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The nature and development of international law

In the long march of mankind from the cave to the computer a central role has always been played by the idea of law – the idea that order is necessary and chaos inimical to a just and stable existence. Every society, whether it be large or small, powerful or weak, has created for itself a framework of principles within which to develop. What can be done, what cannot be done, permissible acts, forbidden acts, have all been spelt out within the consciousness of that community. Progress, with its inexplicable leaps and bounds, has always been based upon the group as men and women combine to pursue commonly accepted goals, whether these be hunting animals, growing food or simply making money.

Law is that element which binds the members of the community together in their adherence to recognised values and standards. It is both permissive in allowing individuals to establish their own legal relations with rights and duties, as in the creation of contracts, and coercive, as it punishes those who infringe its regulations. Law consists of a series of rules regulating behaviour, and reflecting, to some extent, the ideas and preoccupations of the society within which it functions.

And so it is with what is termed international law, with the important difference that the principal subjects of international law are nation-states, not individual citizens. There are many contrasts between the law within a country (municipal law) and the law that operates outside and between states, international organisations and, in certain cases, individuals.

International law itself is divided into conflict of laws (or private international law as it is sometimes called) and public international law (usually just termed international law).[1] The former deals with those cases, *within* particular legal systems, in which foreign elements obtrude, raising questions as to the application of foreign law or the role of foreign courts.[2]

[1] This term was first used by J. Bentham: see *Introduction to the Principles of Morals and Legislation*, London, 1780.

[2] See e.g. C. Cheshire and P. North, *Private International Law*, 13th edn, London, 1999.

For example, if two Englishmen make a contract in France to sell goods situated in Paris, an English court would apply French law as regards the validity of that contract. By contrast, public international law is not simply an adjunct of a legal order, but a separate system altogether,[3] and it is this field that will be considered in this book.

Public international law covers relations between states in all their myriad forms, from war to satellites, and regulates the operations of the many international institutions. It may be universal or general, in which case the stipulated rules bind all the states (or practically all depending upon the nature of the rule), or regional, whereby a group of states linked geographically or ideologically may recognise special rules applying only to them, for example, the practice of diplomatic asylum that has developed to its greatest extent in Latin America.[4] The rules of international law must be distinguished from what is called international comity, or practices such as saluting the flags of foreign warships at sea, which are implemented solely through courtesy and are not regarded as legally binding.[5] Similarly, the mistake of confusing international law with international morality must be avoided. While they may meet at certain points, the former discipline is a legal one both as regards its content and its form, while the concept of international morality is a branch of ethics. This does not mean, however, that international law can be divorced from its values.

In this chapter and the next, the characteristics of the international legal system and the historical and theoretical background necessary to a proper appreciation of the part to be played by the law in international law will be examined.

Law and politics in the world community

It is the legal quality of international law that is the first question to be posed. Each side to an international dispute will doubtless claim legal justification for its actions and within the international system there is no independent institution able to determine the issue and give a final decision.

Virtually everybody who starts reading about international law does so having learned or absorbed something about the principal characteristics of ordinary or domestic law. Such identifying marks would include the

[3] See the *Serbian Loans* case, PCIJ, Series A, No. 14, pp. 41–2.

[4] See further below, p. 92.

[5] *North Sea Continental Shelf* cases, ICJ Reports, 1969, p. 44; 41 ILR, p. 29. See also M. Akehurst, 'Custom as a Source of International Law', 47 BYIL, 1974–5, p. 1.

existence of a recognised body to legislate or create laws, a hierarchy of courts with compulsory jurisdiction to settle disputes over such laws and an accepted system of enforcing those laws. Without a legislature, judiciary and executive, it would seem that one cannot talk about a legal order.[6] And international law does not fit this model. International law has no legislature. The General Assembly of the United Nations comprising delegates from all the member states exists, but its resolutions are not legally binding save for certain of the organs of the United Nations for certain purposes.[7] There is no system of courts. The International Court of Justice does exist at The Hague but it can only decide cases when both sides agree[8] and it cannot ensure that its decisions are complied with. Above all there is no executive or governing entity. The Security Council of the United Nations, which was intended to have such a role in a sense, has at times been effectively constrained by the veto power of the five permanent members (USA; USSR, now the Russian Federation; China; France; and the United Kingdom).[9] Thus, if there is no identifiable institution either to establish rules, or to clarify them or see that those who break them are punished, how can what is called international law be law?

It will, of course, be realised that the basis for this line of argument is the comparison of domestic law with international law, and the assumption of an analogy between the national system and the international order. And this is at the heart of all discussions about the nature of international law.

At the turn of the nineteenth century, the English philosopher John Austin elaborated a theory of law based upon the notion of a sovereign issuing a command backed by a sanction or punishment. Since international law did not fit within that definition it was relegated to the category of 'positive morality'.[10] This concept has been criticised for oversimplifying and even confusing the true nature of law within a society and for overemphasising the role of the sanction within the system by linking it to every rule.[11] This is not the place for a comprehensive summary of Austin's

[6] See generally, R. Dias, *Jurisprudence*, 5th edn, London, 1985, and H. L. A. Hart, *The Concept of Law*, Oxford, 1961.

[7] See article 17(1) of the United Nations Charter. See also D. Johnson, 'The Effect of Resolutions of the General Assembly of the United Nations', 32 BYIL, 1955–6, p. 97 and below, chapter 22.

[8] See article 36 of the Statute of the International Court of Justice and below, chapter 19.

[9] See e.g. *Bowett's Law of International Institutions* (eds. P. Sands and P. Klein), 5th edn, London, 2001, and below, chapter 23.

[10] See J. Austin, *The Province of Jurisprudence Determined* (ed. H. L. A. Hart), London, 1954, pp. 134–42.

[11] See e.g. Hart, *Concept of Law*, chapter 10.

theory but the idea of coercion as an integral part of any legal order is a vital one that needs looking at in the context of international law.

The role of force

There is no unified system of sanctions[12] in international law in the sense that there is in municipal law, but there are circumstances in which the use of force is regarded as justified and legal. Within the United Nations system, sanctions may be imposed by the Security Council upon the determination of a threat to the peace, breach of the peace or act of aggression.[13] Such sanctions may be economic, for example those proclaimed in 1966 against Rhodesia,[14] or military as in the Korean war in 1950,[15] or indeed both, as in 1990 against Iraq.[16]

Coercive action within the framework of the UN is rare because it requires co-ordination amongst the five permanent members of the Security Council and this obviously needs an issue not regarded by any of the great powers as a threat to their vital interests.

Korea was an exception and joint action could only be undertaken because of the fortuitous absence of the USSR from the Council as a protest at the seating of the Nationalist Chinese representatives.[17]

Apart from such institutional sanctions, one may note the bundle of rights to take violent action known as self-help.[18] This procedure to resort to force to defend certain rights is characteristic of primitive systems of law with blood-feuds, but in the domestic legal order such procedures and

[12] See e.g. W. M. Reisman, 'Sanctions and Enforcement' in *The Future of the International Legal Order* (eds. C. Black and R. A. Falk), New York, 1971, p. 273; J. Brierly, 'Sanctions', 17 *Transactions of the Grotius Society*, 1932, p. 68; Hart, *Concept of Law*, pp. 211–21; A. D'Amato, 'The Neo-Positivist Concept of International Law', 59 AJIL, 1965, p. 321; G. Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement', 19 MLR, 1956, p. 1, and *The Effectiveness of International Decisions* (ed. S. Schwebel), Leiden, 1971.

[13] Chapter VII of the United Nations Charter. See below, chapter 22.

[14] Security Council resolution 221 (1966). Note also Security Council resolution 418 (1977) imposing a mandatory arms embargo on South Africa.

[15] Security Council resolutions of 25 June, 27 June and 7 July 1950. See D. W. Bowett, *United Nations Forces*, London, 1964.

[16] Security Council resolutions 661 and 678 (1990). See *The Kuwait Crisis: Basic Documents* (eds. E. Lauterpacht, C. Greenwood, M. Weller and D. Bethlehem), Cambridge, 1991, pp. 88 and 98. See also below, chapter 22.

[17] See E. Luard, *A History of the United Nations*, vol. I, *The Years of Western Domination 1945–55*, London, 1982, pp. 229–74, and below, chapter 22.

[18] See D. W. Bowett, *Self-Defence in International Law*, Manchester, 1958, and I. Brownlie, *International Law and the Use of Force by States*, Oxford, 1963.

methods are now within the exclusive control of the established authority. States may use force in self-defence, if the object of aggression, and may take action in response to the illegal acts of other states. In such cases the states themselves decide whether to take action and, if so, the extent of their measures, and there is no supreme body to rule on their legality or otherwise, in the absence of an examination by the International Court of Justice, acceptable to both parties, although international law does lay down relevant rules.[19]

Accordingly those writers who put the element of force to the forefront of their theories face many difficulties in describing the nature, or rather the legal nature of international law, with its lack of a coherent, recognised and comprehensive framework of sanctions. To see the sanctions of international law in the states' rights of self-defence and reprisals[20] is to misunderstand the role of sanctions within a system because they are at the disposal of the states, not the system itself. Neither must it be forgotten that the current trend in international law is to restrict the use of force as far as possible, thus leading to the absurd result that the more force is controlled in international society, the less legal international law becomes.

Since one cannot discover the nature of international law by reference to a definition of law predicated upon sanctions, the character of the international legal order has to be examined in order to seek to discover whether in fact states feel obliged to obey the rules of international law and, if so, why. If, indeed, the answer to the first question is negative, that states do not feel the necessity to act in accordance with such rules, then there does not exist any system of international law worthy of the name.

The international system[21]

The key to the search lies within the unique attributes of the international system in the sense of the network of relationships existing primarily, if not exclusively, between states recognising certain common principles

[19] See below, chapter 19. See also M. Barkin, *Law Without Sanctions*, New Haven, 1967.

[20] See e.g. H. Kelsen, *General Theory of Law and State*, London, 1946, pp. 328 ff.

[21] See L. Henkin, *How Nations Behave*, 2nd edn, New York, 1979, and Henkin, *International Law: Politics and Values*, Dordrecht, 1995; M. A. Kaplan and N. Katzenbach, *The Political Foundations of International Law*, New York, 1961; C. W. Jenks, *The Common Law of Mankind*, London, 1958; W. Friedmann, *The Changing Structure of International Law*, New York, 1964; A. Sheikh, *International Law and National Behaviour*, New York, 1974; O. Schachter, *International Law in Theory and Practice*, Dordrecht, 1991; T. M. Franck, *The Power of Legitimacy Among Nations*, Oxford, 1990; R. Higgins, *Problems and Process*, Oxford, 1994, and *Oppenheim's International Law* (eds. R. Y. Jennings and A. D. Watts), 9th edn, London, 1992, vol. I, chapter 1.

and ways of doing things.[22] While the legal structure within all but the most primitive societies is hierarchical and authority is vertical, the international system is horizontal, consisting of over 190 independent states, all equal in legal theory (in that they all possess the characteristics of sovereignty) and recognising no one in authority over them. The law is above individuals in domestic systems, but international law only exists as between the states. Individuals only have the choice as to whether to obey the law or not. They do not create the law. That is done by specific institutions. In international law, on the other hand, it is the states themselves that create the law and obey or disobey it.[23] This, of course, has profound repercussions as regards the sources of law as well as the means for enforcing accepted legal rules.

International law, as will be shown in succeeding chapters, is primarily formulated by international agreements, which create rules binding upon the signatories, and customary rules, which are basically state practices recognised by the community at large as laying down patterns of conduct that have to be complied with.

However, it may be argued that since states themselves sign treaties and engage in action that they may or may not regard as legally obligatory, international law would appear to consist of a series of rules from which states may pick and choose. Contrary to popular belief, states do observe international law, and violations are comparatively rare. However, such violations (like armed attacks and racial oppression) are well publicised and strike at the heart of the system, the creation and preservation of international peace and justice. But just as incidents of murder, robbery and rape do occur within national legal orders without destroying the system as such, so analogously assaults upon international legal rules point up the weaknesses of the system without denigrating their validity or their necessity. Thus, despite the occasional gross violation, the vast majority of the provisions of international law are followed.[24]

[22] As to the concept of 'international community', see e.g. G. Abi-Saab, 'Whither the International Community?', 9 EJIL, 1998, p. 248, and B. Simma and A. L. Paulus, 'The "International Community": Facing the Challenge of Globalisation', 9 EJIL, 1998, p. 266. See also P. Weil, 'Le Droit International en Quête de son Identité', 237 HR, 1992 VI, p. 25.

[23] This leads Rosenne to refer to international law as a law of co-ordination, rather than, as in internal law, a law of subordination, *Practice and Methods of International Law*, Dordrecht, 1984, p. 2.

[24] See H. Morgenthau, *Politics Among Nations*, 5th edn, New York, 1973, pp. 290–1; Henkin, *How Nations Behave*, pp. 46–9; J. Brierly, *The Outlook for International Law*, Oxford, 1944, p. 5, and P. Jessup, *A Modern Law of Nations*, New York, 1948, pp. 6–8.

In the daily routine of international life, large numbers of agreements and customs are complied with. However, the need is felt in the hectic interplay of world affairs for some kind of regulatory framework or rules network within which the game can be played, and international law fulfils that requirement. States feel this necessity because it imports an element of stability and predictability into the situation.

Where countries are involved in a disagreement or a dispute, it is handy to have recourse to the rules of international law even if there are conflicting interpretations since at least there is a common frame of reference and one state will be aware of how the other state will develop its argument. They will both be talking a common language and this factor of communication is vital since misunderstandings occur so easily and often with tragic consequences. Where the antagonists dispute the understanding of a particular rule and adopt opposing stands as regards its implementation, they are at least on the same wavelength and communicate by means of the same phrases. That is something. It is not everything, for it is a mistake as well as inaccurate to claim for international law more than it can possibly deliver. It can constitute a mutually understandable vocabulary book and suggest possible solutions which follow from a study of its principles. What it cannot do is solve every problem no matter how dangerous or complex merely by being there. International law has not yet been developed, if it ever will, to that particular stage and one should not exaggerate its capabilities while pointing to its positive features.

But what is to stop a state from simply ignoring international law when proceeding upon its chosen policy? Can a legal rule against aggression, for example, of itself prevail over political temptations? There is no international police force to prevent such an action, but there are a series of other considerations closely bound up with the character of international law which might well cause a potential aggressor to forbear.

There is the element of reciprocity at work and a powerful weapon it can be. States quite often do not pursue one particular course of action which might bring them short-term gains, because it could disrupt the mesh of reciprocal tolerance which could very well bring long-term disadvantages. For example, states everywhere protect the immunity of foreign diplomats for not to do so would place their own officials abroad at risk.[25] This constitutes an inducement to states to act reasonably and moderate

[25] See *Case Concerning United States Diplomatic and Consular Staff in Tehran*, ICJ Reports, 1980, p. 3; 61 ILR, p. 502. See also the US Supreme Court decision in *Boos* v. *Barry* 99 L. Ed. 2d 333, 345–6 (1988); 121 ILR, p. 499.

demands in the expectation that this will similarly encourage other states to act reasonably and so avoid confrontations. Because the rules can ultimately be changed by states altering their patterns of behaviour and causing one custom to supersede another, or by mutual agreement, a certain definite reference to political life is retained. But the point must be made that a state, after weighing up all possible alternatives, might very well feel that the only method to protect its vital interests would involve a violation of international law and that responsibility would just have to be taken. Where survival is involved international law may take second place.

Another significant factor is the advantages, or 'rewards', that may occur in certain situations from an observance of international law. It may encourage friendly or neutral states to side with one country involved in a conflict rather than its opponent, and even take a more active role than might otherwise have been the case. In many ways, it is an appeal to public opinion for support and all states employ this tactic.

In many ways, it reflects the esteem in which law is held. The Soviet Union made considerable use of legal arguments in its effort to establish its non-liability to contribute towards the peacekeeping operations of the United Nations,[26] and the Americans too, justified their activities with regard to Cuba[27] and Vietnam[28] by reference to international law. In some cases it may work and bring considerable support in its wake, in many cases it will not, but in any event the very fact that all states do it is a constructive sign.

A further element worth mentioning in this context is the constant formulation of international business in characteristically legal terms. Points of view and disputes, in particular, are framed legally with references to precedent, international agreements and even the opinions of juristic authors. Claims are pursued with regard to the rules of international law and not in terms of, for example, morality or ethics.[29] This has brought into being a class of officials throughout governmental departments, in

[26] See *Certain Expenses of the United Nations*, ICJ Reports, 1962, p. 151; 34 ILR, p. 281, and R. Higgins, *United Nations Peace-Keeping; Documents and Commentary*, Oxford, 4 vols., 1969–81.

[27] See e.g. A. Chayes, *The Cuban Missile Crisis*, Oxford, 1974, and Henkin, *How Nations Behave*, pp. 279–302.

[28] See e.g. *The Vietnam War and International Law* (ed. R. A. Falk), Princeton, 4 vols., 1968–76; J. N. Moore, *Law and the Indo-China War*, Charlottesville, 1972, and Henkin, *How Nations Behave*, pp. 303–12.

[29] See Hart, *Concept of Law*, p. 223.

addition to those working in international institutions, versed in international law and carrying on the everyday functions of government in a law-oriented way. Many writers have, in fact, emphasised the role of officials in the actual functioning of law and the influence they have upon the legal process.[30]

Having come to the conclusion that states do observe international law and will usually only violate it on an issue regarded as vital to their interests, the question arises as to the basis of this sense of obligation.[31] The nineteenth century, with its business-oriented philosophy, stressed the importance of the contract, as the legal basis of an agreement freely entered into by both (or all) sides, and this influenced the theory of consent in international law.[32] States were independent, and free agents, and accordingly they could only be bound with their own consent. There was no authority in existence able theoretically or practically to impose rules upon the various nation-states. This approach found its extreme expression in the theory of auto-limitation, or self-limitation, which declared that states could only be obliged to comply with international legal rules if they had first agreed to be so obliged.[33]

Nevertheless, this theory is most unsatisfactory as an account of why international law is regarded as binding or even as an explanation of the international legal system.[34] To give one example, there are about 100 states that have come into existence since the end of the Second World War and by no stretch of the imagination can it be said that such states have consented to all the rules of international law formed prior to their establishment. It could be argued that by 'accepting independence', states consent to all existing rules, but to take this view relegates consent to the role of a mere fiction.[35]

[30] See e.g. M. S. McDougal, H. Lasswell and W. M. Reisman, 'The World Constitutive Process of Authoritative Decision' in *International Law Essays* (eds. M. S. McDougal and W. M. Reisman), New York, 1981, p. 191.

[31] See e.g. J. Brierly, *The Basis of Obligation in International Law*, Oxford, 1958.

[32] See W. Friedmann, *Legal Theory*, 5th edn, London, 1967, pp. 573–6. See also the *Lotus* case, PCIJ, Series A, No. 10, p. 18.

[33] E.g. G. Jellinek, *Allgemeine Rechtslehre*, Berlin, 1905.

[34] See also Hart, *Concept of Law*, pp. 219–20. But see P. Weil, 'Towards Relative Normativity in International Law?', 77 AJIL, 1983, p. 413 and responses thereto, e.g. R. A. Falk, 'To What Extent are International Law and International Lawyers Ideologically Neutral?' in *Change and Stability in International Law-Making* (eds. A. Cassese and J. Weiler), 1989, p. 137, and A. Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making', 12 Australian YIL, 1992, p. 22.

[35] See further below, p. 88.

This theory also fails as an adequate explanation of the international legal system, because it does not take into account the tremendous growth in international institutions and the network of rules and regulations that have emerged from them within the last generation.

To accept consent as the basis for obligation in international law[36] begs the question as to what happens when consent is withdrawn. The state's reversal of its agreement to a rule does not render that rule optional or remove from it its aura of legality. It merely places that state in breach of its obligations under international law if that state proceeds to act upon its decision. Indeed, the principle that agreements are binding (*pacta sunt servanda*) upon which all treaty law must be based cannot itself be based upon consent.[37]

One current approach to this problem is to refer to the doctrine of consensus.[38] This reflects the influence of the majority in creating new norms of international law and the acceptance by other states of such new rules. It attempts to put into focus the change of emphasis that is beginning to take place from exclusive concentration upon the nation-state to a consideration of the developing forms of international co-operation where such concepts as consent and sanction are inadequate to explain what is happening.

Of course, one cannot ignore the role of consent in international law. To recognise its limitations is not to neglect its significance. Much of international law is constituted by states expressly agreeing to specific normative standards, most obviously by entering into treaties. This cannot be minimised. Nevertheless, it is preferable to consider consent as important not only with regard to specific rules specifically accepted (which is not the sum total of international law, of course) but in the light of the approach of states generally to the totality of rules, understandings, patterns of behaviour and structures underpinning and constituting the international system.[39] In a broad sense, states accept or consent to the general system of international law, for in reality without that no such system could possibly operate. It is this approach which may be characterised as consensus

[36] See e.g. J. S. Watson, 'State Consent and the Sources of International Obligation', PASIL, 1992, p. 108.

[37] See below, chapter 3.

[38] See e.g. A. D'Amato, 'On Consensus', 8 Canadian YIL, 1970, p. 104. Note also the 'gentleman's agreement on consensus' in the Third UN Conference on the Law of the Sea: see L. Sohn, 'Voting Procedures in United Nations Conference for the Codification of International Law', 69 AJIL, 1975, p. 318, and UN Doc. A/Conf.62/WP.2.

[39] See e.g. J. Charney, 'Universal International Law', 87 AJIL, 1993, p. 529.

or the essential framework within which the demand for individual state consent is transmuted into community acceptance.

It is important to note that while states from time to time object to particular rules of international law and seek to change them, no state has sought to maintain that it is free to object to the system as a whole. Each individual state, of course, has the right to seek to influence by word or deed the development of specific rules of international law, but the creation of new customary rules is not dependent upon the express consent of each particular state.

The function of politics

It is clear that there can never be a complete separation between law and policy. No matter what theory of law or political philosophy is professed, the inextricable bonds linking law and politics must be recognised.

Within developed societies a distinction is made between the formulation of policy and the method of its enforcement. In the United Kingdom, Parliament legislates while the courts adjudicate and a similar division is maintained in the United States between the Congress and the courts system. The purpose of such divisions, of course, is to prevent a concentration of too much power within one branch of government. Nevertheless, it is the political branch which makes laws and in the first place creates the legal system. Even within the hierarchy of courts, the judges have leeway in interpreting the law and in the last resort make decisions from amongst a number of alternatives.[40] This position, however, should not be exaggerated because a number of factors operate to conceal and lessen the impact of politics upon the legal process. Foremost amongst these is the psychological element of tradition and the development of the so-called 'law-habit'.[41] A particular legal atmosphere has been created, which is buttressed by the political system and recognises the independent existence of law institutions and methods of operation characterised as 'just' or 'legal'. In most countries overt interference with the juridical process would be regarded as an attack upon basic principles and hotly contested. The use of legal language and accepted procedures together with the pride of the legal profession reinforce the system and emphasise the degree

[40] See e.g. R. Dworkin, *Taking Rights Seriously*, London, 1977.

[41] See e.g. K. Llewellyn, *The Common Law Tradition*, Boston, 1960, and generally D. Lloyd, *Introduction to Jurisprudence*, 4th edn, London, 1979.

of distance maintained between the legislative–executive organs and the judicial structure.[42]

However, when one looks at the international legal scene the situation changes. The arbiters of the world order are, in the last resort, the states and they both make the rules (ignoring for the moment the secondary, if growing, field of international organisations) and interpret and enforce them.

While it is possible to discern an 'international legal habit' amongst governmental and international officials, the machinery necessary to enshrine this does not exist.

Politics is much closer to the heart of the system than is perceived within national legal orders, and power much more in evidence.[43] The interplay of law and politics in world affairs is much more complex and difficult to unravel, and signals a return to the earlier discussion as to why states comply with international rules. Power politics stresses competition, conflict and supremacy and adopts as its core the struggle for survival and influence.[44] International law aims for harmony and the regulation of disputes. It attempts to create a framework, no matter how rudimentary, which can act as a kind of shock-absorber clarifying and moderating claims and endeavouring to balance interests. In addition, it sets out a series of principles declaring how states should behave. Just as any domestic community must have a background of ideas and hopes to aim at, even if few can be or are ever attained, so the international community, too, must bear in mind its ultimate values.

However, these ultimate values are in a formal sense kept at arm's length from the legal process. As the International Court noted in the *South-West Africa* case,[45] 'It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.'[46]

International law cannot be a source of instant solutions to problems of conflict and confrontation because of its own inherent weaknesses

[42] See P. Stein and J. Shand, *Legal Values in Western Society*, Edinburgh, 1974.

[43] See generally Henkin, *How Nations Behave*, and Schachter, *International Law*, pp. 5–9.

[44] See G. Schwarzenberger, *Power Politics*, 3rd edn, London, 1964, and Schwarzenberger, *International Law*, 3rd edn, London, 1957, vol. I, and Morgenthau, *Politics Among Nations*.

[45] ICJ Reports, 1966, pp. 6, 34.

[46] But see Higgins' criticism that such a formulation may be question-begging with regard to the identity of such 'limits of its own discipline', *Problems*, p. 5.

in structure and content. To fail to recognise this encourages a utopian approach which, when faced with reality, will fail.[47] On the other hand, the cynical attitude with its obsession with brute power is equally inaccurate, if more depressing.

It is the medium road, recognising the strength and weakness of international law and pointing out what it can achieve and what it cannot, which offers the best hope. Man seeks order, welfare and justice not only within the state in which he lives, but also within the international system in which he lives.

Historical development[48]

The foundations of international law (or the law of nations) as it is understood today lie firmly in the development of Western culture and political organisation.

The growth of European notions of sovereignty and the independent nation-state required an acceptable method whereby inter-state relations could be conducted in accordance with commonly accepted standards of

[47] Note, of course, the important distinction between the existence of an obligation under international law and the question of the enforcement of that obligation. Problems with regard to enforcing a duty cannot affect the legal validity of that duty: see e.g. Judge Weeramantry's Separate Opinion in the Order of 13 September 1993, in the *Bosnia* case, ICJ Reports, 1993, pp. 325, 374; 95 ILR, pp. 43, 92.

[48] See in particular A. Nussbaum, *A Concise History of the Law of Nations*, rev. edn, New York, 1954; *Encyclopedia of Public International Law* (ed. R. Bernhardt), Amsterdam, 1984, vol. VII, pp. 127–273; J. W. Verzijl, *International Law in Historical Perspective*, Leiden, 10 vols., 1968–79, and M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960*, Cambridge, 2001. See also W. Grewe, *The Epochs of International Law* (trans. and rev. M. Byers), New York, 2000; A. Cassese, *International Law in a Divided World*, Oxford, 1986, and Cassese, *International Law*, 2nd edn, Oxford, 2005, chapter 2; Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, p. 41; H. Thierry, 'L'Evolution du Droit International', 222 HR, 1990 III, p. 9; P. Guggenheim, 'Contribution à l'Histoire des Sources du Droit des Gens', 94 HR, 1958 II, p. 5; A. Truyol y Serra, *Histoire de Droit International Public*, Paris, 1995; D. Gaurier, *Histoire du Droit International Public*, Rennes, 2005; D. Korff, 'Introduction à l'Histoire de Droit International Public', 1 HR, 1923 I, p. 1; P. Le Fur, 'Le Développement Historique de Droit International', 41 HR, 1932 III, p. 501; O. Yasuaki, 'When was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilisational Perpective', 2 *Journal of the History of International Law*, 2000, p. 1, and A. Kemmerer, 'The Turning Aside: On International Law and its History' in *Progress in International Organisation* (eds. R. A. Miller and R. Bratspies), Leiden, 2008, p. 71. For a general bibliography, see P. Macalister-Smith and J. Schwietzke, 'Literature and Documentary Sources relating to the History of International Law', 1 *Journal of the History of International Law*, 1999, p. 136.

behaviour, and international law filled the gap. But although the law of nations took root and flowered with the sophistication of Renaissance Europe, the seeds of this particular hybrid plant are of far older lineage. They reach far back into history.

Early origins

While the modern international system can be traced back some 400 years, certain of the basic concepts of international law can be discerned in political relationships thousands of years ago.[49] Around 2100 BC, for instance, a solemn treaty was signed between the rulers of Lagash and Umma, the city-states situated in the area known to historians as Mesopotamia. It was inscribed on a stone block and concerned the establishment of a defined boundary to be respected by both sides under pain of alienating a number of Sumerian gods.[50] The next major instance known of an important, binding, international treaty is that concluded over 1,000 years later between Rameses II of Egypt and the king of the Hittites for the establishment of eternal peace and brotherhood.[51] Other points covered in that agreement signed, it would seem, at Kadesh, north of Damascus, included respect for each other's territorial integrity, the termination of a state of aggression and the setting up of a form of defensive alliance.

Since that date many agreements between the rival Middle Eastern powers were concluded, usually aimed at embodying in a ritual form a state of subservience between the parties or attempting to create a political alliance to contain the influence of an over-powerful empire.[52]

[49] See D. J. Bederman, *International Law in Antiquity*, Cambridge, 2001.

[50] Nussbaum, *Law of Nations*, pp. 1–2. Note the discovery in the excavated city of Ebla, the capital of a civilisation at least 4,500 years old, of a copy of a political treaty between Ebla and the city of Abarsal: see *Times Higher Education Supplement*, 19 May 1995, p. 20. See also R. Cohen, *On Diplomacy in the Ancient Near East: The Amarna Letters*, Discussion Paper of the Centre for the Study of Diplomacy, University of Leicester, 1995; O. Butkevych, 'History of Ancient International Law: Challenges and Prospects', 5 *Journal of the History of International Law*, 2003, p. 189; A. Altman, 'Tracing the Earliest Recorded Concepts of International Law. The Early Dynastic Period in Southern Mesopotamia', 6 *Journal of the History of International Law*, 2004, p. 153, and 'Tracing the Earliest Recorded Concepts of International Law. (2) The Old Akkadian and Ur III Periods in Mesopotamia', 7 *Journal of the History of International Law*, 2005, p. 115.

[51] Nussbaum, *Law of Nations*, pp. 1–2.

[52] Preiser emphasises that the era between the seventeenth and fifteenth centuries BC witnessed something of a competing state system involving five independent (at various times) states: Bernhardt, *Encyclopedia*, vol. VII, pp. 133–4.

The role of ancient Israel must also be noted. A universal ethical stance coupled with rules relating to warfare were handed down to other peoples and religions and the demand for justice and a fair system of law founded upon strict morality permeated the thought and conduct of subsequent generations.[53] For example, the Prophet Isaiah declared that sworn agreements, even where made with the enemy, must be performed.[54] Peace and social justice were the keys to man's existence, not power.

After much neglect, there is now more consideration of the cultures and standards that evolved, before the birth of Christ, in the Far East, in the Indian[55] and Chinese[56] civilisations. Many of the Hindu rules displayed a growing sense of morality and generosity and the Chinese Empire devoted much thought to harmonious relations between its constituent parts. Regulations controlling violence and the behaviour of varying factions with regard to innocent civilians were introduced and ethical values instilled in the education of the ruling classes. In times of Chinese dominance, a regional tributary-states system operated which fragmented somewhat in times of weakness, but this remained culturally alive for many centuries.

However, the predominant approach of ancient civilisations was geographically and culturally restricted. There was no conception of an

[53] See P. Weil, 'Le Judaisme et le Développement du Droit International', 151 HR, 1976, p. 253, and S. Rosenne, 'The Influence of Judaism on International Law', *Nederlands Tijdschrift voor Internationaal Recht*, 1958, p. 119.

[54] See Nussbaum, *Law of Nations*, p. 3.

[55] *Ibid.* See also C. H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies*, Leiden, 1967, and Alexandrowicz, 'The Afro-Asian World and the Law of Nations (Historical Aspects)', 123 HR, 1967, p. 117; L. Chatterjee, *International Law and Inter-State Relations in Ancient India*, 1958; Nagendra Singh, 'The Distinguishing Characteristics of the Concept of the Law of Nations as it Developed in Ancient India', *Liber Amicorum for Lord Wilberforce* (eds. A. Bos and I. Brownlie), Oxford, 1987, p. 91; R. P. Anand, *International Law and the Developing Countries*, The Hague, 1987; *International Law and Practice in Ancient India* (ed. H. S. Bhatia), New Delhi, 1977; Nagendra Singh, *India and International Law*, New Delhi, 1969, and P. Bandyopadhyay, *International Law and Custom in Ancient India*, New Delhi, 1982.

[56] Nussbaum, *Law of Nations*, p. 4; Liu Tchoan Pas, *Le Droit des Gens et de la Chine Antique*, Paris, 2 vols., 1926; P. Gong, *The Standard of 'Civilisation' in International Society*, 1984, pp. 130–63; pp. 164–200 with regard to Japan; pp. 201–37 with regard to Siam; I. C. Y. Hsu, *China's Entrance into the Family of Nations*, Harvard, 1960; K. Iriye, 'The Principles of International Law in the Light of Confucian Doctrine', 120 HR, 1967, p. 1, and Wang Tieya, 'International Law in China', 221 HR, 1990 II, p. 195. See also C. F. Amerasinghe, 'South Asian Antecedents of International Law' in *International Law – Theory and Practice* (ed. K. Wellens), The Hague, 1998, p. 3, and E. Y.-J. Lee, 'Early Development of Modern International Law in East Asia – With Special Reference to China, Japan and Korea', 4 *Journal of the History of International Law*, 2002, p. 42.

international community of states co-existing within a defined framework. The scope for any 'international law' of states was extremely limited and all that one can point to is the existence of certain ideals, such as the sanctity of treaties, which have continued to this day as important elements in society. But the notion of a universal community with its ideal of world order was not in evidence.

The era of classical Greece, from about the sixth century BC and onwards for a couple of hundred years, has, one must note, been of overwhelming significance for European thought. Its critical and rational turn of mind, its constant questioning and analysis of man and nature and its love of argument and debate were spread throughout Europe and the Mediterranean world by the Roman Empire which adopted Hellenic culture wholesale, and penetrated Western consciousness with the Renaissance. However, Greek awareness was limited to their own competitive city-states and colonies. Those of different origin were barbarians not deemed worthy of association.

The value of Greece in a study of international law lies partly in the philosophical, scientific and political analyses bequeathed to mankind and partly in the fascinating state of inter-relationship built up within the Hellenistic world.[57] Numerous treaties linked the city-states together in a network of commercial and political associations. Rights were often granted to the citizens of the states in each other's territories and rules regarding the sanctity and protection of diplomatic envoys developed. Certain practices were essential before the declaration of war, and the horrors of war were somewhat ameliorated by the exercise, for example, of religious customs regarding sanctuaries. But no overall moral approach similar to those emerging from Jewish and Hindu thought, particularly, evolved. No sense of a world community can be traced to Greek ideology in spite of the growth of Greek colonies throughout the Mediterranean area. This was left to the able administrators of the Roman Empire.[58]

The Romans had a profound respect for organisation and the law.[59] The law knitted together their empire and constituted a vital source of

[57] Nussbaum, *Law of Nations*, pp. 5–9, and A. Lanni, 'The Laws of War in Ancient Greece', *Harvard Law School Public Law Research Paper No. 07-24*, 2007. See also G. Ténékidès, 'Droit International et Communautés Fédérales dans la Grèce des Cités', 90 HR, 1956, p. 469; S. L. Ager, *Interstate Arbitrations in the Greek World, 337-90 BC*, Berkeley, 1996, and Bernhardt, *Encyclopedia*, vol. VII, pp. 154–6.

[58] Bernhardt, *Encyclopedia*, vol. VII, pp. 136–9, and Nussbaum, *Law of Nations*, pp. 10–16.

[59] See e.g. A. Jolowicz, *Historical Introduction to Roman Law*, 3rd edn, London, 1972. See also A. Watson, *International Law in Archaic Rome*, Baltimore, 1993.

reference for every inhabitant of the far-flung domain. The early Roman law (the *jus civile*) applied only to Roman citizens. It was formalistic and hard and reflected the status of a small, unsophisticated society rooted in the soil.

It was totally unable to provide a relevant background for an expanding, developing nation. This need was served by the creation and progressive augmentation of the *jus gentium*. This provided simplified rules to govern the relations between foreigners, and between foreigners and citizens. The instrument through which this particular system evolved was the official known as the Praetor Peregrinus, whose function it was to oversee all legal relationships, including bureaucratic and commercial matters, within the empire.

The progressive rules of the *jus gentium* gradually overrode the narrow *jus civile* until the latter system ceased to exist. Thus, the *jus gentium* became the common law of the Roman Empire and was deemed to be of universal application.

It is this all-embracing factor which so strongly distinguishes the Roman from the Greek experience, although, of course, there was no question of the acceptance of other nations on a basis of equality and the *jus gentium* remained a 'national law' for the Roman Empire.

One of the most influential of Greek concepts taken up by the Romans was the idea of Natural Law.[60] This was formulated by the Stoic philosophers of the third century BC and their theory was that it constituted a body of rules of universal relevance. Such rules were rational and logical, and because the ideas and precepts of the 'law of nature' were rooted in human intelligence, it followed that such rules could not be restricted to any nation or any group but were of worldwide relevance. This element of universality is basic to modern doctrines of international law and the Stoic elevation of human powers of logical deduction to the supreme pinnacle of 'discovering' the law foreshadows the rational philosophies of the West. In addition to being a fundamental concept in legal theory, Natural Law is vital to an understanding of international law, as well as being an indispensible precursor to contemporary concern with human rights.

Certain Roman philosophers incorporated those Greek ideas of Natural Law into their own legal theories, often as a kind of ultimate justification

[60] See e.g. Lloyd, *Introduction to Jurisprudence*, pp. 79–169.

of the *jus gentium*, which was deemed to enshrine rational principles common to all civilised nations.

However, the law of nature was held to have an existence over and above that of the *jus gentium*. This led to much confusion over the exact relationship between the two ideas and different Roman lawyers came to different conclusions as to their identity and characteristics. The important factors though that need to be noted are the theories of the universality of law and the rational origins of legal rules that were founded, theoretically at least, not on superior force but on superior reason.

The classical rules of Roman law were collated in the *Corpus Juris Civilis*, a compilation of legal material by a series of Byzantine philosophers completed in AD 534.[61] Such a collection was to be invaluable when the darkness of the early Middle Ages, following the Roman collapse, began gradually to evaporate. For here was a body of developed laws ready made and awaiting transference to an awakening Europe.

At this stage reference must be made to the growth of Islam.[62] Its approach to international relations and law was predicated upon a state of hostility towards the non-Moslem world and the concept of unity, Dar al-Islam, as between Moslem countries. Generally speaking, humane rules of warfare were developed and the 'peoples of the book' (Jews and Christians) were treated better than non-believers, although in an inferior position to Moslems. Once the period of conquest was over and power was consolidated, norms governing conduct with non-Moslem states began to develop. The law dealing with diplomats was founded upon notions of hospitality and safety (*aman*), while rules governing international agreements grew out of the concept of respecting promises made.[63]

[61] See generally with regard to Byzantium, M. De Taube, 'L'Apport de Byzance au Développement du Droit International Occidental', 67 HR, 1939, p. 233, and S. Verosta, 'International Law in Europe and Western Asia between 100–650 AD', 113 HR, 1964, p. 489.

[62] See e.g. M. Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach*, The Hague, 1968; A. Draz, 'Le Droit International Public et l'Islam', 5 *Revue Égyptienne de Droit International*, p. 17; C. Stumpf, 'Christian and Islamic Traditions of Public International Law', 7 *Journal of the History of International Law*, 2005, p. 69; H. Khadduri, 'Islam and the Modern Law of Nations', 50 AJIL, 1956, p. 358, and Khadduri, *War and Peace in the Law of Islam*, 2nd edn, Baltimore, 1962, and S. Mahmassani, 'The Principles of International Law in the Light of Islamic Doctrine', 117 HR, 1966, p. 205. See also 'L'Asile et les Refugiés dans la Tradition Musulmane', Report of the Sixty-Ninth Conference, International Law Association, London, 2000, p. 305, and Y. Ben Achour Yadh, 'La Civilisation Islamique et le Droit International', RGDIP, 2006, p. 19.

[63] See Bernhardt, *Encyclopedia*, vol. VII, pp. 141–2, and Nussbaum, *Law of Nations*, pp. 51–4.

The Middle Ages and the Renaissance

The Middle Ages were characterised by the authority of the organised Church and the comprehensive structure of power that it commanded.[64] All Europe was of one religion, and the ecclesiastical law applied to all, notwithstanding tribal or regional affiliations. For much of the period, there were struggles between the religious authorities and the rulers of the Holy Roman Empire.

These conflicts were eventually resolved in favour of the Papacy, but the victory over secularism proved of relatively short duration. Religion and a common legacy derived from the Roman Empire were strongly unifying influences, while political and regional rivalries were not. But before a recognised system of international law could be created, social changes were essential.

Of particular importance during this era were the authority of the Holy Roman Empire and the supranational character of canon law.[65] Nevertheless, commercial and maritime law developed apace. English law established the *Law Merchant*, a code of rules covering foreign traders, and this was declared to be of universal application.[66]

Throughout Europe, mercantile courts were set up to settle disputes between tradesmen at the various fairs, and while it is not possible to state that a Continental *Law Merchant* came into being, a network of common regulations and practices weaved its way across the commercial fabric of Europe and constituted an embryonic international trade law.[67]

Similarly, maritime customs began to be accepted throughout the Continent. Founded upon the Rhodian Sea Law, a Byzantine work, many of whose rules were enshrined in the Rolls of Oleron in the twelfth century, and other maritime textbooks, a series of commonly applied customs relating to the sea permeated the naval powers of the Atlantic and Mediterranean coasts.[68]

[64] Nussbaum, *Law of Nations*, pp. 17–23, and Bernhardt, *Encyclopedia*, vol. VII, pp. 143–9.

[65] Note in particular the influence of the Church on the rules governing warfare and the binding nature of agreements: see Nussbaum, *Law of Nations*, pp. 17–18, and Bernhardt *Encyclopedia*, vol. VII, pp. 146–7. See also M. Keen, *The Laws of War in the Late Middle Ages*, London, 1965.

[66] See G. Holdsworth, *A History of English Law*, London, 1924, vol. 5, pp. 60–3.

[67] *Ibid.*, pp. 63–129.

[68] Nussbaum, *Law of Nations*, pp. 29–31. Note also the influence of the Consolato del Mare, composed in Barcelona in the mid-fourteenth century, and the Maritime Code of Wisby (*c.* 1407) followed by the Hanseatic League.

Such commercial and maritime codes, while at this stage merely expressions of national legal systems, were amongst the forerunners of international law because they were created and nurtured against a backcloth of cross-national contacts and reflected the need for rules that would cover international situations.

Such rules, growing out of the early Middle Ages, constituted the seeds of international law, but before they could flourish, European thought had first to be developed by that intellectual explosion known as the Renaissance.

This complex of ideas changed the face of European society and ushered in the modern era of scientific, humanistic and individualistic thought.[69]

The collapse of the Byzantine Empire centred on Constantinople before the Turkish armies in 1453 drove many Greek scholars to seek sanctuary in Italy and enliven Western Europe's cultural life. The introduction of printing during the fifteenth century provided the means to disseminate knowledge, and the undermining of feudalism in the wake of economic growth and the rise of the merchant classes provided the background to the new inquiring attitudes taking shape.

Europe's developing self-confidence manifested itself in a sustained drive overseas for wealth and luxury items. By the end of the fifteenth century, the Arabs had been ousted from the Iberian peninsula and the Americas reached.

The rise of the nation-states of England, France and Spain in particular characterised the process of the creation of territorially consolidated independent units, in theory and doctrine, as well as in fact. This led to a higher degree of interaction between sovereign entities and thus the need to regulate such activities in a generally acceptable fashion. The pursuit of political power and supremacy became overt and recognised, as Machiavelli's *The Prince* (1513) demonstrated.

The city-states of Italy struggled for supremacy and the Papacy too became a secular power. From these hectic struggles emerged many of the staples of modern international life: diplomacy, statesmanship, the theory of the balance of power and the idea of a community of states.[70]

Notions such as these are immediately appreciable and one can identify with the various manoeuvres for political supremacy. Alliances, betrayals, manipulations of state institutions and the drive for power are not unknown to us. We recognise the roots of our society.

[69] See e.g. Friedmann, *Changing Structure*, pp. 114–16.
[70] See e.g. G. Mattingley, *Renaissance Diplomacy*, London, 1955.

It was the evolution of the concept of an international community of separate, sovereign, if competing, states, that marks the beginning of what is understood by international law. The Renaissance bequeathed the prerequisites of independent, critical thought and a humanistic, secular approach to life as well as the political framework for the future. But it is the latter factor which is vital to the subsequent growth of international law. The Reformation and the European religious wars that followed emphasised this, as did the growing power of the nations. In many ways these wars marked the decline of a continental system founded on religion and the birth of a continental system founded on the supremacy of the state.

Throughout these countries the necessity was felt for a new conception of human as well as state relationships. This search was precipitated, as has been intimated, by the decline of the Church and the rise of what might be termed 'free-thinking'. The theory of international law was naturally deeply involved in this reappraisal of political life and it was tremendously influenced by the rediscovery of Greco-Roman ideas. The Renaissance stimulated a rebirth of Hellenic studies and ideas of Natural Law, in particular, became popular.

Thus, a distinct value-system to underpin international relations was brought into being and the law of nations was heralded as part of the universal law of nature.

With the rise of the modern state and the emancipation of international relations, the doctrine of sovereignty emerged. This concept, first analysed systematically in 1576 in the *Six Livres de la République* by Jean Bodin, was intended to deal with the structure of authority within the modern state. Bodin, who based his study upon his perception of the politics of Europe rather than on a theoretical discussion of absolute principles, emphasised the necessity for a sovereign power within the state that would make the laws. While such a sovereign could not be bound by the laws he himself instituted, he was subject to the laws of God and of nature.[71]

The idea of the sovereign as supreme legislator was in the course of time transmuted into the principle which gave the state supreme power vis-à-vis other states. The state was regarded as being above the law. Such

[71] See A. Gardot, 'Jean Bodin – Sa Place Parmi les Fondateurs du Droit International', 50 HR, 1934, p. 549. See also, for a discussion of sovereignty and the treaty-making power in the late middle ages, T. Meron, 'The Authority to Make Treaties in the Late Middle Ages', 89 AJIL, 1995, p. 1.

notions as these formed the intellectual basis of the line of thought known as positivism which will be discussed later.[72]

The early theorists of international law were deeply involved with the ideas of Natural Law and used them as the basis of their philosophies. Included within that complex of Natural Law principles from which they constructed their theories was the significant merging of Christian and Natural Law ideas that occurred in the philosophy of St Thomas Aquinas.[73] He maintained that Natural Law formed part of the law of God, and was the participation by rational creatures in the Eternal Law. It complemented that part of the Eternal Law which had been divinely revealed. Reason, declared Aquinas, was the essence of man and thus must be involved in the ordering of life according to the divine will. Natural Law was the fount of moral behaviour as well as of social and political institutions, and it led to a theory of conditional acceptance of authority with unjust laws being unacceptable. Aquinas' views of the late thirteenth century can be regarded as basic to an understanding of present Catholic attitudes, but should not be confused with the later interpretation of Natural Law which stressed the concepts of natural rights.

It is with such an intellectual background that Renaissance scholars approached the question of the basis and justification of a system of international law. Maine, a British historical lawyer, wrote that the birth of modern international law was the grandest function of the law of nature and while that is arguable, the point must be taken.[74] International law began to emerge as a separate topic to be studied within itself, although derived from the principles of Natural Law.

The founders of modern international law

The essence of the new approach to international law can be traced back to the Spanish philosophers of that country's Golden Age.[75] The leading figure of this school was Francisco Vitoria, Professor of Theology at the University of Salamanca (1480–1546). His lectures were preserved by his students and published posthumously. He demonstrated a remarkably progressive attitude for his time towards the Spanish conquest of the

[72] Below, p. 49. [73] *Summa Theologia*, English edn, 1927.

[74] H. Maine, *Ancient Law*, London, 1861, pp. 56 and 64–6.

[75] Note Preiser's view that '[t]here was hardly a single important problem of international law until the middle of the 17th century which was not principally a problem of Spain and the allied Habsburg countries': Bernhardt, *Encyclopedia*, vol. VII, p. 150. See also Nussbaum, *Law of Nations*, pp. 79–93.

South American Indians and, contrary to the views prevalent until then, maintained that the Indian peoples should be regarded as nations with their own legitimate interests. War against them could only be justified on the grounds of a just cause. International law was founded on the universal law of nature and this meant that non-Europeans must be included within its ambit. However, Vitoria by no means advocated the recognition of the Indian nations as equal to the Christian states of Europe. For him, opposing the work of the missionaries in the territories was a just reason for war, and he adopted a rather extensive view as to the rights of the Spaniards in South America. Vitoria was no liberal and indeed acted on behalf of the Spanish Inquisition, but his lectures did mark a step forward in the right direction.[76]

Suárez (1548–1617) was a Jesuit and Professor of Theology who was deeply immersed in medieval culture. He noted that the obligatory character of international law was based upon Natural Law, while its substance derived from the Natural Law rule of carrying out agreements entered into.[77]

From a totally different background but equally, if not more, influential was Alberico Gentili (1552–1608). He was born in Northern Italy and fled to England to avoid persecution, having converted to Protestantism. In 1598 his *De Jure Belli* was published.[78] It is a comprehensive discussion of the law of war and contains a valuable section on the law of treaties. Gentili, who became a professor at Oxford, has been called the originator of the secular school of thought in international law and he minimised the hitherto significant theological theses.

It is, however, Hugo Grotius, a Dutch scholar, who towers over this period and has been celebrated, if a little exaggeratedly, as the father of international law. He was born in 1583 and was the supreme Renaissance man. A scholar of tremendous learning, he mastered history, theology, mathematics and the law.[79] His primary work was the *De Jure Belli ac Pacis*,

[76] Nussbaum, *Law of Nations*, pp. 79–84, and Bernhardt, *Encyclopedia*, vol. VII, pp. 151–2. See also F. Vitoria, *De Indis et de Jure Belli Relectiones*, Classics of International Law, Washington, DC, 1917, and J. B. Scott, *The Spanish Origin of International Law, Francisco de Vitoria and his Law of Nations*, Washington, DC, 1934.

[77] Nussbaum, *Law of Nations*, pp. 84–91. See also *ibid.*, pp. 92–3 regarding the work of Ayala (1548–84).

[78] *Ibid.*, pp. 94–101. See also A. Van der Molen, *Alberico Gentili and the Development of International Law*, 2nd edn, London, 1968.

[79] Nussbaum, *Law of Nations*, pp. 102–14. See also W. S. M. Knight, *The Life and Works of Hugo Grotius*, London, 1925, and 'Commemoration of the Fourth Century of the Birth of Grotius' (various articles), 182 HR, 1984, pp. 371–470.

written during 1623 and 1624. It is an extensive work and includes rather more devotion to the exposition of private law notions than would seem appropriate today. He refers both to Vitoria and Gentili, the latter being of special influence with regard to many matters, particularly organisation of material.

Grotius finally excised theology from international law and emphasised the irrelevance in such a study of any conception of a divine law. He remarked that the law of nature would be valid even if there were no God: a statement which, although suitably clothed in religious protestation, was extremely daring. The law of nature now reverted to being founded exclusively on reason. Justice was part of man's social make-up and thus not only useful but essential. Grotius conceived of a comprehensive system of international law and his work rapidly became a university textbook. However, in many spheres he followed well-trodden paths. He retained the theological distinction between a just and an unjust war, a notion that was soon to disappear from treatises on international law, but which in some way underpins modern approaches to aggression, self-defence and liberation.

One of his most enduring opinions consists in his proclamation of the freedom of the seas. The Dutch scholar opposed the 'closed seas' concept of the Portuguese that was later elucidated by the English writer John Selden[80] and emphasised instead the principle that the nations could not appropriate to themselves the high seas. They belonged to all. It must, of course, be mentioned, parenthetically, that this theory happened to accord rather nicely with prevailing Dutch ideas as to free trade and the needs of an expanding commercial empire.

However, this merely points up what must not be disregarded, namely that concepts of law as of politics and other disciplines are firmly rooted in the world of reality, and reflect contemporary preoccupations. No theory develops in a vacuum, but is conceived and brought to fruition in a definite cultural and social environment. To ignore this is to distort the theory itself.

Positivism and naturalism

Following Grotius, but by no means divorced from the thought of previous scholars, a split can be detected and two different schools identified.

[80] In *Mare Clausum Sive de Dominio Maris*, 1635.

On the one hand there was the 'naturalist' school, exemplified by Samuel Pufendorf (1632–94),[81] who attempted to identify international law completely with the law of nature; and on the other hand there were the exponents of 'positivism', who distinguished between international law and Natural Law and emphasised practical problems and current state practices. Pufendorf regarded Natural Law as a moralistic system, and misunderstood the direction of modern international law by denying the validity of the rules about custom. He also refused to acknowledge treaties as in any way relevant to a discussion of the basis of international law. Other 'naturalists' echoed those sentiments in minimising or ignoring the actual practices of states in favour of a theoretical construction of absolute values that seemed slowly to drift away from the complexities of political reality.

One of the principal initiators of the positivist school was Richard Zouche (1590–1660), who lived at the same time as Pufendorf, but in England.[82] While completely dismissing Natural Law, he paid scant regard to the traditional doctrines. His concern was with specific situations and his book contains many examples from the recent past. He elevated the law of peace above a systematic consideration of the law of war and eschewed theoretical expositions.

In similar style Bynkershoek (1673–1743) stressed the importance of modern practice and virtually ignored Natural Law. He made great contributions to the developing theories of the rights and duties of neutrals in war, and after careful studies of the relevant facts decided in favour of the freedom of the seas.[83]

The positivist approach, like much of modern thought, was derived from the empirical method adopted by the Renaissance. It was concerned not with an edifice of theory structured upon deductions from absolute principles, but rather with viewing events as they occurred and discussing actual problems that had arisen. Empiricism as formulated by Locke and Hume[84] denied the existence of innate principles and postulated that ideas were derived from experience. The scientific method of experiment and verification of hypotheses emphasised this approach.

From this philosophical attitude, it was a short step to reinterpreting international law not in terms of concepts derived from reason but rather in terms of what actually happened between the competing states. What

[81] *On the Law of Nature and of Nations*, 1672. See also Nussbaum, *Law of Nations*, pp. 147–50.
[82] Nussbaum, *Law of Nations*, pp. 165–7. [83] *Ibid.*, pp. 167–72.
[84] See Friedmann, *Legal Theory*, pp. 253–5.

states actually do was the key, not what states ought to do given basic rules of the law of nature. Agreements and customs recognised by the states were the essence of the law of nations.

Positivism developed as the modern nation-state system emerged, after the Peace of Westphalia in 1648, from the religious wars.[85] It coincided, too, with theories of sovereignty such as those propounded by Bodin and Hobbes,[86] which underlined the supreme power of the sovereign and led to notions of the sovereignty of states.

Elements of both positivism and naturalism appear in the works of Vattel (1714–67), a Swiss lawyer. His *Droit des Gens* was based on Natural Law principles yet was practically oriented. He introduced the doctrine of the equality of states into international law, declaring that a small republic was no less a sovereign than the most powerful kingdom, just as a dwarf was as much a man as a giant. By distinguishing between laws of conscience and laws of action and stating that only the latter were of practical concern, he minimised the importance of Natural Law.[87]

Ironically, at the same time that positivist thought appeared to demolish the philosophical basis of the law of nature and relegate that theory to history, it re-emerged in a modern guise replete with significance for the future. Natural Law gave way to the concept of natural rights.[88]

It was an individualistic assertion of political supremacy. The idea of the social contract, that an agreement between individuals pre-dated and justified civil society, emphasised the central role of the individual, and whether such a theory was interpreted pessimistically to demand an absolute sovereign as Hobbes declared, or optimistically to mean a conditional acceptance of authority as Locke maintained, it could not fail to be a revolutionary doctrine. The rights of man constitute the heart of the American[89] and French Revolutions and the essence of modern democratic society.

[85] See L. Gross, 'The Peace of Westphalia 1648–1948', 42 AJIL, 1948, p. 20; *Renegotiating Westphalia* (eds. C. Harding and C. L. Lim), The Hague, 1999, especially chapter 1, and S. Beaulac, 'The Westphalian Legal Orthodoxy – Myth or Reality?', 2 *Journal of the History of International Law*, 2000, p. 148.

[86] *Leviathan*, 1651.

[87] See Nussbaum, *Law of Nations*, pp. 156–64. See also N. Onuf, '*Civitas Maxima*: Wolff, Vattel and the Fate of Republicanism', 88 AJIL, 1994, p. 280.

[88] See e.g. J. Finnis, *Natural Law and Natural Rights*, Oxford, 1980, and R. Tuck, *Natural Rights Theories*, Cambridge, 1979.

[89] See e.g. N. Onuf and O. Onuf, *Federal Unions, Modern World*, Madison, 1994.

Yet, on the other hand, the doctrine of Natural Law has been employed to preserve the absoluteness of sovereignty and the sanctity of private possessions. The theory has a reactionary aspect because it could be argued that what was, ought to be, since it evolved from the social contract or was divinely ordained, depending upon how secular one construed the law of nature to be.

The nineteenth century

The eighteenth century was a ferment of intellectual ideas and rationalist philosophies that contributed to the evolution of the doctrine of international law. The nineteenth century by contrast was a practical, expansionist and positivist era. The Congress of Vienna, which marked the conclusion of the Napoleonic wars, enshrined the new international order which was to be based upon the European balance of power. International law became Eurocentric, the preserve of the civilised, Christian states, into which overseas and foreign nations could enter only with the consent of and on the conditions laid down by the Western powers. Paradoxically, whilst international law became geographically internationalised through the expansion of the European empires, it became less universalist in conception and more, theoretically as well as practically, a reflection of European values.[90] This theme, the relationship between universalism and particularism, appears time and again in international law. This century also saw the coming to independence of Latin America and the forging of a distinctive approach to certain elements of international law by the states of that region, especially with regard to, for example, diplomatic asylum and the treatment of foreign enterprises and nationals.[91]

There are many other features that mark the nineteenth century. Democracy and nationalism, both spurred on by the wars of the French revolution and empire, spread throughout the Continent and changed the essence of international relations.[92] No longer the exclusive concern

[90] See Nussbaum, *Law of Nations*, pp. 186–250, and, e.g., C. H. Alexandrowicz, *The European–African Confrontation*, Leiden, 1973. See also B. Bowden, 'The Colonial Origins of International Law. European Expansion and the Classical Standard of Civilisation', 7 *Journal of the History of International Law*, 2005, p. 1, and C. Sylvest, 'International Law in Nineteenth-Century Britain', 75 BYIL, 2004, p. 9.

[91] See below, chapters 3 and 14 respectively. See also H. Gros Espiell, 'La Doctrine du Droit International en Amérique Latine avant la Première Conférence Panaméricaine', 3 *Journal of the History of International Law*, 2001, p. 1.

[92] See especially A. Cobban, *The Nation State and National Self-Determination*, London, 1969.

of aristocratic élites, foreign policy characterised both the positive and the negative faces of nationalism. Self-determination emerged to threaten the multinational empires of Central and Eastern Europe, while nationalism reached its peak in the unifications of Germany and Italy and began to exhibit features such as expansionism and doctrines of racial superiority. Democracy brought to the individual political influence and a say in government. It also brought home the realities of responsibility, for wars became the concern of all. Conscription was introduced throughout the Continent and large national armies replaced the small professional forces.[93] The Industrial Revolution mechanised Europe, created the economic dichotomy of capital and labour and propelled Western influence throughout the world. All these factors created an enormous increase in the number and variety of both public and private international institutions, and international law grew rapidly to accommodate them.[94] The development of trade and communications necessitated greater international co-operation as a matter of practical need. In 1815, the Final Act of the Congress of Vienna established the principle of freedom of navigation with regard to international waterways and set up a Central Commission of the Rhine to regulate its use. In 1856 a commission for the Danube was created and a number of other European rivers also became the subject of international agreements and arrangements. In 1865 the International Telegraphic Union was established and in 1874 the Universal Postal Union.[95]

European conferences proliferated and contributed greatly to the development of rules governing the waging of war. The International Committee of the Red Cross, founded in 1863, helped promote the series of Geneva Conventions beginning in 1864 dealing with the 'humanisation' of conflict, and the Hague Conferences of 1899 and 1907 established the Permanent Court of Arbitration and dealt with the treatment of prisoners and the control of warfare.[96] Numerous other conferences, conventions and congresses emphasised the expansion of the rules of international law and the close network of international relations. In addition, the academic study of international law within higher education developed with the appointment of professors of the subject and the appearance of specialist textbooks emphasising the practice of states.

[93] G. Best, *Humanity in Warfare*, London, 1980; Best, *War and Law Since 1945*, Oxford, 1994, and S. Bailey, *Prohibitions and Restraints in War*, Oxford, 1972.

[94] See e.g. *Bowett's Law of International Institutions*, and *The Evolution of International Organisations* (ed. E. Luard), Oxford, 1966.

[95] See further below, chapter 23. [96] See further below, chapter 21.

Positivist theories dominate this century. The proliferation of the powers of states and the increasing sophistication of municipal legislation gave force to the idea that laws were basically commands issuing from a sovereign person or body. Any question of ethics or morality was irrelevant to a discussion of the validity of man-made laws. The approach was transferred onto the international scene and immediately came face to face with the reality of a lack of supreme authority.

Since law was ultimately dependent upon the will of the sovereign in national systems, it seemed to follow that international law depended upon the will of the sovereign states.

This implied a confusion of the supreme legislator within a state with the state itself and thus positivism had to accept the metaphysical identity of the state. The state had a life and will of its own and so was able to dominate international law. This stress on the abstract nature of the state did not appear in all positivist theories and was a late development.[97]

It was the German thinker Hegel who first analysed and proposed the doctrine of the will of the state. The individual was subordinate to the state, because the latter enshrined the 'wills' of all citizens and had evolved into a higher will, and on the external scene the state was sovereign and supreme.[98] Such philosophies led to disturbing results in the twentieth century and provoked a re-awakening of the law of nature, dormant throughout the nineteenth century.

The growth of international agreements, customs and regulations induced positivist theorists to tackle this problem of international law and the state; and as a result two schools of thought emerged.

The monists claimed that there was one fundamental principle which underlay both national and international law. This was variously posited as 'right' or social solidarity or the rule that agreements must be carried out (*pacta sunt servanda*). The dualists, more numerous and in a more truly positivist frame of mind, emphasised the element of consent.

For Triepel, another German theorist, international law and domestic (or municipal) law existed on separate planes, the former governing international relations, the latter relations between individuals and between the individual and the state. International law was based upon agreements between states (and such agreements included, according to Triepel, both

[97] See below, chapter 2.

[98] See e.g. S. Avineri, *Hegel's Theory of the Modern State*, London, 1972, and Friedmann, *Legal Theory*, pp. 164–76.

treaties and customs) and because it was dictated by the 'common will' of the states it could not be unilaterally altered.[99]

This led to a paradox. Could this common will bind individual states and, if so, why? It would appear to lead to the conclusion that the will of the sovereign state could give birth to a rule over which it had no control. The state will was not, therefore, supreme but inferior to a collection of states' wills. Triepel did not discuss these points, but left them open as depending upon legal matters. Thus did positivist theories weaken their own positivist outlook by regarding the essence of law as beyond juridical description. The nineteenth century also saw the publication of numerous works on international law, which emphasised state practice and the importance of the behaviour of countries to the development of rules of international law.[100]

The twentieth century

The First World War marked the close of a dynamic and optimistic century. European empires ruled the world and European ideologies reigned supreme, but the 1914–18 Great War undermined the foundations of European civilisation. Self-confidence faded, if slowly, the edifice weakened and the universally accepted assumptions of progress were increasingly doubted. Self-questioning was the order of the day and law as well as art reflected this.

The most important legacy of the 1919 Peace Treaty from the point of view of international relations was the creation of the League of Nations.[101] The old anarchic system had failed and it was felt that new institutions to preserve and secure peace were necessary. The League consisted of an Assembly and an executive Council, but was crippled from the start by the absence of the United States and the Soviet Union for most of its life and remained a basically European organisation.

While it did have certain minor successes with regard to the maintenance of international order, it failed when confronted with determined aggressors. Japan invaded China in 1931 and two years later withdrew from the League. Italy attacked Ethiopia, and Germany embarked unhindered

[99] Friedmann *Legal Theory*, pp. 576–7. See also below, chapter 4.

[100] See e.g. H. Wheaton, *Elements of International Law*, New York, 1836; W. E. Hall, *A Treatise on International Law*, Oxford, 1880; Von Martens, *Völkerrecht*, Berlin, 2 vols., 1883–6; Pradier-Fodéré, *Traité de Droit International Public*, Paris, 8 vols., 1855–1906; and Fiore, *Il Diritto Internazionale Codificato e la Sua Sanzione Giuridica*, 1890.

[101] See Nussbaum, *Law of Nations*, pp. 251–90, and below, chapter 22.

upon a series of internal and external aggressions. The Soviet Union, in a final gesture, was expelled from the organisation in 1939 following its invasion of Finland.

Nevertheless much useful groundwork was achieved by the League in its short existence and this helped to consolidate the United Nations later on.[102]

The Permanent Court of International Justice was set up in 1921 at The Hague and was succeeded in 1946 by the International Court of Justice.[103] The International Labour Organisation was established soon after the end of the First World War and still exists today, and many other international institutions were inaugurated or increased their work during this period.

Other ideas of international law that first appeared between the wars included the system of mandates, by which colonies of the defeated powers were administered by the Allies for the benefit of their inhabitants rather than being annexed outright, and the attempt was made to provide a form of minority protection guaranteed by the League. This latter creation was not a great success but it paved the way for later concern to secure human rights.[104]

After the trauma of the Second World War the League was succeeded in 1946 by the United Nations Organisation, which tried to remedy many of the defects of its predecessor. It established its site at New York, reflecting the realities of the shift of power away from Europe, and determined to become a truly universal institution. The advent of decolonisation fulfilled this expectation and the General Assembly of the United Nations currently has 192 member states.[105]

Many of the trends which first came to prominence in the nineteenth century have continued to this day. The vast increase in the number of international agreements and customs, the strengthening of the system of arbitration and the development of international organisations have established the essence of international law as it exists today.

Communist approaches to international law

Classic Marxist theory described law and politics as the means whereby the ruling classes maintained their domination of society. The essence of economic life was the ownership of the means of production, and all

[102] See also G. Scott, *The Rise and Fall of the League of Nations*, London, 1973.
[103] See below, chapter 19. [104] See below, chapter 6.
[105] Following the admission of Montenegro on 28 June 2006.

power flowed from this control. Capital and labour were the opposing theses and their mutual antagonism would eventually lead to a revolution out of which a new, non-exploitive form of society would emerge.[106] National states were dominated by the capitalist class and would have to disappear in the re-organising process. Indeed, the theory was that law and the state would wither away once a new basis for society had been established[107] and, because classical international law was founded upon the state, it followed that it too would go.

However, the reality of power and the existence of the USSR surrounded by capitalist nations led to a modification in this approach. The international system of states could not be changed overnight into a socialist order, so a period of transition was inevitable. Nevertheless basic changes were seen as having been wrought.

Professor Tunkin, for example, emphasised that the Russian October revolution produced a new series of international legal ideas. These, it is noted, can be divided into three basic, interconnected groups: (a) principles of socialist internationalism in relations between socialist states, (b) principles of equality and self-determination of nations and peoples, primarily aimed against colonialism, and (c) principles of peaceful coexistence aimed at relations between states with different social systems.[108]

We shall briefly look at these concepts in this section, but first a historical overview is necessary.

During the immediate post-revolution period, it was postulated that a transitional phase had commenced. During this time, international law as a method of exploitation would be criticised by the socialist state, but it would still be recognised as a valid system. The two Soviet theorists Korovin and Pashukanis were the dominant influences in this phase. The transitional period demanded compromises in that, until the universal victory of the revolution, some forms of economic and technical

[106] See Lloyd, *Introduction to Jurisprudence*, chapter 10, and Friedmann, *Legal Theory*, chapter 29.

[107] Engels, *Anti-Duhring*, quoted in Lloyd, *Introduction to Jurisprudence*, pp. 773–4.

[108] *Theory of International Law*, London, 1974, p. 4, and *International Law* (ed. G. I. Tunkin), Moscow, 1986, chapter 3. See also B. S. Chimni, *International Law and World Order*, New Delhi, 1993, chapter 5; K. Grzybowski, *Soviet Public International Law*, Leiden, 1970, especially chapter 1, and generally H. Baade, *The Soviet Impact on International Law*, Leiden, 1964, and Friedmann, *Legal Theory*, pp. 327–40. See also R. St J. Macdonald, 'Rummaging in the Ruins, Soviet International Law and Policy in the Early Years: Is Anything Left?' in Wellens, *International Law*, p. 61.

co-operation would be required since they were fundamental for the existence of the international social order.[109] Pashukanis expressed the view that international law was an interclass law within which two antagonistic class systems would seek accommodation until the victory of the socialist system. Socialism and the Soviet Union could still use the legal institutions developed by and reflective of the capitalist system.[110] However, with the rise of Stalinism and the 'socialism in one country' call, the position hardened. Pashukanis altered his line and recanted. International law was not a form of temporary compromise between capitalist states and the USSR but rather a means of conducting the class war. The Soviet Union was bound only by those rules of international law which accorded with its purposes.[111]

The new approach in the late 1930s was reflected politically in Russia's successful attempt to join the League of Nations and its policy of wooing the Western powers, and legally by the ideas of Vyshinsky. He adopted a more legalistic view of international law and emphasised the Soviet acceptance of such principles as national self-determination, state sovereignty and the equality of states, but not others. The role of international law did not constitute a single international legal system binding all states. The Soviet Union would act in pursuance of Leninist–Stalinist foreign policy ideals and would not be bound by the rules to which it had not given express consent.[112]

The years that followed the Second World War saw a tightening up of Soviet doctrine as the Cold War gathered pace, but with the death of Stalin and the succession of Khrushchev a thaw set in. In theoretical terms the law of the transitional stage was replaced by the international law of peaceful co-existence. War was no longer regarded as inevitable between capitalist and socialist countries and a period of mutual tolerance and co-operation was inaugurated.[113]

Tunkin recognised that there was a single system of international law of universal scope rather than different branches covering socialist and capitalist countries, and that international law was founded upon agreements

[109] Tunkin, *Theory of International Law*, p. 5.
[110] *Ibid.*, pp. 5–6. See also H. Babb and J. Hazard, *Soviet Legal Philosophy*, Cambridge, MA, 1951.
[111] Grzybowski, *Soviet Public International Law*, pp. 6–9. [112] *Ibid.*, p. 9.
[113] *Ibid.*, pp. 16–22. See also R. Higgins, *Conflict of Interests*, London, 1964, part III.

between states which are binding upon them. He defined contemporary general international law as:

> the aggregate of norms which are created by agreement between states of different social systems, reflect the concordant wills of states and have a generally democratic character, regulate relations between them in the process of struggle and co-operation in the direction of ensuring peace and peaceful co-existence and freedom and independence of peoples, and are secured when necessary by coercion effectuated by states individually or collectively.[114]

It is interesting to note the basic elements here, such as the stress on state sovereignty, the recognition of different social systems and the aim of peaceful co-existence. The role of sanctions in law is emphasised and reflects much of the positivist influence upon Soviet thought. Such preoccupations were also reflected in the definition of international law contained in the leading Soviet textbook by Professor Kozhevnikov and others where it was stated that:

> international law can be defined as the aggregate of rules governing relations between states in the process of their conflict and co-operation, designed to safeguard their peaceful co-existence, expressing the will of the ruling classes of these states and defended in case of need by coercion applied by states individually or collectively.[115]

Originally, treaties alone were regarded as proper sources of international law but custom became accepted as a kind of tacit or implied agreement with great stress laid upon *opinio juris* or the legally binding element of custom. While state practice need not be general to create a custom, its recognition as a legal form must be.[116]

Peaceful co-existence itself rested upon certain basic concepts, for example non-intervention in the internal affairs of other states and the sovereignty of states. Any idea of a world authority was condemned as a violation of the latter principle. The doctrine of peaceful co-existence was also held to include such ideas as good neighbourliness, international co-operation and the observance in good faith of international obligations.

[114] *Theory of International Law*, p. 251. See also G. I. Tunkin, 'Co-existence and International Law', 95 HR, 1958, pp. 1, 51 ff., and E. McWhinney, 'Contemporary Soviet General Theory of International Law: Reflections on the Tunkin Era', 25 Canadian YIL, 1989, p. 187.

[115] *International Law*, Moscow, 1957, p. 7.

[116] *Theory of International Law*, p. 118. See also G. I. Tunkin, 'The Contemporary Soviet Theory of International Law', *Current Legal Problems*, London, 1978, p. 177.

The concept was regarded as based on specific trends of laws of societal development and as a specific form of class struggle between socialism and capitalism, one in which armed conflict is precluded.[117] It was an attempt, in essence, to reiterate the basic concepts of international law in a way that was taken to reflect an ideological trend. But it must be emphasised that the principles themselves have long been accepted by the international community.

While Tunkin at first attacked the development of regional systems of international law, he later came round to accepting a socialist law which reflected the special relationship between communist countries. The Soviet interventions in eastern Europe, particularly in Czechoslovakia in 1968, played a large part in augmenting such views.[118] In the Soviet view relations between socialist (communist) states represented a new, higher type of international relations and a socialist international law. Common socio-economic factors and a political community created an objective basis for lasting friendly relations whereas, by contrast, international capitalism involved the exploitation of the weak by the strong. The principles of socialist or proletarian internationalism constituted a unified system of international legal principles between countries of the socialist bloc arising by way of custom and treaty. Although the basic principles of respect for state sovereignty, non-interference in internal affairs and equality of states and peoples existed in general international law, the same principles in socialist international law were made more positive by the lack of economic rivalry and exploitation and by increased co-operation. Accordingly, these principles incorporated not only material obligations not to violate each other's rights, but also the duty to assist each other in enjoying and defending such rights against capitalist threats.[119]

The Soviet emphasis on territorial integrity and sovereignty, while designed in practice to protect the socialist states in a predominantly capitalist environment, proved of great attraction to the developing nations of the Third World, anxious too to establish their own national identities and counteract Western financial and cultural influences.

[117] Tunkin, 'Soviet Theory', pp. 35–48. See also F. Vallat, 'International Law – A Forward Look', 18 YBWA, 1964, p. 251; J. Hazard, 'Codifying Peaceful Co-existence', 55 AJIL, 1961, pp. 111–12; E. McWhinney, *Peaceful Co-existence and Soviet–Western International Law*, Leiden, 1964, and K. Grzybowski, 'Soviet Theory of International Law for the Seventies', 77 AJIL, 1983, p. 862.

[118] See Grzybowski, *Soviet Public International Law*, pp. 16–22.

[119] Tunkin, *Theory of International Law*, pp. 431–43.

With the decline of the Cold War and the onset of *perestroika* (restructuring) in the Soviet Union, a process of re-evaluation in the field of international legal theory took place.[120] The concept of peaceful coexistence was modified and the notion of class warfare eliminated from the Soviet political lexicon. Global interdependence and the necessity for international co-operation were emphasised, as it was accepted that the tension between capitalism and socialism no longer constituted the major conflict in the contemporary world and that beneath the former dogmas lay many common interests.[121] The essence of new Soviet thinking was stated to lie in the priority of universal human values and the resolution of global problems, which is directly linked to the growing importance of international law in the world community. It was also pointed out that international law had to be universal and not artificially divided into capitalist, socialist and Third World 'international law' systems.[122]

Soviet writers and political leaders accepted that activities such as the interventions in Czechoslovakia in 1968 and Afghanistan in 1979 were contrary to international law, while the attempt to create a state based on the rule of law was seen as requiring the strengthening of the international legal system and the rule of law in international relations. In particular, a renewed emphasis upon the role of the United Nations became evident in Soviet policy.[123]

The dissolution of the Soviet Union in 1991 marked the end of the Cold War and the re-emergence of a system of international relations based upon multiple sources of power untrammelled by ideological determinacy. From that point,[124] Russia as the continuation of the former Soviet Union (albeit in different political and territorial terms) entered into the Western political system and defined its actions in terms of its own national interests free from principled hostility. The return to statehood of the Baltic states and the independence of the other former republics of the Soviet Union, coupled with the collapse of Yugoslavia, has constituted

[120] See, for example, *Perestroika and International Law* (eds. A. Carty and G. Danilenko), Edinburgh, 1990; R. Müllerson, 'Sources of International Law: New Tendencies in Soviet Thinking', 83 AJIL, 1989, p. 494; V. Vereshchetin and R. Müllerson, 'International Law in an Interdependent World', 28 *Columbia Journal of Transnational Law*, 1990, p. 291, and R. Quigley, '*Perestroika* and International Law', 82 AJIL, 1988, p. 788.

[121] Vereshchetin and Müllerson, 'International Law', p. 292.

[122] *Ibid.*

[123] See Quigley, '*Perestroika*', p. 794.

[124] See e.g. R. Müllerson, *International Law, Rights and Politics*, London, 1994. See also *The End of the Cold War* (eds. P. Allan and K. Goldmann), Dordrecht, 1992, and W. M. Reisman, 'International Law after the Cold War', 84 AJIL, 1990, p. 859.

a political upheaval of major significance. The Cold War had imposed a dualistic superstructure upon international relations that had had implications for virtually all serious international political disputes and had fettered the operations of the United Nations in particular. Although the Soviet regime had been changing its approach quite significantly, the formal demise both of the communist system and of the state itself altered the nature of the international system and this has inevitably had consequences for international law.[125] The ending of inexorable superpower confrontation has led to an increase in instability in Europe and emphasised paradoxically both the revitalisation and the limitations of the United Nations.

While relatively little has previously been known of Chinese attitudes, a few points can be made. Western concepts are regarded primarily as aimed at preserving the dominance of the bourgeois class on the international scene. Soviet views were partially accepted but since the late 1950s and the growing estrangement between the two major communist powers, the Chinese concluded that the Russians were interested chiefly in maintaining the status quo and Soviet–American superpower supremacy. The Soviet concept of peaceful co-existence as the mainstay of contemporary international law was treated with particular suspicion and disdain.[126]

The Chinese conception of law was, for historical and cultural reasons, very different from that developed in the West. 'Law' never attained the important place in Chinese society that it did in European civilisation.[127] A sophisticated bureaucracy laboured to attain harmony and equilibrium, and a system of legal rights to protect the individual in the Western sense did not really develop. It was believed that society would be best served by example and established morality, rather than by rules and sanctions. This Confucian philosophy was, however, swept aside after the successful

[125] See e.g. R. Bilder, 'International Law in the "New World Order": Some Preliminary Reflections', 1 *Florida State University Journal of Transnational Law and Policy*, 1992, p. 1.

[126] See H. Chiu, 'Communist China's Attitude towards International Law', 60 AJIL, 1966, p. 245; J. K. Fairbank, *The Chinese World Order*, Cambridge, 1968; J. Cohen, *China's Practice of International Law*, Princeton, 1972; Anglo-Chinese Educational Trust, *China's World View*, London, 1979; J. Cohen and H. Chiu, *People's China and International Law*, Princeton, 2 vols., 1974, and C. Kim, 'The People's Republic of China and the Charter-based International Legal Order', 72 AJIL, 1978, p. 317.

[127] See Lloyd, *Introduction to Jurisprudence*, pp. 760–3; S. Van der Sprenkel, *Legal Institutions in Northern China*, New York, 1962, and R. Unger, *Law in Modern Society*, New York, 1976, pp. 86–109.

communist revolution, to be replaced by strict Marxism–Leninism, with its emphasis on class warfare.[128]

The Chinese seem to have recognised several systems of international law, for example, Western, socialist and revisionist (Soviet Union), and to have implied that only with the ultimate spread of socialism would a universal system be possible.[129] International agreements are regarded as the primary source of international law and China has entered into many treaties and conventions and carried them out as well as other nations.[130] One exception, of course, is China's disavowal of the so-called 'unequal treaties' whereby Chinese territory was annexed by other powers, in particular the Tsarist Empire, in the nineteenth century.[131]

On the whole, international law has been treated as part of international politics and subject to considerations of power and expediency, as well as ideology. Where international rules conform with Chinese policies and interests, then they will be observed. Where they do not, they will be ignored.

However, now that the isolationist phase of its history is over, relations with other nations established and its entry into the United Nations secured, China has adopted a more active role in international relations, an approach more in keeping with its rapidly growing economic power. China has now become fully engaged in world politics and this has led to a legalisation of its view of international law, as indeed occurred with the Soviet Union.

The Third World

In the evolution of international affairs since the Second World War one of the most decisive events has been the disintegration of the colonial empires and the birth of scores of new states in the so-called Third World. This has thrust onto the scene states which carry with them a legacy of bitterness over their past status as well as a host of problems relating to

[128] Lloyd, *Introduction to Jurisprudence*, and H. Li, 'The Role of Law in Communist China', *China Quarterly*, 1970, p. 66, cited in Lloyd, *Introduction to Jurisprudence*, pp. 801–8.

[129] See e.g. Cohen and Chiu, *People's China*, pp. 62–4.

[130] *Ibid.*, pp. 77–82, and part VIII generally.

[131] See e.g. I. Detter, 'The Problem of Unequal Treaties', 15 ICLQ, 1966, p. 1069; F. Nozari, *Unequal Treaties in International Law*, Stockholm, 1971; Chiu, 'Communist China's Attitude', pp. 239–67, and L.-F. Chen, *State Succession Relating to Unequal Treaties*, Hamden, 1974.

their social, economic and political development.[132] In such circumstances it was only natural that the structure and doctrines of international law would come under attack. The nineteenth century development of the law of nations founded upon Eurocentrism and imbued with the values of Christian, urbanised and expanding Europe[133] did not, understandably enough, reflect the needs and interests of the newly independent states of the mid- and late twentieth century. It was felt that such rules had encouraged and then reflected their subjugation, and that changes were required.[134]

It is basically those ideas of international law that came to fruition in the nineteenth century that have been so clearly rejected, that is, those principles that enshrined the power and domination of the West.[135] The underlying concepts of international law have not been discarded. On the contrary. The new nations have eagerly embraced the ideas of the sovereignty and equality of states and the principles of non-aggression and non-intervention, in their search for security within the bounds of a commonly accepted legal framework.

While this new internationalisation of international law that has occurred in the last fifty years has destroyed its European-based homogeneity, it has emphasised its universalist scope.[136] The composition of, for example, both the International Court of Justice and the Security Council of the United Nations mirrors such developments. Article 9 of the Statute of the International Court of Justice points out that the main forms of civilisation and the principal legal systems of the world must be represented within the Court, and there is an arrangement that of the ten non-permanent seats in the Security Council five should go to Afro-Asian

[132] See e.g. R. P. Anand, 'Attitude of the Afro-Asian States Towards Certain Problems of International Law', 15 ICLQ, 1966, p. 35; T. O. Elias, *New Horizons in International Law*, Leiden, 1980, and Higgins, *Conflict of Interests*, part II. See also Hague Academy of International Law, Colloque, *The Future of International Law in a Multicultural World*, especially pp. 117–42, and Henkin, *How Nations Behave*, pp. 121–7.

[133] See e.g. Verzijl, *International Law in Historical Perspective*, vol. I, pp. 435–6. See also B. Roling, *International Law in an Expanded World*, Leiden, 1960, p. 10.

[134] The converse of this has been the view of some writers that the universalisation of international law has led to a dilution of its content: see e.g. Friedmann, *Changing Structure*, p. 6; J. Stone, *Quest for Survival: The Role of Law and Foreign Policy*, Sydney, 1961, p. 88, and J. Brierly, *The Law of Nations*, 6th edn, Oxford, p. 43.

[135] See e.g. Alexandrowicz, *European–African Confrontation.*

[136] See F. C. Okoye, *International Law and the New African States*, London, 1972; T. O. Elias, *Africa and the Development of International Law*, Leiden, 1972, and Bernhardt, *Encyclopedia*, vol. VII, pp. 205–51.

states and two to Latin American states (the others going to Europe and other states). The composition of the International Law Commission has also recently been increased and structured upon geographic lines.[137]

The influence of the new states has been felt most of all within the General Assembly, where they constitute a majority of the 192 member states.[138] The content and scope of the various resolutions and declarations emanating from the Assembly are proof of their impact and contain a record of their fears, hopes and concerns.

The Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960, for example, enshrined the right of colonies to obtain their sovereignty with the least possible delay and called for the recognition of the principle of self-determination. This principle, which is discussed elsewhere in this book,[139] is regarded by most authorities as a settled rule of international law although with undetermined borders. Nevertheless, it symbolises the rise of the post-colonial states and the effect they are having upon the development of international law.

Their concern for the recognition of the sovereignty of states is complemented by their support of the United Nations and its Charter and supplemented by their desire for 'economic self-determination' or the right of permanent sovereignty over natural resources.[140] This expansion of international law into the field of economics was a major development of the twentieth century and is evidenced in myriad ways, for example, by the creation of the General Agreement on Tariffs and Trade, the United Nations Conference on Trade and Development, and the establishment of the International Monetary Fund and World Bank.

The interests of the new states of the Third World are often in conflict with those of the industrialised nations, witness disputes over nationalisations. But it has to be emphasised that, contrary to many fears expressed in the early years of the decolonisation saga, international law has not been discarded nor altered beyond recognition. Its framework has been retained as the new states, too, wish to obtain the benefits of rules such as those governing diplomatic relations and the controlled use of force, while campaigning against rules which run counter to their perceived interests.

While the new countries share a common history of foreign dominance and underdevelopment, compounded by an awakening of national

[137] By General Assembly resolution 36/39, twenty-one of the thirty-four members are to be nationals of Afro-Asian–Latin American states.

[138] See above, note 105. [139] See below, chapter 5, p. 205.

[140] See below, chapter 14, p. 827.

identity, it has to be recognised that they are not a homogenous group. Widely differing cultural, social and economic attitudes and stages of development characterise them, and the rubric of the 'Third World' masks diverse political affiliations. On many issues the interests of the new states conflict with each other and this is reflected in the different positions adopted. The states possessing oil and other valuable natural resources are separated from those with few or none and the states bordering on oceans are to be distinguished from landlocked states. The list of diversity is endless and variety governs the make-up of the southern hemisphere to a far greater degree than in the north.

It is possible that in legal terms tangible differences in approach may emerge in the future as the passions of decolonisation die down and the Western supremacy over international law is further eroded. This trend will also permit a greater understanding of, and greater recourse to, historical traditions and conceptions that pre-date colonisation and an increasing awareness of their validity for the future development of international law.[141]

In the medium term, however, it has to be recognised that with the end of the Cold War and the rapid development of Soviet (then Russian)–American co-operation, the axis of dispute is turning from East–West to North–South. This is beginning to manifest itself in a variety of issues ranging from economic law to the law of the sea and human rights, while the impact of modern technology has hardly yet been appreciated.[142] Together with such factors, the development of globalisation has put additional stress upon the traditional tension between universalism and particularism.[143] Globalisation in the sense of interdependence of a high order of individuals, groups and corporations, both public and private, across national boundaries, might be seen as the universalisation of Western civilisation and thus the triumph of one special particularism.

[141] See e.g. H. Sarin, 'The Asian–African States and the Development of International Law', in Hague Academy Colloque, p. 117; Bernhardt, *Encyclopedia*, vol. VII, pp. 205–51, and R. Westbrook, 'Islamic International Law and Public International Law: Separate Expressions of World Order', 33 Va. JIL, 1993, p. 819. See also C. W. Jenks, *The Common Law of Mankind*, Oxford, 1958, p. 169. Note also the references by the Tribunal in the *Eritrea/Yemen* cases to historic title and regional legal traditions: see the judgment in Phase One: Territorial Sovereignty, 1998, 114 ILR, pp. 1, 37 ff. and Phase Two: Maritime Delimitation, 1999, 119 ILR, pp. 417, 448.

[142] See e.g. M. Lachs, 'Thoughts on Science, Technology and World Law', 86 AJIL, 1992, p. 673.

[143] See Koskenniemi, *Gentle Civilizer of Nations*. See also G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, Cambridge, 2004.

On the other hand, particularism (in the guise of cultural relativism) has sometimes been used as a justification for human rights abuses free from international supervision or criticism.

Suggestions for further reading

T. M. Franck, *The Power of Legitimacy Among Nations*, Oxford, 1990
L. Henkin, *International Law: Politics and Values*, Dordrecht, 1995
R. Higgins, *Problems and Process*, Oxford, 1994
A. Nussbaum, *A Concise History of the Law of Nations*, revised edition, New York, 1954