Public International Law

TEXTBOOK

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History and Nature of International Law

1.1 The historical development of international law

It is impossible to fix a precise date or a period in history to mark the beginning of international law as it predates recorded history! It began when a politically organised group came into contact with another group and was prepared to treat that group as equal and, at the same time, felt the need to develop a system of rules to regulate their relations. Evidence of rules and procedure regarding international law dates back over 5,000 years. Around 2100 BC a solemn treaty was signed between the rulers of Lagash and Umma (small city states in Mesopotamia) which defined boundaries between them. In 1400 BC the Egyptian Pharaoh Rameses II concluded a Treaty of Peace, Alliance and Extradition with the King of Cheta, which recognised territorial sovereignty over certain areas of each ruler and provided for the extradition of refugees and the exchange of ambassadors: C Fenwick, *International Law*, 4th ed, New York: Appleton-Century Crofts, 1965, pp5–6. The grand empires of Egypt, Mesopotamia, Persia, Assyria and Chaldea, as well as small Hebrew monarchies and the Phoenician city states, concluded treaties based on the equality of signatories and the principle 'pacta sunt servanda' (agreements are to be kept). Ancient Greece adopted two institutions from the oriental civilisations – the technique of treaties and the art of diplomacy – and added its own: international arbitration.

The most influential of all ancient civilisations, the Roman civilisation, before its period of expansion and conquest, made treaties with Latin cities under which Latins and Romans were given rights in each other's courts and promised mutual

co-operation. Once Rome became an empire the Romans organised their relations with foreigners on the basis of ius fetiale and ius gentium. Ius fetiale consisted of religious rules which governed Roman external relations and formal declarations of war which, inter alia, recognised the inviolability of ambassadors and was at the origin of the distinction between just and unjust war. Ius gentium was the Roman solution (as Rome expanded) to the necessity of regulating legal relations between Roman citizens and foreigners. A special magistrate, the praetor peregrinus, was appointed in 242 BC who created law (called ius gentium) acceptable to both Roman citizens and foreigners. This law was the first truly international law, although it essentially regulated relations between private individuals. It was based on the commercial law in use in Mediterranean trade, ius civile (law applicable to relations between Roman citizens), in its less formalistic version, and on principles of equity and bona fides (good faith). The distinction between ius civile and ius gentium was obliterated when Roman citizenship was granted to all male inhabitants of the Empire in 212 AD. However, ius gentium did not disappear but became an essential part of Roman law and has thus greatly influenced all European legal systems and, through them, public international law. From ancient Rome international law has also inherited the doctrine of the universal law of nature known as 'natural law', which was developed by Stoic philosophers of ancient Greece and adopted by the Romans. This doctrine considered law as the product of right reason emanating from assumptions about the nature of man and society. Because natural law is the expression of right reason inherent in nature and man, and discoverable by reason, it applies universally. Cicero in his *De Republica* gave the following definition of natural law:

> 'True law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions ... There will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times.'

The doctrine of natural law is regarded as a precursor to the concept of human rights.

There is disagreement as to whether and to what extent the Middle Ages contributed to the development of international law. Some argue that papal leadership in all matters and the voluntarily recognition of feudal suzerainty of the papacy were incompatible with the existence of international law, particularly as at its height in the twelfth and thirteenth centuries the medieval Church was omnipresent and the distinction between Church and 'states' as separate entities had disappeared. Indeed, the basic premise of international law which requires co-existence of equal and independent communities was missing. Others claim that 'the pyramidal structure of feudalism culminating in Pope and Emperor as spiritual and temporal heads of Western Christendom, was hardly ever fully realised. It left ample scope for relations on a footing of equality between what were often in fact

independent states. This applied especially to kingdoms like England and Scotland which existed on the fringe of the Holy Roman Empire. Even within the Empire, relations between the more powerful feudal princes, independent knights and free cities were regulated by rules which in all but form were indistinguishable from those of international law and formed a system of quasi-international law': G Schwarzenberger, *A Manuel of International Law*, 5th ed, New York: Praeger, 1967, p6. There is no doubt that the confrontation between the papacy and German emperors over the ultimate authority in the Christian empire which lasted for centuries contributed to the revival of legal studies in Italian universities. Indeed, in their confrontation, both sides invoked legal arguments based on Roman law and canon law, blended with natural law, to bolster their claims. Treaties, principles and standards which were elaborated by medieval Christian world became, at a later stage, the origins of international customary law.

In the Middle Ages two sets of truly international law developed – the lex mercatoria and the maritime customary law – to deal with problems that transcended national boundaries.

With the revival of trade in the tenth century merchants started to travel throughout Europe in order to sell, buy and place orders for various goods. These commercial activities required the establishment of a common legal framework. Out of necessity the European merchants created their own rules of conduct and fair dealing which formed the lex mercatoria.

Also, in the Middle Ages maritime customs and usages were formed. The high seas were no-man's land, but with the development of maritime commerce it became necessary to establish some rules and standards. The rules of the sea, based on the Rhodian Sea Law, a codification undertaken under the Byzantine empire, were compiled into widely recognised collections such as the Consolato del Mare, composed in Barcelona in the mid-fourteenth century, the Rolls of Oleron in the twelfth century, the English Black Book of the Admiralty and the Maritime Code of Visby. These codifications become accepted throughout Europe.

The Middle Ages also saw the rise of nation states. First, there were the microscopic Italian city states which with increasing wealth and prestige were searching for legal justifications to accommodate their demands for independence. The Italian School of Law represented by Bartolus (1314–1357) and Baldus (1327–1400) responded to their needs. Although the treatment of international law was fragmentary the Italian School conceived the law of nations as a universal and natural law applicable between independent princes and free commonwealths. Towards the end of the medieval period the Spanish School of International Law represented by Francesco de Vitoria (circa 1486–1546) added its ideas to international law. De Vitoria in his *Reflectiones de Indis Noviter Inventis* confirmed the universal validity of international law and it application in the Americas. He considered that the Indians were the true owners of the land but justified the Spanish colonial expansion on the inferiority of their civilisation.

The period from the Peace Treaty of Westphalia (1648) to the Congress of

Vienna (1815) is considered as the period of formation of 'classical' international law. Indeed, international law in its modern version begins with the break up of the feudal state-system and the formation of society into free nation states. This is commonly traced back to the Peace Treaty of Westphalia (1648) which brought to an end the Thirty Years War in Europe.

The Treaty of Westphalia 1648, which is often referred to as the constitutional treaty of Europe, recognised the principle of sovereignty, territorial integrity and equality of states as independent members of an international system. Since then a state defeated in war may be deprived of some of its territory but in general is allowed to continue as an independent state. Also, after the Thirty Years of War, one of the bloodiest in history until World War II, European rulers established a system of balance of power aimed at preventing wars. This system lasted until the French Revolution and Napoleonic Wars.

The concept of sovereignty is at the centre of the international system. It justifies the authority of kings over their subjects and places the supreme power within the state. But since all states are equally sovereign it also conveys the idea of independence. The claim of a state to be sovereign does not mean that the power of the state is subject to no limitations. The obvious limitation is territorial: any state is finite and necessarily has boundaries. Beyond the scope of its boundaries, where its writ does not run, the independence of each state presupposes that of the others. Sovereignty as a concept is decisive in distinguishing Europe from the rest of the world. In the East the decline of empire spelt anarchy and created a power vacuum which led to colonial subjugation. In Europe power was devolved to states who were content simply to rule themselves rather than to succeed to the imperial mantle. The growing relationship between sovereign states provides the customary source of international law.

The intellectual support for new ideas was provided by scholars, in particular the Anglo-Dutch School represented by Hugo Grotius and Alberto Gentilli. Alberto Gentilli, an Italian Protestant who fled to England to avoid prosecution, was the first to separate international law from theology and ethics. Grotius, who is considered as the founder of the modern theory of natural law, acknowledged Gentilli's contribution to his work but further divorced international law from theology by exploring the hypothetical argument that natural law would have validity even if there were no God or if God was not interested in human affairs. Grotius's second innovation was that he treated his law as deductive and independent of experience. In respect of international law in his work *Mare Liberum* (*The Free Sea* (1609)) he advocated the freedom of the seas. He argued that it would be against natural law to rule over the sea as no country was able to monopolise control over the ocean because of its immensity, lack of stability and lack of fixed limits. His principal work *De Jure Belli ac Pacis* (*On the Law of War and Peace* (1625)) constituted the first systematic treatment of positive international law. He considered war as violating natural law but accepted its necessity. He supported the idea of a 'just war' which according to him was a war to obtain a right. War was of a punitive character,

conducted against state crimes, when conciliation had failed. He considered religious war as unjust because religion was a matter of inner conviction which could not be forced on anyone. He believed that war should be regulated. In his work *Ptolegomena* he stated that:

> 'I saw in the whole Christian world a license of fighting at which even barbarious nations might blush. Wars were begun on trifling pretexts or none at all, and carried on without any reverence for law, Divine or human. A declaration of war seemed to let loose every crime.'

Consequently he put emphasis on moral conduct during wars. Non-combatants should be protected, hostages and prisoners treated humanly, property protected from wanton destruction. The topics of neutrality, treaties and diplomatic practice were examined in his works. He also discussed methods for peaceful settlement of international disputes. He recognised sovereign states as the basic units of international law and the law of nations as universally accepted, and emphasised that a civil right which derives from the laws of a sovereign state is inferior to a right based on the law of nations because 'the law of nations is more extensive rights, deriving its authority from the consent of all, or at least of many nations'.

His works were very popular with his contemporaries and appealed to subsequent generations. His law of nature was further developed by the German jurist Samuel von Pufendorf and the seventeenth century English philosophers Thomas Hobbes and John Locke. In the nineteenth century the principle of utility – according to which the object of all legislation must be the 'greatest happiness of the greatest number' – developed by Jeremy Bentham and legal positivism (according to which law is based simply on 'the command of the ruler') formulated by John Austin rejected the doctrine of natural law as unprovable. However, after World War II the idea that there are some higher standards than positive law revived the interest in natural law.

From the Congress of Vienna held in 1815 to the outbreak of World War I international law was based on five principles: sovereignty, balance of power, legitimacy (in the sense of restoration of 'legitimate' governments to power and of prevention of political revolutions), nationality (which relegated the principle of legitimacy as nations aspiring to achieve national unity replaced the system of the old regime, based exclusively upon the aristocracy, with a system of governments elected by people from all classes of society) and equality. The Congress of Vienna ended 25 years of Napoleonic war in Europe. The Congress was convened by the four European powers which had defeated Napoleon. Its main objective was to establish a balance of power of political forces in Europe which would ensure lasting peace and to maintain the status quo in Europe by repressing political revolutions. At the Congress the five powers (France joined in 1818) promised to meet periodically over the next 20 years to discuss common problems and to co-operate on major issues to prevent war. This so-called Concert of Europe which developed out of the Congress of Vienna was mostly successful in preserving peace in Europe

for almost a century. It constituted the first serious attempt in modern times to establish an international mechanism to maintain peace. The system of periodic meetings also began a new diplomatic era in Europe which was marked by the adoption of numerous treaties, inter alia, establishing the neutrality of Switzerland (1815) and Belgium (1831), laying down general rules for the navigation of rivers (1815) (and specific regulations for the Rhine), and a number of treaties aimed at restricting human suffering during international armed conflicts (this matter is examined elsewhere in the book). During that period state practice produced the framework for modern international law dealing with recognition of states, which achieved prominence in the attitude of the United Kingdom and the United States to the independence of Greece. Rules governing state responsibility were also developed.

The classical system of international law was described by Grewe in the following terms:

> '... the basic and characteristic feature of the classical system was its close commitment to the modern sovereign state as the sole subject of international law. Deriving from this basic structure, two other elements helped to form the shape of the classical system: the unorganised character of the international community, composed of a multitude of sovereign states as legally equal, if de facto unequal members; and the acceptance of war as the ultimate instrument of enforcing law and safeguarding national honour and interest': W G Grewe in R Bernhardt, *Encyclopaedia of Public International Law*, Vol II, 8th ed, 1995, pp839–40.

The twentieth century witnessed two inhuman ideologies at work – Nazism and Communism – and two World Wars. In response a different system of international law has been introduced which is examined in this book.

1.2 Definition of international law

There are many definitions of international law. In *SS Lotus Case*: *France* v *Turkey* (1927) PCIJ Rep Ser A No 10, 18 the PCIJ provided the following definition:

> 'International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own will as expressed in conventions [treaties] or by usages generally accepted as expressing principles of law established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.'

In *Trendtex Trading Corporation* v *Central Bank of Nigeria* [1977] 1 All ER 881 at 901 and 902 an English judge gave a definition of international law in terms of its impact on English law:

> 'I know no better definition of it than that it is the sum of rules or usages which civilised states have agreed shall be binding upon them in their dealing with one another.
>
> It is quite true that whatever has received the common consent of civilised nations must have received the assent of our country, and that to which we have assented along

with other nations in general may be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant.'

The American Law Institute in the Official Draft of the Restatement of the Foreign Relations Law of the United States provided the following definition:

'International law ... means those rules of law applicable to a state or international organisations that cannot be modified unilaterally by it': §1, at 1, 3rd ed, St Paul, MN: American Law Inst Publishers, 1987.

The definition formulated by the US Department of State and the American Law Institute emphasises the evolving nature of international law. It states that:

'International law is the standard of conduct, at a given time, for states and other entities thereto. It comprises the rights, privileges, powers, and immunities of states and entities invoking its provisions, as well as the correlative fundamental duties, absence of rights, liabilities, and disabilities. International law is, more or less, in a continual state of change and development. In certain of its aspects the evolution is gradual; in others it is avulsive. International law is based largely on custom, eg, on practice, and whereas certain customs are recognised as obligatory, others are in retrogression and are recognised as non-obligatory, depending upon the subject matter and its status at a particular time': I M Whiteman, *Digest of International Law*, Washington, DC: US Department of State, 1963.

The definition provided by Shearer is the most comprehensive. It states that:

'International law may be defined as that body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with each other, and which includes also:
(a) the rules of law relating to the functioning of international institutions or organisations, their relations with each other, and their relations with states and individuals; and
(b) certain rules of law relating to individuals and non-states so far as the rights or duties of such individuals and non-state entities are the concern of the international community.'

See *Starke's International Law*, 11th ed, London: Butterworths, 1994, p3.

1.3 The nature of international law

The question of whether or not international law is law at all may be examined at two levels. First, people believe that states have little respect for international law and have no incentive to comply with it in the absence of world government. This belief springs from the common misconception that international law is broken with impunity. But the same could be said of any legal system. In English criminal law, where prosecutions are brought by the police, around 60 per cent of crimes known to the police are never solved, and there must be a large number which are never reported in the first place. The breaches of international law are more spectacular than the comparatively staid law of international co-operation. Moreover, people

imagine that international disputes are not necessarily governed by international law, just as disputes between individuals are not necessarily governed by national law.

Second, at the theoretical level, the existence of international law has been challenged by the positivist theory. John Austin, the great nineteenth-century positivist, argued that international law is not really law because it has no sovereign. He defined laws 'properly so called' as commands of a sovereign. According to him a sovereign is a person who receives obedience of the members of an independent political society and who, in turn, does not owe such obedience to any person. Rules of international law did not qualify as rules of positive law by this test and not being commands of any sort were placed in the category of laws 'improperly so called'.

The reply of any international lawyer would be to ask what legal system does conform to Austin's concept. In the United States the separation of powers does not admit a single sovereign, and in the United Kingdom the legislature is not the only source of law-making. His criticism of international law is largely based on his peculiar conception of law. But it must be conceded that his definition of law does not invalidate his criticism and he does expose one shortcoming which international law has always suffered: the lack of effective enforcement mechanisms.

1.4 Machinery for enforcement of international law

In municipal systems the machinery for enforcement is centralised in the government authority. In international law it is of necessity decentralised, since the primary subjects of international law are sovereign states.

Professor Kelsen, the Austrian-American legal philosopher who formulated a kind of positivism known as the 'pure theory' of law and was the main representative of the monist school in international law, argued that international law does have machinery for enforcement. Traditionally, in a decentralised society enforcement of laws is accomplished through self-help. The legal order leaves enforcement to the individuals injured by the delict or illegality. He stated that although it may appear that the individuals take law into their own hands, they may nevertheless be considered as acting as organs of the community.

Kelsen's argument is not without historical attraction. Until the 1928 Kellogg-Briand Pact, the use of force did constitute a recognised method of enforcing international law. However, the use of force, except in self-defence, is now illegal. The problem therefore arises as to what to put in place of force as a means of enforcement.

The system established under the UN Charter was designed to ensure that member states obey and respect international obligations deriving from the Charter. The Cold War and its rigid division of the world distorted the potential of the UN system. However, since the end of the Cold War the enforcement powers of the UN have been reinvigorated even though the UN is not a law-enforcing agency. Nevertheless, the scope of enforcement actions taken by the UN is steadily growing.

Within its function of maintaining international peace and security the Security Council has found that it must act in situations involving serious and continuous violation of human rights. Also the punishment of notorious abusers of human rights has become a concern of the Security Council. The establishment of the two Criminal Tribunals – the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda – on the basis of the Security Council resolutions illustrates this point. In the foreseeable future the establishment of the International Criminal Court will contribute to the creation of a more comprehensive and effective system of enforcement of human rights: see Chapter 19.

Also, the Security Council's use of sanctions, both involving use of force and those not involving use of force has been more frequent and more effective than ever before: see Chapter 17.

States are more active in apprehending and trying persons responsible for grave violations of human rights as exemplified by a growing number of cases before courts in Belgium, France, Austria, Germany etc. It may be said that this new development has been, to some extent, initiated and inspired by the decision of the House of Lords in the *Pinochet* case: see Chapter 9.

Moreover, the Final Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in August 2001 reinforces the system of remedies available to a state injured by a violation of legal obligations by another state. The ILC Draft legitimates the recourse to counter-measures against a delinquent state whilst strictly defining their scope. The Draft introduces the 'aggravated responsibility' which allows any state to seek compensation on behalf of the victims of serious and widespread human rights violations and to apply counter-measures when a delinquent state is breaching a peremptory norm of international law: see Chapter 10.

Another important factor contributing to the enforcement of international law is the growing awareness of ordinary people of their rights under international law. This has two dimensions. On the one hand, they fight for their rights against totalitarian governments and, on the other hand, governments appeal to public opinion for support in the case of breaches of international law by a state. Pressures which are exercised by public opinion on governments, whether their own or foreign, should not be underestimated.

The existence of international law should not be viewed exclusively in the context of enforcement. Individuals obey municipal law for many reasons, only one of them is the fear of being punished. Individuals and states obey legal rules because those rules are considered as appropriate and right.

No country can totally disregard international law, although this occurred during the 1966–76 Cultural Revolution in the People's Republic of China! International law was no longer considered as an academic subject, all law lectures and professors were dismissed. When the Cultural Revolution ended in 1976 China's leaders, in the light of China's isolation, decided to join the international community in order to conduct relations with other governments. In 1982 more liberal views were taken

and the President of the Chinese Society of International Law in Beijing announced that China had abandoned its parochial view of international law. Thus international law is essential for the existence of any state and no state can afford to stand alone.

1.5 Situations to which international law is relevant

If it is accepted that international law does exist, what form does it take? It is suggested that international law is relevant at three separate levels in international relations: the level of co-operation, co-existence and conflict.

Co-operation

States are naturally interdependent in many ways and international law facilitates co-operation. States have a common interest in an international postal system, eradicating disease by means of common rules as to vaccination etc. These are areas where action on an international scale is essential and, in general, states obey these rules of international law.

Co-existence

States have to co-exist with one another and a means of doing this is to define their relationship by making treaties and other consensual agreements. At this level, Professor Schwarzenberger argued, obedience is high and the law is generally effective. Several reasons have been suggested for this fidelity. The concept of reciprocity plays an important part in a state's strategy. Both medium- and long-term strategies are involved. The former is illustrated by an example of a state thinking of extending its territorial waters, but not doing so because it may encourage other states to do the same. In the long term all states have an interest in international stability, so there is an incentive not to rock the boat excessively.

Conflict

The role of international law is confined to two main functions: the technical rules of conduct and the keeping of the breach to a minimum.

For example, many of the rules of warfare exist in an unwritten form but some of the rules are embodied in international conventions, particularly the Hague and Geneva Conventions. All these rules are included in manuals of military law for use by commanders in the field. Breach has important psychological impact. States will try to keep violations of international law to the minimum. A good example of this psychological impact is evidenced in the US blockade of Cuba. In the Suez crisis, Sir Partick Dean, the Foreign Office Legal Adviser, and the Lord Chancellor were consulted throughout.

2

Sources of International Law

2.1 Introduction

The question of where to find sources of international law, bearing in mind that the international community has neither a constitution nor legislature, is usually answered by reference to art 38 of the Statute of the International Court of Justice (ICJ). This provision, adopted from the same article in the Statute of the Permanent Court of International Justice (PCIJ) which operated under the auspices of the League of Nations, provides:

> '(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognised by civilised nations;
> (d) subject to the provisions of Article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

(2) This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.'

Five distinct sources can be identified from art 38 of the Statute of the ICJ:

1. international treaties;
2. international custom;
3. the general principles of law;
4. judicial decisions;
5. the writings of publicists

There is an incidental source, ie equity. While there is little doubt that art 38 does embody the most important sources of international law, it provides an incomplete list of them because, on the one hand, it envisages sources of international law from a strictly jurisdictional perspective and, on the other hand, being a text adopted almost 80 years ago, it does not take into account the evolution of international law.

Article 38 has been criticised for a number of reasons. For example, it treats judicial decisions and the writing of publicists as being of equal importance, while in practice judicial decisions have more weight than the writings of publicists. There is also a discrepancy between the English and the French texts of art 38 as to the role of judicial decisions and the writing of publicists which is considered as 'auxiliary' in French and as 'subsidiary' in English, terms which do not have the same meaning. Furthermore, art 38 is worded very generally and thus provides little assistance in resolving the issue of a hierarchy of sources. Although art 38 indicates an order of importance, which in practice the Court may be expected to observe, it does not address the issue of a conflict between different sources of law. Therefore, it operates without any problem when there is, for example, no treaty between the parties to a dispute but there is a customary rule. The situation is more complex where a treaty and a customary rule of international law provide an opposite solution. This is particularly acute when a customary rule has the status of ius cogens. Another criticism which may be added to art 38 is that it does not reflect the evolution of international law. Thus, the reference to international principles 'recognised by civilised nations' appears today as at best archaic, and at worst insulting.

Acts of international organisations which have greatly contributed to the formation of international law are not mentioned in art 38. Moreover, the concept of ius cogens, recognised by the Vienna Convention on the Law of Treaties 1969 and endorsed by the ICJ and other international and national courts and tribunals, which plays a fundamental role in modern international law is not a part of art 38.

However, whatever the shortcomings of art 38 it provides a starting point for any discussion of sources of international law.

It should be noted that the distinction between formal and material sources appears inappropriate in relation to international law. Salmond explained the distinction between formal and material sources in the following words: