Public International Law

Contemporary Principles and Perspectives

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1. International law: history, theory and purpose

1.1 THE APPROACH TO INTERNATIONAL LAW IN THIS BOOK

The focus of this book is upon principles and perspectives in international law. International law is made up of a framework of broadly accepted principles from which rules are developed and applied. The status and precise nature of these principles vary depending upon the views of the states, courts, scholars or practitioners examining them. This does not mean that they necessarily lack certainty or clarity; rather, it reflects the variegated nature of international law, lacking as it does a constitutional or parliamentary framework, and infused as it is with international politics.

This book explains the content and structure of public international law and how it works. It critically examines what the law is, how it has evolved and is applied, and contemporary and future trends. In doing so, it will at times look beyond the legal to consider the political and other extralegal considerations that are an essential aspect of international law. This book does not, however, endeavour to exhaustively describe the entire international legal system. Thus there are no discrete chapters on the Law of the Sea, International Trade Law, Environmental Law, Humanitarian Law, Human Rights or International Criminal Law (although these will each be introduced later in this chapter[1]). Rather, these areas of the practice of international law are examined in the context of the principle of international law under examination. For example, Chapter 5 considers individuals as subjects of international law and the rights and obligations that have accrued through the international human rights and criminal law regimes, in the context of non-state actors. Case studies and contemporary examples are infused in the discussion on a particular topic, and critical analysis and the prospective development of international law are given prominence. In this way, this book will provide

[1] See section 1.5 below.

a solid understanding of the fundamentals of international law, how they are practised and applied, and – where appropriate – what the future holds.

1.2 THE CONCEPT OF INTERNATIONAL LAW

For some, international law is an anarchic system of inter-state relations, used and misused by states and their representatives in a position to exert their power and influence, both over less powerful states and people. For others, it is a promise of peace, justice and a global society that can ameliorate poverty and persecution. Questions about the purpose and nature of international law (and what it is) are many and varied, as are conceptions about what it should be. Like all systems of law, and certainly all social and political systems, international law cannot serve all the interests of all of its stakeholders. It is imperfect to be sure, and acts to entrench and perpetuate certain power paradigms that adversely impact upon those who need it most. At the same time, it is a reflection of the capacity of humanity to work towards a common good, to ameliorate harm and protect the vulnerable.

The following sections of this chapter will examine some of the infrastructural aspects of international law. After considering the place of international law in history, certain different theories will be considered, reflecting the diverse conceptions and perspectives of the system and how it operates. Finally, the question of what is international law will be considered. That international law serves a myriad of functions, forming and regulating an extraordinary range of behaviour outside and between the domestic domain of states, has not silenced questions about whether there even exists a system of international law as such – and if so, what can and should it achieve, and how? These concerns may be more than mere theoretical abstractions and need to be addressed before a consideration of the fundamental aspects of international law can be pursued.

1.3 THE PLACE OF INTERNATIONAL LAW IN HISTORY

In the first lecture delivered to the Academy of International Law at The Hague, Baron Korff asserted that, since ancient times, international relations developed among and between relatively equally civilized peoples, 'and thus always bore the unquestionable mark of cultural and legal

equality'.[2] The extent to which this idea reflects reality or has always been a naive or convenient fiction remains the subject of scholarly debate. Writing in 1924, Korff points to nineteenth-century legal scholarship as wrongly conceiving of international law as a product of modern thinking, developed since the Peace of Westphalia in 1648.[3] One thing that legal scholars disagree little on now is that international law is far from a modern construct.[4]

In fact, many modern rules of international law can be traced back through millennia to different civilizations, including the areas of diplomatic immunity, the resort to and conduct of war and even what are now more or less universally accepted human rights principles. Despite the complaint, no doubt merited, that '[n]o area of international law has been so little explored by scholars as the history of the subject',[5] there is enough understood of the lives of ancient and more modern civilizations to glean the nature of their external relations, and the ways in which they regulated these relations with a system of rules. Reason was considered fundamental by Roman philosopher Cicero: 'a veritable law, true reason . . . in conformity with nature, universal, immutable and eternal, the commands of which constitute a call to duty and the prohibitions of which avert evil.'[6] In the seventeenth century, the philosopher and jurist Pufendorf stated that the common rule of actions, or the law of nature, required humans to 'cultivate and maintain towards others a peaceable sociality that is

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[2] Baron S.A. Korff, 'An Introduction to the History of International Law' (1924) 18 *American Journal of International Law* 246, 259. See also Ernest Nys, 'The Development and Formation of International Law' (1912) 6 *American Journal of International Law* 1.

[3] Korff, above note 2, 247. See section 1.3.2, below.

[4] See, Malcolm Shaw, *International Law* (Cambridge; New York: Cambridge University Press, 2008, 6th edn), 14; D.J. Bederman, *International Law in Antiquity* (Cambridge: Cambridge University Press, 2001), 14. See also Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: MacMillan, 1954, 2nd edn), 1–2, referring to an example of international law existing in a treaty between two Mesopotamian city states dating from 3100 BC.

[5] Stephen C. Neff, 'A Short History of International Law', in Malcolm D. Evans, *International Law* (Oxford: Oxford University Press, 2006, 2nd edn), 31. Georg Schwarzenberger also described the history of international law as 'the Cinderella of the doctrine of international law': Georg Schwarzenberger, 'The Frontiers of International Law' (1952) 6 *Yearbook of World Affairs* 251, cited in Alexandra Kemmerer, 'The Turning Aside: On International Law and its History', in R.M. Bratspies and R.A. Miller (eds), *Progress in International Law* (Leiden; Boston: Martinus Nijhoff Publishers, 2008), 72.

[6] Nys, above note 2, 1.

consistent with the native character and end of humankind in general.'[7] Modern rules of international law can be traced even to classical literature, such as Shakespeare's *Henry V*, in which a demand for war reparations is depicted.[8]

1.3.1 The Ancient Roots of International Law

One of the obvious areas in which international law has persistently emerged as a system of rules and structures is where trade and commerce with the outside world has been required. Greece stands as an example of an ancient civilization which constructed a system of law to regulate trade and travel. This system reflected civilizations that had come before it (for example, the Egyptian and Babylonian civilizations). It developed rules for the creation and enforcement of treaties and contracts, the development of permanent channels of diplomatic exchange, and the protection and granting of extraterritorial privileges to ambassadors.[9] Greece also developed a system to deal with the presence of foreigners on its territories, including such sophisticated processes as rules for the extradition of criminals[10] – an area of international law still giving rise to significant complexity as between international and municipal law.[11]

The Roman Empire is seen as one of the most significant civilizations in the development of international law as we understand it today. Rome developed ambassadorial missions with a system of rights and privileges, and developed procedures for concluding treaties and receiving foreign envoys. Ambassadorial immunities were systematized, as evidenced by Cicero: 'The inviolability of ambassadors is protected by divine and

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[7] Michael Seidler, 'Pudendorf's Moral and Political Philosophy', *The Stanford Encyclopedia of Philosophy* (Summer 2011 edn), Edward N. Zalta (ed.), forthcoming, available at http://plato.stanford.edu/archives/sum2011/entries/pufendor-moral/

[8] Theodor Meron, *Bloody Constraint: War and Chivalry in Shakespeare* (Oxford; New York: Oxford University Press, 1998), 28

[9] Shaw, above note 4, 16; see also Nussbaum, above note 4, 5–9; Coleman Phillipson, *International Law and Custom of Ancient Greece and Rome, Volume 1* (London: Macmillan & Co. Ltd, 1911, 1st edn), 136–56.

[10] See Korff, above note 2, 250–51. See also Coleman Phillipson, above note 9, Volume 2, 257–63.

[11] Examples of such complexities were well emphasized in the *Pinochet* proceedings: see Andrea Bianci, 'Immunity versus Human Rights: The Pinochet Case', (1999) 10 *European Journal of International Law* 237; J. Craig Barker, Colin Warbrick and Dominic McGoldrick, 'The Future of Former Head of State Immunity after ex parte Pinochet' (1999) 48 *The International and Comparative Law Quarterly* 937.

human laws; their person is sacred and inviolable not only between allies, but also during their sojourn among enemies.'[12] The Romans developed a system of international relations, under which the state was bound by agreements and treaties much like private contracts, revealing a relatively sophisticated system of international law. This system was comprised of two parts: *jus gentium* and *jus inter gentes*. *Jus gentium*, or 'law of nations', originally formed part of Roman civil law applied to special circumstances concerning Rome's dealings with foreigners, distinct from the narrower system of law applicable only to Roman citizens (*jus civile*).[13] However, as the rules of *jus gentium* gradually supplanted the *jus civile* system, *jus gentium* subsequently came to encompass the natural or common law of Rome, considered to be of universal application among nations (what might today be termed customary international law). In contrast, *jus inter gentes,* meaning 'law between the peoples', refers to the body of treaty law, now recognizable in UN conventions and other international agreements that form a major part of public international law.

The distinction between *jus gentium* and *jus inter gentes* can be difficult to grasp given that writers often use 'international law' as a synonym for either term.[14] The original meaning of *jus gentium* is extremely broad, embodying the consensus on legal principles amongst the world's judges, jurists and lawmakers.[15] However, following the rise of the statist territorial order, and as international law continued to grow and develop, legal positivists such as Bentham posited that *jus gentium* was no more than 'the mutual transactions between sovereigns'.[16] In other words, *jus gentium* had been subsumed under international law and *jus inter gentes* interactions. However, this merger with *jus inter gentes* was never entirely complete.[17] Residual connotations of *jus gentium* allow it to capture issues beyond the scope of matters between sovereigns, especially significant to the emergence of human rights law.[18] When considered in the light of

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[12] Cicero, quoted in Korff, above note 2, 254. See also Korff, above note 2, 253; Meredith B. Colket, Jr, 'The Inviolability of Diplomatic Archives' (1945) 8 *The American Archivist* 26.

[13] See Shaw, above note 4, 17.

[14] Francisco Forrest Martin et al., *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (Cambridge; New York: Cambridge University Press, 2006), 1.

[15] Jeremy Waldron, 'Foreign Law and the Modern Ius Gentium' (2005–06) 119 *Harvard Law Review* 129, 132.

[16] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1907), 327.

[17] Waldron, above note 15, 135.

[18] Ibid., 32.

the nature of modern international law, Rome clearly set out a complex system that serves, in many profound ways, as the root of modern public international law.[19]

Another crucial area in the development of the international law of nations throughout the ages has been the rules relating to recourse to and the conduct of war. Often cited as being developed by St Augustine in the Middle Ages, it was the Romans who developed the idea of the just war, thereby providing Rome with a legal justification for its many wars of aggression.[20] The concept of a just war occupied much of the literature on war and the law of nations during the Middle Ages and the Renaissance.[21] In *Henry VI*, the title character declares: 'God will, in justice, ward you as his soldiers.'[22] The concept of a 'just cause' was thus characterized as protective: its presence was considered to absolve one from sin and damnation for causing the loss of innocent life.

Much earlier, in Sumer – one of the early civilizations of the Ancient Near East in what is today south-eastern Iraq – evidence exists that war was regulated, which included the provision of immunity for enemy negotiators.[23] The Code of Hammurabi, dating from 1728 to 1686, BC, provided for the protection of the weak against oppression by the strong, the release of hostages on payment of ransom, and a catalogue of sanctions aimed at repairing the prejudices caused to both victims and society.[24] The Law of Hittites required respect for the inhabitants of an enemy city that had capitulated.[25] In the sixth century BC, Cyrus the Great of Persia prescribed the treatment of enemy soldiers as though they were his own. The Proclamation of Cyrus was divided into three parts: the first two parts explained why Cyrus conquered Babylon, while the third part was recited as a factual account of what he did upon seizing Babylon. This part reveals some extraordinary principles of present-day international humanitarian

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[19] See Korff, above note 2, 253. See also Phillipson, above note 10, Chapter III. See generally on the Ancient Roman legal system, Nussbaum, above note 4, 10–16.

[20] See Korff, above note 2, 252; Nussbaum, above note 4, 10–11 ('in fact, the invention of the "just war" doctrine constitutes the foremost Roman contribution to the history of international law'); Phillipson, above note 10, Chapter XXII, see particularly 178–9.

[21] Meron, above note 8, 30.

[22] Ibid.

[23] See Christopher Greenwood, 'Historical Development and Legal Basis', in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995), [107].

[24] Ibid.

[25] Ibid. The Hittites were an ancient people who established a kingdom centred at Hattusa in north-central Anatolia from the eighteenth century BC.

law and human rights law, including the freedom of thought, conscience and religion, and the protection of civilians and their property.[26]

In the middle ages, St Augustine espoused the popular (but not always or often respected) principle of protecting women, children and the elderly from hostilities.[27] The Code of Chivalry, which originally developed as a moral code of conduct in warfare among knights, had the more general effect of humane treatment for non-combatants in armed conflict.[28] Richard II of England, in the fourteenth century, issued rules for the conduct of war known as the 'Articles of War', which included a prohibition on the taking of booty, robbery and pillage, as well as the 'forcing' of women.[29] And in Japan, *Bushido*, the Japanese medieval code of honour, espoused the principle of humanity in war, which extended to prisoners of war.[30] However, there was general agreement that in war the innocent would always suffer with the guilty. Chivalric authors, therefore, discussed war as akin to a medicine which cures but also produces adverse effects – war was considered a means to establish peace. These chivalric themes are depicted in the literature of the time. In Shakespeare's *Henry VI*, a leader of the rebellion proclaims that his aim is '[n]ot to break peace, or any breach of it, [b]ut to establish here a peace indeed'.[31] Thus, there seem to be inherent limitations to the conduct considered appropriate in warfare.

These examples of a system of international law regulating the conduct of hostilities and the fundamental rights of human beings across ages and cultures is further evidence that a system of international law is an inevitable consequence of any civilization.[32] Where the need arises nations

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[26] See Hirad Abtahi, 'Reflections on the Ambiguous Universality of Human Rights: Cyrus the Great's Proclamation as a Challenge to the Athenian Democracy's Perceived Monopoly on Human Rights', in Hirad Abtahi and Gideon Boas (eds), *The Dynamics of International Criminal Justice: Essays in Honour of Sir Richard May* (Leiden: Martinus Nijhoff Publishers, 2005), 14–21; Hilaire McCoubrey, *International Humanitarian Law: The Regulation of Armed Conflict* (Aldershot, UK: Dartmouth Publishing, 1990), 6–11.

[27] See Greenwood, above note 23, [109].

[28] See, generally, Gerald Draper, 'The Interaction of Christianity and Chivalry in the Historical Development of the Law of War', (1965) 46 *International Review of the Red Cross* 3. See also Greenwood, above note 23, [109].

[29] See Leslie C. Green, *Essays on the Modern Law of War* (Dobbs Ferry, NY: Transnational Publishers, 1985), 360.

[30] See Greenwood, above note 23, [109]. See also M. Cherif Bassiouni, 'Crimes against Humanity', in Bassiouni (ed.), *International Criminal Law* (The Hague and London: Kluwer Law International, 1999, 2nd edn), 196–7.

[31] Meron, above note 8, 19–20.

[32] Korff, above note 2, 248.

have developed sometimes sophisticated systems of rules that bear the hallmarks of the modern international law system.

1.3.2 The Peace of Westphalia and the Development of Modern International Law

The seventeenth century was an important period in the development of international law. In the early 1600s, the conception of international law was developed by the practitioner and scholar Hugo Grotius, in his famous work *On the Law of War and Peace*.[33] His key contribution to the development of international law was to distinguish the 'law of nations' from natural law, by creating a set of rules applicable solely to states. This was a crucial development because, as Neff notes, 'for the first time in history, there was a clear conception of a systematic body of law applicable specifically to the relationship between nations'.[34]

The modern structure and form of the international system can largely be traced back to the Peace of Westphalia in 1648, bringing about the end of the vicious Thirty Years War – a war that came to involve virtually the entirety of Europe in a struggle for political and military domination.[35] Gerry Simpson describes the Peace of Westphalia (really two treaties adopted at Münster and Osnabrück) as 'the transition from empire to sovereignty'.[36] A key development emerging from Westphalia was a substantial reduction in the role played by religion in the international system, through the decline of the 'presence of two poles of authority: the Pope at the head of the Catholic Church, and the Emperor at the head of the Holy Roman Empire'.[37] This decline opened the door for the begin-

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[33] Neff, above note 5, 35.

[34] Ibid.

[35] Indeed, the Preamble to the Treaty of Westphalia provides a long and striking list of interlocutors: Treaty of Westphalia, Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies, reproduced at http://avalon.law.yale.edu/17th_century/westphal.asp (last accessed 20 June 2011). See also Nussbaum, above note 4, 115; S. Beaulac, 'The Westphalian Legal Orthodoxy – Myth or Reality?', 2 *Journal of the History of International Law*, 2000, 148; Leo Gross, 'The Peace of Westphalia', 42(1) *American Journal of International Law* 21; Shaw, above note 4, 26.

[36] Gerry Simpson, 'International Law in Diplomatic History', in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012). Although Simpson notes that states were later themselves to become (colonial) empires.

[37] Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2005, 2nd edn), 23.

nings of the modern international law system, leading to the rise of the nation state as the key actor in international law and politics. As Cassese notes:

> In short, the Peace of Westphalia testified to the rapid decline of the Church (an institution which had already suffered many blows) and to the de facto disintegration of the Empire. By the same token it recorded the birth of an international system based on a plurality of independent States, recognizing no superior authority over them.[38]

This development of the concept of the nation state increasingly caused states to be seen as 'permanently existing, corporate entities in their own right, separate from the rulers who governed them at any given time'.[39] One of the key concepts to come out of the development of the nation state was that the law of nations only governed inter-state relations, and that rulers were free to 'govern as they please' within their state.[40] This can be seen as the beginnings of the concept of state sovereignty. This exciting development in international law, reflecting a significant evolution in the rights of states within the sphere of international law, has soured increasingly over the past two centuries. The idea of the complete equality of states (no matter how large or small) in international law became lost during the nineteenth century 'under the influence of the diametrically opposed idea of the hegemony of the great Powers'.[41] The same sentiment is reflected in the twentieth-century revolt against massive human rights violations committed by the leadership of states against their own citizens.[42]

Nonetheless, the principle of state sovereignty was and remains the fundamental principle upon which modern international law is based, reflected in the UN Charter,[43] representing the now

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38 Ibid., 24; Gross, above note 35, 20.

39 Neff, above note 5, 35.

40 Ibid.

41 Ibid., 259.

42 Of the myriad of examples, see William A. Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), 1 (referring to the tacit acceptance of the commission of genocide by states under the veil of sovereign equality); see also Gideon Boas, James L. Bischoff and Natalie L. Reid, *Elements of Crimes Under International Law* (Cambridge: Cambridge University Press, 2008), Chapter 2, section 2.1.1 (discussing the failed pre-First World War endeavours to criminalize crimes against humanity, including in the context of the Armenian genocide).

43 United Nations, Charter of the United Nations (24 October 1945) 1 UNTS XVI, Art. 2.

paramount importance of the principle of sovereignty in international law.[44]

1.4 THEORIES OF INTERNATIONAL LAW

1.4.1 The Framework for International Law and the Importance of Norms

Traditionally, international law has been seen as 'a complex of norms regulating the mutual behaviour of states, the specific subjects of international law'.[45] These norms can be distinguished from rules, which may govern other areas of law such as domestic law. By 'norms' is meant 'standards of behaviour defined in terms of rights and obligations'.[46] Rules, in contrast, are the 'specific application of norms to particular situations' that prescribe or proscribe particular acts.[47]

Rosalyn Higgins views international law not as a system of rules, but as a normative system:

> All organized groups and structures require a system of normative conduct – that is to say, conduct which is regarded by each actor, and by the group as a whole, as being obligatory, and for which violation carries a price. Normative systems make possible that degree of order if society is to maximize the common good – and, indeed, even to avoid chaos in the web of bilateral and multilateral relationships that society embraces.[48]

While bearing in mind the importance of these norms and the attraction of viewing international law as a process, it is equally important to note that

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[44] See Cassese, above note 37, 48 ('It is safe to conclude that sovereign equality constitutes the linchpin of the whole body of international legal standards, the fundamental premise on which all international relations rest.') For a detailed discussion of states and sovereignty, see Chapter 4.

[45] Hans Kelsen, *Pure Theory of Law* (Berkeley, CA: University of California Press, 1967), 320.

[46] Stephen Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' in Stephen Krasner (ed.), *International Regimes* (Ithaca, NY: Cornell University Press, 1983), 2.

[47] Andrew P. Cortell and James W. Davis Jr, 'How Do International Institutions Matter? The Domestic Impact of International Rules and Norms' (1996) 40 *International Studies Quarterly* 451, 452.

[48] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), 1.

international law does not exist in an 'intellectual vacuum'.[49] These norms must also be viewed within a theoretical framework (or frameworks). This is because theories, at least in part, underpin the action of states, which in turn leads to the creation of norms, which become international law. International law theory, therefore, essentially relates to understanding, explaining and critiquing the basic propositions of international law. As we shall see, certain theoretical perspectives challenge the legitimacy and threaten the operation of international law; yet others call for reform or the space for different voices in the international legal system.

The role of states in defining and developing international law is well understood. Clearly, it is the contractual behaviour of states that develops the law through treaty. It is also the practice of states, and their belief in that practice, that develops customary international law.[50] Hans Kelsen states:

> International law consists of norms which were created by custom, that is, by acts of the national states or, more correctly formulated, by the state organs authorized by national legal orders to regulate interstate relations. These are the norms of 'general' international law, because they create obligations or rights for all states.[51]

This idea itself raises an interesting question. Why is it that the state as opposed to any other body or actor is given this power? The historical evolution of international law from the Peace of Westphalia, and its little challenged reflection in the sources of law under Article 38(1) of the Statute of the International Court of Justice,[52] provides one answer. Another answer lies in the crucial norm of *pacta sunt servanda* which 'authorizes the states as the subjects of the international community to regulate by treaty their mutual behaviour, that is, the behaviour of their own organs and subjects in relation to the organs and subjects of other states'.[53] Therefore, it is this norm that gives the state the legitimacy to act

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[49] Iain Scobbie, 'Wicked Heresies or Legitimate Perspectives? Theory and International Law', in Evans, above note 5, 83, 92.

[50] The sources of international law are discussed in Chapter 2. In brief, treaties are bilateral or multilateral agreements between states giving rise to rights and responsibilities as between those contracting states in relation to a particular issue or issues. Customary international law rules are created by the uniform and consistent practice of a significant number of states (the things states say and do in different fora) and their belief that this practice is derived from legal obligation.

[51] Kelsen, above note 45, 323.

[52] United Nations, Statute of the International Court of Justice, 18 April 1946.

[53] Kelsen, above note 45, 323.

on behalf of its subjects as one body. The reason why *pacta sunt servanda* presents only one answer to this question is that it provides but one theoretical framework for an understanding of how international law operates: certainly the predominant post-Westphalian model. Of course, predating this period it was possible to talk about the importance of the development and control of international law by different entities, including protectorates and empires, let alone the extensive political and legal control exercised by the Church. The modern question of the state as the paramount subject of international law, and the relationship of non-state actors with the creation and operation of international law, is a subject giving rise to increasing debate, and will be revisited in other contexts throughout this book.

1.4.2 Different Theoretical Conceptions of International Law

1.4.2.1 Natural and positive law theories

Natural law as a theory of international law held sway for many centuries. Roman jurists viewed natural law as the law derived from the nature of human beings, and as law expressive of the basic ideas of justice.[54] Cicero saw natural law as something immutable.[55] At heart, natural law views law as embodying axiomatic truths. It is because of this universal application that the principles of natural law were equally applicable to either domestic or international law. In the Middle Ages in Europe, natural law diversified into two key schools of thought. The first viewed it as created by God and discoverable by humans. The second, more popular and enduring school of thought was the 'rationalistic' approach, articulated by Thomas Aquinas, holding that natural law could be discovered and applied through human reason and analysis, as opposed to religious revelation. This interpretation viewed all law as already existing, waiting to be discovered. Hugo Grotius further developed this secular interpretation of international law. He focused particularly on the applicability of natural law to an international law framework, seeing natural law as one of the basic elements and sources of international law.[56] He viewed law as governing nations as well as people by universal principle based on morality

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[54] See, e.g., Philip Allott, 'International Law and the Idea of History', (1999) 1 *Journal of History and International Law* 1.

[55] Alexander Orakhelashvili, 'Natural Law and Justice', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Heidelberg: Max-Planck-Institut, 2010), [7].

[56] Ibid., [9]. See also Amos S. Hershey, 'International Law since the Peace of Westphalia' (1912) 6 *American Journal of International Law* 30, 31–2.

and divine justice,[57] although his 'eclectic' approach to international law entrenched principles of modern international law – such as legal equality, territorial sovereignty and the independence of states – in the European, and eventually global, political landscape.

While the rise of positive law theory in the sixteenth century clearly led to a substantial decline in support for natural law theory, some scholars contend that natural law still continues to play an important part in the international law system through the principles it provides for, such as natural justice.[58] The development in the twentieth century of the prohibition against crimes against humanity and genocide borrow deeply from the naturalist idea that there are laws of humanity that are immutable and give rise to rights and obligations that transcend the conscious or positive acts of states.[59] Reading Justice Jackson's Opening at Nuremberg, for example, one is struck by the evangelical (in the sense of carrying an almost religious truth) language, reminiscent of naturalist thinking:

> The doctrine was that one could not be regarded as criminal for committing the usual violent acts in the conduct of legitimate warfare. The age of imperialistic expansion during the eighteenth and nineteenth centuries added the foul doctrine . . . that all wars are to be regarded as legitimate wars. The sum of these two doctrines was to give war-making a complete immunity from accountability to law.
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> This was intolerable for an age that called itself civilized. Plain people with their earthy common sense, revolted at such fictions and legalisms so contrary to ethical principles and demanded checks on war immunities.[60]

The reasoning that scaffolded Jackson's arguments was legally flimsy but morally irresistible, reminding us of Cicero's belief in the immutability of law.

Indeed, certain developments in areas of fundamental human rights and even the use of force based on 'humanitarian intervention' may

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[57] *De Jure Belli ac Pacis Libri Tres* (1625).

[58] Orakhelashvili, above note 55, [35].

[59] See, e.g., the Martens Clause – which first appeared in the Preamble to the 1899 Hague Convention II and the 1907 Hague Convention IV and is most likely the legal foundation for crimes against humanity – which states that 'populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the *laws of humanity* and the requirements of the public conscience'. See Boas et al., above note 42, Chapter 2, section 2.2.1.

[60] Opening Speech of Justice Jackson before the Nuremberg Tribunal, in *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg*, Vol. II, 98–102.

signal something of a naturalist view of some norms being deeply rooted in the international legal conscience, not requiring discovery through the usual sources of international law.[61] Although these developments require appraisal from a modern understanding of international law, one is reminded of the words of Pierre Joseph Proudhon from the nineteenth century: 'Whoever invokes humanity wants to cheat.'[62]

Positivist legal theory grew in large part as a reaction to naturalist thought. Originally conceived by the French philosopher Auguste Comte, positivism 'promised to bring the true and final liberation of the human mind from the superstitions and dogmas of the past'.[63] While natural law holds that all law already exists waiting to be discovered, positivist theory views law not as a set of pre-existing or pre-ordained legal rules derived from some mystical source; rather, positivism views international law as discoverable through a scientific, objective or empirical process.[64]

Positivist law was developed in the writings of John Austin, who defined

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[61] Antonio Cassese appears to call on something like natural law when he suggests that where a rule of international law concerns the 'laws of humanity' or the 'dictates of conscience', it may be unnecessary to look at state practice as the foundation of its legal status (see Cassese, above note 37, 160–1). This seems to suggest that there are some rules that are simply given, justified by virtue purely of their nature and content. Apart from the less controversial references to the prohibition of genocide and crimes against humanity, justification for the NATO bombing of Serbia in the late 1990s as based on 'humanitarian intervention' has a certain natural law (or even 'just war') ring to it. Kartashkin refers to humanitarian interventions 'justified by common interests and humane considerations, such as natural law principles': Vladimir Kartashkin, 'Human Rights and Humanitarian Intervention', in Lori Fisler Damrosch and David J. Scheffer (eds), *Law and Force in the New International Order* (Boulder, CO: Westview, 1991), 202, 203–4. See also Antonio Cassese, 'Ex Injuria Ius Oritur: Are we Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) *European Journal of International Law* 23; cf. Brownlie, who believes 'there is very little evidence to support assertions that a new principle of customary law legitimising humanitarian intervention has crystallised': Ian Brownlie, 'International Law and the Use of Force – Revisited', speech delivered at the Graduate Institute of International Studies, Geneva, 1 February 2010, available at http://www.europaeum.org/files/publications/pamphlets/IanBrownlie.pdf; Higgins, above note 48, 245–8. See also J.B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907* (New York: Oxford University Press, 1915), 101–2.

[62] Quoted by Carl Schmitt and cited in Marttii Koskenniemi, 'What is International Law For?' in Evans, above note 5, 64.

[63] Neff, above note 5, 38.

[64] Ibid.

it as 'set by a sovereign individual or a sovereign body of individuals, to a person or persons in a state of subjection to its author'.[65] Interestingly, while such a conception of law is clearly a rejection of natural law theory, it has deep links to Hugo Grotius' 'law of nations'. Grotius transformed the Romanic *jus gentium*[66] into his idea of a law of nations, which led to it being identified as a body of law distinct from natural law, an idea that Jeremy Bentham would eventually refer to for the first time as 'international law'.[67]

For Neff, '[b]y positivism is meant such a wealth of things that it may be best to avoid using the term altogether'.[68] Indeed, the use of the term legal positivism in international legal scholarship represents a myriad of ideas. Austin's positivism views law as essentially anarchistic – rules set by those individuals or bodies who hold power over others.

The twentieth-century realist, Hans Morgenthau, describes positivism in terms of strict legalism:

> The juridic positivist delimits the subject-matter of his research in a dual way. On the one hand, he proposes to deal exclusively with matters legal, and for this purpose strictly separates the legal sphere from ethics and *mores* as well as psychology and sociology. Hence, his legalism. On the other hand, he restricts his attention within the legal sphere to the legal rules enacted by the state, and excludes all law whose existence cannot be traced to the statute books or the decisions of the courts. Hence his *étatist* monism. This 'positive' law the positivist accepts as it is, without passing judgment upon its ethical value or questioning its practical appropriateness. Hence his agnosticism. The positivist cherishes the belief that the 'positive' law is a logically coherent system which virtually contains, and through a mere process of logical deduction will actually produce, all rules necessary for the decision of all possible cases. Hence, his system worship and dogmatic conceptualism.[69]

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[65] John Austin, in R. Campbell (ed.), *Lectures on Jurisprudence*, or *The Philosophy of Positive Law*, two volumes (Bristol: Thoemmes Press reprint, 2002), 35. See also John Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1832). See Gerry Simpson's articulation of Austin's conception of international law as anarchic in text accompanying note 201 below. See also Bernard Röling, *International Law in an Expanded World* (Amsterdam: Djambatan, 1960), who viewed international law (like all law) as having 'the inclination to serve primarily the interests of the powerful', at 230.

[66] See section 1.3.1 above for the Roman Law roots of this concept.

[67] Jeremy Bentham, *Principles of Morals and Legislation* (Oxford: Clarendon Press, 1789).

[68] Neff, above note 5, 38.

[69] Hans J. Morgenthau, 'Positivism, Functionalism, and International Law', (1940) 34 *American Journal of International Law* 260, 261.

Traditional positivism denotes a formalism, a search for law objectively, without interference from the extralegal. The attraction of such an approach to law can easily be understood when seen as emerging out of the mysticism and religious trappings of natural law theory. Modern positivism as a search for objective law eschews the teleological development of law (law as it should be), which is interesting when viewed through a humanist lens. Some of the most profound developments in modern international law challenge the firm positivist grip on the discipline. Human rights law and humanitarian law have, in recent years, received platinum teleological treatment before the most exacting and conservative juridical forum of all: criminal courts. The meteoric development of international criminal law in the brief life of the International Criminal Tribunal for the former Yugoslavia, for example, shows how modern international law can be very much a case of law as it should be. This enthusiastic humanism surely paved the way for the doctrine of responsibility to protect, and what Gerry Simpson calls belligerent humanitarianism.[70]

At heart, positivism emerged from the creation of a law of nations, born of a contract (or rather a complex and ever changing web of contracts) between nations consciously dictating their own destiny.[71] In this way international law can be viewed at once as liberating (rescued from the vagaries of dogma and the control of religious institutions)[72] and, at the same time, as a reflection of state power paradigms (out of the frying pan and into the fire). The latter observation is particularly powerful when considering the contention, advanced by Boyle, that continued investigation of the source of international law is, in short, an attempt to 'develop some conceptual way of differentiating between law and politics'.[73] In the context of modern international law, plagued by challenges to state-centrism, the cold formalism of positivist theory (born of the idea of state as the supreme and self-determiner of the rules of international law) is under something of a challenge. Questions continue to arise regarding how a sov-

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[70] Gerry Simpson, above note 36.

[71] Ago explains that the development of Grotius' writings in the eighteenth century by scholars such as Emer de Vattel, Christian Wolff George and Frederick de Martens led to the view that '"positive international law" within the body of law in force in international society is that part of law which is laid down by the tacit and expressed consent of different states': Roberto Ago, 'Positive Law and International Law' (1957) 51 *American Journal of International Law* 691, 693.

[72] See, e.g., *SS 'Lotus'* (Judgment No. 9) (1927) PCIJ (Ser. A) No. 10, 14 (describing the rules of law binding upon states as emanating 'from their own free will').

[73] Gerry Simpson, above note 36, 279.

ereign can bind itself to bind itself in the future,[74] and the circularity which legal positivism appears unable to shake in the search for a source which can 'imbue the sovereign's consent with the kind of normative force'[75] required by this doctrine. Considerations of these challenges posed to the positivist theory will re-emerge throughout this book.

1.4.2.2 Relationship between international relations, international law, and different theories of international law

All law has a relationship with politics. Because international law is largely created by the actions of states and their organs, there is an inevitably strong relationship between international relations and international law. Indeed, the international political environment compels states to behave in particular ways, which in turn leads to the variation and creation of international law. Many aspects of international relations and politics have impacted on the theoretical conception of international law. As the voices in the community of the international system grow, as they have dramatically done in the latter half of the twentieth and beginning of the twenty-first centuries, so too theories develop to reflect differing perspectives. In this way one sees the development of theories based on social policy and international relations/politics (such as realism and liberalism, the new haven and socialist schools), of theories developed around counter-culture (critical legal studies), as well as theories developed in response to oppressive aspects of the conservative and exclusive system of international law (feminist theory; lesbian, gay, bisexual and transgender/transsexual theory; Third World theory). While all of these theories merit consideration and reflect important voices in the milieu of international law, only a few will be discussed in this section (and only briefly) to enable an understanding of the international law landscape and to assist in considering, in the final section of this chapter, what is international law.

All forms of law are inevitably subjected to theories that describe, explain and critique them. Such theory may be presented as the origin of a system of law; or to explain, rationalize, justify or challenge it. A unique aspect of international law, however, is the extent to which theory becomes so crucial both in dictating the direction of the law itself, and the set of politics that is intrinsic to it.[76] This is at least in part because the

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[74] Ibid., 285.

[75] Ibid.

[76] See, Shaw, above note 4, 12: 'Politics is much closer to the heart of the [international] system than is perceived within national legal orders, and power much more in evidence. The interplay of law and politics in world affairs is much more complex and difficult to unravel.' Anne-Marie Slaughter, 'International Law in a

ideology adhered to by a state or group of states influences their approach to international relations and in turn determines their behaviour in the international sphere. This behaviour, or 'state practice', assists in the development of custom, which itself leads to the creation of international law.

1.4.2.2.1 Realism and liberalism Realism and liberalism are two international relations theories used to explain, predict, and justify the actions of states. These are by no means the only international relations theories, but are the dominant ones in contemporary thought.[77]

1.4.2.2.1.1 REALISM The fundamental concept underpinning the realist school of thought is that states are mutually self-interested actors that, in situations where they must choose a particular course of action out of multiple alternatives, will engage in a cost–benefit analysis of each option. To realist legal scholars, states will inevitably make the only 'rational' choice; they will act in a way that best promotes their own interests, to the exclusion of the interests of others. This assumption forms the basis of Rational Choice Theory, which is currently the dominant theoretical paradigm in economic modeling.[78] The predominance of Rational Choice Theory in economic scholarship is, today, possibly the most visible and well-known manifestation of realism.

World of Liberal States', (1995) 6 *European Journal of International Law* 503, 503: 'International Law and international politics cohabit the same conceptual space. Together they comprise the rules and the reality of "the international system", an intellectual construct that lawyers, political scientists, and policymakers use to describe the world they study and seek to manipulate. As a distinguished group of international lawyers and a growing number of political scientists have recognized, it makes little sense to study one without the other.' An interesting example of this relationship can be found in war crimes law: see Gerry Simpson, *Law War and Crime* (2008), 11–12: '[W]ar crimes are political trials. They are political not because they lack a foundation in law or because they are the crude product of political forces but because war crimes law is saturated with conversations about what it means to engage in politics or law, as well as a series of projects that seek to employ these terms in the service of various ideological preferences. War crimes are political trials because concepts of the political remain perpetually in play . . . In the end, war crimes law is a place where politics happens.'

77 Slaughter, above note 76, 506.

78 In 1881, F.Y. Edgeworth stated that 'the first principle of Economics is that every agent is actuated only by self-interest': *Mathematical Psychics: An Essay on the Application of Mathematics for the Moral Sciences* (London: C. Kegan Paul & Co., 1881), 6; available at http://socserv.mcmaster.ca/~econ/ugcm/3ll3/edgeworth/mathpsychics.pdf.

This egoistic model, however, generates gloomy predictions regarding the nature of state interactions and for international law in general. In 1513, Niccolò Machiavelli wrote: 'They who lay down the foundations of a State and furnish it with laws must . . . assume that all men are bad, and will always, when they have free field, give loose to their evil inclinations.'[79] Slaughter explains that, for realists, states interact with one another within an uncertain and anarchical system like billiard balls: hard, opaque, unitary actors colliding with one another.[80] In this way, the internal dynamics, political system and ideology of an individual state are irrelevant.[81] All states will act accordingly, leading to a troubling view of international law: 'International norms serve only an instrumental purpose, and are likely to be enforced or enforceable only by a hegemon. The likelihood of positive-sum games in which all states will benefit for cooperation is relatively low.'[82] Thus, from a purely realist perspective, the value of international law to the international community is highly questionable.

1.4.2.2.1.2 LIBERALISM The realist school can be contrasted with liberalism. A key difference between liberalist and realist thought is that while realists focus on relations between states to the exclusion of internal relations, liberalists focus on the relationship between the state and society. Moravcsik refers to three core liberalist assumptions.[83] First, 'the fundamental actors in politics are members of domestic society, understood as individuals and privately constituted groups seeking to promote their independent interests',[84] a clear difference from the statist approach taken under realism. The second core assumption is that 'governments represent some segment of domestic society, whose interests are reflected

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[79] Niccolò Machiavelli, *Discourses on the First Decade of Titus Livius, Book I, Chapter III* (Ninian Hill Thomson trans, 1883), 28; available at http://www2.hn.psu.edu/faculty/jmanis/machiavelli/Machiavelli-Discourses-Titus-Livius.pdf.

[80] Slaughter, above note 76, 507 (of the billiard balls metaphor, Slaughter explains that this is the classic Realist metaphor first used by Arnold Wolfers, *Discord and Collaboration: Essays on International Politics* (Baltimore: John Hopkins Press, 1962), 19–24.

[81] Ibid., 507; Christian Reus-Smith, 'The Strange Death of Liberal International Theory' (2001) 12(3) *European Journal of International Law*, 573, 581–2.

[82] Slaughter, above note 76, 507.

[83] See A.M. Moravcsik, *Liberalism and International Relations Theory* (Center for International Affairs, Harvard University, Working Paper No. 92-6, 1992). See also Slaughter, above note 76 (endorsing Moravcsik's classification of the broad principles of liberalist theory), 508.

[84] Moravcsik, above note 83, 6.

in state policy'.[85] This differs from the realist approach which divorces internal domestic matters from the factors that affect how a state will act in the international sphere. The third core liberalist assumption is that the behaviour of states – and hence levels of international conflict and cooperation – reflects 'the nature and configuration of state preferences'.[86]

1.4.2.2.1.3 REALISM AND LIBERALISM AS ALTERNATIVES The interplay between international law and politics became particularly pronounced during the Cold War. During this period, theories were advanced by scholars from both the United States and the USSR, which had the effect of justifying these political regimes' own respective and opposing ideologies. Policy-oriented schools of international legal theory during this period impacted significantly on global politics and therefore on the interpretation and development of international law.

However, while realism and liberalism were often used during this period in counteraction to the other, it is equally conceivable that the two are not truly alternatives, let alone mutually exclusive. Indeed, the better understanding of the interaction between these two theories is that liberalism is an offspring of realism. Liberalism, although in a sense more nuanced than realism, nonetheless remains rooted in the foundational principle that states act out of self-interest. The distinction lies in the fact that the range of interests considered to be of relevance by liberals is wider than those accepted by traditional realists.

1.4.2.2.1.4 CONSTRUCTIVISM The more plausible alternative to realism is constructivism. Although the term 'constructivism' was only coined in 1989, key tenets of constructivism can be found in the works of mainstream international political science theorists in the 1950s.[87] To constructivists, the international community is an environment of communication and learning in which states come to form expectations about others' behaviour. Whereas realism assumes that the interests of states are fixed and exogenous, constructivism views the interests and identities of states as endogenous and constituted through interaction with other states on the basis of shared norms.[88] International law, therefore, has a much more

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[85] Ibid., 9.

[86] Ibid., 10.

[87] Jutta Brunee and Stephen J. Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law', (2000–01) 39 *Columbia Journal of Transnational Law* 19.

[88] Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, 'International Law and International Relations Theory: A New Generation of

positive role to play in constructivist theory, cultivating a sense of shared identity and destiny, and engendering enhanced cooperation and trust between states.

1.4.2.2.2 Post-Cold War Two schools of political theory that shaped the polarized international law landscape during the Cold War were the New Haven and Soviet theories. The New Haven School was created by American scholars, and represented essentially an embrace of democratic values, growing out of the Second World War and the emergence of communism as an international political force.[89] This theory reflected an argument for 'clearly defined democratic values in all the areas of social life where lawyers have or can assert responsibility'.[90] In stark contrast, Soviet theory – developed by Soviet scholars during the Cold War period, particularly Tunkin – was a 'diametrical opposite to the New Haven School, both in its professed structure and envisaged political outcome.'[91]

The intense and obvious interplay between international law theory and politics during the Cold War period has since become more subtle, but is clearly still influential. While the age of diametrically opposed theories may have passed, states still utilize and rely upon international law theory to justify policy. A recent and relevant example of this was the use of the hegemonic theory by the US administration under George W. Bush to justify its treatment of 'enemy combatants' following the invasion of

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Interdisciplinary Scholarship', (1998) 92 *American Society of International Law* 367, 373, 384; See, generally, Friedrich Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989); Harold Hongju Koh 'Why do Nations Obey International Law?', (1997) 106 *Yale Law Journal* 2599.

[89] Scobbie, above note 49, 93. Generally on the New Haven theory, see Hilary Charlesworth, 'Current Trends in International Legal Theory', in S.K.N. Blay, R.W. Piotrowicz and B.M. Tsamenyi, *Public International Law: An Australian Perspective* (Oxford: Oxford University Press, 1997), 403; Shaw, above note 4, 58–62.

[90] Harold D. Laswell and Myers S. McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest', (1943) 52 *Yale Law Journal* 203, 207.

[91] Scobbie, above note 49, 96 and 97 (referencing G.I. Tunkin, *Theory of International Law* (Cambridge, MA: Harvard University Press, 1974) and Lori Fisler Damrosch, Gennady M. Danilenko and Rein Mullerson, *Beyond Confrontation: International Law for the Post-Cold War Era* (Boulder, CO: Westview Press, 1995)).

Afghanistan in 2001. This theory, adopting a strongly dualist stance,[92] argues that a 'radical freedom of action' for the United States is to be put first and foremost before any form of international law. An unreconstructed advocate of this theory, John Bolton, argues:

> We should be unashamed, unapologetic, uncompromising American constitutional hegemonists. International law is *not* superior to, and does not trump the Constitution. The rest of the world may not like that approach, but abandoning it is the first step to abandoning the United States of America.[93]

This theory was used as a justification for US policy in the treatment of 'enemy combatants' at Guantanamo Bay and Abu Ghraib. By applying hegemonic theory and rejecting any form of law that has not been ratified by the US Congress, the Bush Administration was able to act in a way 'denying the applicability of the Geneva Conventions and international prohibitions on torture and inhumane treatment',[94] leading to wide-scale systematic human rights abuse.[95] This presents just one example, and a depressing one at that, of how international law theory is still used to justify the political behaviour of states.

Other theories of international law have a political content, in the broader sense of the term.

1.4.2.2.3 Marxist theory Marxist theory takes its name from Karl Marx, whose writings, along with Friedrich Engels', established an account of international law based upon a materialistic interpretation of history, criticism of capitalism and a theory of social change produced by economic conditions.[96] In general terms, Marxism is a description of the societal shift to communism, and an account of the inevitability of this shift, driven as it is by social inequality. The result is a broad-based social and political theory that encompasses multitudes of interpretations of Marx's

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[92] For an explanation of 'monist' and 'dualist' theories of international law, see Chapter 3, section 3.1.

[93] John R. Bolton, 'Is There Really "Law" in International Affairs?' (2000) 10 *Transnational Law and Contemporary Problems*, 1, 48.

[94] Scobbie, above note 49, 106.

[95] See, e.g., George Aldrich, 'The Taliban, al Qaeda, and the Determination of Illegal Combatants', (2002) 96 *American Journal of International Law* 891.

[96] Susan R. Marks, 'Introduction', in Susan R. Marks (ed.), *International Law on the Left: Re-Examining Marxist Legacies* (Cambridge: Cambridge University Press, 2008), 1–3.

philosophy, producing categories such as 'Classical Marxism', 'Official Marxism', and 'Alternative Marxism'.[97]

Of the current incarnation of the school of Marxist theory, Chimni – who is at the forefront of current endeavours to recast mainstream accounts of international law in a Marxist mould – outlines the distinctive features of critical Marxist international law scholarship (CMILS).[98] First, the definition of 'national interest' is informed by historical phases, group and class interests.[99] Second, the democratic transformation of international law is recognized to be subject to structural constraints such as power-driven conceptions of sources of international law.[100] Thirdly, whereas mainstream theories contain notions of objectivity in interpretations of fact and law, and the New Haven School adopts a position of radical indeterminacy, CMILS occupies a middle-ground between the two.[101] Fourthly, CMILS attempts to take an inclusive approach to international law and acknowledges alternative theories rather than lending credence to the characterization of American and European perspectives as the universal story of international law.[102]

As it stands, proponents of Marxism remain engaged in the challenge to gain greater legitimacy as a more accurate and meaningful alternative to more mainstream theories of international law.

1.4.2.2.4 Critical legal studies Critical legal studies challenge accepted norms in the international community and question the assumptions 'common to most legal systems that they are rational, objective and supported by evidence'.[103] Regarding the current world order, critical legal theorists argue that the 'liberal underpinnings of western international law and the notion of universality based on the consensus of states, are

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[97] China Miéville, 'The Commodity Form Theory of International Law: An Introduction', (2004) 17 *Leiden Journal of International Law* 271, 276–9.

[98] B.S. Chimni, 'An Outline of a Marxist Course on Public International Law', (2004) 17 *Leiden Journal of International Law* 1, 3–5; B.S. Chimni, 'Marxism and International Law: A Contemporary Analysis', (1999) 34 *Economics and Political Weekly* 337.

[99] B.S. Chimni, 'An Outline of a Marxist Course on Public International Law', above note 98, 3.

[100] Ibid., 4.

[101] Ibid.

[102] Ibid.

[103] Gillian Triggs, *International Law: Contemporary Principles and Practices* (Sydney: LexisNexis Butterworths, 2011, 2nd edn), 13; Charlesworth, above note 89, 404.

illusory'.[104] This is due in part to the fact that 'liberalism tries constantly to balance individual freedom and social order and, it is argued, inevitably ends up siding with one or other of those propositions'.[105]

Critical legal studies have been described as a 'political location', lacking any essential intellectual component, and presently occupied by many fundamentally different and even sometimes contradictory subgroups, including various feminists, critical race theorists, post-modernists and political economists.[106] Nonetheless, several common themes can be discerned. The first is a strong view of the flaws in objectivism and formalism.[107] Another is the proposition that law is politics, that is, an analysis of the assumptions that form the foundation of the law will reveal that these assumptions operate to advance the interests of some political grouping.[108] Further, critical legal scholars stress the contradictions and indeterminacy inherent in legal rules.[109] Martii Koskenniemi, for example, argues that international legal analysis cannot provide an objective resolution of disputes because the recognition of sovereign states as the basic unit of international society is itself a normative, value judgement:[110]

> [I]nternational law is singularly useless as a means for justifying or criticizing international behaviour. Because it is based on contradictory premises it remains both over- and under-legitimizing: it is over-legitimizing as it can be ultimately invoked to justify any behaviour (apologism), it is under-legitimizing because it is incapable of providing a convincing argument on the legitimacy of any practices (utopianism).[111]

Koskenniemi attributes the inability of international legal analysis to objectively resolve disputes to the inherent 'reversibility' of international legal arguments. He argues that patterns of argument ostensibly appeal to autonomy (which is characterized as an ascending pattern of argument) or community (which is characterized as descending).[112] In international law, ascending patterns of argument are countered by descending patterns of

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104 Charlesworth, ibid., 404.

105 Marttii Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), 52.

106 Mark Tushnet, 'Critical Legal Studies: A Political History', (1991) 100 *Yale Law Journal* 1515, 1516–18.

107 See, generally, Roberto Mangabeira Unger, 'The Critical Legal Studies Movement', (1983) 96 *Harvard Law Review*, 561.

108 Tushnet, above note 106, 1517.

109 Shaw, above note 4, 63–4.

110 Koskenniemi, above note 105, 192–3.

111 Ibid., 48.

112 Ibid., 503–4.