Whither the International Community?

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Abstract

Proceeding from the summa divisio *that Wolfgang Friedmann proposed for international law — into the 'law of coexistence' and the 'law of cooperation' — the article endeavours to establish the degree of community obtaining in contemporary international society by identifying the position of international law at the relevant moment on the schedule linking these two contrasting types of legal regulation. The article begins by comparing the two approaches, and then follows the evolution of international law through three stages. The first, starting from the Peace of Westphalia, provided the initial configuration of classical international law, the epitome of the law of coexistence. The advent of the industrial revolution called for a different type of legal regulation, which led to the emergence of law of cooperation regimes, albeit limited to technical fields. The two World Wars, and particularly the Charter of the United Nations, brought the approach of the law of cooperation to the centre-stage of international law, especially through the system of collective security. The third part of the article focuses on the Charter era, describing the expanding role of the law of cooperation approach in the initial design of the Charter, then the impact of the Cold War, and finally the post-Cold War present. The article draws the paradoxical conclusion that the end of the Cold War, far from pushing the international society towards a more integrated global community, has introduced new dangers and bones of contention among the members of this society, which create the risk of causing it to evolve in the opposite direction.*

Introduction

Asking the question: 'Whither the international community and where does it stand today?' in a symposium celebrating the intellectual legacy of Wolfgang Friedmann necessarily leads us to situate the question in relation to that legacy. In my view, the link is clear. It lies in the *summa divisio* that he proposes for international law — into the 'law of coexistence' and 'law of cooperation'. And the answer to the question

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consists in identifying more or less the exact position of international law at a given moment along the schedule linking these two poles, or rather these two contrasting types of legal regulation. This position in turn denotes the degree of intensity of the sense of community prevailing among the members of international society at that moment.

Allow me to illustrate this proposition by comparing these two approaches to legal regulation, but not before I have explained what I mean by the concept of 'international community'.

In his masterly *cours général* of 1979, René-Jean Dupuy[1] demonstrated wittily as well as convincingly the very variable geometry of the use of the term 'International Community', in both formal legal instruments and doctrine. Indeed, this community could be, according to the case in point, that of the states of the world, that of the peoples of those states or of the world as such (thus merging into the concept of humanity) or, furthermore, of the active part of those peoples, in the form of international public opinion or international civil society. Personally, I will use the term here in the sense of community of states, but without ignoring the social forces which make those states act or which transcend them sometimes by acting through alternative circuits of their own construction.

Sociologically speaking, however, 'community' is a relative concept and its existence is a question of degree. It can exist in one group with regard to one point, but not necessarily with regard to others, and may similarly exist in different degrees of intensity. Even taking the paradigm example of a natural group, the family, we find that in certain respects it constitutes an intense community, with spontaneous or unconditional solidarity among its members; in other respects, such a community is clearly refuted by ruptures and conflicts among its members as a result of those very family bonds, whilst in other cases membership or non-membership of the family group shows no sign of bearing an influence. The community is thus a fragmentary phenomenon, and when a legal rule is said to be based on the presumption of the existence of a community, it does not mean that that community exists in the group concerned in the same way and with the same intensity on all subjects.

Rather than referring to a group as a community in general, it is better, for the sake of precision, to speak of the degree of community existing within the group in relation to a given subject, at a given moment. In order to designate a group globally as a 'community' it must first constitute a 'society'; that is to say, it must first attain a certain degree or threshold of intensity and stability (or normality) in relations among its members, enabling them to be identified and distinguished from other subjects found in the same sphere. In other words, it must be possible to trace the boundary between the group and its environment. Only if this society is welded together by a sense of community, even to very different degrees, over a broad range of matters (that is to say of interests and values), can it be aggregately designated a 'community'.

Thus, the tenuous relationships entertained by Europe with the rest of the world up until the age of discoveries and the circumnavigation of the Cape of Good Hope by

[1] 'Communauté internationale et disparités de développement', 165 *RdC* (1979, IV) 21 *et seq.*

Vasco da Gama did not justify the existence of a community, nor even of an international society, in the sociological sense of the terms. It is true that these relations were placed by the founding fathers of classical international law such as Vitoria, Suarez and Grotius) in the ideal framework of a *societas gentium*, an expression of the fundamental unity of the human race (and precursor of the *civitas maxima* of Wolff and Vattel in the eighteenth century), governed by natural law (*jus humanae societatis*, or quite simply the *jus gentium*). Yet this universal community, embracing all humanity, was only a theoretical construct or explanation, a mental image, perceived as a philosophical proposition or a distant horizon, rather than as an existent reality.[2]

If there was a 'community' in that period, it was one represented by the idea that reigned in Europe at the end of the Middle Ages until the Reformation and the Wars of Religion. This was the idea of the existence 'of a Christian empire, heir to Rome',[3] the idea that Vinogradoff called 'The World State of Mediaeval Christendom'.[4] And it is the disintegration of this community that led to the birth of a new structure for the legal system which had previously governed it, namely, the system of classical international law, the archetype of the 'law of coexistence'. And this brings us back to Wolfgang Friedmann's *summa divisio*.

1 'Law of Coexistence' and 'Law of Cooperation': A Comparison

Contrary to what we are led to believe by the majority of those who use this classification in legal doctrine, it is not a key to dividing *ratione materiae*, and once and for all the different fields or branches of international law, declaring, for example, that the law of war partakes of the law of coexistence whilst environmental law partakes of the law of cooperation. It is rather a distinction between two different techniques of legal regulation or two ways of envisaging it. It is thus not a division according to the objects of regulation, but according to the way in which regulation is approached. Thus, the same subject may be regulated according to either of the approaches; and the law of the sea provides a good example of an area which has recently been disputed between them.

A comparison of these two approaches reveals a striking contrast on several levels.

A *The Basic Presumption*

The law of coexistence is merely the 'modelization' or 'ideal type' of the classical international law resulting from the Peace of Westphalia, which put an end to

[2] See Abi-Saab, 'Humanité et Communauté internationale dans la dialectique du droit internationale', in *Humanité et droit international. Mélanges René-Jean Dupuy* (1991), at 3 *et seq.*

[3] Guggenheim, 'Droit international général et droit international européen', 18 *Annuaire suisse de droit international* (1961) 12.

[4] Vinogradoff, 'Historical Types of International Law', 1 *Bibliotheca Visseriana* (1923) 53.

Europe's Wars of Religion. Far from presupposing the existence of any form of community among its subjects, it is a law which aimed to establish and manage the disintegration of a community. Even before the Wars of Religion, the Reformation signalled the disintegration of the ideological (or value-based) community which underlay and legitimated that 'World State of Mediaeval Christendom'. The Wars of Religion juxtaposed two ways of perceiving the truth. In every ideological conflict, the only solution at first acceptable to both protagonists is for each to cause his own 'truth' to prevail by eliminating or subordinating the other. But once they realize at a given moment that that is unattainable, the question then arises of how to achieve a solution which goes beyond those current differences, or which makes a certain equilibrium or a certain coexistence possible, despite the persistence of those differences.

The solution was found in the principle of *cujus regio, ejus religio*, which prescribed, in terms of the conflict it was ending, a new allocation of power in the post-war society. It thus bore within itself the genetic code of the classical system, by establishing the liberty of each prince to follow his own version of the truth and to assert it within his territorial domain, in total independence of the Pope, the Emperor and other rulers. By another name, this is the principle of sovereignty. Yet, faced with a plurality of rulers, this principle can be applied to all of them at the same time only if they reciprocally recognize the same attributes, setting aside their differences of size, power, wealth, ideology or religion; hence the corollary principle of equality. Thus emerges, to suit the system's needs, the model of a hermetic state, referred to by some as the 'billiard ball' state; that is, equal and opaque balls, which one cannot, or pretends not to, see inside, and which only touch each other externally.

The law of coexistence is thus an approach to legal regulation which endeavours to establish a minimum of order between antagonistic entities that challenge any authority superior to themselves and which perceive their relations as a 'zero sum game' where one's gain is immediately perceived as another's loss. It is a law which has to manage the disintegration of a community, where the only common interest it can assume is in the rules of the game (as in a game of poker) which permit each to play against the others in order to gain at their expense.

In contrast, the approach of the law of cooperation is based on the awareness among legal subjects of the existence of a common interest or common value which cannot be protected or promoted unilaterally, but only by a common effort. In other words, it is based on a premise or an essential presumption, which is the existence of a community of interests or of values.

B *The Task Assigned to the Legal System*

For the law of coexistence, this task is one of confirming the disintegration of the community existing among its subjects and managing their separation. In David Mitrany's words, it lies in the answer to the question of 'how to keep them peacefully apart'. In contrast, for the law of cooperation the question is 'how to bring them

actively together';[5] that is, to undertake together what they cannot do, or do well, individually. In this point resides the presumption of community, in the conviction that certain necessary things cannot be done, or done well, unilaterally.

C *The Nature of Obligations*

In a system based on the law of coexistence, obligations are essentially those of 'not doing' or of abstention, according to the triad of obligations under Roman law: to do, not to do, or to give something. Indeed, as the aim of the system is to keep its subjects peacefully apart, that is to say in a state of negative peace or the absence of war, it suffices to impose on them the obligation of respecting each other's sovereignty; i.e., not to encroach on each other's spheres of competence, so that the conditions of equilibrium may be satisfied.

For the law of cooperation, which starts from the idea of common action or tasks which cannot be undertaken, or undertaken well, individually, obligations are obviously 'to do', or positive obligations.

D *Mechanisms of Implementation*

These mechanisms are based on the nature of the object of the obligations. Under the law of coexistence, and going back to the origins of the classical system, states did not want to give with one hand what they had just acquired with the other, namely, their emancipation from any dependence. Above all they did not want to see a new superior authority established over them, whatever it may be. The new structure of international law was thus assigned a precise and limited task: to establish a new key to the allocation of power in the international context, to legitimate and sanction the sovereignty of states, without encroaching on it. That was the real function imparted to the new legal system by its creators-subjects. In relation to its subjects, the states, this legal system necessarily has a weak and barely constraining structure and hold, strictly proportioned to its limited task.

Thus, for the law of coexistence, the mechanisms of application are limited to one: self-regulation. Indeed, given that this is essentially a question of abstention, each state undertakes to respect its obligations without having to go through another organ or be submitted to it. It is thus a completely non-institutional and non-organic form of law. It is the subjects themselves, by way of their actions and reactions, who make the system work.

The law of cooperation, on the other hand, is by essence institutional, given the nature of the tasks and obligations it prescribes. For what do common tasks or actions mean if not a common enterprise, the realization of which requires a certain division of labour among the participants? This cannot be achieved by the spontaneous interaction of the subjects, but requires central organs in order to conceive and elaborate common actions and to allocate tasks, as well as coordinate and monitor them, with a view to their realization. Abstention, by contrast, does not need a system of autonomous management.

[5] D. Mitrany, *A Workable Peace System* (1943).

E *The Position of Subjects in the System*

This position is also determined by the nature of obligations. The law of coexistence considers all states as sovereign. But in order to establish this sovereignty and make it endure, and in order that the system may maintain and reproduce itself in the same way, it must also consider all states as equal. It is a formal equality that obscures all real differences among states, imagined as opaque billiard balls which all look alike from the outside.

Equality in the law of cooperation has a very different meaning. It is the equality of participation. Yet the tasks and obligations are differentiated. For even if the elephant's and the mouse's abstention are identical and have the same nature — not moving — their respective movements, in themselves and by their effects, are very different. It would not be possible for all of them 'to do' the same thing: tasks must be allocated and obligations adapted according to abilities and needs.

F *The Quality of Obligations and Instruments*

The obligations under the law of coexistence are essentially obligations 'not to do'; and these obligations 'not to do' are necessarily obligations of result. Yet as far as the law of cooperation is concerned, it is more difficult to construct obligations 'to do' as obligations of result. Even in the most authoritarian systems, it is not always possible to guarantee that the common undertaking will be realized exactly according to plan, or that the plan will be fulfilled 100 per cent. We note here many obligations of means (i.e., of best efforts) and a gradation in both the content of obligations and in the malleability of legal instruments, giving an important role to *soft law* (in both its referents: the *negotium* and the *instrumentum*).[6]

G *Sanctioning Violations*

Grosso modo, sanctions for violations of rules of the law of coexistence *inflict* damage, such as war or reprisals. These are generally considered the typical sanctions of classical international law, even if they have consequently been institutionalized (for example in Chapter VII of the UN Charter).

On the other hand, sanctions for violations of rules of the law of cooperation (when it is not *soft law*) *deprive* the subject of an advantage. They are only conceived in an institutionalized context of cooperation which itself becomes the stake of those very sanctions; the latter are in reality nothing but the total or partial deprivation of the benefits of cooperation, going as far as the exclusion of the sanctioned entity from the cooperative circuit (such as the suspension or exclusion of members envisaged in Articles 5 and 6 of the UN Charter).[7]

These are thus two very different approaches to legal regulation. We must now very briefly trace their respective roles in the evolution of international law as a measure of

[6] See Abi-Saab, 'L'éloge du droit assourdi: Quelques réflexions sur le rôle de la *soft law* en droit international contemporain', *Nouveaux itinéraires en droit : Hommage à François Rigaux* (1993).

[7] See C. Leben, *Les sanctions privatives de droits ou de qualité dans les organisations internationales spécialisées* (1979).

the degree of community which is progressively establishing itself in international society. To this end, we can divide this evolution into three periods leading up to the present.

2 Three Stages of Evolution

A *The Initial Configuration of Classical International Law*

The law that prevailed in the aftermath of Westphalia perfectly reflected the approach of the law of coexistence. Its rules may be schematically classified in two large categories, according to their function:

1 The Legal Articulation of Sovereignty and of the Coexistence of Several Sovereignties

These are, first and foremost, all the rules that establish and rationalize within the system the state's supreme position as last-instance decision-maker, and that specify the implications of this position in terms of powers and competencies. They are rules which can be aggregated in one structural principle of sovereignty, serving as a pivot for the whole system.

But the legal articulation of several sovereignties equally imposes, by logical necessity, a minimum of rules and principles as a condition for the system's sustainability, i.e., so that it may continuously maintain and reproduce itself in its own image. These minimal rules and principles all derive from the other structural principle of the system, that of equality. In fact, they can all be aggregated into a single normative proposition: the injunction to respect the sovereignty of others. The omnipotent state exercises its full powers within the ambit of its jurisdiction, but has to recognize that other states have the same faculty, by abstaining from encroaching on their ambits, whether it be by force (the principle of non-use of force) or by other means (the principle of non-intervention). Otherwise, the exercise of sovereignty without the counterweight of equality leads inexorably to the universal empire of the most powerful, and the system changes in nature. Yet whilst postulating these principles, in the absence of mechanisms of application other than 'self-help', the system does not have the means to make them respected.

2 The Regulation of Inter-state Transactions and Relations

The first category includes almost the entire logical requirements of classical international law. Yet, beyond these minimum rules and principles of passive coexistence, which essentially impose obligations of abstention, if states decide to establish relations with others, classical international law provides them with — still from the perspective of the law of coexistence — legal 'formulae' or 'recipes' regarding the way to do so.

In fact, the most developed chapters of classical international law fall into this category, by setting up in a predominantly procedural and essentially supplementary way, the legal forms of interaction which could take place among states; what could be called the law of international transactions and relations. It includes diplomatic

and consular law, the law of treaties, the law of state responsibility and state succession, and even the *jus in bello* (which governs violent interactions, in the absence of a binding *jus ad bellum*).

B *The Emergence of the Law of Cooperation amidst Classical International Law in the Nineteenth Century*

Even at its origins in the seventeenth century, the basic presumption according to which classical international law was elaborated was not totally realistic: the assumption that states are necessarily antagonistic and that consequently their sole common interest and the principal function of the system was to 'keep them peacefully apart', that is to say in a condition of passive coexistence. Yet, this presumption could only be justified to the extent that the model of the hermetic state which resulted from it was not too far from reality, in the sense that the material life of societies could still largely unfold in a self-contained way, within state boundaries, however narrow they may be.

With the Industrial Revolution at the end of the eighteenth and beginning of the nineteenth centuries (and the socio-political upheavals that accompanied it: the French Revolution, the Napoleonic wars and the system ensuing from the Congress of Vienna), the technical and economic overtaking of the state became more and more apparent, in the sense that not only the small European states, but also the Great Powers such as Great Britain, no longer had an adequate territorial base to encompass the economic activities made possible by the new means of production and exchange. This explains the emergence of an international economy based on a growing division of labour (partly imposed by the unfurling of the second wave of colonization) and a growing awareness of a need for a new type of international regulation permitting and facilitating the development of these activities, which swept through and beyond states, thus creating bonds of material interdependence and giving rise to partial solidarities. This explains in turn the occasional emergence, from the second half of the nineteenth century, of pockets of the law of cooperation, especially in the area of communications, in order to respond to problems of a global nature caused by the Industrial Revolution. Its privileged instrument, the multilateral treaty, was not only a 'law-making treaty' (*traité-loi*) bearing a new type of legal regulation, but also an 'organic' treaty, providing an institutional structure which underlies this regulation and attends to its implementation. This refers to the first generation of international organizations, such as the River Commissions (for the Danube and the Rhine) and the administrative unions such as the Universal Postal Union. Yet these were mere islands of the law of cooperation in an ocean of the law of coexistence.

It is true that this approach was slowly gaining ground; a growth which sped up after the First World War and tended, with the creation of the League of Nations, to move from sectoral (technical and specialized) questions to those which have always occupied the centre stage in international law — the problems of maintenance of international peace and security — albeit without much success.

C *The Post-war Era*

The third period brings us up to the present. In view of its importance and proximity, it deserves more attention and occupies the final part of this essay.

3 The 'Law of Coexistence' and the 'Law of Cooperation' in the Era of the United Nations Charter

Three points are worth underlining before we examine the evolution, under the influence of the United Nations Charter, of the situation that concerns us here: that is, the degree of penetration of the law of cooperation approach into the structure and normative content of international law. This equally serves as a legal measure of the prevailing sense of community in international society.

The first point is that the law of cooperation approach is much more ambitious than that of the law of coexistence, both with regard to the role and tasks that it attributes to law; tasks which are consequently much more difficult to accomplish. Indeed, this approach most often envisages that law should influence society by regulating and channelling social change and even by encouraging it. The law of coexistence approach has always mistrusted and distanced itself from such change, whilst endeavouring to digest and untangle its consequences as and when it has occurred.

The second point is that the success of legal regulation derived from the law of cooperation's approach in accomplishing its ambitious tasks depends on the verification of the presumption underlying that approach, i.e., the existence of a sufficient sense of community to give rise to effective legal protection of the common value or interest in question. This presumption must be verified not only from the factual point of view, but above all from the point of view of the awareness among the subjects concerned of the common need, value or interest involved and of the appropriate solutions.

Finally, the third point to be underlined is that the law of cooperation approach is deeply institutional, precisely because of the more ambitious tasks it tackles. This is in application of what could be termed a law or fundamental hypothesis of 'legal physics', which can be formulated as follows: 'each level of normative density requires a corresponding level of institutional density in order to enable the norms to be applied in a satisfactory manner'.[8] In other words, norms resulting from the law of cooperation approach, however ambitious they may be, cannot have a real social hold without adequate institutional arrangements for applying them. It is the advent of this institutional element which definitively reveals the existence of a sense of community at the basis of the regulation.

A *The Initial Design of the Charter*

By its very origins, the United Nations Charter appears as a blueprint, reflecting the

[8] G. Abi-Saab, 'Cours général de droit international public', 207 *RdC* (1987, VII), at 93.

vision of the victors of the Second World War of the post-war international society as they wished to reconstruct it.

1 *The Principles and Purposes of the United Nations*

If we examine the initial design of the Charter from the normative point of view in order to situate it on the scale linking the two legal approaches, particularly through an analysis of Article 2 which deals with 'Principles', we may observe that this article follows the pre-existing pattern of international law. It thus involves a general, albeit more concretely defined framework of the law of coexistence, integrating, however, a much broader sphere of the law of cooperation. The general framework remains that of the law of coexistence, because the first principle of the Charter which defines the structure of the system, namely 'sovereign equality' — from which all the rest flows — is merely the synthetic reformulation of the two fundamental principles at the basis of classical international law.

Indeed, as in the logic of the classical system, this principle only imposes one general obligation, but it is a significant one, namely respect of the sovereignty of others; in other words, the non-transgression of the spatial and functional limits of that sovereignty. The most visible and the most typical violation of this obligation is the use of force, although the prohibition of such use has never before been as categorical in Article 2(4). The sovereignty of Member States is equally protected against breaches of lesser importance and visibility, in any case if caused by the Organization itself, by Article 2(7). If the use of force is forbidden, the settlement of international disputes must be achieved by peaceful means (Article 2(3)), although the Charter goes further by imposing a positive obligation on states to endeavour to settle their disputes and by providing fora and procedures to that end; that which brings us to the law of cooperation. It is true that this general framework of the law of coexistence, more concretely defined than ever before, integrates an enlarged sphere of the law of cooperation. This sphere appears, however, to be a special regime (*lex specialis*) where obligations of cooperation and assistance are conventionally assumed; hence the duty to fulfil them in good faith as set out in Article 2(2). This obligation to cooperate is not general in character but relates to specific subject-matters, particularly in applying the system of collective security, in the context of which the duty to cooperate is explicitly reiterated and further specified in Article 2(5). However, the Charter takes a revolutionary step here by extending the obligations flowing from the system of collective security to non-member states, 'so far as may be necessary for the maintenance of international peace and security', in the terms of Article 2(6).

If, on the other hand, we examine the initial design of the Charter from the point of view of its aspirations, the 'Purposes' set out in Article 1, we notice that it tends far more towards the law of cooperation. Indeed, if it is normal for the Charter of an Organization born out of war to establish the maintenance of international peace and security as its first and paramount purpose, what is more remarkable is the way it has conceived this task. It has done so by representing peace as a 'common and indivisible good' in which everyone, and above all the Organization itself, has an interest, hence a standing to act in order to protect it, through the system of pacific settlement of

disputes set out in Chapter VI and the system of collective security set out in Chapter VII. It is thus a legal regulation which extends the law of cooperation approach to this key sector of international relations.

The same can be said for the second purpose of the United Nations, that which we could call 'perfecting the international system', by improving the environment and framework within which international relations unfold. This aim is pursued by various means, and firstly by the development of 'international cooperation in the political field', with which the Charter associates the encouragement of the 'progressive development' of international law and its codification (Article 13(1)(a)), in order to develop more friendly and confident relations among nations (Article 1(2)). Once again this also tends towards the law of cooperation approach. In parallel, the third purpose is to promote international cooperation in other areas, such as the economic, social and cultural fields, as well as that of human rights. This is not to forget that in its fourth aim the United Nations proposes itself as the arena and framework for such cooperation in all of these fields.

Thus, starting from the 'principles', the diligent pursuit of the 'purposes' would have extended the law of cooperation approach to all fields of international relations. In other words, according to the original design of the Charter, through the creation of a 'security community'[9] the United Nations would have provided the appropriate framework for the progressive integration of international society, by multiplying and deepening the areas of cooperation among its members so as to bring it to a point where it may be globally called the 'International Community'.

2 Ends and Means

The grand design borne by the Charter for the future of the post-war world covers all current and potential areas of international relations. Yet the means available to the Organization for achieving that design are much more modest and vary according to the purpose.

Indeed, by its nature and constitution, and in conformity to its first principle of 'sovereign equality', the Organization is in fact an international (or inter-state), and not a supranational, Organization. The principal activity of its organs consists of deliberations with a view to reaching common positions or solutions formulated in resolutions, whose implementation (be they obligatory or in the form of recommendations or draft treaties) is left in principle to the Member States.[10]

Thus, by setting out these purposes of promoting and deepening cooperation in the political field as well as in the other economic, social and cultural fields and in matters

[9] The term 'security community' was coined by Karl Deutsch in his famous study, K. Deutsch (*et al.*), *Political Community and the North Atlantic Area* (1957).

[10] Five of the six principal organs of the Organization (the General Assembly and the three Councils, which are the representative organs of the states, and the ICJ which is an autonomous organ) are conceived basically as deliberative organs, with the exception of the role of the Security Council under Chapter VII, as set out in the text. As far as the Secretariat is concerned, its activities have an undeniably operational character. It is not clear from the text of the Charter alone, however, whether these activities may go beyond assuring mere technical support for the other organs.

of human rights, the Charter designates these areas to be governed by a form of legal regulation steeped in the law of cooperation approach. Yet, for all that, it does not itself provide such regulation nor the institutional structures necessary for its implementation. In fact, realization of cooperation in these areas consists firstly of elaborating such a regulation.

The situation is radically different, however, in relation to the first purpose of the Charter, that of maintaining international peace and security. In this respect, the Charter itself provides a complete legal regulation, with both its normative and institutional components, and endows the Organization with more abundant means in terms of resources and powers. The normative regulation in terms of the rights and obligations of states is brief, but complete, for it is based directly on the principles. The fundamental rule is that of Article 2(4) (prohibition of the threat or the use of force), which suffers no exceptions other than those figuring expressly in the Charter (principally self-defence as set out in Article 51).

Moreover, the Charter endows the Organization with 'operational' powers, albeit of a diplomatic nature as far as the 'preventive' aspect of this function is concerned, by way of different types of intercession provided for in Chapter VI. These powers change radically, however, in relation to the 'remedial' side of this function, by way of the collective security system of Chapter VII. According to this system, the Security Council may transform itself, as a result of its own 'determination' of the existence of 'any threat to the peace, breach of the peace or act of aggression', into an 'international executive' endowed with extensive powers, including the use of coercive force in the form of 'collective measures', under Article 42.

B *The Impact of the Cold War*

The realization of the initial design of the Charter was rapidly hampered by the advent of the Cold War, which affected all aspects of international life. Its first and most illustrious victim was the collective security system of the United Nations, given the almost total paralysis of the Security Council which was meant to set it up and implement it.

Paradoxically, the paralysis of the Chapter VII collective security system and of the Security Council in general led to the emergence of a new type of 'output' of the Organization's deliberative activity. The more the Organization found itself limited in its efforts to settle effectively the crises and disputes brought before it, and particularly in its efforts to react to the use of force, the more it tended to react 'at one remove' by 'taking a stand' on these matters, a technique adopted especially by the General Assembly. Oscar Schachter qualified this role as 'quasi-judicial'.[11] It partakes in what Inis Claude called 'collective legitimation'.[12] But collective legitimation is not only that: if a dispute cannot be effectively resolved, and while avoiding concretely to take a

[11] Schachter, 'The Quasi-Judicial Role of the Security Council and the General Assembly', 58 *AJIL* (1964) 960.

[12] Claude, 'Collective Legitimization as a Political Function of the United Nations', 20 *International Organization* (1966) 367.

stand *in casu*, the dispute can be tackled 'at a second remove' by an affirmation or a general formulation of the norms which should govern such a situation.

In a way, given the absence of alternative means of action, the UN has progressively, and at the beginning perhaps unconsciously, developed for itself a function as an 'oracle', or rather it has begun acting through the General Assembly as the 'oracle' of international society. In so doing it not only expressed international society's stand on certain issues, but also its needs, its values and its *desiderata*, and formulated proposals to respond to them. This role fulfilled a strongly-felt need in an expanding international society deprived of legislative power.

Thus, the debilitating effect of the Cold War on the Security Council and the collective security system has paradoxically and laterally favoured the advent of the Organization's collective legitimation function and the spectacular expansion of its normative activities. We can schematically classify these as having pursued the following three objectives:

1) *To place the principles of the Charter at the centre of the legal system, by fleshing them out and making them operational.* These principles, which we can qualify as 'constitutive', in the sense that they determine the structure of the legal system and condition to varying degrees its normative content, are firstly, as we have seen, the basic principles of classical international law. Yet, the latter's position was paradoxical towards them. While logically being necessary premises for the existence of classical international law, the historical circumstances of its advent did not permit it to have a sufficient hold on the real problems that those principles were meant to regulate. They were thus treated as theoretical postulates of the system, yet without having a sufficiently concrete normative content to be directly applicable to the subjects of the system.

The Charter has had the great merit of giving them a prime position and of defining them a little more concretely in Article 2, while remaining, by force of circumstance, at a very high level of generality. Nevertheless, that was not considered a serious handicap, for this triangle composed of sovereign equality and the other side of the coin, the principles of non-use of force and non-intervention, was supposed to be safeguarded and progressively given a more concrete content by the practice of the competent organs of the Organization and particularly by the 'findings' of the Security Council.

The advent of the Cold War and the paralysis of the Council refuted this presumption and it became necessary, notably for the weaker states, to elaborate these principles in a far more concrete form in order to be able to identify violations more easily and to reach agreements over them, in the absence of a formal decision by the competent organ. This is what was done by two major General Assembly 'Declarations': The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (GA Res. 2625 (XXV), 1970) and the Definition of Aggression (GA Res. 3314 (XXIX), 1974).

The 1970 Declaration, adopted by consensus on the occasion of the United Nation's

25th anniversary, aimed primarily to provide an authentic interpretation of the principles of the Charter in light of the experience of the Organization's first 25 years of existence, whilst formulating them in purely inter-state terms as principles of general international law. Since the adoption of the Charter, certain potentialities within it had taken shape in the practice and perception of states; and the principles were becoming more specific and more palpable with the elaboration from case to case and in various resolutions, of their import, their logical consequences as well as of their mutual relations and influences. In this way they gradually emerged from the legal limbo to which classical international law had confined them — the limbo of postulates so general and so vague that, while being paid homage, are relegated in practice to the status of meta-legal premises which have the exclusive function of safeguarding the system's logical coherence on the intellectual level, without having a direct impact on practice. It is these developments that the Declaration attempted to capture as far as possible.

Furthermore, a close reading of the Declaration leaves us with the impression that if the principle of sovereign equality formally retains its central role as the defining principle of the system's structure, this role is relativized to a certain extent by two other principles, namely that of equal rights of peoples and their right of self-determination and that of the duty to cooperate. These principles are not new; they already existed as potentialities within the Charter, in the sense that the elements composing their normative propositions were already included in it. But they acquired a growing coherence, visibility and importance, in the practice of the Organization's first 25 years, which enabled them to be included in the Declaration. Yet, as principles of general international law, they cannot be explained in a purely inter-state universe, governed exclusively by the logic of the law of coexistence; for they necessarily imply the existence of a wider framework, an international community in which they are anchored, thus being clearly situated in the logic of the law of cooperation.

The prodigious development of the principle of self-determination, through successive resolutions and declarations, culminating in that of 1970, was accompanied by the parallel development of an institutional infrastructure, such as the Decolonization Committee (the Committee of 24). This infrastructure has accelerated implementation of that principle, with results surpassing anything that could have been expected in 1945, with its well-known effect on the universality of international society and of the United Nations itself. We shall return below (under iii) to the other principle, the duty to cooperate, which is the very basis of the law of cooperation approach.

ii) *To update what we have called the 'law of international transactions and relations'*, the 'formulae' or 'recipes' which govern current relations between states, particularly by clarifying the practical consequences of the constitutive principles in their respective areas. This in effect 'socializes' these branches of law by integrating them in a 'hierarchical normative structure' and thus gives them a more substantial and less procedural normative content.

The most accomplished example of this evolution to date is the 1969 Vienna

Convention on the Law of Treaties, which features for the first time a system of substantive grounds of invalidity worthy of the name, in particular duress resulting from a use of force in violation of the Charter, as well as a coherent concept of international public policy or *jus cogens* (which is only conceived by reference to a community of values). The same tendencies can equally be found in the still unfinished work of the International Law Commission on the responsibility of states, with the notions of state crime and obligations *erga omnes* (which equally presuppose a community of interests and values).

iii) *To extend the application of the law of cooperation approach to new areas of legal regulation*, particularly to those of non-political cooperation, such as the fields of human rights, the environment and development, with, to be sure, very different results according to the field in question.

The international protection of human rights is the greatest conquest of post-war international law; protection which can only be conceived in the context of the law of cooperation. If we consider the matter from the point of view of the law of coexistence, what direct and personal interest would a state (or another entity) have in another state respecting the human rights of its own citizens? It would be, on the contrary, according to this law's own logic, an intolerable intervention in the internal affairs and domestic jurisdiction of that other state. Only a common value elevated to a superior interest of the collectivity, according to the premises of the law of cooperation, could justify such a 'right of oversight'.

In this area of human rights, and despite the ideological war underlying it, an international system of protection, both normative and institutional, was gradually constructed, although it still has an uncertain hold on reality; but we cannot say so much for the other areas.

It is true that an increasing awareness of environmental problems, be they concerned with the growing scarcity of resources or the dangers of pollution, from the closing of the 1960s has given rise to an impressive range of normative instruments, all steeped in the spirit of the law of cooperation. But the necessary institutional infrastructure has not kept pace. Moreover, certain key problems are still to be resolved in a satisfactory manner, in particular that of equitable distribution of the benefits and burdens of effective environmental protection, and the mediation between environment and development.

It is thus not by coincidence that, whilst the 1972 Stockholm Conference, marking the official advent of this problem on the international stage, related to the 'human environment', the Rio Conference, 20 years later, related to 'environment and development'. A reminder, as though it were necessary, that it is not possible to confront adequately one of the two problems at the expense of the other, nor by ignoring it.

Yet, it is precisely in the area of development cooperation that the results are most humble. It is true that with the Cold War and the non-functioning of the system of collective security on the one hand, and the decolonization and mass entry of new states, on the other, the UN found itself a new mission in development assistance. An

imposing institutional structure was established to this end, permitting the UN to undertake an operational activity on a large scale in this area; an activity which absorbed up to 80 per cent of the Organization's financial resources during the period of the Cold War.

Yet despite its size, this financing remained on a purely voluntary basis. For here, paradoxically, it is the normative element which has not kept pace with developments on the institutional and operational levels. That does not mean that there have not been parallel efforts on the normative level. On the contrary, whether within the UN or in general doctrine, an enormous effort has been made, provoking long, complex and passionate debates, to build an impressive normative structure, which French doctrine has called the 'international law of development'. Through resolutions and declarations proclaiming development Decades and Strategies, the establishment of a New International Economic Order, the Charter of economic rights and duties of states, or sectoral schemes and programmes, the General Assembly, together with its own creation UNCTAD (United Nations Conference on Trade and Development) and other organs, have provided the bases of this new branch of international law, which has been systematized by doctrine. This new branch postulates as its basis the common interest of all states in the development of the weakest and most vulnerable, which justifies according them preferential treatment in the form of special protection or targeted assistance. From this derives the principle of the duality of norms as the principal axis and common denominator of legal regulation, which is diversely formulated according to the different sectors of North–South economic relations: commodities, manufactured goods, technology transfers, financial flows, etc.

However, this impressive normative structure has remained very fragile because the basis of obligation of the industrialized countries to act according to these principles was very controversial. While agreeing to participate in certain schemes and programmes, the industrialized countries, particularly the Western ones, have always insisted on the purely voluntary character of this participation and have denied any sense of obligation, as they have always dissociated themselves from declaratory resolutions of principles. Consequently, the greater part of this legal structure has remained in form of soft law, if not of *lex ferenda*.

C *The Post-Cold War*

The euphoria which accompanied the end of the Cold War, even going as far as considering it 'the end of history', has not spared international law. Yet after a period of frenetic activity and enthusiasm, the euphoria has given way to disenchantment as the shape of the post-Cold War world began to emerge. This brings us to examine this new situation from the point of view of its effects on international law and especially its movement along the law of coexistence-law of cooperation scale.

i) With regard to *constitutive principles*, the elaboration of their normative content was undertaken, as we have seen, during the Cold War, despite, or perhaps even because of, the paralysis of the collective security system which was meant to provide them with an institutional infrastructure and guarantee.

We briefly believed that the disappearance of the ideological divisions that obscured common interests and values and which consequently hindered collective decision-making and action for their guarantee and defence, was going to allow, at last, the system of collective security to function as the Charter had originally intended.

The Gulf War, authorized by the Security Council, in principle to make Iraq withdraw from Kuwait which it had invaded and annexed — an operation called 'a war for international law' — gave former President Bush the opportunity to proclaim the advent of a 'New World Order'. This implied that from then on the system would function in a regular and non-selective manner each time that circumstances required it, thus providing an institutional guarantee to the hard core of constitutive principles.

Unfortunately, however, whether we consider the Gulf War itself (the consequences of which are still with us) or subsequent crises, events have not followed this optimistic scenario. The Security Council's reaction has oscillated, according to the crises in question, between rash action (at least at the beginning) and inertia, subsequently more and more frequent; an inertia which can be explained by a progressive disinterest in the protection of common values and interests on the part of the great powers where they have no direct interest; hence a shocking selectivity on the level of collective action. Moreover, even when there has been action, whether for lack of means or the insistence of certain permanent members, notably the United States, this action has not been taken by the Organization itself, but by delegation to the state or to the coalition or group of states offering to act.

This tendency bears enormous risks of 'excess' or 'abuse of power' by the executors, given the Security Council's lack of means of control (or their paralysis by veto) over execution of the mandate to act once it has been given. In a wider political sense, the risk is that of the abuse of collective legitimization and the collective framework to serve the undeclared private ends of those states carrying out the mandated action or for legitimating new hegemonies; in other words, the risk of putting the collective interest at the service of the private rather than the other way around.

ii) As regards the *sphere of expansion* of the law of cooperation in non-political fields, the end of the Cold War has had very variable effects according to the matter in question.

If in the environmental area the effect has not been appreciable (though problems become much more complicated by their correlation to that of development), it has been more so in the area of human rights, which became the main ideological battleground during this period. The use of human rights by the West as a means of political pressure in relation to Third World countries leads the latter to dispute the universality of these rights in the name of cultural relativity — a clumsy strategy on both sides which can only weaken the patiently reached common achievements.

The main problem remains, however, that of North–South cooperation for development. In this area, change has been radical. It is true, as we have shown, that a large part of the impressive normative body of the international law of development had not yet crossed the threshold of *lex lata*, yet it was either part of *soft law* or at least a

legal prophecy in the process of realization. The end of the Cold War opened the era of triumphant neo-liberalism, which is poles apart from the protective and 'affirmative action' strategy of the international law of development, and especially of its basic principle of duality of norms.

Such a return to the wild liberalism of the nineteenth century, trusting entirely in the 'invisible hand' and the supreme law of the market (new dogma which we could call *marketheism*), leaves it in reality to naked power relations in society, in the pure tradition of social Darwinism, to reach their natural equilibria through the process of natural selection. Such a policy cannot but aggravate potential entropies and disorders, just as it did at the time of the Industrial Revolution and the rise of the international economy before the First World War; disorders which in their turn led, as an antidote, to the development of the social state (with both its Eastern 'socialist' and Western 'welfare' variants).

Thus, the international law of development, *the law of welfare*, as Wolfgang Friedmann called it, is stopped dead in its evolution; a progressive deconstruction of this law's normative structure can now be seen, together with a total about-turn in the opposite direction, towards policies of privatization, deregulation and the dismantlement of all protections. These new strategies, in the 'spirit of the times', to favour globalization, with the World Trade Organization as their flagship, place themselves squarely in the pure tradition of the law of coexistence.

On the other hand, the institutional structure in terms of organs, schemes and programmes, patiently built up with a view to the gradual establishment of this international law of development, sees its task being converted into facilitating, softening and mitigating the hardships of the process of 'structural adjustment' in the economies of developing countries (and 'countries in transition'). The only concession to which they are entitled is a certain period of grace in order to effect this adjustment.

It is on this pessimistic note that we must conclude that the end of the Cold War, far from pushing international society towards a more integrated global international community, has introduced new dangers together with new bones of contention among the members of this society, which create the risk of making it evolve in the opposite direction.