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# *International Law in and with International Politics: The Functions of International Law in International Society*

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## **Abstract**

*International law has conducted and still conducts distinctive societal functions based on the general understandings and perceptions of law. In this article, I first quickly glance at two disciplines, international law and international relations, and see how they have developed as separate disciplines, scarcely learning from each other until recently. In the second section, I deal with the longstanding debates on the binding force of and compliance with international law from a functional perspective. In the third section, I seek to demonstrate that although bindingness is the primary function of international law, the *raison d'être* of international law must be explained by means of more comprehensive perspectives. In the final section, I indicate functions other than the binding one, and seek to elucidate how they carry out important societal functions which non-legal norms, such as ethics, morality and religion, as well as policies or politics, cannot fulfil. In this way, I seek to explore the *raison d'être* of international law in terms of its societal functions, in comparison with those of international politics (or policies) and international ethics (or morality), by analysing four functions of international law: binding, communicative, value-declaratory, and justifying and legitimating.*

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Please note that Onuma is the author's family name. This ordering of names is common to Japanese, Korean, Chinese and many other languages.

## Introduction

The question of the societal functions which underpin the *raison d'être* of international law, in comparison with those of politics (or policies) and ethics (or morality) in international society, is one which merits elaborate theorizing by both international lawyers and international relations scholars.<sup>1</sup> As suggested by the repeated assertion that a particular issue is not a problem of law but rather of politics (or policy), international law has often been dealt with in relation to, or in comparison with, international politics or policy, although in most cases this has occurred in a tacit and/or unconscious manner. Moreover, international law has, either explicitly or tacitly, been dealt with in relation to, or in comparison with, international ethics or morality. This is evidenced by John Austin's claim that international law is not law in the proper sense of the term but positive morality.<sup>2</sup> Similarly, Hans Kelsen and other leading lawyers have undertaken comparisons of (international) law and (international) ethics or morality, and have sought to distinguish the former from the latter by means of various criteria.<sup>3</sup> So too, the place and function of international ethics and/or morality have at times been explored by international relations scholars, either explicitly or implicitly, together with those of international law.<sup>4</sup>

Nevertheless, the question of the *raison d'être* of international law, in terms of what societal functions international law, international politics and international ethics or morality can and do fulfil, respectively and by comparison, has not been the subject of sufficient investigation. When international lawyers argue that a particular issue is not a problem of law but of politics or policy, there is a tendency on their part to simply abandon any further professional or scholarly exploration of the question. There is an assumption that the problem should be taken up by international relations scholars. However, there is no guarantee that this is actually the case. The claim that a certain issue is not a problem of law but of politics or policy has often been used as a magic wand by international lawyers to wave away their professional responsibility.

<sup>1</sup> To deal with the functions of international law in international society, we have to deal not only with phenomena relating to international law understood as law between nations (actually governments), but also those relating to international organizations, private companies and NGOs, private international law, state laws, relations between domestic politics and international law and other related questions. Further, as will be shown in the text, international law is diverse. Therefore it is impossible to talk about the role of international law in universal and trans-historical terms. The same is true with international politics. However, for the sake of simplification of the discussion, which is needed as a first step to a more complicated theory, I will deal with the subject assuming the general perception of international law and politics prevalent in international society basically in the late twentieth century. The argument in this article will thus be state-centric (as to the need for the revision of the state-centric approach, via introduction of transnational and intercivilizational perspectives, see Onuma, 'Towards an Intercivilizational Approach to Human Rights', 7 *Asian Yearbook of International Law* (2001) 21, at 30–31, 77–81). The term international relations is used to refer both to the discipline in the US dealing with international political phenomena and to international political phenomena themselves.

<sup>2</sup> J. Austin, *The Province of Jurisprudence Determined* (Weidenfeld and Nicolson ed., 1954, reprint, 1998) 127, 140–142.

<sup>3</sup> See, e.g., H. Kelsen, *Principles of International Law* (2nd ed., 1966) 3, 570–571.

<sup>4</sup> See, e.g., H. Morgenthau, *Politics among Nations* (rev. 5th ed., 1978) 219–298.

In this author's view, international law has conducted, and continues to conduct, distinct societal functions based on a general understanding and perception of law. Like state law, which has assumed various forms and has played various functions according to country, time period, traditions and societal structure, international law is diverse. There are a variety of international laws, depending on forms or 'sources', the particular area they are supposed to regulate, the way they are understood and perceived in different countries and in different historical periods, and so on.<sup>5</sup> The functions of international law differ in relation to different conditions and circumstances. Further, the term 'function' is itself equivocal. Disagreements over the theory of functions of international law depend basically on which aspect of these diverse international laws a researcher may seek to analyse. If we understand the 'essence' of law as the realization of justice, we may think that a major function of international law is to provide a tool for achieving international justice. If, on the other hand, we see the role of law as that of camouflaging the dominance and exploitation by the establishment of a society, then a major function of international law can be seen as that of justifying global dominance and exploitation by the powerful developed countries.

Many authors have written interesting pieces on the function of international law, but their terminology differs greatly.<sup>6</sup> When Hersch Lauterpacht wrote his renowned *The Function of Law in the International Community*, his 'function' meant nothing other than judicial function.<sup>7</sup> For Kelsen, the 'essential function' of international law was to determine the spheres of validity of the national legal orders, including the determination of their territorial, personal, material and temporal spheres of validity.<sup>8</sup> Although many authors have referred to the 'essential' or 'specific' function of international law, it is not always clear what they have in mind as comparative referents.<sup>9</sup>

The function of international law in this article will be analysed in terms of societal roles which international law has played in comparison with the societal roles of politics or policies and those of morality or ethics in international society. The analysis is not in terms of a substantive function, such as allocating territorial jurisdiction,

<sup>5</sup> See, e.g., my remarks criticizing a peculiarly domestic-oriented understanding of international law in the US in comparison with the understanding of international law in other nations, Onuma, 'Remarks', 75 *Proceedings of the ASIL* (1982) 163–167.

<sup>6</sup> See, e.g., H. Lauterpacht, *The Function of Law in the International Community* (1933); G. Schwarzenberger, *Frontiers of International Law* (1962), at 21–42; H. Kelsen, *supra* note 3, pt. III; W. Coplin, *The Functions of International Law* (1966), esp. at 4–7; H. Bull, *The Anarchical Society* (1977), at 140–142; Abbott, 'The Trading Nation's Dilemma', 26 *Harvard ILJ* (1985) 501, at 521–532; Johnston, 'Functionalism in the Theory of International Law', *Canadian YIL* (1988) 3.

<sup>7</sup> Lauterpacht, *supra* note 6.

<sup>8</sup> Kelsen, *supra* note 3, pt. III.

<sup>9</sup> Although Kelsen, *supra* note 3, calls Part III of his book 'The Essential Function of International Law' and assigns 130 pages to this part, he does not use the term 'function' in the actual analysis. Brownlie has the same problem. Although Chapter 1 of his book, *The Rule of Law in International Affairs* (1998), is entitled, 'The Function of Law in International Community', he does not deal with the problem of function in an elaborate manner. It is difficult to know what his 'function' means.

restricting the use of force and so forth. A major reason for this approach is that the function of international law can be most clearly elucidated by comparing it with those of politics (or policies) and morality (or ethics). Law, morality (or ethics) and politics (or policy) are all useful social constructs and play roles which often overlap and yet often differ from each other. Law and morality especially share common features as norms, yet each has its own respective *raison d'être*. So too, law and politics share common features associated with power, especially the power of a state, yet they often contradict each other. Law is a tool of politics, but at the same time politics is expected to be conducted within the framework of law. Thus, it is meaningful and useful to compare functions of law with those of morality and of politics.

In this article, I will first take a quick glance at two disciplines, international law and international relations, and see how they have developed as separate disciplines, scarcely learning from each other until recently. In the second section, I will consider the longstanding debates on the question of the binding force of, and compliance with, international law from a functional perspective. In the third section, I will seek to demonstrate that although bindingness is the primary function of international law,<sup>10</sup> the *raison d'être* of international law must be explained by more comprehensive perspectives. In the final section, I will point to functions other than that of bindingness, and attempt to elucidate how they carry out important societal functions which non-legal norms, such as ethics, morality and religion, as well as policies or politics, cannot fulfil. In this way, I will explore the *raison d'être* of international law in terms of its societal functions, in comparison with those of international politics (or policies) and international ethics (or morality), by analysing four functions of international law: the binding, communicative, value-declaratory, and justifying and legitimating functions.<sup>11</sup>

<sup>10</sup> Onuf argues that bindingness is a property, not a function, of law (Comment on an earlier version of this article, 24 January 2002). An anonymous referee also suggested that bindingness is a quality rather than a function of law. It is true that law has been preeminently defined as a binding norm, and international law has benefited from this prevalent definition as well as the prevalent image based on this definition, as I myself argue in the text. However, this does not mean that we cannot, and should not, observe bindingness from a functional perspective. We might be able to say that it is better to grasp bindingness as a property or a quality than to grasp it as a function of law (whether one takes this position or not depends on his/her purposes, philosophy and other factors). However, we cannot say that bindingness is a property or a quality of law, and that therefore we should not grasp it from a functional perspective. Bindingness can be grasped as a function, together with other functions such as communicating, and justifying or legitimating. I am ready to admit that the binding function is the primary function of law, and other functions are secondary, at least partly based on the perception of law as a binding norm. However, I do not believe that bindingness must be defined exclusively as a property or a quality of law and that for that reason we cannot or should not grasp it from a functional perspective.

<sup>11</sup> It is generally assumed that international law has another important function: settling conflicts between nations. However, I have already dealt with that elsewhere (Onuma, 'The ICJ: An Emperor without Clothes?', in N. Ando *et al.* (eds), *Liber Amicorum Judge Shigeru Oda* (2002) 191). In this article, I will mainly deal with the binding function and other secondary functions enumerated in the text.

## 1 Previous Studies of International Law and International Relations and Their Problems

During the last two decades, a number of international lawyers in the US and in Europe have sought to bridge the gap between studies of international law and international relations. Especially since the 1990s, both the *American Journal of International Law* and the *European Journal of International Law* have published a number of stimulating articles dealing with law and politics in international society.<sup>12</sup> In 2002, the American Society of International Law hosted an Annual Meeting entitled 'The Legalization of International Relations/The Internationalization of Legal Relations'. Some international relations scholars, especially institutionalists and constructivists, have dealt with relevant treaties and decisions and/or resolutions of international organizations in such fields as international trade, global environment, disarmament, human rights and 'humanitarian intervention'. *International Organization*, a leading journal in the study of international relations, published a special issue on 'Legalization and World Politics' in 2000.<sup>13</sup>

Writing in 1998, Slaughter *et al.* declared that '[o]n the IR side of the ledger, the "I word" is no longer taboo'.<sup>14</sup> I wish I could agree with them. However, judging from the actual writings of international relations scholars, I am afraid that they are overly optimistic. I take their words as an expression of their wish rather than their observation of the actual state of international relations studies. Similarly, the publications and debates on the part of international lawyers dealing with international relations have not been accepted by the majority of international lawyers. The interest seems to be limited to a small number of enthusiastic scholars.<sup>15</sup> Precisely because the present tendency for international lawyers and international relations scholars to seek mutual understanding is welcome and to be encouraged,<sup>16</sup> research covering their common fields should be carried out on each side with a sense of both

<sup>12</sup> *The Nordic Journal of International Law*, *The Finnish Yearbook of International Law* and some other journals have also carried interesting articles dealing with this issue.

<sup>13</sup> 54 *International Organization* (2000). Informative and stimulating studies have been carried out by prominent international relations scholars, including K. Abott, G. Downs and D. Rocke, M. Finnemore, J. Goldstein, A. Hurrell, P. Katzenstein, R. Keohane, S. Krasner, F. Kratochwil, J. Mearsheimer, N. Onuf, J. Ruggie, S. Scott, K. Sikkink, B. Simmons, H. Suganami, A. Wendt and O. Young, since the late 1970s, especially since the 1990s.

<sup>14</sup> Slaughter *et al.*, 'International Law and International Relations Theory', 92 *AJIL* (1998) 367, at 367. In making this statement, they referred to A. Chayes and A. H. Chayes, *The New Sovereignty* (1995), at 2, n. 3. However, what Chayes and Chayes said is somewhat different. They wrote that 'Regime theorists find it hard to say the "L-word", but "principles, norms, rules, and decision-making procedures" are what international law is all about.' (*Ibid.*)

<sup>15</sup> See Simpson, 'The Situation on the International Legal Theory Front', 11 *EJIL* (2000) 439, at 453, n. 43.

<sup>16</sup> However, see criticism by David Kennedy of the prevalent tendency to deal with two disciplines, 'The Disciplines of International Law and Policy', 12 *Leiden Journal of International Law* (1999) 9.

self-criticism and critical analysis of the other.<sup>17</sup> In order to carry out this important task, it is necessary to situate recent research and discussions in a wider perspective that encompasses the history of both disciplines.

During the twentieth century, the positivists formed the mainstream in the study of international law. They almost exclusively concentrated their concern on the practical interpretation of ‘positive’ international law, and generally ignored criticisms from international relations scholars. They were not interested in the actual function of the very interpretation of law, such as tacit justification of a particular policy of a particular state or of the overall status quo in international society. Nor did they pay much attention to the fundamental question of what positive law is. As long as specific norms they dealt with fell within the category of Article 38 of the ICJ Statute, especially explicit provisions in existing treaties and norms of customary international law as exemplified by leading Western international lawyers, they regarded them as positive law.<sup>18</sup>

This tendency became even more apparent after the 1970s, when such prominent figures as Hans Kelsen, Carl Schmitt, Georg Schwarzenberger, Julius Stone and Charles de Visscher, each of whom, in his own way, had demonstrated a keen interest in the problem of law and politics, gradually disappeared. When positivist international lawyers actually deal with specific problems of international law, however, they implicitly take for granted certain assumptions and perspectives, and accept certain conclusions, of international politics. In this way, positivists invite international politics into their home through a back door, so to speak. Nevertheless, because they publicly assert separation or independence of law from politics, their treatment or analysis of political problems is almost always arbitrary and insufficient.

International relations scholars, for their part, have generally given international law a negative assessment until recently, even though the role of international law in international society strengthened during the course of the twentieth century. E. H. Carr’s *Twenty Years’ Crisis*, often characterized as marking the starting point of the study of international politics or international relations, is famous for its criticism of the utopianism of international lawyers during the inter-war period.<sup>19</sup> Although Stanley Hoffmann is one of the leading international relations scholars who recognize the importance of norms in international relations, he basically shares the perspective of a (classical) realist as far as the critique of international law is concerned.<sup>20</sup> Until

<sup>17</sup> The study of international relations in the US has a tendency to consume academic fashions within a relatively short period of time. We have witnessed the rise and fall of many theories and approaches including system theory, linkage politics, regime theory, interdependence theory, and so on. The emerging interest in the role of norms by international relations scholars should not be one of these fashions, particularly as propounded by a limited number of constructivists and institutionalists.

<sup>18</sup> For criticism of this approach, see Onuma, *supra* note 11, at 205–207.

<sup>19</sup> E. H. Carr, *The Twenty Years’ Crisis* (1964), pt. 4. George Kennan’s criticism of the moralistic and legalistic approach (G. Kennan, *American Diplomacy 1900–1950* (1951), Pt. 1, Ch. 6) is also famous. Hans Morgenthau, who began his academic career as an international lawyer, became a leading figure in the criticism of legalistic thinking in international affairs (Morgenthau, *supra* note 4, Ch. 1, at 11–14).

<sup>20</sup> Hoffmann, ‘International Law and the Control of Forces’, in K. Deutsch and S. Hoffmann (eds), *The Relevance of International Law* (1968) 21–46.

recently, the study of international relations after behaviourism generally showed a lack of interest in the role of international law in the context of international politics. The 'English School' has generally regarded the role of international law as important, but this perspective has hardly been shared by US international relations scholars. From a global perspective, the influence of the English School has, regrettably, been limited. In continental Europe, Asia and other regions of the world, the study of international relations has more or less underestimated the significance of international law in international society, following the tendency of international relations studies in the US.<sup>21</sup>

Traditional responses from international lawyers to the negative assessment by international relations scholars may be classified in four groups.<sup>22</sup> The first group argues that almost all nations observe almost all principles of international law, based on their own analysis of international political phenomena with regard to international law. Louis Henkin represents this approach.<sup>23</sup> The second group, taking a policy-oriented approach, defines law as an authoritative decision-making process. They thus 'incorporate', so to speak, international politics into international legal studies in their own unique way. Myres McDougal represents this approach.<sup>24</sup> The third group, represented by Richard Falk and William Coplin, regards highly the communicative and cooperation-facilitating functions of international law. They argue that even if its binding force is weak, international law is still relevant and plays an important role in international politics.<sup>25</sup> The fourth group, the mainstream 'positivists', pays little attention to criticism by international relations scholars. They regard methodological, ontological and functional problems as too theoretical, and concentrate their concern on the practical interpretation of 'positive' international law.

Since the 1960s, international lawyers have expanded their field of study to 'soft laws', and political or moral commitments. However, when they actually deal with them, they basically regard them as *something minus legal commitment*. Many international lawyers have failed to recognize that both hard laws and soft laws have their own distinctive societal functions, which their counterparts cannot fulfil. They have simply and unconsciously assumed that it is better for soft law to become hard law someday. To remain a soft law, to them, means being something defective.

<sup>21</sup> Japan is a typical example. Many experts on diplomatic history had a keen interest and solid knowledge of international law up to the 1960s. However, most international relations scholars have lost interest in international law since the 1970s, when 'Americanization' of international relations studies started and began to prevail in universities and research institutions as well as in media circles in Japan.

<sup>22</sup> Since the 1980s, both the 'dual agenda' group represented by Anne-Marie Slaughter and the critical studies group represented by David Kennedy and Martti Koskeniemi have dealt with the issue of international law and international relations in an energetic manner. Their arguments will be dealt with in the later sections.

<sup>23</sup> L. Henkin, *How Nations Behave* (2nd ed., 1979), esp. at 47.

<sup>24</sup> For representative works by McDougal and his school, see M. McDougal and W. M. Reisman (eds), *International Law Essays* (1981).

<sup>25</sup> Coplin, *supra* note 6; R. Falk, *The Status of Law in International Society* (1970), esp. at 50–59 and 345.

Furthermore, the failure to explore characteristic features of law in comparison with policies and morals or ethics has contributed to the *excessive emphasis on the indeterminacy of law* by some international lawyers. As will be fully explored later, although law is not necessarily completely determinate, its degree of determinacy is much higher than that of policies or ethics, and therefore can play a distinctive societal role.

On the part of international relations scholars, there has been a tendency to avoid the problem of law, although some have dealt with the question of norms in international society. Most of them have not sufficiently raised and discussed an important question: Isn't international law significant as a tool to justify the behaviour of a state and to facilitate the political, economic and social process between states, even if it is not sufficiently powerful as a binding norm regulating the state's behaviour? Carr and Morgenthau certainly demonstrated the limitations of international law as a binding norm. However, they did not analyse the binding function of international law in a sufficiently sophisticated and nuanced manner. When they referred to the binding function of international law, they simply assumed the direct binding function: whether something called international law could or could not prevent states from doing something — resorting to war, for example. They did not think of indirect binding functions of international law.<sup>26</sup> Nor did they explore other functions of international law besides its binding function. Subsequent international relations scholars, especially those in the US, have been impressed by their criticism of international law as a (direct) binding norm and have followed suit.

Further, the study of international relations in the US, which manifests a global influence, has become excessively theoretical, especially since Kenneth Waltz. It has ignored the fact that states have in most cases acted, whether consciously or unconsciously, in accordance or coincidence with rules and principles of international law as an established institution in international society and have used them as useful practical tools.<sup>27</sup> International relations scholars in general, and 'realists' in particular, have explicitly claimed or tacitly taken for granted that they deal with empirical facts and are far more realistic than international lawyers in observing international phenomena. However, by no means few of them have failed to recognize the undeniable fact that policy makers are actually concerned with international law and pay attention to, for example, whether a treaty or a non-treaty agreement should

<sup>26</sup> As to the indirect binding function of international law, see *infra* at 126–128.

<sup>27</sup> It should be noted that neither Carr nor Morgenthau nor Kennan totally denied the significance of international law. Carr criticized the intellectual atmosphere and actual foreign policies in Europe during the inter-war period as tending to be too utopian and legalistic. Morgenthau and Kennan criticized the postwar US intellectual atmosphere and foreign policy as too legalistic, moralistic and unrealistic. However, they all acknowledged that international law had its own *raison d'être*. These points must be particularly emphasized with regard to Carr, who is often characterized as a realist, but not at all a simple realist.

be adopted when their government makes an important commitment not only in the field of 'low politics' but also in 'high politics', including security matters.<sup>28</sup>

Despite the wishful claim of Slaughter *et al.*, the 'I word' seems to be a taboo still to a number of international relations scholars. Or, there may be a tacit assumption shared by many international relations scholars, especially those in the US, that while international ethics or morality does count to a certain extent in international relations, international law does not.<sup>29</sup> I, as an international lawyer, fully welcome a critical analysis of international law by international relations scholars. I also agree with the general assessment by Andrew Hurrell that regime theorists have demonstrated the political impact of law in a far more specific and rigorous way than international lawyers have.<sup>30</sup> However, criticism of international legal studies must be conducted based on a correct understanding and assessment of the discipline and its achievement.

## 2 Perennial Debates Centring on the Direct Binding Function of and Compliance with International Law

### *A Binding Function of Law and the Problem of Compliance*

A major theme of the relationship between law and politics in international society has been whether international law is ever observed, or complied with, by states. The problem of whether states observe rules and principles of international law, and, if so,

<sup>28</sup> In my view, the study of international relations in the US has lost its acute sense of reality since the 1960s as the 'realists', represented by Waltz, came to be heavily influenced by the ideology of scientism and devoted themselves to an increasingly sophisticated theorizing of international political phenomena. Although their rivals, 'liberals', were critical of the state-centrism and excessive emphasis on military power in the theory of realists, they were also preoccupied with scientism, and shared the assumption of 'rational' behaviour of states. Ironically, however, the more sophisticated their theory became, the less it could explain various aspects of reality. Many irrational factors of international life, such as national resentment, sense of victimization, memories of being oppressed or exploited in the past, opportunism and xenophobia, were underestimated and left unexplored. Excessive concern with possible wars between superpowers at the cost of overlooking the reality of mass hunger and death in the developing countries in the issue of 'security' is one of the examples of this unrealistic 'realism' prevalent during the Cold War period. Ignorance of international law in international relations studies is one of the products of this excessively theoretically preoccupied 'realism' flawed with the ideology of scientism and its tacit influence on the discipline of international relations as a whole.

<sup>29</sup> On the whole, international relations scholars have tended to deal with the problem of norms including law in their own way without sufficiently exploring a vast array of accumulated study of international lawyers. For example, in their interesting article, Finnemore and Sikkink raise an important question 'how do we know a norm when we see one?', 'International Norm Dynamics and Political Change', in P. Katzenstein *et al.* (eds), *Exploration and Contestation in the Study of World Politics* (1999) 247, at 252. However, they fail to analyse international law as an important cognitive source of relevant international norms. Had they studied the sophisticated debate on whether a provision of the statute (or treaty) itself or what is declared as law by the court (or norm-declaring organ in general) through the interpretation of the provision should be regarded as law, their argument would have been even more elaborate and sophisticated.

<sup>30</sup> Hurrell, 'International Society and Study of Regimes', in V. Rittberger (ed.), *Regime Theory and International Relations* (1993) 49, at 54–57.

to what extent they observe them, constitutes a fundamental question. Although validity (whether law must be observed), not efficacy (whether law is actually observed), should be the primary concern for lawyers,<sup>31</sup> even a proponent of the pure theory of law admits that the efficacy of law constitutes a condition of the validity of law. If international law were not observed by states at all, the very validity of international law would be lost.<sup>32</sup> The study of international law focusing on the normative analysis and the interpretation of existing law would lose its essential meaning. Most scholars of international relations, for their part, have substantially ignored the *raison d'être* of international law precisely because they have believed that states, or more specifically government officers or policy makers, do not necessarily observe law, at least in the critical areas ('high politics') such as use of force. Even if international law plays a role in international relations, they argue, its role is limited to low politics, such as economic cooperation, social development and the like. International law is thus marginalized.

Factors influencing the observance of or compliance with international law by states lie both in international law itself and in the nation or state,<sup>33</sup> its major addressee. As to the former, a certain number of studies have been conducted by such authors as Louis Henkin, Thomas Franck, Chayes and Chayes, Edith Brown Weiss, Harold Koh and Michael Byers.<sup>34</sup> Although their conclusions differ considerably from

<sup>31</sup> H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), at 13; *Idem*, *General Theory of Law and State* (1945), at 29–45.

<sup>32</sup> Kelsen, *General Theory*, *supra* note 31, at 42.

<sup>33</sup> As will be discussed later, overall compliance with international law by states depends on the whole structure of international and domestic society. Therefore, a number of factors, such as those enumerated in the following, influence compliance of international law: the relatively small number of addressees of law; international and domestic political, economic and informational structure; and international and domestic ideological and religious situations. The structure of international society is further characterized by domestic factors of nations existing at a certain period of time. A more elaborate analysis would thus require a typology of compliance depending on divergent factors such as 'sources' of international law, areas to be regulated by international law, historical periods, and domestic structures of nations. Here, however, for the sake of simplicity of the theory, which is needed for a study covering the whole area of the problem in a limited space, all these factors should be abstracted.

<sup>34</sup> Henkin, *supra* note 23, at 49–68; T. Franck, *The Power of Legitimacy among Nations* (1990); *Idem*, *Fairness in International Law and Institutions* (1995); Chayes and Chayes, *supra* note 14; Koh, 'Transnational Legal Process', 75 *Nebraska LR* (1996) 181; *Idem*, 'Why Do Nations Obey International Law?', 106 *Yale LJ* (1997) 2599; E. B. Weiss and H. K. Jacobson (eds), *Engaging Countries* (1998); M. Byers, *Custom, Power and the Power of Rules* (1999). The study by Weiss and Jacobson provides a fairly comprehensive framework to explain compliance factors. It is also on the similar line of argument made by Chayes and Chayes, and has an implication to verify their claims. Koh's study emphasizing the relativity of international/domestic division is also interesting. However, it is not clear that examples cited by Koh are merely anecdotes rather than true examples of a general rule (see Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law', 19 *Michigan JIL* (1998) 345; see also Keohane, 'International Law and International Relations: Two Optics', 38 *Harvard ILJ* (1997) 487, at 492–494). Also, had the transnational legal process been a defining factor of compliance as Koh claims, international law would not have been complied with during the period when the transnational process was not so predominant. Yet, during the period when subjects of international law were limited to European nations, which shared common normative ideas and culture, the degree of compliance seems to have been generally higher than today. Koh did not respond to this paradox. On the part of international relations scholars, Keohane provides five hypothetical factors as to the US's compliance and

each other, we can reasonably assume that factors inducing state compliance with a rule of international law include: (1) the extent to which the rule in question embodies interests of states with various powers, including military, economic, diplomatic powers, and the power of occupying a majority in international society; (2) the extent to which the rule embodies values which are regarded as important by states and people in general in international society; (3) the extent to which the creation and application of the rule is regarded by members in international society as legitimate in terms of procedure and substance; (4) the extent to which institutions realizing the rule are well established and actually functioning.

There have been relatively few studies analysing factors on the part of a nation that influence its compliance with international law.<sup>35</sup> However, judging from overall observations and experiences, we could reasonably assume that they include: (1) to what extent ideas and institutions which incorporate the significance of law, such as the idea and institution of rule of law and legality of state, as well as the normative consciousness to obey law, have been rooted in the society of the nation in question (the more deeply rooted in the society, the more the nation tends to comply with law, including international law); (2) whether the nation in question has sufficient power to survive in international society even if it ignores international law (while the US, in particular, and other major powers, to a certain extent, are less susceptible to sanctions and deprivation of profits even if they violate international law and can therefore ignore international law relatively easily, smaller nations can hardly enjoy such luxury); (3) to what extent the accountability and transparency, and the freedom to criticize the behaviour of the government for its failure to comply with law are established in the society;<sup>36</sup> (4) historical experiences regarding the nation's relations with the international legal order as shared by the leadership and citizens of

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non-compliance with international law (Keohane, 'Compliance with International Commitments', 86 *Proceedings of the Annual Meeting of ASIL* (1992) 176, at 177–179). As these important studies suggest, the question of conditions for international law to be observed certainly constitutes a fundamental question for international law to have a meaningful existence in international society (see Y. Onuma, *Senso sekininron josetsu (Prolegomena to the Responsibility for War, 1975)*, at 3).

<sup>35</sup> See articles in 54 *International Organization* (2000), *supra* note 13. Some works cited in *supra* note 34, particularly the study of Weiss and Jacobson, also deal with this problem. Slaughter and others claim that liberal democracies tend to observe rules of international law more often than non-liberal democracies do (see, e.g., Slaughter, 'International Law in a World of Liberal States', 6 *EJIL* (1995) 503). Slaughter's argument is severely criticized by Alvarez in 'Do Liberal States Behave Better?', 12 *EJIL* (2001) 183. More limited, but solid studies have been done by Simmons (Simmons, 'Compliance with International Agreements', 1 *Annual Review of Political Science* (1998), 75; Simmons, 'The Legalization of International Monetary Affairs', in *supra* note 13, at 573; Simmons, 'International Law and State Behavior', 94 *American Political Science Review* (2000) 819).

<sup>36</sup> I do not necessarily agree with the view that democracies observe international law more faithfully than non-democratic countries. The US probably violates international law more than many smaller non-democratic countries, because it can enjoy the luxury of ignoring international law (see (2) in the text). However, we could reasonably argue that other conditions being equal, liberal democracies would comply with international law more faithfully than non-liberal democracies because of the factors described in (1), (3) and (5) in the text.

the nation and their perception of these experiences;<sup>37</sup> and, (5) to what extent domestic legal institutions and economic, social and cultural structures are well established to implement international legal obligations. Many developing countries have not faithfully complied with rules of international human rights law not only because they are not necessarily willing to do so, but also because they are not capable of doing so.<sup>38</sup>

### **B Positive Factors Inducing Compliance**

Nations have made use of institutions and notions of international law for various purposes, such as to establish and maintain diplomatic, commercial, financial and transportation relations, to communicate with each other not only in times of peace but even in war, to end war and re-establish peace, and so on. International law has generally been considered to be law based on agreement between nations, and nations usually act on this assumption. They could, in principle, reject the creation of international law, if they regarded it as incompatible with their vital interests. Government officers of a state know well the disadvantages which international law would impose on the nation they represent: nations can neither unilaterally deny the binding force of international law nor deny its universal application, once international law is created and comes into force.<sup>39</sup> Despite these facts, nations have actually made use of treaties and other forms of international law for more than a century. This is because policy makers have believed that the advantages of international law generally outweigh its disadvantages.

On the other hand, the above-mentioned facts reveal the ideological character of international law contributing to the maintenance of the status quo. Nations which newly participate in the existing international legal order, such as Japan and China in the nineteenth century or many Afro-Asian nations after World War II, were actually forced to be subject to that order which was generally discriminatory towards them. In the case of bilateral treaties, powerless nations are forced to accept treaties which are disadvantageous to them because of the unequal power relationship. Once the treaties are concluded, it is difficult to denounce them unilaterally because of the legal and political power of the principle '*pacta sunt servanda*'. Thus treaties that are

<sup>37</sup> Germany and Japan committed serious violations of international law during World War II, and the memory of these events is still fairly strong. Their leaders and people fully recognize this fact and have sought to comply with rules of international law, especially those relating to the use of force. Japan has been particularly timid in dispatching its self-defence force abroad, even as part of UN Peace-Keeping Operations. On the other hand, many developing countries believe that they have been victimized by an international legal order established and maintained by major Western powers. Therefore many of them share resentment toward the international legal order and find it difficult to observe some of the rules and principles of international law, which are not necessarily just according to their judgement based on their historical experiences.

<sup>38</sup> Chayes and Chayes emphasize the significance of the capacity to observe rules (see *supra* note 14, at 13–15, 197–201).

<sup>39</sup> The principle of '*pacta sunt servanda*' is not only a normative principle existing in the theory of international lawyers. It is a powerful idea in all human societies including international society (see Y. Onuma (ed.), *A Normative Approach to War* (1993), at 211–220). No nations dare to violate it easily because they know that they have to pay high political costs if they do so.

disadvantageous to smaller nations tend to last a long time. Unequal treaties which were imposed on — although, theoretically, concluded on the basis of the free will of the parties — the Ottoman Empire, China and many other non-European nations in the nineteenth and early twentieth centuries serve as typical examples of international law as a tool of powerful nations.<sup>40</sup> Even if Turkey, China and other non-European nations wanted to free themselves from various unequal obligations, they were prohibited from renouncing the treaties unilaterally. They were thus the victims of discrimination for a long time because of these treaties.

In the case of multilateral treaties, however, there is less likelihood that those treaties that grossly deny the fundamental interests of smaller nations become international law so easily because smaller nations occupy the majority in international conferences where such treaties are adopted. This is especially the case with multinational treaties after World War II, because such discriminatory ideas as the ‘*mission civilisatrice*’ or ‘white man’s burden’ lost legitimacy, and the democratic principle gained legitimacy in international society. Generally speaking, law, which is assumed to be inherently general and reciprocal, is relatively more advantageous to less powerful members of a society than is bilateral negotiation. The latter tends to reflect the naked power relationship between the two more directly and manifestly than does the former.

In 1995, Japan claimed that the application of Article 301 of the US Trade Act constituted a violation of the WTO procedure, and brought the case to the newly established WTO. Although Japan could not gain a complete victory in the Japan-US automobile negotiation, it succeeded in utilizing the rule of international law in that the US had to withdraw its unilateral measures. This critical decision of withdrawal was made because the US government knew very well that if the case were reviewed by the WTO, it would lose. Had Japan continued the bilateral negotiation, without utilizing the rule of international law, Japan could not have attained such an advantageous result.<sup>41</sup> It is evident that the rules and institutions (in this case, those of the WTO) of multilateral treaties provided stronger bargaining power to the less powerful party, namely Japan, than to the more powerful party, the United States. More powerful parties, for their part, tend to be content with and to accept law because law generally embodies their fundamental interests due to their strong influence in the law-making process. Also, more powerful nations generally prefer to maintain their superior position by means of law rather than by using naked power, which is more costly.

### C *Negative Responses to Violations*

Together with the advantages of observance of international law, deprivation of interests or sanctions against the violators of law in the wider sense of the term are

<sup>40</sup> Unequal treaties were imposed on Japan by the European powers and the US, but Japan, as a new imperial power that quickly mastered the imperial policies of European powers and the US in the 19th century, imposed similarly unequal treaties on China, Korea and other Asian nations.

<sup>41</sup> See Y. Hatakeyama, *Tsusho Kosho (Trade Negotiations)*, 1996), at 99–121.

another factor influencing compliance with international law by states.<sup>42</sup> Nations pursue a number of interests to survive and prosper in international society. These include: (1) national security and human security; (2) economic interests obtained through international trade, finance and investment; (3) use of international communication and transportation networks; (4) good global and regional environment, and so on. Nations which violate a rule of international law are often denied or have restrictions imposed on the enjoyment of these interests. The denial or restriction of such interests is carried out by international organizations and/or more powerful nations whose interests are harmed by such violation of the rule or by those which are interested in maintaining the rule in question.

This does not necessarily mean that nations abide by international law *because* when they violate it sanctions are imposed upon them. In actual practice, even if a nation violates international law, it is not always exposed to sanctions in the legal sense nor is its state responsibility pursued. In the actual intercourse between states, the theory of state responsibility remains in many cases purely theoretical.<sup>43</sup> Actual negative responses from states against a law-violating state rarely follow the typical theory of state responsibility. Further, violation of a rule of international law is not always more serious than an unfriendly but legal act. For example, the placement of the Soviet missiles in Cuba in 1962 constituted the most serious violation of the ‘rules of the game’ as the US understood them, and was far more serious than thousands of violations of minor rules of international law.<sup>44</sup>

Thus, the negative response against the violation of a rule of international law basically depends on a discretionary policy decision of the government which believes that its nation’s interest is violated. It also depends to a certain extent on a discretionary policy of other governments which believe that such a violation either indirectly harms vital interests of their nations, or threatens the international order which they want to preserve, and therefore cannot be tolerated. It further depends on the will and ability of the international organization whose mandate includes the maintenance of the rule. As Hart rightly pointed out, ‘the principal functions of the law as a means of social control are not to be seen in private litigation or prosecutions, which represent vital but still ancillary provisions for the failure of the system. It is to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court.’<sup>45</sup> Concentrating attention on the negative reaction of law in the case of its violation overlooks the normal function of law as a norm of conduct.<sup>46</sup>

However, this does not mean that the violation of international law is always judged as trivial in international life, as some ‘realists’ suggest. Usually, violations of

<sup>42</sup> See W. Levi, *Law and Politics in the International Society* (1976), at 25–27.

<sup>43</sup> See Nakatani, ‘Kokusai hochishugi no chihei (Horizons of International Legality)’, in T. Mogami (ed.), *Kokusai shakai to ho (International Society and Law)* (1997) 131, at 134.

<sup>44</sup> See a blatant negative estimation of international law in the Cuban missile crisis by the US Secretary of State, himself a lawyer (Acheson, ‘Remarks on Cuban Quarantine’, *57 Proceedings of the ASIL* (1963), at 13–14).

<sup>45</sup> H. L. A. Hart, *The Concept of Law* (1961), at 39.

<sup>46</sup> See R. Higgins, *Problems and Process* (1994), at 1. See also Onuma, *supra* note 11, at 196–212.

international law are regarded as more serious than an unfriendly act within the limits of international law. If a nation violates an important rule of international law, major powers which are interested in maintaining the interest that the rule is supposed to protect or whose direct interest is violated will generally seek to deprive at least some interests of this law-violating nation. International organizations, whose mandate is to maintain the interest the rule is supposed to protect, generally seek to take similar actions. Even though states seldom follow the typical course of pursuing state responsibility of the law-violating nation, they could do so if other conditions allowed. All government policy makers know these facts. They usually decide their state's behaviour upon considering such possibilities. Here, one can find a factor inducing compliance with international law.

There are certainly cases in which a nation violates a rule of international law, yet no nation or international organization takes a countermeasure or sanction. This is particularly the case with a superpower's violation of international law. But this is an exceptional luxury which only a few major powers — especially the US, the only superpower — can enjoy. This fact suggests a very problematic feature of theories expounded by US scholars. In the fields of both international law and international relations, there has been a tendency to regard those theories as general theories to be followed (or even imitated) by other scholars and to be applied universally. However, if US scholars construct their theories by unconsciously assuming the US as an actor in international society, such a theory cannot claim general validity precisely because the US is an exceptional, not an ordinary, nation. A far larger number of nations cannot so easily enjoy the luxury of ignoring international law. One of the reasons why the claim of the irrelevance of international law has been predominant is that the study of international relations itself has been carried out most actively in the US and has been accepted by international relations scholars in other nations without elaborate critical examinations of the *US-centric nature* of the discipline.

Even when the US and a limited number of major powers ignore some rules of international law under certain circumstances, their negative reputation as violators of international law will remain and often jeopardize their leadership in their future relations with other nations. The negative reputation as a violator of international law also counts in domestic politics as well, particularly in liberal democratic societies where the parliament, media and non-governmental organizations pay keen attention to illegal acts by governments. Also, by no means few of today's major powers are liberal democracies with judicial review systems in which the government has to conduct policies taking fully into consideration their legality and constitutionality judged by the judicial branch. Powerful nations certainly have the luxury of violating international law in that they can ignore countermeasures or sanctions from other states or international organizations in international society. Still, policy makers of these nations worry about the negative reactions from various domestic powers, such as the opposition parties, media institutions and NGOs criticizing the government's policy violating international law. Moreover, the judiciary in liberal democracies is generally competent to declare the policy illegal or unconstitutional

and to prevent the government from implementing it.<sup>47</sup> In this way, while a larger number of smaller nations have to take into consideration the negative response of international society to the violation of international law, many major powers, which may disregard countermeasures and sanctions for the violations of international law in international society, tend to refrain from gross violations of international law because of their domestic constraints.

It is true that we should not overestimate this domestic restraint. Some major powers, such as China, have extremely limited domestic constraints because of the lack of effective opposition parties, critical media institutions and NGOs, and a truly independent judiciary. Even in a highly democratic nation such as the US, citizens tend to regard domestic interests or legitimacy more highly than internationally lawful behaviour of their government.<sup>48</sup> If the US government judges that the domestic reputation as the 'leader of the world', the 'guardian of democracy', the 'fighter against terrorism' or simply the 'macho' superpower outweighs the negative international reputation as a violator of international law, it would choose a policy enhancing the former image at the cost of the latter.<sup>49</sup> Here lies a serious limitation of the binding function of international law whose final guarantee lies in the domain of public opinion.<sup>50</sup> Still, the nexus between the international constraints and domestic restraints as referred to above must be taken into consideration when the issue of compliance with international law by states is discussed. More sophisticated analysis of influential factors inducing compliance and non-compliance from the perspective of this nexus must be conducted in an elaborate manner.

<sup>47</sup> How effectively the judiciary can compel the executive and legislative branches' compliance with the rule of international law depends on various factors: explicit provisions of the constitution on the power of the judiciary; the established interpretation of the provisions or constitutional practices of the judicial control over the executive and the legislative; actual political and military conditions affecting the power of the judiciary; and so on. On the whole, in liberal democracies, the judiciary has gradually become more effective than before in preventing the executive from violating international obligations.

<sup>48</sup> Fundamentally, according to the US Constitution, the status of a treaty is equal to that of a federal statute, not superior to it. Therefore, the Congress can nullify the existing treaty which the US concluded, by enacting a statute contradicting the treaty (last in time rule). Although some US courts have sought to avoid this consequence as much as possible (see *the US v. the PLO* 695 F. Supp. 1456 (1988)), if the Congress wishes to nullify the treaty with a clear and unequivocal intention, it can do so. Thus, the international obligation which the US assumes has a far more fragile ground than many countries such as Japan, where the status of international law is superior to that of national statutory law according to the firmly established interpretation of the Constitution.

<sup>49</sup> Regrettably, the behaviour of the US after the end of the Cold War has amply demonstrated this fact. Like many historical empires, today's US behaves as if its domestic ideas and institutions should prevail universally. The very idea that the US is subject to international law which is valid for all nations is not sufficiently appreciated by policy makers and ordinary citizens in the US. Its attitude towards multinational treaties in the fields of global environment, disarmament and use of force reveals this regrettable fact.

<sup>50</sup> In this respect, see the interesting research criticizing the myth of the deterrence effect of public opinion in J. Mercer, *Reputation and International Politics* (1996).

### D *Frequency of Compliance and the Question of Custom*

When discussing the subject of the binding function of international law, we should also take into consideration the frequency of compliance and breaches of international law.<sup>51</sup> International executive agreements,<sup>52</sup> which constitute an overwhelming majority of treaties, are used as a tool for nations to fulfil their daily administrative tasks.<sup>53</sup> It is contradictory for nations to make a full use of executive agreements on one hand and to violate them on the other. Such behaviour is usually unthinkable. As nations become more and more involved in economic, social and cultural activities, executive agreements radically increase in number. Today, we can no longer think of our daily life without executive agreements, just as we cannot think of our life without domestic orders and regulations by central and local governments. Our daily life itself is possible precisely because nations daily comply with and implement obligations they have agreed to in executive agreements.

The foregoing argument presumes the case of treaties. The same argument is basically valid in the case of customary international law, which has been regarded as another major form of international law. Mainstream international lawyers have required state practice and *opinio juris* for the establishment of customary international law. In both cases they have identified acts of the government, laws, court judgments, statements of government officers of the major Western powers, and formulated state practice and *opinio juris* based on these materials. Therefore, prevalent patterns of the behaviour of Western powers have already been incorporated into norms of international law as customary law. Thus, it is natural that actual behaviours of the leading Western powers tend to coincide with norms formulated and characterized as customary law.<sup>54</sup>

It has been a long-established habit for human beings to regard law as a necessary and useful societal institution and to behave in accordance with law. Law has long been used as a necessary tool to manage human relations in an orderly manner in society. Even a despotic ruler who wants to deny the significance of law finds it difficult to do so openly and manifestly. With the globalization of Western, and particularly US, culture, which highly regards law in society, the role and significance of law have

<sup>51</sup> There is a difficult problem of whether it is possible to count the compliance and violation of rules and principles of international law, but the analysis in the text concerns a qualitative rather than quantitative one. See Simmons, 'Compliance with International Agreements', 1 *Annual Review of Political Science* (1998) 75, at 78.

<sup>52</sup> Here executive agreements mean treaties which are concluded by governments without the endorsement of the parliament. These executive agreements have greatly increased in the twentieth century to deal with daily international matters such as to provide technical or economic assistance to developing countries and other administrative matters.

<sup>53</sup> In Japan, e.g., executive agreements made up more than 97% of all treaties concluded between 1989 and 1998 (Y. Onuma (ed.), *Shiryō de yomitoku kokusaiho (International Law as Explored through Materials, 1996)* 53 and the calculation by NAKAMURA Koichiro, Ministry of Foreign Affairs).

<sup>54</sup> See Onuma, *supra* note 11, at 206. This fact also reveals the ideological character of international law itself and of the theory of compliance which tends to assume tacitly the desirability of compliance with law. For many disadvantaged nations, compliance with customary international law often means unreasonable subjugation to a status quo which was established and maintained by the major Western powers and in the creation of which they did not participate.

gradually increased, even in societies where traditionally law was not regarded as so important. The fact that law has been internalized contributes to the tendency of government officers to conduct their state affairs in accordance with law in international society.

In many cases government officers implement their decisions or policies in accordance with law not necessarily because they intentionally choose to do so, but because they unconsciously or habitually behave in accordance with law.<sup>55</sup> The fact that state organs, especially highly organized bureaucracies, generally follow precedents reinforces this lawful behaviour because precedents are in most cases lawful acts. In this way, the intentional ‘observance’ of or ‘compliance’ with law by the states based on the calculation of advantages and disadvantages explains only a part of the actual concurrence or agreement between norms of international law and state behaviour. An unconscious element — that is, for government policy makers to behave unconsciously accepting and taking for granted the established institution of international law — constitutes another important factor which explains the ‘observance’ of or ‘compliance’ with international law by states.<sup>56</sup>

### **3 Raison d’Être of International Law in International Society in Terms of Its Societal Functions Based on the Shared Perception of Law**

#### ***A The Continued Use of International Law as Law by States***

International law, whether in practice or in theory, has been referred to, treated, discussed, negotiated, promulgated, implemented and violated not as part of morality, ethics or politics, but as law. It is true that international law has many different characteristics from those of modern state laws, which ordinary people tend to think of when they think of law in general. A number of scholars, such as John Austin, have argued that international law is not law ‘properly so called’.<sup>57</sup> However, such an argument has not generally been accepted. International law has not been called ‘positive morality’ or characterized as part of international ethics either in state practice or in theory. International law, together with civil law, criminal law, American law, Japanese law, common law, statutory law and others, has always been dealt with, referred to, discussed, utilized, implemented and violated, as law.

The very fact that most states have under such an assumption referred to international law and have continued to behave generally in accordance with international law demonstrates the falsehood of the argument that international law

<sup>55</sup> See Henkin, *supra* note 23, at 60–68.

<sup>56</sup> Here again, the problematic feature of talking of ‘compliance’ becomes apparent. When we talk about ‘compliance’, we unconsciously tend to think of the causal relationship between the will to comply with something and the agreement between the assumed will and the actual behaviour. However, what we could discuss empirically is basically an agreement or coincidence of a behaviour with the substance of the norm in question, not their causal relationship.

<sup>57</sup> Austin, *supra* note 2, at 142.

is meaningless or irrelevant in international relations.<sup>58</sup> This fact has also contributed to establishing, re-establishing and maintaining international law as a social institution in international society.<sup>59</sup> By being perceived by the overwhelming majority of nations and people as law among sovereign states, international law has, as individual rules and as a system, played its societal functions and demonstrated its *raison d'être*. What is important is to elucidate the *raison d'être* of international law in terms of societal functions it has fulfilled by being perceived as the law of international society. The perception and understanding of international law differs according to the historical period, the country, the area to be regulated by it, the author and other factors. However, in comparison with the perception of politics (or policy) and ethics (or morality), it is generally understood to be a binding norm with some enforcement mechanism having the following features of law.

First, the general perception of law is associated with justice and fairness. It is generally perceived that whereas a bad rule or bad politics (or policy) is fairly common, a bad law is an exception. In this respect, law is closer to ethics and morality. However, whereas a bad ethic or bad morality is an oxymoron, it is believed that bad laws do exist, although exceptionally. Thus, the connection between law and justice is not as close as the one between ethics (or morality) and justice. Second, the general perception of law is associated with power and enforcement. In this respect, law is characterized as an external norm to be ultimately enforced by the socially organized power, and is contrasted with ethics or morality, which is characterized as an internal norm, to be fulfilled by individual conscience alone. The perception of law associated with power is closer to that of politics as power politics (but not as politics perceived as compromise). Although it has been doubted by some scholars whether international law is an enforceable norm, the perception of international law as an enforceable norm has generally been shared in international society. Third, law has been perceived to be determinate. Again, whether law is determinate has been heatedly discussed among lawyers. However, if compared with policies, ethics and morality, law is definitely more determinate. And the perception of law as determinate rules — though it is to a certain extent an ideology camouflaging the reality — has widely been shared. This problem will be further discussed later. Fourth, law has been perceived to be standardized and technical. Thus, law can deal with a massive amount of phenomena, arrange them and settle them in an orderly manner. On the other hand, because of its standardized and technically oriented nature, it often lacks the loftiness which ethics and morality have. Fifth, law is perceived to be a common positive norm shared by members of a society in general. Social ethics and morality

<sup>58</sup> This fact also reveals a problematic nature of the 'definition' adopted by a scholar. To define something or to adopt a certain definition lies in the freedom of a scholar. However, if he or she adopts a certain definition which is fundamentally contradictory to the general usage of the term, then the very act of definition is detached from realities. A theory based on such a definition, however attractive it may appear to researchers, would lose relevance to the very phenomena it seeks to explore.

<sup>59</sup> As to the mechanism of institutionalization, establishment and reestablishment of an idea by societal behaviour, see Wendt, 'Anarchy Is What States Make of It', 46 *International Organization* (1992) 391, at 414–416. See also F. Kratochwil, *Rules, Norms, and Decisions* (1989), at 61.

are also common norms shared by societal members. However, law is different from them in that it is perceived by the members themselves that they are not allowed to deviate from it as long as they are societal members. Ethics or morality is generally perceived, in contrast, to depend on a personal conscience in the final analysis. Sixth, law has been perceived to be coherent and fair. Law should be universally applied, and a double standard is condemned. In this respect, law is close to ethics and morality, and is contrasted with politics or policies, which are perceived to be more flexible and situation-dependent. Seventh, because of the sixth characteristic feature, law is perceived to be rigid and to follow precedents. Although it is possible for law to be applied in a flexible manner or deviate from the precedents, the room for such flexibility is very limited. In contrast, policies have more room for discretion and can be conducted in deviation from the precedents. Eighth, the perception of law is associated with that of judgment and decision by an authoritative third party. Third-party judgment does exist in the case of politics, policies, ethics and morality. However law's distinctive character as third-party settlement is conspicuous due to the highly sophisticated procedure and the binding force of the third-party settlement.

Based on the assumption of international law as law having these characteristic features as compared with politics (or policies) and ethics (or morality), nations have acknowledged the *raison d'être* of international law and have utilized it in the following ways.

First, nations have used treaties as an indispensable tool to deal with a huge number of activities covering trade, finance, investment, security, crimes, culture, science and technology in international society. As the interdependence between nations increases, the significance of treaties to support and facilitate this interdependence increases. Without treaties which bind nations, no international trade, finance, transportation and information activities are possible today. This means that treaties, one form of international law, are an indispensable tool in the very life of contemporary people. And in order that they can function smoothly, it is necessary that treaties be interpreted and implemented based on the accumulated theory and practice of international law. One of the reasons why some scholars or politicians can talk about the irrelevance of international law is that they *take for granted* the structure of daily life which can be conducted only through the accumulated theory and practice of international law. In the same manner that it is difficult to recognize the importance of air because we take its existence for granted, it is difficult to recognize the importance of international law.

Second, when nations commit themselves to significant undertakings between them, they usually do so by concluding a treaty to that effect. Although in certain cases governments prefer non-treaty arrangements for various reasons, the most common form of important international undertakings are treaties.<sup>60</sup> When nations

<sup>60</sup> This does not mean that states *always* adopt a treaty for an important undertaking. There have been a number of non-treaty instruments which are of great political importance, such as the Yalta Agreement of 1945, the Universal Declaration of Human Rights of 1948 and the Final Act of the CSCE of 1975. It depends on various factors whether nations adopt a treaty or a non-treaty instrument for an important undertaking. Merits and demerits of each form of instrument will be examined later.

have been engaged in major wars and subsequently seek to re-establish peaceful relations, they usually conclude a treaty for that purpose. The Peace of Westphalia, the Versailles Treaty, the San Francisco Peace Treaty and the UN Charter are leading examples. When governments sign and ratify a treaty which involves internationally and/or domestically important issues, they usually make serious and elaborate efforts: (1) to gain support from factions within the governing party, the opposition parties, and pressure groups; (2) to persuade domestic and international media institutions and NGOs; (3) to gain support or at least acquiescence from third-party states which have some interests in the undertaking, and (4) to have conformity with domestic laws including the Constitution so that international obligations imposed by the treaty will not be denied by the judiciary. If the treaty, which is a major form of international law, is irrelevant or unimportant as many 'realist' international relations scholars assert, it would be difficult to explain why governments make such serious and elaborate efforts for such 'irrelevant' things.

Third, many states, including major powers, have a treaty bureau or legal advisor's office, and assign a substantial number of capable officials to these offices. They engage in drafting treaties, interpreting international law, negotiating with other ministry officials and politicians to implement international law which their nation has to abide by, and analysing international legal situations surrounding their countries. In some countries, such as Japan and South Korea, the treaty bureau is regarded as one of the most important bureaus in the Ministry of Foreign Affairs. If international law were irrelevant or meaningless, it would be difficult to explain why states assign so many capable staff members to the treaty bureau or legal advisor's office.

Fourth, government officers of a state usually take actions even in the critical case of resorting to armed force by paying attention to the regulatory function and legitimating power of international law. Many international relations scholars argue against this claim. They argue that policy makers at most give secondary consideration to the restraints of international law when they make decisions whether or not to resort to force. The most important factor in their critical decision is whether their state can win, and if this is not certain, whether they can make peace with the enemy without incurring many casualties. I am ready to admit that this is generally the case. However, the inability of international law to prevent policy makers from making the critical decision to resort to armed force is due to the whole structure of international society. International law is nothing other than the legal expression of such structure.

It is not that some entity called international law confronts another entity called the nation or the state independently from the whole structure of international society. Both international law and nations (or states) are social constructs of human species in a particular period of time. International law, together with other sub-systems such as global financial, trade and telecommunication systems, international diplomacy, as well as globally coexisting and conflicting ethics and religions, contributes in influencing to a certain extent the critical decision of a state agent to resort to force. International law is not the only factor constraining the behaviour of states in international society. It is one of many constraining factors, which, as a whole, can or

cannot actually constrain the decision made by policy makers of a state to resort to force.

In other words, international law, together with other sub-systems in international society, can play a certain role in settling structural problems in international society including inter-state violence. Thus, to examine the capability of existing international law to settle the structural problems in international society and to propose a policy based on this examination is an important task for the study of international law. One of the serious flaws of the predominant positivist international legal studies is to regard the task of international lawyers exclusively as examining and interpreting existing international law and to ignore this important task of policy proposals.

### **B Indirect Binding Functions**

Hoffmann argues that unless state behaviour is restrained by law, other functions such as the communicative function will have little meaning.<sup>61</sup> Hoffmann is just one of the many international relations scholars who tacitly share a similar view. It is true that law has been expected to guarantee the life and security of people by restraining the arbitrary power of private subjects and that it has in fact played this role. The modern sovereign state secures the life and security of people within its territory by monopolizing the violence which used to be shared by intermediate powers and by legitimating such monopoly by law. However, this state of affairs has not been brought about by (domestic) law alone. It is not that some entity called law confronted various intermediate powers such as feudal lords and knights, suppressed them, and prohibited them from resorting to violence by the power of law alone. The state of affairs in which no one but the state can resort to violence has been brought about by a number of factors: the seizure of means of violence by absolutist monarchs from intermediate powers; the progress of economic unity in a nation through the development of a capitalist economy and subsequent decline of the economic bases of the intermediate powers; and the decline of the power of churches as an intermediate power through the secularization of society. All these factors contributed to the establishment of the state of affairs in which the life and security of citizens came to be protected by domestic law.<sup>62</sup>

During the transitional period from the decentralized structure of power shared by intermediate powers to the monopoly of power by the sovereign state, modern domestic law never sufficiently played the 'essential function' of restraint or constraint on political behaviour to prohibit use of force by intermediate powers. However, even during the period when law could not fulfil such an 'essential function' in a sufficiently effective manner, law fulfilled many important functions as a tool of the state. These functions include legitimating the state's monopoly of violence; preparing institutional frameworks through which a capitalist economy could function as a national and international economy; organizing bureaucracy; and establishing a national education system through which the state could disseminate an ideology legitimating

<sup>61</sup> Hoffmann, *supra* note 20, at 24.

<sup>62</sup> See Onuma, *supra* note 39 and references cited in it.

its monopoly of violence. It is through these 'secondary' functions of law and other functions of non-legal sub-systems contributing to the establishment of the sovereign state that the domestic law came to be able to secure, or more correctly, to be able *to give the general impression* that it secures, the life and security of people within the state's territory. Domestic law could never fulfil alone its 'essential function' to secure the life and security of citizens from the very beginning. The binding force of law depends on the whole normative consciousness of the entire addressee of a society. It is therefore natural that domestic law during the formative period of sovereign states, domestic law after the establishment of the sovereign state, and contemporary international law function in a different manner from one another in their binding force.

Even if international law by itself cannot directly prevent the policy makers of a state from making a critical decision to resort to war, it can influence their decision in various ways. First, together with other factors which influence such a decision, including considerations of possible economic and strategic gains as well as popular support for a war, and possible economic loss and human casualties resulting from it, the consideration of the possible reputation as a faithful observer or the possible condemnation as a violator of international law constitutes an important factor influencing the decision. In other words, although no single factor can prevent the policy makers of a state from deciding to resort to war, a combination of considerations of various factors including international law may prevent them from making the decision.

Second, policy makers take international law into consideration in making an important decision to choose the cause or pretext for the use of force. Up to the early twentieth century, when war was not outlawed, they could choose to resort to war without considering the general condemnation for violation of international law. Although policy makers were able to choose various forms of use of force short of war, including self-defence and armed reprisals, they could still choose war without violating international law. With the outlawry of war, however, this freedom of action came to be seriously restricted. Nations now basically have to justify their use of force as self-defence, the only explicitly exceptional legal use of force. Although there are other notions which might be able to legitimate the use of force, such as protection of citizens abroad and humanitarian intervention, their legality is somewhat dubious. They are likely to invite far more criticism than the notion of self-defence. Thus policy makers seek to justify the use of force as self-defence even in a case where it is difficult to do so.

In 1931, three years after the enactment of the Kellogg-Briand Pact prohibiting war, Japan launched the 'Manchurian Incident', characterizing it as self-defence. The Japanese leadership during the 1930s did not share the respect for international law which their predecessors had shown. However, even this leadership took into consideration the binding force of international law on the use of force, its effectiveness and the effect of the possible condemnation for the breach of international law. The very fact that they had to choose the pretext of self-defence in 1931 made it difficult for them to justify their military action, for, as a matter of fact, it was apparent that the Guandong Army had not acted in self-defence. The gap between the

actual behaviour of Japan and the pretext of its behaviour was too apparent. In 1937, when Japan engaged in war with China, it did not declare war. A major reason for Japan's not declaring war was that had it done so, the law of neutrality would have been applied, and Japan could not have imported goods characterized as contraband from neutral countries, especially from the US.<sup>63</sup> Apparently consideration for international law, although unable to prevent the Japanese leadership from resorting to use of force, constituted an important factor for them in choosing a certain cause or pretext for it.

During the Vietnam War period, the US government justified its military action under international law as use of the right of collective self-defence and as a response to the request of the legitimate government in South Vietnam. In 1971, India intervened militarily in Pakistan. In 1979 Tanzania invaded Uganda, and Vietnam invaded Cambodia. All these states sought to justify their military actions as self-defence.<sup>64</sup> In all these cases, it was difficult for them to justify their use of force as self-defence, because all of their factual situations apparently demonstrated that they were not acting in self-defence. Yet, the policy makers of these nations never sought to make the argument that their nations had violated international law but that such violation was justified in the pursuit of some other lofty cause such as freedom, humanity, or justice. Government officers do resort to the argument emphasizing non-legal high causes. But *they never claim that such high causes justify their violation of international law*. Why? Because they know very well that a bad reputation for violating international law carries high costs. Policy makers of a state know well that international law does count in international politics. And because the gap between the actual behaviour and the justification of self-defence of their nations is generally apparent, they have to, more or less, pay a certain political cost.

As the above arguments have shown, the binding function of international law, including the indirect one, is certainly important. Government officers do take into consideration rules and principles of international law when they make decisions including critical decisions involving use of force by states. To elucidate the reach of various forms and functions of the binding force of international law and the condition for its functioning is, and will remain, an important task for international lawyers working together with international relations scholars. However, this is not the only issue relating to international law and international politics. Concentrating on the problem of the binding function of, or the compliance with, international law has its own dangers.

### ***C Dangers of Concentrating on the Binding Function and Compliance***

First, as noted above, the binding function of law is often closely related to its ideological function of justifying government policies and the status quo. Simply emphasizing the significance of the binding function of international law and arguing for compliance evades this important aspect of international law functioning as a tool

<sup>63</sup> A. Kazami, *Konoe naikaku* (Konoe Cabinet, 1951), at 67.

<sup>64</sup> Y. Onuma, *Jinken, kokka, bummei* (Human Rights, States, and Civilizations, 1998), at 105–107.

of politics. Such an attitude itself can unconsciously play an ideological role to justify a particular policy of a state or the status quo in general. We have to be aware that lawfulness constitutes only one of many values or virtues, not the only value or virtue. If the substance of the existing rule or principle of international law is unjust, simply discussing the binding function of international law, *tacitly or unconsciously regarding compliance as desirable*, does not make sense.

Second, concentrating on the problem of the binding force of law and compliance with law would lead to a problem whose answer is almost impossible to identify. It is generally difficult to explain social phenomena by the law of causation because there are always plural causes responsible for bringing about an effect. It is even more difficult if causal facts include human behaviours based on free will because to establish a causal relationship between the will and the effect is extremely difficult. It is almost impossible to demonstrate empirically that the will to comply with a rule of international law constitutes the decisive cause of a certain behaviour of a nation or state.<sup>65</sup>

Theoretically it is possible to demonstrate the *agreement or coincidence* between a certain state behaviour and a certain rule of international law. If a state adopts a policy whose substance agrees or coincides with a prescription of a certain rule of international law consistently for a long period of time regardless of political, economic and other non-legal situations, we may be able to assume that the state seeks to conduct a policy complying with or observing the rule of international law. However, it is likely that such a case is an exception rather than the rule. Moreover, even in such a case, it would be difficult to demonstrate that the state adopts a particular policy because it *intends* to comply with the rule of international law.

The causation between the will or intent to comply with a rule of international law and the state's behaviour which agrees or coincides with it has not been adequately demonstrated since the days of Henkin. He certainly showed the general *agreement or coincidence* between the rule of international law and the nation's behaviour<sup>66</sup>. However, he did not demonstrate empirically that the nation behaved in accordance with international law *because* international law prescribes that it do so. As noted above, we may reasonably be able to assume that a nation is aware of the rule of international law and regards the compliance with it as a guiding principle in adopting a certain policy, if the behaviour of the nation agrees or coincides with the rule of international law in many areas for a long period of time. However, even in such a case, it is difficult to demonstrate that the will to comply with the rule constitutes the primary cause of that nation's behaviour. How could we demonstrate that the nation has adopted a certain policy complying with a rule of international law at the cost of important strategic, economic, cultural and other factors? If we are not allowed to talk about the will of a nation or state because a nation or state is an

<sup>65</sup> See Kratochwil and Ruggie, 'International Organization', 40 *International Organization* (1986) 767; Kratochwil, 'The Force of Prescriptions', 38 *International Organization* (1984), 685; Goldstein and Keohane, 'Ideas and Foreign Policy', in J. Goldstein and R. O. Keohane (eds), *Ideas and Foreign Policy* (1993).

<sup>66</sup> See Henkin, *supra* note 23.

abstract entity and the very problem of causation is an empirical one, we must choose someone representing the ‘will’ of a state. However, the actual bearer of the act of a nation or state ranges from the president, prime minister, foreign minister, bureaucrats, members of the polito-bureau of the communist party, to the police, the military forces, their commanders, officers and soldiers. The difficulty of identifying the ‘will’ or intent of a state has been fully discussed in the question of ‘*opinio juris*’ in customary international law.<sup>67</sup>

In this way, although the binding function is the most basic and important function of law, it would not necessarily be productive to concentrate on the question of causation between the binding function of international law and the particular policy of a state, i.e., the question of the compliance in international law. However, this does not mean at all that exploring the *raison d’être*, usefulness and various functions of international law is meaningless. Nor does it mean that international law is irrelevant in international politics. The usefulness of international law as perceived by policy makers of a state and the various forms of influence which international law exerts on their decision-making have been fully demonstrated in the earlier arguments. Further, the function of international law is not limited to its bindingness.<sup>68</sup> There are other functions which play an important role for members in international society.

## 4 Functions of International Law Other than the Binding Function in International Society

There are at least three functions which international lawyers barely take into consideration but which nevertheless play significant roles in international society: (1) the communicative function; (2) the function of embodying shared understandings of international society; and, (3) the justifying and legitimating function.

### A *The Communicative Function*

The first is the communicative function. Nations exist as ‘sovereign’ states. They must thus coordinate and accommodate mutually conflicting interests, and seek to coexist peacefully and to prosper in international society where common interests and norms are scarce. Consequently, they negotiate with each other in order to maximize their own interests under various conditions and restraints. Even when they are engaged in war, they need to communicate with each other because they need to know a wide range of things: what kind of counterattacks they would invite by their own attacks; how the other party would respond if they abuse prisoners of war and civilians of the other party; under what conditions the other party would be willing to make a truce and/or peace, and so on. International law provides a common language and framework for the exchange of claims in the argumentative process between states.<sup>69</sup>

By resorting to international law, a nation can send a message to the other party

<sup>67</sup> See, e.g., A. D’Amato, *The Concept of Custom in International Law* (1971), at 33–44 and 73.

<sup>68</sup> See Remarks by G. Abi-Saab in A. Cassese and J. Weiler (eds), *Change and Stability in International Law-Making* (1988), at 77. See also Scott, ‘Beyond Compliance’, 19 *Australian Year Book of International Law* (1998) 35, at 42–48.

<sup>69</sup> See Kratochwil, *supra* note 59, at 35, 181.

that it is ready to settle an issue via the standard and framework which is common to them, rigid in nature, associated with justice and fairness, binding not only on the other party but also on itself, and enforceable as the last resort. In this way, international law provides an important instrument to mediate conflicting parties. By resorting to international law, nations can thus arrange conflicting claims through various features of law such as the commonly accepted normativity, relatively high determinacy, the coherence and technically highly-developed quality of specific provisions. Combined with the binding function, this communicative (as well as mediating) function of international law can contribute to inducing the conflicting parties to move in a certain direction, i.e., towards the settlement of conflicts, in a peaceful manner.

One may argue that law lacks determinacy and therefore cannot fulfil the function described above. The New Haven School has argued the omnipresence of complementary norms.<sup>70</sup> The critical legal studies movement has tended to emphasize that law can be manipulated by political powers.<sup>71</sup> It is true that the interpretation of law is not necessarily rigid reasoning based on syllogism, but rather leaves substantial room for discretion. This has been well understood since the days of the free law movement (*Freirechtsbewegung*) and realist jurisprudence. There are certainly rules and principles of law which are not sufficiently determinate and leave room for manipulation. However, it is one thing to admit that international law leaves room for discretion. It is quite another to claim that a state or a government can manipulate every rule of international law, or that every rule has a complementary norm (the 'omnipresence of complementary norms') and therefore cannot establish its normative meaning.

In most cases there is a difference of degree in the persuasiveness of a certain interpretation of a rule over another. Even if there is a complementary norm of self-defence to the rule prohibiting the use of force in international law, whether a particular government can effectively justify its particular use of force as self-defence is a totally different matter. The latter depends on various specific factors. An argument by a certain government utilizing the notion of self-defence can be wholly unpersuasive.<sup>72</sup> Although law can certainly be manipulated by a government, it is far more determinate *if compared with* other norms such as religion, morality and ethics.<sup>73</sup> This is an important point which those who emphasize the indeterminacy of law have often overlooked.

Compare, for example, international law with 'universal morality', 'international

<sup>70</sup> M. McDougal and Associates, *Studies in World Public Order* (1960) 294 *et passim*.

<sup>71</sup> M. Koskenniemi, *From Apology to Utopia* (1989) xvii–xxii; *Idem*, 'The Politics of International Law', 1 *EJIL* (1990) 4. See, however, the criticism of these critical studies in Georgiev, 'Politics or Rule of Law', 4 *EJIL* (1993) 1.

<sup>72</sup> R. Falk, *supra* note 25, at 15–16; Onuma, 'Kokusai hogaku no Kokunai moderu shiko' (The Domestic Model Approach in the Study of International Law), in K. Hirobe and T. Tanaka (eds), *Kokusaiho to kokunaiho (International Law and Domestic Law)* (1991), at 82, n. 49.

<sup>73</sup> For example, the norm prescribing that 'Thou shalt not kill' is a legal, religious, ethical and moral norm with which an overwhelming majority of people agree today. However, the degree of determinacy of the legal norm prohibiting murder is far more definite than other norms. Unless precise and concrete requirements are provided in explicit provisions of law, the prohibition of murder cannot be accepted as a

ethics' or 'universal religion'. If conflicting parties seek to negotiate with each other resorting to one of these non-legal norms instead of international law, they must at first decide rules which they can share in order to secure a common framework within which they can negotiate. This would be extremely difficult even between nations which share relatively similar moral or ethical ideas, religions and cultures. It would be impossible for all members in international society to agree on 'universal morality' or 'international ethics' and specific moral or ethical rules. The same is true with 'universal' religions. However vocally they claim universality, they do not actually enjoy the universal validity which international law enjoys. No one can deny that international law is the only positive norm which all members of international society have actually agreed on.<sup>74</sup> International law has developed a great number of specific rules which all international actors share and can utilize whenever they need to communicate with each other. No other norm, whether moral, ethical or religious, can play this critical role in international society. It is a gross mistake to appreciate the role of international ethics or morality and to ignore international law, which is the only institution equipped with this asset of actual universal validity.

'Politics' or 'policies', which has often been referred to as another form of something 'non-legal', can be far more useful than morality and ethics, or even international law as a means of communication or mediation between nations. Why? Because in the case of politics or policies, the parties in question are not required to commit themselves to the substance of the agreement. They can maintain their own positions and yet agree on something through compromise. In the world of politics, a compromise is not something to be assessed negatively. The value of politics or policies is not judged by whether they are reached by a compromise, but by whether they can bring about a good result. It is thus natural that criticism of the legalistic and moralistic approach made by Kennan has been well accepted, because such an approach could jeopardize a flexible diplomacy which could bring about a good result by compromises. The criticism by Kennan was not so impressive to people other than those in the US. For them, Kennan's claim that diplomacy should be flexible, not jeopardized by excessive legalistic and moralistic thinking, was a matter of course. But for the US people, who tend to think and behave in an exceptionally legalistic manner in their ordinary life and to apply the legalistic approach to external behaviours, Kennan's criticism was fresh and had a tremendous impact.

However, the usefulness of flexible diplomacy does not necessarily mean the futility of international law. Had international lawyers argued that all international

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legal prohibition. So-called indeterminacy exists only within this limitation. We can recognize this relatively high determinacy *by comparing* legal norms with religious, ethical and moral norms. We can hardly recognize this important fact if we discuss the problem of determinacy of law only within the domain of law, without comparing it with the determinacy of non-legal norms.

<sup>74</sup> See Hurrell, *supra* note 30, at 66.

conflicts<sup>75</sup> must be settled in accordance with international law by judicial settlements and arbitrations, such an argument would certainly have jeopardized the flexibility of diplomacy and would have been harmful to international relations. International relations are certainly prone to change according to ever-changing human behaviours and conditions. Carr was right when he criticized a tendency of some influential international legal studies which sought such a direction during the inter-war period.<sup>76</sup> However, what has actually been valid in international society since the days of Carr is not such international law. The assertion to settle all international conflicts by judicial settlements and arbitrations in accordance with international law has not been accepted even by international lawyers. There has always been a classification between juridical disputes and political disputes both in theory and in state practice.

Moreover, an important function of international law is to provide common standards and frameworks on which policy makers of a state can rely in classifying and arranging which part of conflicts they can settle by international law and which part by non-legal means when they have complex conflicting claims. It is the task of political considerations and deliberations to decide which issues should be settled by means of law and which issues by non-legal means. Policy makers may even decide that it would be wise to settle issues which can be settled by international law through non-legal means because a settlement based on law can be damaging to overall relations between the interested nations. Yet, before reaching such a decision, the conflicting claims must be classified and arranged in order by means of international law. This task cannot be accomplished by politics or policies. Why? Because the first task of classification and arrangement must be accomplished based on a *common standard* which the conflicting parties can and do share. Since there is no permanent common politics or common policies which can be applied universally, the task must be accomplished by no other means than international law.

In this way, international law provides a positive common language for the communication of members in international society. International law, with its more than a century of history in a global society,<sup>77</sup> has a wide range of rules and principles in almost every field of human activity such as military activities, territorial questions, trade, international finance and investment, environmental issues, cultural exchange, nationality and human rights, with which the overwhelming majority of members in international society agree. Therefore they can use these rules and principles as a common framework of communication and mediation without discussion on which common ground they will start negotiations. This is a great asset of international law, which no 'policy' or 'ethics' or 'morality' can replace.

<sup>75</sup> Most international lawyers use the term 'disputes' without distinguishing the concept of conflict and that of dispute. However, it seems more appropriate to distinguish the concepts of conflicts and disputes. While the former signifies the conflict itself, which has social, political, economic and emotional aspects, the latter signifies the conflict as expressed and formulated in normative terms.

<sup>76</sup> A major target of Carr's criticism was Hersch Lauterpacht, who had the tendency described in the text (see Lauterpacht, *supra* note 6).

<sup>77</sup> See Onuma, 'When Was the Law of International Society Born?', 2 *Journal of History of International Law* (2001).

What is important here is the fact that the framework of communication and mediation is commonly accepted by members in international society. Whether the framework can be enforced is of secondary importance. Therefore, the ‘soft law’, common policies of nations concerned and the ‘rules of the game’ can play a similar role. In some cases one of these non-legal instruments may be able to provide a more suitable common framework to the parties concerned. However, no one can deny that international law, with its long history as a common framework between nations and its accumulated, detailed, sophisticated and well-established substantive and procedural rules, can provide the most suitable framework in most cases. The role of non-legal frameworks in this respect is basically secondary and supplementary.

### ***B The Function of Embodying Shared Understandings of International Society***

The second significant function of international law is based on the first communicative function and on the long-established shared perception of the determinacy and solemnity of law. This is to embody and express shared ideas and understandings of the constitutional structure and legitimate aspirations of international society to its diverse members. By this function, international law indicates common positive rules of behaviour and induces convergence of behaviours of diverse international members, thereby contributing to the smooth management of international, transnational and intercivilizational relations, and to the realization of common ideas and aspirations of international society. This can be shown in two ways.

First, in most cases the basic structure of global or European international society after major wars is embodied in and expressed by peace treaties such as the Peace of Westphalia and the Versailles Treaty. The UN Charter is not a peace treaty, but shares a similar characteristic. Second, major human rights treaties such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 1966 as well as major global environment treaties such as the 1990 UN Framework Convention on Climate Change embody global aspirations shared by the overwhelming majority of members of international society in a legitimate and solemn manner. These ‘constitutional’ or ‘aspirational’ treaties, especially the latter, are not necessarily observed in a strict manner. Everybody knows that there is a gap between major human rights treaties and reality. Yet, no one can openly deny their legitimacy and authority. As such they *induce convergence, if not strict observance*, of the behaviour of diverse members of international society over a period of time.

For those who tend to think according to the domestic model, this may not appear to be satisfactory. They would argue that observance, not convergence, should be the objective of law. However, given the anarchical, diverse and unequal structure of international society, the fact that international law helps induce convergence by tremendously diverse members toward the shared goal should not be underestimated. Had there not been international law, even this limited function of converging diverse behaviours of diverse members in international society would have been impossible. The very attitude of examining and estimating functions of international law from a

domestic model perspective, which has been unconsciously accepted and taken for granted, must fundamentally be reconsidered in a critical manner.<sup>78</sup>

It is true that, like the first function, this second function can be fulfilled not only by general treaties but also by non-treaty agreements. The Yalta Agreement of 1945, the Universal Declaration of Human Rights of 1948, the Stockholm Declaration of 1972 and the Final Act of CSCE of 1975 are such examples. In the case of post-World War II structure, the Yalta Agreement, whose international legal character is doubtful, may be even more important than the UN Charter. As to overall normative impact on the behaviour of international actors, the Universal Declaration of Human Rights is even more powerful than the ICCPR and the ICESCR. So is the Stockholm Declaration *vis-à-vis* any global environmental treaties, including the Climate Change Convention. Some of the rules of the game between the two superpowers during the Cold War period may have such significance. In this way, the function of embodying the shared constitutional and aspirational understandings of international society can be fulfilled by non-treaty agreements as well.

However, international law has its own, distinctive merits in this function. International law is relatively more determinate than other norms and instruments. Moreover, international law embodies common or shared understandings of the members in international society in a more legitimate and explicit manner than other norms or instruments. These features can be demonstrated by comparing international law with 'universal (or international, or global) ethics', rules of the game and other possible candidates which can also fulfil this function. Take the rules of the game first. The rules of the game between the US and the Soviet Union on the use of nuclear weapons and the sphere of influence certainly constituted a 'constitutional' instrument avoiding an overall nuclear war during the Cold War period. Their overall significance might have been even higher than that of formal international legal rules on the use of force during the Cold War period. However, these rules existed in the form of tacit understandings between the politico-military leaders of the two superpowers. As such, they lacked the high degree of determinacy which treaties usually have. This flaw was revealed in the Cuban missile crisis. Because of the lack of determinacy of the rules, the leaders of each superpower found it difficult to interpret their counterparts' intentions correctly. Because of this difficulty they pushed the matter to the brink of nuclear war.

The relative indeterminacy of 'universal morality' or 'international (or global) ethics' in comparison with international law has been demonstrated earlier. In the case of non-treaty agreements adopted by highly authoritative and legitimate institutions such as the Universal Declaration of Human Rights of 1948 adopted by the UN General Assembly, the degree of determinacy of the norms embodied in these instruments is closer to that of those in treaties. They are sometimes superior to legal instruments in that they can express universally shared or aspirational ideas in a more lofty and impressive manner. Treaties must generally be formulated to respond to legalistic and technical requirements, and therefore tend to lack such loftiness. This is

<sup>78</sup> Onuma, *supra* note 72.

one of the reasons why non-treaty agreements have often been utilized. This fact, however, does not mean that international law does not fulfil the function of embodying the constitutional and aspirational understandings in international society. Together with such non-treaty instruments, international law has played, still plays, and will play this important function. Whether the members of international society should and do adopt the form of a treaty or a non-treaty agreement depends on overall considerations as to the following factors: the need for speedy promulgation; the number of possible adherents in the case of a treaty; to what extent it should be, and is, established in order to realize the expressed ideas; and so on. The study of international law, together with that of international relations, could contribute to choosing one of these forms by comparing their advantages and disadvantages in a particular circumstance.

### *C The Justifying and Legitimizing Function*

The third significant function of international law is justification and legitimation. Every state justifies international behaviour of its own and seeks to deny the legitimacy of the behaviour of opposing states. Even 'realist' international relations scholars or deniers of the relevance of international law tend to admit that states use international law as an instrument of justification. Or, they argue that the only meaningful role of international law is to justify the policy of states, especially to justify the policy of maintaining the status quo.<sup>79</sup> However, to recognize that international law is an instrument for justification of a state's policy constitutes only the first step of elucidating overall and divergent functions of justification and legitimation of international law. A far more elaborate analysis is needed.

As noted earlier, there exists a wide range of discretion in interpreting rules and principles of international law. When a number of governments take different interpretations, there exists a difference of persuasiveness in them depending on the determinacy, explicitness and nature of those rules, factual contexts, and other factors. International law cannot justify all behaviours of all states or governments.<sup>80</sup> Whether it can actually justify a particular act of a state depends on the factors noted above. Most policy makers consider whether they can effectively and persuasively justify a certain act by certain norms of international law when they want to take an action whose legality is doubtful. If they consider that it is difficult to justify it under international law, they have to choose between the two: either to give up this

<sup>79</sup> See, e.g., Morgenthau, *supra* note 4, at 87–88.

<sup>80</sup> The Manchurian Incident, the Viet-Nam War and the invasion of Kuwait by Iraq are examples in which Japan, the US and Iraq, respectively, could not effectively justify the use of force in international and/or domestic society. Even the US government, which usually enjoys the luxury of ignoring international law, could not help withdrawing their military forces from Viet-Nam because of harsh and increasing strictures both in international society and in the US itself. The reasons for this withdrawal varied, but one of them was a criticism that the US government was in violation of international law in sending the military forces under the pretext of collective self-defence and the invitation by the legitimate government and in conducting warfare in violation of important rules and principles of the law of war.

particular action, or to pay a cost of violation of international law, including reproaches and strictures from other governments, international organizations, domestic political rivals and opposition parties, media institutions, NGOs and ordinary citizens.

As also observed earlier, policy makers, especially those of powerful states, sometimes do take actions, knowing that the actions of their state are violating rules of international law. However, in such cases the fact that their state has acted in violation of international law remains, and that state will suffer from a number of negative consequences. They include international and domestic bad reputations, as well as sanctions and countermeasures under international law and other negative responses such as the suspension of economic aid, trade, and various kinds of other economic, financial, social and cultural activities from which most nations gain profit as members in international society. Even a powerful state such as the US generally seeks to avoid a bad reputation as a violator of international law because its policy makers know that such a bad reputation diminishes its power to influence other members in international society and that the bad reputation does count in domestic politics as well. In other words, they violate international law only when they calculate that it would be more profitable for them even at the cost of being criticized as a violator of international law. This calculation differs from person to person, society to society, time to time, rule to rule, and so on. The important thing is that policy makers do calculate the profits and costs of observing and violating international law. This means that international law *does matter* in policy making.

Moreover, a number of exchanges and resultant accumulation of various kinds of justifications contribute to the well-functioning of the 'market of ideas' in terms of international law. If conflicts between opposing nations are carried out as disputes between them expressed and justified in terms of international law, they demonstrate a relative persuasiveness of their claims not only to the conflicting parties but also to third parties, including other governments, international organizations, NGOs, and media institutions both in domestic and in international society. Therefore, an apparently unpersuasive interpretation tends to yield to a relatively more persuasive interpretation of international law. An apparently unreasonable interpretation of international law, even if it were carried out by the naked power of a powerful state at some time, may be abandoned later by that state because of its excessive political cost. Thus, the justificatory function of international law does not end in justification. In the long run, it could contribute to enhancing the legitimacy of the international legal system as a whole.<sup>81</sup>

<sup>81</sup> However, it is necessary for international society to guarantee equality of those who introduce arguments of international law to the market in order that the global 'market of ideas' in terms of international law functions well. Present international society lacks this precondition, because it has a huge asymmetry between those who can introduce their arguments far more easily and effectively through powerful public relations facilities of the government, media institutions such as CNN as well as academic publications such as the *American Journal of International Law*, and those who lack such powerful means of expressing their ideas. Thus, in the present setting of the international society, what is described in the text has a limited validity.

Further, since international law has long been referred to as law, international law is generally thought to share basic features of law such as consistency and fairness.<sup>82</sup> Because of this shared perception, justification in terms of international law contributes to the self-restraint of nations which use international law as an instrument of justification. When a state justifies a certain act by using a certain rule of international law, it is generally expected that the state should apply the rule in question to other states as well. Policy makers tend to refrain from taking an apparently unreasonable interpretation of international law because they know that opposing or rival states would take advantage of that interpretation in the future and that they would find it difficult to oppose it because they themselves have taken that interpretation. Again, in actual '*Realpolitik*' the use of a double standard is fairly common in international society. Still, policy makers seek to avoid the apparent use of a double standard as much as possible in order to avoid the reproaches and criticisms resulting therefrom. The very fact that they seek to avoid such reproaches reveals that the bad reputation resulting from the manipulation of international law does count in international society. Although the direct binding power of international law on states, especially on powerful states, is not necessarily strong enough, its indirect or reflective binding power can be recognized to a considerable degree.

I have outlined the *raison d'être* of international law as seen from its functional perspective. In my view, we could contribute both to the study of international law and that of international relations, if, from the perspective described above, we could elucidate the following factors: (1) what type of government can or cannot succeed in justifying its international behaviour; (2) by means of what kind of behaviour it takes (use of force, imposition of 'economic sanctions', prosecution of political criminals, etc.); (3) having regard for which domestic and international factors as being important, (4) through which international legal norms does that government seek to justify its behaviour, and (5) in relation to which societal formations (i.e., *vis-à-vis* international society as a whole, only friendly nations, its domestic society as a whole, the governing party, bureaucracy, domestic media or ordinary citizens, etc.) that government succeeds and in relation to which it fails to justify its behaviour.

Furthermore, we could also contribute to the study of international law as a normative science by seeking to answer the question of how we can promote compliance with international law by exploring the following issues: (1) Which international legal norms do we utilize? (2) Which government behaviour are we

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On the other hand, we should not be too pessimistic. Even if an apparently unreasonable assertion and interpretation prevails at a particular period of time, such an assertion and interpretation may well be criticized and eventually be abandoned in the long run. Although the present situation of international law on the rule of regulating use of force is discouraging because of the unilateralistic and imperialistic attitude of the US government (as of August 2002), this may be rectified in the long run.

<sup>82</sup> See the judgment rendered by the ICJ in the *Libya and Malta Continental Shelf Case*, saying that 'the justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability' (ICJ Reports (1985) at 39, para. 45).

seeking to regulate? (3) What kind of law-realizing mechanism are we trying to use? and (4) What kind of interpretative and legislative techniques are we going to employ?

The foregoing analysis is neither systematic nor comprehensive. As noted at the outset, the function of international law function to facilitate the peaceful settlement of international conflicts is not analysed here. Because the emphasis is placed on the instrumentalist perspective — functions of international law as a useful tool of a state and as an essential instrument of international society — the symbolic and ideological function of international law has not been sufficiently examined. Thus, this article may excessively emphasize the usefulness of international law, and tends to be excessively optimistic. Further, it fails to explore critically the function of international law as tacitly endorsing the present international order, which is state-centric, male-centric and West-centric, with a huge gap between the North and the South. In order to carry out this task of critical exploration, various perspectives such as transnational, feminist, postcolonial and intercivilizational, are needed.<sup>83</sup>

However, for a fundamental ideological critique to be meaningful, it must be demonstrated that international law actually functions as a useful instrument in international society. If international law did not function as a relevant factor in international relations, it could not even fulfil its role as an ideology justifying the international order. This article has sought to demonstrate such a *raison d'être* of international law by elucidating that (1) international law has been characterized as law by almost all parties concerned with the perception of various qualities of law, such as binding force, determinacy, coherence, and association with justice and fairness, and that therefore even sovereign states do not dare to deny such characteristics of international law, and, (2) international law has played various societal functions making use of the shared perception of such characteristics. It is hoped that this small piece can add some new perspectives to the rich body of research and discussions already conducted, and help stimulate further research and discussions which ought to follow in the future.

<sup>83</sup> The first three perspectives have already been provided by a number of international lawyers. As to the fourth one, see Onuma, *supra* note 1.