SOURCEBOOK ON PUBLIC INTERNATIONAL LAW

Tim Hillier, LLB, MA, Senior Lecturer in law,
De Montfort University, Leicester

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First published in Great Britain 1998 by Cavendish Publishing Limited, The Glass House, Wharton Street, London WC1X 9PX.
Telephone: 0171-278 8000 Facsimile: 0171-278 8080
e-mail: info@cavendishpublishing.com
Visit our Home Page on http://www.cavendishpublishing.com

Hillier, Tim
Sourcebook on Public International Law – (Sourcebook series)
I Title II Series
341

ISBN 1 85941 050 2

Printed and bound in Great Britian

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CHAPTER 1

INTRODUCTION

> States and law faculties of higher educational institutions are encouraged to include international law as a core subject in their curricula. They are also encouraged to introduce courses in international law for students studying law, political science, social sciences and other relevant disciplines; they should study the possibility of introducing topics of international law in the curricula of schools at the primary and secondary levels. They should also consider introducing public international law courses geared towards career training and the establishment of clinical programmes in various areas of international law. Co-operation between institutions at the university level among developing countries, on the one hand, and their co-operation with those of developed countries, on the other, should be encouraged.[1]

On 17 November 1989 the UN General Assembly passed Resolution 44/23 by which it declared the period 1990–99 the United Nations Decade of International Law. Among the purposes of the Decade are the promotion of the acceptance of and respect for the principles of international law and the encouragement of the teaching, study, dissemination and wider appreciation of international law. The adoption of the resolution by the 183 member states of the United Nations indicates the ever-increasing significance of international law.

The purpose of this Sourcebook is to provide a clear and comprehensive guide to the major topics of international law. It has been the author's aim to include all the up-to-date material necessary for the reader to achieve the level of discussion expected of a good student during classes and for the preparation for examinations. It is hoped that this Sourcebook can be used both as a textbook and as a cases and materials book. International law is a subject for which a Sourcebook is particularly appropriate: the sources of its rules are numerous and diverse and many of these sources are not always readily available in the standard law library. The Sourcebook has been written so as to provide an entire and comprehensive undergraduate course in public international law, although it should also prove useful to those who simply wish to find a particular source.

This chapter provides a general introduction to the subject of international law by examining the definition, nature and scope of the subject. It is also useful at this stage to place modern international law in its historical context by tracing its development over the last three centuries.

> A new and very small sovereign state was admitted as a member of the United Nations in the 1970s. Within the United Nations the *de facto* position is that each sovereign state is equal and has one vote in the United Nations General Assembly, even though beneath that technical equality the usual hierarchy exists with the richest and most powerful states exerting the most influence. The newly appointed representative from the newly independent state did not initially

1 Resolution adopted by the United Nations General Assembly – Resolution 51/157 United Nations Decade of International Law (A/RES/51/157 16 December 1996).

> grasp that the quality was supposed only to be formal. Consequently he or she spoke at length on every topic which fell for debate to the obvious chagrin of the representatives of the larger and greater states. At last, in considerable frustration, he was taken off into the office of a delegate of one of the great states, upon the wall of which hung a large map of the world. The 'Important Delegate' explained to the unimportant new representative his position by showing the vast area of the map covered by such states as the US, Canada, Ghana, and even New Zealand, when compared to the tiny dots which represented the new delegate's country. The new delegate's immediate response was to ask a question – 'who drew that map?[2]

The question 'who drew that map?' can partially be answered by an investigation of the historical development of international law. Closely linked to the question of 'who' are the questions of 'how' and 'why' which will also be addressed in this chapter. With a grasp of the theoretical underpinnings, the 'map' of international law, investigated in subsequent chapters, will be more understandable.

1.1 Historical development

> The modern system of international law is a product, roughly speaking, of only the last four hundred years. It grew to some extent out of the usages and practices of modern European states in their intercourse and communications, while it still bears witness to the influence of writers and jurists of the sixteenth, seventeenth, and eighteenth centuries, who first formulated some of its most fundamental tenets. Moreover, it remains tinged with concepts such as national and territorial sovereignty, and the perfect equality and independence of states, that owe their force to political theories underlying the modern European state system, although, curiously enough, some of these concepts have commanded the support of newly emerged non-European states.
>
> But any historical account of the system must being with earliest times, for even in the period of antiquity rules of conduct to regulate the relations between independent communities were felt necessary and emerged from the usages observed by these communities in their mutual relations. Treaties, the immunities of ambassadors, and certain laws and usages of war are to be found many centuries before the dawn of Christianity, for example in ancient Egypt and India, while there were historical cases of recourse to arbitration and mediations in ancient China and in the early Islamic world, although it would be wrong to regard these early instances as representing any serious contribution towards the evolution of the modern system of international law.[3]
>
> The Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilised states in their relations with one another. Rules which may be described as international law are to be found in the history of both the ancient and medieval worlds; for ever since men began to organise their common life in political communities they have felt the need of some system of rules, however rudimentary, to regulate their inter-community relations. But as a definite branch of jurisprudence the system which

2 Mansell, Meteyard and Thomson, *A Critical Introduction to Law*, 1995, London: Cavendish Publishing at p 1.

3 IA Shearer, *Starke's International Law*, 11th edn, 1994, London: Butterworths at p 7.

> we now know as international law is modern, dating only from the 16th and 17th centuries, for its special character has been determined by that of the modern European state system, which was itself shaped in the ferment of the Renaissance and the Reformation.[4]
>
> The origin of the international community in its present structure and configuration is usually traced back to the Peace of Westphalia (1648), which concluded the ferocious and sanguinary Thirty Years War. However, it was not then that international intercourse between groups and nations started. From time immemorial there had been consular and diplomatic relations between different communities, as well as treaties of war and peace and treaties of alliance; reprisals had been regulated for many years, and during the Middle Ages a body of law on the conduct of belligerent hostilities had gradually evolved. A peace treaty going back to approximately 3100 BC has come to light – concluded in the Sumerian language between Eannatum, the victorious ruler of the Mesopotamian city state of Lagash, and the representatives of Umma, another Mesopotamian city state, which had been defeated. And yet all these relations were radically different from current international dealings, for the body politic itself was different.[5]

It can be seen that there is widespread agreement that the modern system of international law developed from Western European origins. With the gradual break up of the Holy Roman Empire after 1648, states such as England, the Netherlands, France and Spain became strong and independent from any superior authority. Without the influence of Papal or Imperial laws, new rules were developed to govern inter-state relations. These rules owed much to doctrines of canon law and of Roman law. The basis of the system was the consensus of equal, independent sovereign states and the rules could therefore be created by express agreement or develop out of a continued common practice. Holding such a view of the development of international law has important consequences both for the nature and definition of international law[6] and for the sources of international law.[7] However, while the perception of modern international law as a phenomenon of medieval Western European origins tends to be the prevailing one there are those who take a different view:

> As all the introductory historical sections of the leading textbooks agree, it was not until this time[8] that there appeared, in the shape of nation states possessing unlimited sovereignty, those subjects of international law which, together with the simultaneously and universally blossoming theoretical study of constitutional and international law, provided the doctrinal bases for a legally ordered system of states. At this time the only open question was the date when the international law of the modern era was supposed to have begun. After some hesitation, a willingness was expressed to go back a good century before Grotius, to Charles VII's Italian Campaign of 1649, to Machiavelli and Bodin, to the

4 JL Brierly, *The Law of Nations, An Introduction to the International Law of Peace*, 6th edn, 1963, Oxford: Oxford University Press at p 1.

5 Antonio Cassese, *International Law in a Divided World*, 1986, Oxford: Oxford University Press at p 34.

6 See, for example, the views expressed by Hall, Westlake and Oppenheim at p 9.

7 Discussed in Chapter 3.

8 ie the modern era – post 1648.