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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]

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.

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[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.

[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.

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.

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

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[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.

[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 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 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.

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[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.

[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

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

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[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.

[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.

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[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.