

1. Law is not a sum total of rules embodying normative prescriptions; it is rather an authoritative decision-making process³⁰ and a body of decisions already taken. In short, law represents the sum of choices and decisions taken by the operators clothed with political functions. The lawyer does not look for rules; he or she makes choices leading to decisions.
2. Law is orientated towards goal values. The choices of the lawyer have the aim of maximising scope values or base values, such as power, wealth, enlightenment, skill, well-being, affection, respect, rectitude, etc.³¹ The principal political aims of this school of thought are the 'dignity and freedom of the human being' according to a western (or rather US) constitutional tradition. But it has to be added that behind these lofty aims there often lurked the pursuit of US interests during the Cold War.
3. The law is not fixed *a priori*, since it is not a set body of rules; it is rather in constant flux, emerging from a process of claim and counterclaim. The decision-making organs can at any time inspire themselves to a new set of values or combination thereof. Therefore, the law cannot be predicted:

From the perspective of realistic description, the international law of the sea is not a mere static body of rules but is rather a whole decision-making process, a public order which includes a structure of authorized decision-makers as well as a body of highly flexible, inherited prescriptions. It is in other words, a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character ... and in which other decision-makers ... weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them. As such a process, it is a living, growing law ...³²

The main criterion in the process must be the one of 'shared expectations'. From the continuous process of demand and response emerge some standards and patterns of expectation regarding future behaviour. These expectations take the place of the rule. They are normative, and their violation will be qualified by the legal community as a violation of the law.³³

As can be seen, this approach is extremely teleological and dynamic. The normativity of the law dissolves under the weight of open-ended

³⁰ See R Higgins, 'International Law and the Avoidance, Containment and Resolution of Disputes' (1991-V) 230 *RCADI* 35.

³¹ M McDougal, 'International Law, Power and Policy: A Contemporary Conception' (1953-I) 82 *RCADI* 168. Other authors speak out for 'common values' processed on the international plane: Higgins, above n 30, 33.

³² M McDougal, 'The Hydrogen Bomb Tests and the International Law of the Sea' (1955) 49 *AJIL* 356.

³³ MS McDougal and WM Reisman, 'The Prescribing Function in the World Constitutive Process: How International Law is Made' (1980) 6 *Yale Studies in World Public Order* 249ff; WM Reisman, 'International Law-making: A Process of Communication' (1981) 75 *ASIL Proceedings* 101.

decision-making, with the moderating device of expectations. The 'is' and the 'ought' tend to merge into each other. Law thereby becomes fundamentally an instrument of political justification or rhetoric.³⁴ Normativity, to the extent that it exists, is reduced to a choice based on a multitude of criteria and of their combination. The integrity of the legal order is thereby heavily jeopardised. Almost any *ad hoc* manipulation can be brought within the four corners of the law. Foreseeability and certainty are reduced almost to nothing. Such a conception—interesting as it is—can in the best case suit a Great Power policy. Smaller States cling to a normative order, which ensures some degree of certainty and protection. They do not conclude treaties in order to see them interpreted according to alien values and US foreign policy interests. The policy-orientated school is thus ultimately a school of unilateralism in disguise. This fact is revealed by the shaping of the values: for the school we are discussing, the values used in the process are not crystallised in the UN organs or on the universal plane (our authors even show a certain contempt for the UN, a place for ugly merchandising with dictatorial States). The values are mainly shaped by the US Government's foreign policy goals. There the meaning of 'human dignity' or 'free world society' is rooted and takes form.³⁵

5. Conclusion

We have discussed four theories on the relations between law and power:

1. the negation of law by the use of force (so-called realism);
2. the limits imposed on the penetration of law outside conventional relationships;
3. the strong influence of the holders of social authority, mainly the Great Powers;
4. international law utilised in the service of the policy goals of a particular national society (vested with 'manifest destiny').

But in order to reach a fuller understanding of the multiple interactions between the ideal factors (law) and the real factors (power), it will be necessary to pierce the veil of such totalising theories and consider in much greater detail the many influences exerted by and affecting these two fertile sources.

D. Inroads of Politics into the Law: Political Tensions

Before looking at the many influential factors surrounding the two notions of policy and law, it may be useful to consider one extreme of the spectrum, namely 'political tension', in order to see how one pole is affected by disorder at the other.

³⁴ G Abi-Saab, 'Cours général de droit international public' (1987-VII) 207 *RCADI* 39.

³⁵ On the concept of human dignity, see the analysis by M Rothhaar, *Die Menschenwürde als Prinzip des Rechts* (Tübingen, 2015).