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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Third World

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Suggestions for further reading

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

2

International law today

The expanding legal scope of international concern

International law since the middle of the last century has been developing in many directions, as the complexities of life in the modern era have multiplied. For, as already emphasised, law reflects the conditions and cultural traditions of the society within which it operates. The community evolves a certain specific set of values – social, economic and political – and this stamps its mark on the legal framework which orders life in that environment. Similarly, international law is a product of its environment. It has developed in accordance with the prevailing notions of international relations and to survive it must be in harmony with the realities of the age.

Nevertheless, there is a continuing tension between those rules already established and the constantly evolving forces that seek changes within the system. One of the major problems of international law is to determine when and how to incorporate new standards of behaviour and new realities of life into the already existing framework, so that, on the one hand, the law remains relevant and, on the other, the system itself is not too vigorously disrupted.

Changes that occur within the international community can be momentous and reverberate throughout the system. For example, the advent of nuclear arms created a status quo in Europe and a balance of terror throughout the world. It currently constitutes a factor of unease as certain states seek to acquire nuclear technology. Another example is the technological capacity to mine the oceans and the consequent questions as to the nature and beneficiaries of exploitation.[1] The rise of international terrorism has posited new challenges to the system as states and international organisations struggle to deal with this phenomenon while retaining

[1] See below, chapter 11.

respect for the sovereignty of states and for human rights.[2] There are several instances of how modern developments demand a constant reappraisal of the structure of international law and its rules.

The scope of international law today is immense. From the regulation of space expeditions to the question of the division of the ocean floor, and from the protection of human rights to the management of the international financial system, its involvement has spread out from the primary concern with the preservation of peace, to embrace all the interests of contemporary international life.

But the *raison d'être* of international law and the determining factor in its composition remains the needs and characteristics of the international political system. Where more than one entity exists within a system, there has to be some conception as to how to deal with other such entities, whether it be on the basis of co-existence or hostility. International law as it has developed since the seventeenth century has adopted the same approach and has in general (though with notable exceptions) eschewed the idea of permanent hostility and enmity. Because the state, while internally supreme, wishes to maintain its sovereignty externally and needs to cultivate other states in an increasingly interdependent world, it must acknowledge the rights of others. This acceptance of rights possessed by all states, something unavoidable in a world where none can stand alone, leads inevitably to a system to regulate and define such rights and, of course, obligations.

And so one arrives at some form of international legal order, no matter how unsophisticated and how occasionally positively disorderly.[3] The current system developed in the context of European civilisation as it progressed, but this has changed. The rise of the United States and the Soviet Union mirrored the decline of Europe, while the process of decolonisation also had a considerable impact. More recently, the collapse of the Soviet Empire and the Soviet Union, the rise of India and China as major powers and the phenomenon of globalisation are also impacting deeply upon the system. Faced with radical changes in the structure of power, international law needs to come to terms with new ideas and challenges.

[2] See below, chapter 20.

[3] For views as to the precise definition and characteristics of the international order or system or community, see G. Schwarzenberger and E. D. Brown, *A Manual of International Law*, 6th edn, London, 1976, pp. 9–12; H. Yalem, 'The Concept of World Order', 29 YBWA, 1975, and I. Pogany, 'The Legal Foundations of World Order', 37 YBWA, 1983, p. 277.

The Eurocentric character of international law has been gravely weakened in the last sixty years or so and the opinions, hopes and needs of other cultures and civilisations are now playing an increasing role in the evolution of world juridical thought.[4]

International law reflects first and foremost the basic state-oriented character of world politics and this essentially because the state became over time the primary repository of the organised hopes of peoples, whether for protection or for more expansive aims. Units of formal independence benefiting from equal sovereignty in law and equal possession of the basic attributes of statehood[5] have succeeded in creating a system enshrining such values. Examples that could be noted here include non-intervention in internal affairs, territorial integrity, non-use of force and equality of voting in the United Nations General Assembly. However, in addition to this, many factors cut across state borders and create a tension in world politics, such as inadequate economic relationships, international concern for human rights and the rise in new technological forces.[6] State policies and balances of power, both international and regional, are a necessary framework within which international law operates, as indeed are domestic political conditions and tensions. Law mirrors the concern of forces within states and between states.

It is also important to realise that states need law in order to seek and attain certain goals, whether these be economic well-being, survival and security or ideological advancement. The system therefore has to be certain enough for such goals to be ascertainable, and flexible enough to permit change when this becomes necessary due to the confluence of forces demanding it.[7]

International law, however, has not just expanded horizontally to embrace the new states which have been established since the end of the Second World War; it has extended itself to include individuals, groups and international organisations, both private and public, within its scope. It has also moved into new fields covering such issues as international trade, problems of environmental protection, human rights and outer space exploration.

[4] See e.g. L. C. Green, 'Is There a Universal International Law Today?', 23 Canadian YIL, 1985, p. 3.

[5] See below, chapter 5, p. 211.

[6] For examples of this in the context of the law relating to territory, see M. N. Shaw, *Title to Territory in Africa: International Legal Issues*, Oxford, 1986, pp. 1–11.

[7] See S. Hoffman, 'International Systems and International Law', 14 *World Politics*, 1961–2, p. 205.

The growth of positivism in the nineteenth century had the effect of focusing the concerns of international law upon sovereign states. They alone were the 'subjects' of international law and were to be contrasted with the status of non-independent states and individuals as 'objects' of international law. They alone created the law and restrictions upon their independence could not be presumed.[8] But the gradual sophistication of positivist doctrine, combined with the advent of new approaches to the whole system of international relations, has broken down this exclusive emphasis and extended the roles played by non-state entities, such as individuals, multinational firms and international institutions.[9] It was, of course, long recognised that individuals were entitled to the benefits of international law, but it is only recently that they have been able to act directly rather than rely upon their national states.

The Nuremberg and Tokyo Tribunals set up by the victorious Allies after the close of the Second World War were a vital part of this process. Many of those accused were found guilty of crimes against humanity and against peace and were punished accordingly. It was a recognition of individual responsibility under international law without the usual interposition of the state and has been reinforced with the establishment of the Yugoslav and Rwanda War Crimes Tribunals in the mid-1990s and the International Criminal Court in 1998.[10] Similarly the 1948 Genocide Convention provided for the punishment of offenders after conviction by national courts or by an international criminal tribunal.[11] The developing concern with human rights is another aspect of this move towards increasing the role of the individual in international law. The Universal Declaration of Human Rights adopted by the United Nations in 1948 lists a series of political and social rights, although it is only a guideline and not legally binding as such. The European Convention for the Protection of Human Rights and Fundamental Freedoms signed in 1950 and the International Covenants on Human Rights of 1966 are of a different nature and binding upon the signatories. In an effort to function satisfactorily various bodies of a supervisory and implementational nature were established. Within the European Union, individuals and corporations have certain rights of direct appeal to the European Court of Justice against decisions of the various Union institutions. In addition, individuals may appear before certain international tribunals. Nevertheless, the whole subject has been highly controversial, with some writers (for example Soviet theorists prior

[8] See the *Lotus* case, PCIJ, Series A, No. 10, p. 18.
[9] See further below, chapter 5.
[10] See below, chapter 8.
[11] *Ibid.*

to *perestroika*) denying that individuals may have rights as distinct from duties under international law, but it is indicative of the trend away from the exclusivity of the state.[12]

Together with the evolution of individual human rights, the rise of international organisations marks perhaps the key distinguishing feature of modern international law. In fact, international law cannot in the contemporary era be understood without reference to the growth in number and influence of such intergovernmental institutions, and of these the most important by far is the United Nations.[13] The UN comprises the vast majority of states (there are currently 192 member states) and that alone constitutes a political factor of high importance in the process of diplomatic relations and negotiations and indeed facilitates international co-operation and norm creation. Further, of course, the existence of the Security Council as an executive organ with powers to adopt resolutions in certain circumstances that are binding upon all member states is unique in the history of international relations.

International organisations have now been accepted as possessing rights and duties of their own and a distinctive legal personality. The International Court of Justice in 1949 delivered an Advisory Opinion[14] in which it stated that the United Nations was a subject of international law and could enforce its rights by bringing international claims, in this case against Israel following the assassination of Count Bernadotte, a United Nations official. Such a ruling can be applied to embrace other international institutions, like the International Labour Organisation and the Food and Agriculture Organisation, which each have a judicial character of their own. Thus, while states remain the primary subjects of international law, they are now joined by other non-state entities, whose importance is likely to grow even further in the future.

The growth of regional organisations should also be noted at this stage. Many of these were created for reasons of military security, for example NATO and the opposing Warsaw Pact organisations, others as an expression of regional and cultural identity such as the Organisation of African Unity (now the African Union) and the Organisation of American States. In a class of its own is the European Union which has gone far down the road of economic co-ordination and standardisation and has a range of

[12] See further below, chapters 6 and 7. [13] See further below, chapter 22.

[14] *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports, 1949, p. 174; 16 AD, p. 318.

common institutions serviced by a growing bureaucracy stationed primarily at Brussels.

Such regional organisations have added to the developing sophistication of international law by the insertion of 'regional–international law sub-systems' within the universal framework and the consequent evolution of rules that bind only member states.[15]

The range of topics covered by international law has expanded hand in hand with the upsurge in difficulties faced and the proliferation in the number of participants within the system. It is no longer exclusively concerned with issues relating to the territory or jurisdiction of states narrowly understood, but is beginning to take into account the specialised problems of contemporary society. Many of these have already been referred to, such as the vital field of human rights, the growth of an international economic law covering financial and development matters, concern with environmental despoliation, the space exploration effort and the exploitation of the resources of the oceans and deep seabed. One can mention also provisions relating to the bureaucracy of international institutions (international administrative law), international labour standards, health regulations and communications controls. Many of these trends may be seen as falling within, or rather reflecting, the phenomenon of globalisation, a term which encompasses the inexorable movement to greater interdependence founded upon economic, communications and cultural bases and operating quite independently of national regulation.[16] This in

[15] See generally below, chapter 23.

[16] See e.g. A. Giddens, *The Consequences of Modernity*, Stanford, 1990; S. Sur, 'The State Between Fragmentation and Globalisation', 8 EJIL, 1997, p. 421; B. Simma and A. Paulus, 'The "International Community": Facing the Challenge of Globalisation. General Conclusions', 9 EJIL, 1998, p. 266, and P. M. Dupuy, 'International Law: Torn Between Coexistence, Co-operation and Globalisation. General Conclusions', 9 EJIL, 1998, p. 278. See also the Declaration of Judge Bedjaoui in the Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, pp. 226, 270–1. Note that Philip Bobbitt has described five developments challenging the nation-state system, and thus in essence characterising the globalisation challenge, as follows: the recognition of human rights as norms requiring adherence within all states regardless of internal laws; the widespread deployment of weapons of mass destruction rendering the defence of state borders ineffectual for the protection of the society within; the proliferation of global and transnational threats transcending state boundaries such as those that damage the environment or threaten states through migration, population expansion, disease or famine; the growth of a world economic regime that ignores borders in the movement of capital investment to a degree that effectively curtails states in the management of their economic affairs; and the creation of a global communications network that penetrates borders electronically and threatens national languages, customs and cultures, *The Shield of Achilles*, London, 2002, p. xxii.

turn stimulates disputes of an almost ideological nature concerning, for example, the relationship between free trade and environmental protection.[17] To this may be added the pressures of democracy and human rights, both operating to some extent as countervailing influences to the classical emphasis upon the territorial sovereignty and jurisdiction of states.

Modern theories and interpretations

At this point some modern theories as to the nature and role of international law will be briefly noted.

Positive Law and Natural Law

Throughout the history of thought there has been a complex relationship between idealism and realism, between the way things ought to be and the way things are, and the debate as to whether legal philosophy should incorporate ethical standards or confine itself to an analysis of the law as it stands is a vital one that continues today.[18]

The positivist school, which developed so rapidly in the pragmatic, optimistic world of the nineteenth century, declared that law as it exists should be analysed empirically, shorn of all ethical elements. Moral aspirations were all well and good but had no part in legal science. Man-made law must be examined as such and the metaphysical speculations of Natural Law rejected because what counted were the practical realities, not general principles which were imprecise and vague, not to say ambiguous.[19]

This kind of approach to law in society reached its climax with Kelsen's 'Pure Theory of Law'. Kelsen defined law solely in terms of itself and eschewed any element of justice, which was rather to be considered within the discipline of political science. Politics, sociology and history were all

[17] See e.g. *Myers* v. *Canada* 121 ILR, pp. 72, 110.

[18] See e.g. D. Lyons, *Ethics and the Rule of Law*, London, 1984; R. Dworkin, *Taking Rights Seriously*, London, 1977; H. L. A. Hart, *The Concept of Law*, Oxford, 1961, and P. Stein and J. Shand, *Legal Values in Western Society*, Edinburgh, 1974. See also R. Dias, *Jurisprudence*, 5th edn, London, 1985.

[19] See Hart, *Concept of Law*, and Hart, 'Positivism and the Separation of Law and Morals', 71 *Harvard Law Review*, 1958, p. 593. Cf. L. Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart', 71 *Harvard Law Review*, 1958, p. 630. See also D. Anzilotti, *Cours de Droit International*, Paris, 1929, and B. Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law', 13 EJIL, 2002, p. 401.

excised from the pure theory which sought to construct a logical unified structure based on a formal appraisal.[20]

Law was to be regarded as a normative science, that is, consisting of rules which lay down patterns of behaviour. Such rules, or norms, depend for their legal validity on a prior norm and this process continues until one reaches what is termed the basic norm of the whole system. This basic norm is the foundation of the legal edifice, because rules which can be related back to it therefore become *legal* rules. To give a simple example, a court order empowering an official to enforce a fine is valid if the court had that power which depends upon an Act of Parliament establishing the court. A rule becomes a legal rule if it is in accordance with a previous (and higher) legal rule and so on. Layer builds upon layer and the foundation of it all is the basic norm.[21]

The weakness of Kelsen's 'pure' system lies primarily in the concept of the basic norm for it relies for its existence upon non-legal issues. In fact, it is a political concept, and in the United Kingdom it would probably be the principle of the supremacy of Parliament.[22]

This logical, structured system of validity founded upon an extra-legal concept encounters difficulties when related to international law. For Kelsen international law is a primitive legal order because of its lack of strong legislative, judicial and enforcement organs and its consequent resemblance to a pre-state society. It is accordingly characterised by the use of self-help.[23] The principles of international law are valid if they can be traced back to the basic norm of the system, which is hierarchical in the same sense as a national legal system. For Kelsen, the basic norm is the rule that identifies custom as the source of law, or stipulates that 'the states ought to behave as they customarily behaved'.[24] One of the prime rules of this category is *pacta sunt servanda* declaring that agreements must be carried out in good faith and upon that rule is founded the second stage within the international legal order. This second stage consists of the network of norms created by international treaties and conventions

[20] 'The Pure Theory of Law', 50 LQR, 1934, pp. 474, 477–85 and 51 LQR, 1935, pp. 517–22. See also the articles collected in 'The European Tradition in International Law: Hans Kelsen', 9 EJIL, 1998, pp. 287 ff.

[21] Kelsen, *Pure Theory*.

[22] See J. Stone, 'Mystery and Mystique in the Basic Norm', 26 MLR, 1963, p. 34, and J. Raz, *Practical Reason and Norms*, Oxford, 1975, pp. 129–31.

[23] *General Theory of Law and State*, Cambridge, 1946, pp. 328 ff. See also J. Lador-Lederer, 'Some Observations on the "Vienna School" in International Law', 17 NILR, 1970, p. 126.

[24] Kelsen, *General Theory of Law and State*, pp. 369–70.

and leads on to the third stage which includes those rules established by organs which have been set up by international treaties, for instance, decisions of the International Court of Justice.[25]

The problem with Kelsen's formulation of the basic norm of international law is that it appears to be tautological: it merely repeats that states which obey rules ought to obey those rules.[26] It seems to leave no room for the progressive development of international law by new practices accepted as law for that involves states behaving differently from the way they have been behaving. Above all, it fails to answer the question as to why custom is binding.

Nevertheless, it is a model of great logical consistency which helps explain, particularly with regard to national legal systems, the proliferation of rules and the importance of validity which gives as it were a mystical seal of approval to the whole structured process. It helps illustrate how rule leads to rule as stage succeeds stage in a progression of norms forming a legal order.

Another important element in Kelsen's interpretation of law is his extreme 'monist' stance. International law and municipal law are not two separate systems but one interlocking structure and the former is supreme. Municipal law finds its ultimate justification in the rules of international law by a process of delegation within one universal normative system.[27]

Kelsen's pure theory seemed to mark the end of that particular road, and positivism was analysed in more sociological terms by Hart in his book *The Concept of Law* in 1961.

Hart comprehends law as a system of rules, based upon the interaction of primary and secondary rules. The former, basically, specify standards of behaviour while the latter provide the means for identifying and developing them and thus specify the constitutional procedures for change. Primitive societies would possess only the primary rules and so would be characterised by uncertainty, inefficiency and stagnation, but with increasing sophistication the secondary rules would develop and identify authority and enable the rules to be adapted to changing circumstances in a regular and accepted manner.[28]

[25] *Ibid.* [26] Hart terms this 'mere useless reduplication': *Concept of Law*, p. 230.
[27] *General Theory of Law and State*, pp. 366–8. See further below, chapter 4.
[28] *Concept of Law*, chapter 5. See also e.g. Dworkin, *Taking Rights Seriously*; Raz, *Practical Reason*, and N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford, 1978.

The international legal order is a prime example of a simple form of social structure which consists only of the primary rules, because of its lack of a centralised legislature, network of recognised courts with compulsory jurisdiction and organised means of enforcement. Accordingly, it has no need of, or rather has not yet evolved, a basic norm or in Hart's terminology a rule of recognition, by reference to which the validity of all the rules may be tested. Following this train of thought, Hart concludes that the rules of international law do not as yet constitute a 'system' but are merely a 'set of rules'. Of course, future developments may see one particular principle, such as *pacta sunt servanda*, elevated to the state of a validating norm but in the present situation this has not yet occurred.[29]

This approach can be criticised for its over-concentration upon rules to the exclusion of other important elements in a legal system such as principles and policies,[30] and more especially as regards international law, for failing to recognise the sophistication or vitality of the system. In particular, the distinction between a system and a set of rules in the context of international law is a complex issue and one which is difficult to delineate.

The strength of the positivist movement waned in the last century as the old certainties disintegrated and social unrest grew. Law, as always, began to reflect the dominant pressures of the age, and new theories as to the role of law in society developed. Writers started examining the effects of sociological phenomena upon the legal order and the nature of the legal process itself, with analyses of judicial behaviour and the means whereby rules were applied in actual practice. This was typified by Roscoe Pound's view of the law as a form of social engineering, balancing the various interests within the society in the most efficacious way.[31] Law was regarded as a method of social control and conceptual approaches were rejected in favour of functional analyses. What actually happened within the legal system, what claims were being brought and how they were satisfied: these were the watchwords of the sociological school.[32]

It was in one sense a move away from the ivory tower and into the courtroom. Empirical investigations proliferated, particularly in the United States, and the sciences of psychology and anthropology as well

[29] *Concept of Law*, pp. 228–31. [30] See Dworkin, *Taking Rights Seriously*.
[31] See e.g. *Philosophy of Law*, New Haven, 1954, pp. 42–7. See also M. D. A. Freeman, *The Legal Structure*, London, 1974, chapter 4.
[32] *Outlines of Jurisprudence*, 5th edn, Cambridge, 1943, pp. 116–19.

as sociology became allied to jurisprudence. Such concern with the wider social context led to the theories of Realism, which treated law as an institution functioning within a particular community with a series of jobs to do. A study of legal norms within a closed logical system in the Kelsenite vein was regarded as unable to reveal very much of the actual operation of law in society. For this an understanding of the behaviour of courts and the various legal officials was required. Historical and ethical factors were relegated to a minor role within the realist–sociological tradition, with its concentration upon field studies and 'technical' dissections. Legal rules were no longer to be accepted as the heart of the legal system.[33]

Before one looks at contemporary developments of this approach and how they have affected interpretations of international law, the revival of Natural Law has first to be considered.

In the search for meaning in life and an ethical basis to law, Natural Law has adopted a variety of different approaches. One of them has been a refurbishment of the principles enumerated by Aquinas and adopted by the Catholic Church, emphasising the dignity of man and the supremacy of reason together with an affirmation of the immorality (though not necessarily the invalidity) of law contrary to right reason and the eternal law of God.[34] A more formalistic and logic-oriented trend has been exemplified by writers such as Stammler, who tried to erect a logical structure of law with an inbuilt concept of 'Natural Law with a changing content'. This involved contrasting the *concept* of law, which was intended to be an abstract, formal definition universally applicable, with the *idea* of law, which embodies the purposes and direction of the system. This latter precept varied, of necessity, in different social and cultural contexts.[35]

As distinct from this formal idealist school, there has arisen a sociologically inspired approach to the theme of Natural Law represented by Gény and Duguit. This particular trend rejected the emphasis upon form, and concentrated instead upon the definition of Natural Law in terms

[33] See e.g. K. Llewellyn, *The Common Law Tradition*, Boston, 1960, and *Jurisprudence*, Chicago, 1962. See also W. Twining, *Karl Llewellyn and the Realist Movement*, London, 1973, and L. Loevinger, '*Jurimetrics* – The Next Step Forward', 33 *Minnesota Law Review*, 1949, p. 455.

[34] See e.g. J. Maritain, *Man and the State*, Paris, 1951, and J. Dabin, *General Theory of Law*, 2nd edn, 1950.

[35] See e.g. R. Stammler, *Theory of Justice*, New York, 1925, and G. Del Vecchio, *Formal Bases of Law*, Boston, 1921.

of universal factors, physical, psychological, social and historical, which dominate the framework of society within which the law operated.[36]

The discussion of Natural Law increased and gained in importance following the Nazi experience. It stimulated a German philosopher, Radbruch, to formulate a theory whereby unjust laws had to be opposed by virtue of a higher, Natural Law.[37]

As far as international law is concerned, the revival of Natural Law came at a time of increasing concern with international justice and the formation of international institutions. Many of the ideas and principles of international law today are rooted in the notion of Natural Law and the relevance of ethical standards to the legal order, such as the principles of non-aggression and human rights.[38]

New approaches[39]

Traditionally, international law has been understood in a historical manner and studied chronologically. This approach was especially marked in the nineteenth century as international relations multiplied and international conferences and agreements came with increasing profusion. Between the world wars, the opening of government archives released a wealth of material and further stimulated a study of diplomatic history,

[36] See e.g. F. Gény, *Méthode d'Interprétation et Sources en Droit Privé Positif*, Paris, 1899, and L. Duguit, *Law in the Modern State*, New York, 1919, and 'Objective Law', 20 *Columbia Law Review*, 1920, p. 817.

[37] *Introduction to Legal Philosophy*, 1947. See also Hart, 'Positivism'; Fuller, 'Positivism', and Fuller, 'The Legal Philosophy of Gustav Radbruch', 6 *Journal of Legal Education*, 1954, p. 481.

[38] See H. Lauterpacht, *International Law and Human Rights*, London, 1950. Note more generally the approach of J. Rawls, *A Theory of Justice*, Oxford, 1971, and A. D'Amato, 'International Law and Rawls' Theory of Justice', 5 *Denver Journal of International Law and Policy*, 1975, p. 525. See also J. Boyle, 'Ideals and Things: International Legal Scholarship and the Prison-house of Language', 26 *Harvard International Law Journal*, 1985, p. 327; A. D'Amato, 'Is International Law Part of Natural Law?', 9 *Vera Lex*, 1989, p. 8; E. Midgley, *The Natural Law Tradition and the Theory of International Relations*, London, 1975, and C. Dominicé, 'Le Grand Retour du Droit Naturel en Droit des Gens', *Mélanges Grossen*, 1992, p. 399.

[39] See e.g. B. S. Chimni, *International Law and World Order*, New Delhi, 1993; A. Cassese, *International Law*, 2nd edn, Oxford, 2005, chapter 1, and R. Müllerson, *Ordering Anarchy: International Law in International Society*, The Hague, 2000. See also D. J. Bederman, *The Spirit of International Law*, Athens, 2002; A. Buchanan, *Justice, Legitimacy and Self-Determination*, Oxford, 2004; *International Law and its Others* (ed. A. Orford), Cambridge, 2006; S. Rosenne, *The Perplexities of Modern International Law*, Leiden, 2004, and P. M. Dupuy, *L'Unité de l'Ordre Juridique International*, Leiden, 2003.

while the creation of such international institutions as the League of Nations and the Permanent Court of International Justice encouraged an appreciation of institutional processes.

However, after the Second World War a growing trend appeared intent upon the analysis of power politics and the comprehension of international relations in terms of the capacity to influence and dominate. The approach was a little more sophisticated than might appear at first glance, for it involved a consideration of social and economic as well as political data that had a bearing upon a state's ability to withstand as well as direct pressures.[40] Nevertheless, it was a pessimistic interpretation because of its centring upon power and its uses as the motive force of inter-state activity.

The next 'wave of advance', as it has been called, witnessed the successes of the behaviouralist movement. This particular train of thought introduced elements of psychology, anthropology and sociology into the study of international relations and paralleled similar developments within the realist school. It reflected the altering emphasis from analyses in terms of idealistic or cynical ('realistic') conceptions of the world political order, to a mechanistic discussion of the system as it operates today, by means of field studies and other tools of the social sciences. Indeed, it is more a method of approach to law and society than a theory in the traditional sense.[41]

One can trace the roots of this school of thought to the changing conceptions of the role of government in society. The nineteenth-century ethic of individualism and the restriction of state intervention to the very minimum has changed radically. The emphasis is now more upon the responsibility of the government towards its citizens, and the phenomenal growth in welfare legislation illustrates this. Rules and regulations controlling wide fields of human activity, something that would have been unheard of in the mid-nineteenth century, have proliferated throughout the nations of the developed world and theory has had to try and keep up with such re-orientations.

[40] See e.g. H. Morgenthau, *Politics Among Nations*, 4th edn, New York, 1967, and K. Thompson, *Political Realism and the Crisis of World Politics: An American Approach to Foreign Policy*, Princeton, 1960. See also A. Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda', 87 AJIL, 1993, p. 205, and A.-M. Slaughter, *A New World Order*, Princeton, 2004; R. Aron, *Paix et Guerre Entre des Nations*, Paris, 1984; M. Koskenniemi, *The Gentle Civilizer of Nations*, Cambridge, 2001, chapter 6.

[41] See e.g. *Contending Approaches to International Politics* (eds. K. Knorr and J. Rosenau), Princeton 1969, and W. Gould and M. Barkun, *International Law and the Social Sciences*, Princeton, 1970.

Since the law now plays a much deeper role in society with the increase in governmental intervention, impetus has been given to legal theories that reflect this growing involvement. Law, particularly in the United States, is seen as a tool to effect changes in society and realist doctrine underlines this. It emphasises that it is community values and policy decisions that determine the nature of the law and accordingly the role of the judge is that much more important. He is no longer an interpreter of a body of formal legal rules, but should be seen more as an active element in making decisions of public policy.

This means that to understand the operation of law, one has to consider the character of the particular society, its needs and values. Law thus becomes a dynamic process and has to be studied in the context of society and not merely as a collection of legal rules capable of being comprehended on their own. The social sciences have led the way in this reinterpretation of society and their influence has been very marked on the behavioural method of looking at the law, not only in terms of general outlook but also in providing the necessary tools to dissect society and discover the way it operates and the direction in which it is heading. The interdisciplinary nature of the studies in question was emphasised, utilising all the social sciences, including politics, economics and philosophy.[42] In particular the use of the scientific method, such as obtaining data and quantitative analysis, has been very much in evidence.

Behaviouralism has divided the field of international relations into basically two studies, the first being a consideration of foreign policy techniques and the reasons whereby one particular course of action is preferred to another, and the second constituting the international systems analysis approach.[43] This emphasises the interaction of the various players on the international stage and the effects of such mutual pressures upon both the system and the participants. More than that, it examines

[42] Note Barkun's comment that 'the past theoretical approaches of the legal profession have involved logical manipulations of a legal corpus more often than the empirical study of patterns of human behaviour', *Law Without Sanctions*, New Haven, 1968, p. 3. See also R. A. Falk, 'New Approaches to the Study of International Law', in *New Approaches to International Relations* (ed. M. A. Kaplan), New York, 1968, pp. 357–80, and J. Frankel, *Contemporary International Theory and the Behaviour of States*, London, 1973, pp. 21–2.

[43] See e.g. C. A. McClelland, *Theory and the International System*, New York, 1966; M. A. Kaplan, *System and Process in International Politics*, New York, 1964; M. A. Kaplan and N. Katzenbach, *The Political Foundations of International Law*, New York, 1961, and R. A. Falk and C. Black, *The Future of International Legal Order*, Princeton, 1969. See also A. Kiss and D. Shelton, 'Systems Analysis of International Law: A Methodological Inquiry', 17 Netherlands YIL, 1986, p. 45.

the various international orders that have existed throughout history in an attempt to show how the dynamics of each particular system have created their own rules and how they can be used as an explanation of both political activity and the nature of international law. In other words, the nature of the international system can be examined by the use of particular variables in order to explain and to predict the role of international law.

For example, the period between 1848 and 1914 can be treated as the era of the 'balance of power' system. This system depended upon a number of factors, such as a minimum number of participants (accepted as five), who would engage in a series of temporary alliances in an attempt to bolster the weak and restrict the strong, for example the coalitions Britain entered into to overawe France. It was basic to this system that no nation wished totally to destroy any other state, but merely to humble and weaken, and this contributed to the stability of the order.[44]

This system nurtured its own concepts of international law, especially that of sovereignty which was basic to the idea of free-floating alliances and the ability of states to leave the side of the strong to strengthen the weak. The balance of power collapsed with the First World War and, after a period of confusion, a discernible, loose 'bipolar' system emerged in the years following the Second World War.

This was predicated upon the polarisation of capitalism and communism and the consequent rigid alliances that were created. It included the existence of a Third World of basically non-aligned states, the objects of rivalry and of competition while not in themselves powerful enough to upset the bipolar system. This kind of order facilitated 'frontier' conflicts where the two powers collided, such as in Korea, Berlin and Vietnam, as well as modified the nature of sovereignty within the two alliances thus allowing such organisations as NATO and the European Community (subsequently European Union) on the one hand, and the Warsaw Pact and COMECON on the other, to develop. The other side of this coin has been the freedom felt by the superpowers to control wavering states within their respective spheres of influence, for example, the Soviet actions in Poland, Hungary and Czechoslovakia and those of the USA, particularly within Latin America.[45]

[44] See J. Frankel, *International Relations in a Changing World*, London, 1979, pp. 152–7, and Kaplan and Katzenbach, *Political Foundations*, pp. 62–70.

[45] Kaplan and Katzenbach, *Political Foundations*, pp. 50–5. As far as the systems approach is concerned, see also S. Hoffman, 'International Systems and International Law' in *The*

Behaviouralism has been enriched by the use of such techniques as games theory.[46] This is a mathematical method of studying decision-making in conflict situations where the parties react rationally in the struggle for benefits. It can be contrasted with the fight situation, where the essence is the actual defeat of the opponent (for example, the Israel–Arab conflict), and with the debate situation, which is an effort to convince the participants of the rightness of one's cause. Other factors which are taken into account include communications, integration, environment and capabilities. Thus the range and complexity of this approach far exceeds that of prior theories.

All this highlights the switch in emphasis that has taken place in the consideration of law in the world community. The traditional view was generally that international law constituted a series of rules restricting the actions of independent states and forming exceptions to state sovereignty. The new theories tend to look at the situation differently, more from the perspective of the international order expanding its horizons than the nation-state agreeing to accept certain defined limitations upon its behaviour.

The rise of quantitative research has facilitated the collation and ordering of vast quantities of data. It is primarily a methodological approach utilising political, economic and social data and statistics, and converting facts and information into a form suitable for scientific investigation. Such methods with their behavioural and quantitative aspects are beginning to impinge upon the field of international law. They enable a greater depth of knowledge and comprehension to be achieved and a wider appreciation of all the various processes at work.[47]

International System (eds. K. Knorr and S. Verba), Westport, 1961, p. 205; G. Clark and L. Sohn, *World Peace Through World Law*, 3rd edn, Boston, 1966, and *The Strategy of World Order* (eds. R. A. Falk and S. Mendlovitz), New York, 4 vols., 1966. See now Bobbitt, *Shield*, book II.

[46] See e.g. R. Lieber, *Theory and World Politics*, London, 1972, chapter 2; *Game Theory and Related Approaches to Social Behaviour* (ed. H. Shubik), London, 1964, and W. J. M. Mackenzie, *Politics and Social Sciences*, London, 1967.

[47] Note also the functionalist approach to international law. This orientation emphasises the practical benefits to states of co-operation in matters of mutual interest: see e.g. W. Friedmann, *An Introduction to World Politics*, 5th edn, London, 1965, p. 57; F. Haas, *Beyond the Nation State*, Stanford, 1964; D. Mitrany, *A Working Peace System*, London, 1946; C. W. Jenks, *Law, Freedom and Welfare*, London, 1964, and J. Stone, *Legal Controls of International Conflict*, London, 1959. See also D. Johnston, 'Functionalism in the Theory of International Law', 25 Canadian YIL, 1988, p. 3.

The behavioural approach to international relations has been translated into international law theory by a number of writers, in particular Professor McDougal, with some important modifications. This 'policy-orientated' movement regards law as a comprehensive process of decision-making rather than as a defined set of rules and obligations. It is an active all-embracing approach, seeing international law as a dynamic system operating within a particular type of world order.[48] It therefore minimises the role played by rules, for such a traditional conception of international law 'quite obviously offers but the faintest glimpse of the structures, procedures and types of decision that take place in the contemporary world community'.[49] It has been emphasised that the law is a constantly evolving process of decision-making and the way that it evolves will depend on the knowledge and insight of the decision-maker.[50] In other words, it is the social process of constant human interaction that is seen as critical and in this process, claims are continually being made in an attempt to maximise values at the disposal of the participants. Eight value-institution categories have been developed to analyse this process: power, wealth, enlightenment, skill, well-being, affection, respect and rectitude. This list may be further developed. It is not exhaustive. Law is to be regarded as a product of such social processes.[51] International law is the whole process of authoritative decision-making involving crucially the concepts of authority and control. The former is defined in terms of the structure of expectation concerning the identity and competence of the decision-maker, whilst the latter refers to the actual effectiveness of a decision, whether or not authorised.[52]

[48] See e.g. M. S. McDougal, 'International Law, Power and Policy', 82 HR, 1952, p. 133; M. S. McDougal, H. Lasswell and W. M. Reisman, 'Theories about International Law: Prologue to a Configurative Jurisprudence', 8 Va. JIL, 1968, p. 188; M. S. McDougal, 'International Law and the Future', 50 *Mississippi Law Journal*, 1979, p. 259, and H. Lasswell and M. S. McDougal, *Jurisprudence for a Free Society*, Yale, 1992. See also G. Scelle, *Manuel de Droit International*, Paris, 1948, and Chimni, *International Law*, chapter 3.

[49] M. S. McDougal and W. M. Reisman, *International Law in Contemporary Perspective*, New Haven, 1980, p. 5.

[50] M. S. McDougal, 'The Policy-Oriented Approach to Law', 40 *Virginia Quarterly Review*, 1964, p. 626. See also E. Suzuki, 'The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence', 1 *Yale Studies in World Public Order*, 1974, p. 1.

[51] Suzuki, 'Policy-Oriented Jurisprudence', pp. 22–3. See also M. S. McDougal, 'Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry', 4 *Journal of Conflict Resolution*, 1960, pp. 337–54.

[52] M. S. McDougal and H. Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order', 53 AJIL, 1959, pp. 1, 9.

McDougal's work and that of his followers emphasises the long list of values, interests and considerations that have to be taken into account within the international system by the persons actually faced with making the decisions. This stress upon the so-called 'authoritative decision-maker', whether he or she be in the United States Department of State, in the British Foreign Office or 'anyone whose choice about an event can have some international significance',[53] as the person who in effect has to choose between different options respecting international legal principles, emphasises the practical world of power and authority.

Such a decision-maker is subject to a whole series of pressures and influences, such as the values of the community in which that person operates, and the interests of the particular nation-state served. He or she will also have to consider the basic values of the world order, for instance human dignity. This approach involves a complex dissection of a wide-ranging series of factors and firmly fixes international law within the ambit of the social sciences, both with respect to the procedures adopted and the tools of analysis. International law is seen in the following terms, as

> a comprehensive process of authoritative decision in which rules are continuously made and remade; that the function of the rules of international law is to communicate the perspectives (demands, identifications and expectations) of the peoples of the world about this comprehensive process of decision; and that the national application of these rules in particular instances requires their interpretation, like that of any other communication, in terms of who is using them, with respect to whom, for what purposes (major and minor), and in what context.[54]

Legal rules articulate and seek to achieve certain goals and this value factor must not be ignored. The values emphasised by this school are basically those of human dignity, familiar from the concepts of Western democratic society.[55] Indeed, Reisman has emphasised the Natural Law origins of this approach as well as the need to clarify a jurisprudence for those persons whose activities have led to innovations in such fields of international law as human rights and the protection of the environment.[56]

[53] McDougal and Reisman, *International Law*, p. 2.

[54] M. S. McDougal, 'A Footnote', 57 AJIL, 1963, p. 383.

[55] See M. S. McDougal, H. Lasswell and L. C. Chen, *Human Rights and World Public Order*, New Haven, 1980. For a discussion of the tasks required for a realistic inquiry in the light of defined goals, see McDougal, 'International Law and the Future', pp. 259, 267.

[56] 'The View from the New Haven School of International Law', PASIL, 1992, p. 118.

The policy-oriented movement has been greatly criticised by traditional international lawyers for unduly minimising the legal content of the subject and for ignoring the fact that nations generally accept international law as it is and obey its dictates.[57] States rarely indulge in a vast behavioural analysis, studiously considering every relevant element in a particular case and having regard to fundamental objectives like human dignity and welfare. Indeed, so to do may weaken international law, it has been argued.[58] In addition, the insertion of such value-concepts as 'human dignity' raises difficulties of subjectivity that ill fit within a supposedly objective analytical structure. Koskenniemi, for example, has drawn attention to the predilection of the policy-oriented approach to support the dominant power.[59]

Other writers, such as Professor Falk, accept the basic comprehensive approach of the McDougal school, but point to its inconsistencies and overfulsome cataloguing of innumerable interests. They tend to adopt a global outlook based upon a deep concern for human welfare and morality, but with an emphasis upon the importance of legal rules and structure.[60]

Professor Franck, however, has sought to refocus the essential question of the existence and operation of the system of international law in terms of inquiring into why states obey international law despite the undeveloped condition of the international legal system's structures, processes and enforcement mechanisms.[61] The answer is seen to lie in the concept of legitimacy. States will obey the rules because they see such rules and

[57] See in particular P. Allott, 'Language, Method and the Nature of International Law', 45 BYIL, 1971, p. 79. Higgins has vividly drawn attention to the differences in approach to international law adopted by American and British writers: 'Policy Considerations and the International Judicial Process', 17 ICLQ, 1968, p. 58. See also T. Farer, 'Human Rights in Law's Empire: The Jurisprudence War', 85 AJIL, 1991, p. 117.

[58] Allott, 'Language', pp. 128 ff. [59] See *Gentle Civilizer of Nations*, pp. 474 ff.

[60] See e.g. R. A. Falk, *Human Rights and State Sovereignty*, New York, 1981, and Falk, *On Human Governance*, Cambridge, 1995. See also *The United Nations and a Just World Order* (eds. R. Falk, S. Kim and S. Mendlovitz), Boulder, 1991, and Chimni, *International Law*, chapter 4. But note the approach of, e.g., J. S. Watson, 'A Realistic Jurisprudence of International Law', 34 YBWA, 1980, p. 265, and M. Lane, 'Demanding Human Rights: A Change in the World Legal Order', 6 *Hofstra Law Review*, 1978, p. 269. See also Boyle, 'Ideals and Things'.

[61] T. M. Franck, *The Power of Legitimacy Among Nations*, Oxford, 1990. See also Franck, 'Fairness in the International Legal and Institutional System', 240 HR, 1993 III, p. 13, chapter 2; Franck, *Fairness in International Law and Institutions*, Oxford, 1995, chapter 2, and Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium', 100 AJIL, 2006, p. 88.

their institutional framework as possessing a high degree of legitimacy. Legitimacy itself is defined as 'a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process'.[62] Legitimacy may be empirically demonstrated but compliance may be measured not only by observing states acting in accordance with the principle in question, but also by observing the degree to which a violator actually exhibits deference to that principle even while violating it.

Legitimacy will depend upon four specific properties, it is suggested: determinacy (or readily ascertainable normative content or 'transparency'); symbolic validation (or authority approval); coherence (or consistency or general application) and adherence (or falling within an organised hierarchy of rules). In other words, it is proposed that there exist objectively verifiable criteria which help us to ascertain why international rules are obeyed and thus why the system works. This approach is supplemented by the view that legitimacy and justice as morality are two aspects of the concept of fairness, which is seen by Franck as the most important question for international law.[63] Franck, however, has also drawn attention to the 'emerging right to individuality'[64] within the context of a 'global identity crisis'[65] in which the growth of supranational institutions and the collapse of a range of states combine to undermine traditional certainties of world order. He notes that persons are increasingly likely to identify themselves as autonomous individuals and that this is both reflected and manifested in the rise and expansion of international human rights law and in the construction of multi-layered and freely selected affinities.[66] While such personal rights are increasingly protected in both national and international law, the question as to the appropriate balancing of individual, group and state rights is posed in more urgent form.

However, legitimacy may also be understood in a broader way in referring to the relationship with the international political system as a whole and as forming the link between power and the legal system. It imbues the normative order with authority and acceptability, although not as such legality. Legitimacy links law and politics in its widest sense and will depend upon the context out of which it emerges. One writer has concluded

[62] Franck, *Legitimacy*, p. 24. [63] Franck, 'Fairness', p. 26.
[64] T. M. Franck, *The Empowered Self*, Oxford, 1999, p. 1.
[65] *Ibid.*, p. 3. [66] *Ibid.*, pp. 278–80.

that legitimacy 'is a matter of history and thus is subject to change as new events emerge from the future and new understandings reinterpret the past'.[67] Legitimacy is important in that it constitutes a standard for the testing in the wider political environment of the relevance and acceptability of legal norms and practices. A rule seen as legitimate will benefit from a double dose of approval. A rule, institution or practice seen as illegal and illegitimate will be doubly disapproved of. A rule, or entity, which is legal but not legitimate will, it is suggested, not be able to sustain its position over the long term. A practice seen as illegal but legitimate is likely to form the nucleus of a new rule.

The recurring themes of the relationship between sovereign states and international society and the search for a convincing explanation for the binding quality of international law in a state-dominated world appear also in very recent approaches to international law theory which fall within the general critical legal studies framework.[68] Such approaches have drawn attention to the many inconsistencies and incoherences that persist within the international legal system. The search for an all-embracing general theory of international law has been abandoned in mainstream thought as being founded upon unverifiable propositions, whether religiously or sociologically based, and attention has switched to the analysis of particular areas of international law and in particular procedures for the settlement of disputes. The critical legal studies movement notes that the traditional approach to international law has in essence involved the transposition of 'liberal' principles of domestic systems onto the international scene, but that this has led to further problems.[69] Specifically, liberalism tries constantly to balance individual freedom and social order and, it is argued, inevitably ends up siding with either one or other of those propositions.[70]

[67] Bobbitt, *Shield*, p. 17.

[68] See e.g. *The Structure and Processes of International Law* (eds. R. St J. Macdonald and D. Johnston), Dordrecht, 1983; Boyle, 'Ideals and Things'; A. Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs*, Manchester, 1986; D. Kennedy, *International Legal Structure*, Boston, 1987; M. Koskenniemi, *From Apology to Utopia*, Helsinki, 1989; F. V. Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, Cambridge, 1989; P. Allott, *Eunomia*, Oxford, 1990; Allott, *The Health of Nations*, Cambridge, 2002; *Theory and International Law: An Introduction* (ed. Allott), London, 1991, and *International Law* (ed. M. Koskenniemi), Aldershot, 1992. See also I. Scobbie, 'Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism', 61 BYIL, 1990, p. 339, and S. Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology*, Cambridge, 2000.

[69] See e.g. Koskenniemi, *International Law*, p. xvi.

[70] Koskenniemi, *From Apology to Utopia*, p. 52.

Additionally, there are only two possibilities with regard to justice itself, it is either simply subjective or it is imposed. In either case, liberalism is compromised as a system.

The critical legal studies approach (sometimes termed the 'New Approaches to International Law' or NAIL) notes the close relationship that exists between law and society, but emphasises that conceptual analysis is also crucial since such concepts are not in themselves independent entities but reflect particular power relationships. The point is made that the nexus between state power and international legal concepts needs to be taken into consideration as well as the way in which such concepts in themselves reflect political factors. As Koskenniemi writes, 'a post-realist theory . . . aims to answer questions regarding the relationship of law and society and the legitimacy of constraint in a world of sovereigns as aspects of one single problem: the problem of power in concepts'.[71] The problem posed by the growth in the world community and the need to consider the range of different cultures and traditions within that community leads, it is suggested, to the decline of universality as such and the need to focus upon the specific contexts of particular problems.

In a more recent work, Koskenniemi has drawn attention not only to the continuing tension between the universalist and particularist impulses in international law,[72] but also to the related distinction between formalism and dynamism, or the contrast between rule-oriented and policy-oriented approaches. It is his view in essence that the latter approach might too easily be utilised to support a dominant political position.[73] It is the typical lawyer's answer in any event to declare that all depends upon the particular circumstances of the case and this approach is generalised in order to deal with the question of which of several relevant international rules is to predominate. It is in fact a way of noting that superior operating principles are difficult to find or justify and thus concluding that the search for universal concepts or principles is of little value. In effect, it is proposed that no coherent international system as such actually exists and that one should rather concentrate upon ad hoc legal concepts as reflecting power considerations and within the confines of the specific contexts in which the particular questions or issues have arisen. Like the policy-oriented approach, the critical legal studies view is to accept that

[71] *Ibid.*, p. xxi.

[72] See also M. Eyskens, 'Particularism versus Universalism' in *International Law – Theory and Practice* (ed. K. Wellens), The Hague, 1998, p. 11.

[73] *Gentle Civilizer of Nations.*

international law is more than a set of rules, but it then proceeds to emphasise the indeterminacy as such of law rather than seeing law as a collection of competing norms between which choices must be made.[74] One particular area of study in recent years has been that concerned with the position of women within international law, both in terms of the structure of the system and the, for example, relative absence of females from the institutions and processes of international law and in terms of substantive law, which has until recently paid little attention to the needs and concerns of women.[75]

The fragmentation of international law?[76]

The tremendous expansion of both the rules and the institutions of international law, with the rise of more and more specialist areas, such as trade law, environmental law and human rights law, has led to arguments that international law as a holistic system is in the process of fragmentation. This has led to the fear that the centre will not be able to hold and that international law might dissolve into a series of discrete localised or limited systems with little or no interrelationship. In many ways it is the explosion

[74] See Higgins, *Problems and Process*, p. 9. See also J. A. Beckett, 'Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL', 16 EJIL, 2005, p. 213.

[75] See e.g. H. Charlesworth and C. M. Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester, 2000; H. Charlesworth, C. M. Chinkin and S. Wright, 'Feminist Approaches to International Law', 85 AJIL, 1991, p. 613; F. Tesón, 'Feminism and International Law: A Reply', 33 Va. JIL, 1993, p. 647, and *International Law: Modern Feminist Approaches* (eds. D. Buss and A. Manji), Oxford, 2005. See also the 'Final Report on Women's Equality and Nationality in International Law' in *Report of the Sixty-Ninth Conference*, International Law Association, London, 2000, p. 248. Note that article 25(2) of the Rules of the European Court of Human Rights requires that the Sections of the Court be 'gender balanced', while article 36(8)a(iii) of the Statute of the International Criminal Court 1998 declares that the selection process for judges of the Court should include the need for a 'fair representation of female and male judges'. See also ICC-ASP/1/Res.- 2 (2002) on the procedure for nomination of judges which required a minimum number of female and male candidates.

[76] See e.g. 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission (finalised by M. Koskenniemi), A/CN.4/L.682, 2006; M. Koskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law*, 2002, p. 553; M. Prost and P. K. Clark, 'Unity, Diversity and the Fragmentation of International Law', 5 *Chinese Journal of International Law*, 2006, p. 341; B. Simma and D. Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law', 17 EJIL, 2006, p. 483, and E. Benvenisti and G. W. Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', 60 *Stanford Law Review*, 2007, p. 595.

of what is termed globalisation, with the consequential spread of practices and mechanisms across the world,[77] that has precipitated this problem of fragmentation, being defined in one view as the 'emergence of specialised and relatively autonomous spheres of social action and structure'.[78] This has led to a debate as to the relationship between self-contained regimes in international law and the system as a whole,[79] with the fear being expressed that the rise of specialised rules and mechanisms that have no clear authority relationship might lead to conflicts between local systems and, at the least, inconsistency in the interpretation and development of international law.[80] While to some extent the former is a real danger,[81] there is still a powerful centralising dynamic in international law and indeed a strong presumption against normative conflict:[82] for example, the principle that special law (*lex specialis*) derogates from general law (*lex generalis*), so that the more detailed and specific rule will have priority.[83] It is also true that international law, as a decentralised system, has long had to face the problem of relating together a variety of rules derived from general treaties, specific treaties and customary law, while it is indeed the case that even with the increase in specialist areas of international law, there is an increasing tendency to relate hitherto discrete spheres.[84] Further, while decisions of international courts and tribunals may not always be compatible, there is a hierarchy of authority with the International Court of Justice at the summit.[85] The International Law Commission's Report on Fragmentation reached two principal conclusions, first that 'the

[77] See e.g. P. S. Berman, *The Globalisation of International Law*, Aldershot, 2005.

[78] International Law Commission Report on Fragmentation, p. 11.

[79] See, for an early example, B. Simma, 'Self-Contained Regimes', 16 Netherlands YIL, 1985, p. 111.

[80] See e.g. *Unity and Diversity in International Law* (eds. A. Zimmermann and R. Hofmann), Berlin, 2006; K. Wellens, 'Fragmentation of International Law and Establishment of an Accountability Regime for International Organizations', 25 *Michigan Journal of International Law*, 2004, p. 1159, and *L'Influence des Sources sur l'Unité et la Fragmentation du Droit International* (eds. K. C. Wellens and R. H. Viraxia), Brussels, 2006.

[81] See e.g. A. Reinisch, 'Necessity in International Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on CMS v. Argentina and LG&E v. Argentina', 8 *Journal of World Investment and Trade*, 2007, p. 191.

[82] International Law Commission Report on Fragmentation, p. 25.

[83] See further below, chapter 3, p. 124.

[84] See e.g. with regard to human rights law and humanitarian law (or the laws of war), A. E. Cassimitis, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law', 56 ICLQ, 2007, p. 623. See further below, chapter 21, p. 1180.

[85] See further below, chapter 19, p. 1115.

emergence of special treaty-regimes (which should not be called "self-contained") has not seriously undermined legal security, predictability or the equality of legal subjects' and second that 'increasing attention will have to be given to the collision of norms and regimes and the rules, methods and techniques for dealing with such collisions'.[86]

Conclusion

The range of theories and approaches to international law and not least the emphasis upon the close relationship between international law and international relations[87] testifies both to the importance of the subject and the inherent difficulties it faces.[88] International law is clearly much more that a simple set of rules. It is a culture in the broadest sense in that it constitutes a method of communicating claims, counter-claims, expectations and anticipations as well as providing a framework for assessing and prioritising such demands.

International law functions in a particular, concrete world system, involving a range of actors from states to international organisations, companies and individuals, and as such needs to be responsive to the needs and aspirations of such participants. The international system is composed increasingly of co-operative and competing elements participating in cross-boundary activities, but the essential normative and structural nature of international law remains. Law is not the only way in which issues transcending borders are negotiated and settled or indeed fought over. It is one of a number of methods for dealing with an existing complex and shifting system, but it is a way of some prestige and influence for it is

[86] At pp. 248–9.

[87] See e.g. A.-M. Slaughter, A. S. Tulumello and S. Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship', 92 AJIL, 1998, p. 367, and Slaughter, *A New World Order*. See also Bobbitt, *Shield*, who posits the dying of the nation-state and its replacement by the market-state, with consequential changes with regard to both international law and its institutions, e.g. pp. 353 ff. and 667 ff.

[88] Note relatively recent arguments based on a revived power realism approach, particularly made in the US, that international law is simply a part of a complex of factors which are relevant, and implicitly subservient, to diplomacy and the pursuit of national interests: see e.g. J. L. Goldsmith and E. A. Posner, *The Limits of International Law*, Oxford, 2005, and M. J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo*, New York, 2001, but cf. Franck, *Power of Legitimacy*; A. Van Aaken, 'To Do Away with International Law? Some Limits to the "Limits of International Law" ', 17 EJIL, 2006, p. 289, and G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, Cambridge, 2004.

of its very nature in the form of mutually accepted obligations.[89] Law and politics cannot be divorced. They are not identical, but they do interact on several levels. They are engaged in a crucial symbiotic relationship. It does neither discipline a service to minimise the significance of the other.

Suggestions for further reading

P. Bobbitt, *The Shield of Achilles*, London, 2002
H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester, 2000
T. M. Franck, *Fairness in International Law and Institutions*, Oxford, 1995
The Empowered Self, Oxford, 1999
M. Koskenniemi, *The Gentle Civilizer of Nations*, Cambridge, 2001
S. Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology*, Cambridge, 2000
R. Müllerson, *Ordering Anarchy: International Law in International Society*, The Hague, 2000

[89] Higgins has noted that 'international law has to be identified by reference to what the actors (most often states), often without benefit of pronouncement by the International Court of Justice, believe normative in their relations with each other', *Problems and Process*, p. 18.

3

Sources

Ascertainment of the law on any given point in domestic legal orders is not usually too difficult a process.[1] In the English legal system, for example, one looks to see whether the matter is covered by an Act of Parliament and, if it is, the law reports are consulted as to how it has been interpreted by the courts. If the particular point is not specifically referred to in a statute, court cases will be examined to elicit the required information. In other words, there is a definite method of discovering what the law is. In addition to verifying the contents of the rules, this method also demonstrates how the law is created, namely, by parliamentary legislation or judicial case-law. This gives a degree of certainty to the legal process because one is able to tell when a proposition has become law and the

[1] See generally C. Parry, *The Sources and Evidences of International Law*, Cambridge, 1965; M. Sørensen, *Les Sources de Droit International*, Paris, 1946; V. D. Degan, *Sources of International Law*, The Hague, 1997; *Oppenheim's International Law* (eds. R. Y. Jennings and A. D. Watts), 9th edn, London, 1992, p. 22; I. Brownlie, *Principles of Public International Law*, 6th edn, Oxford, 2003, chapter 1; Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, p. 111; A. Boyle and C. Chinkin, *The Making of International Law*, Oxford, 2007; G. M. Danilenko, *Law-Making in the International Community*, The Hague, 1993; G. I. Tunkin, *Theory of International Law*, London, 1974, pp. 89–203; J. W. Verzijl, *International Law in Historical Perspective*, Leiden, 1968, vol. I, p. 1; H. Lauterpacht, *International Law: Collected Papers*, Cambridge, 1970, vol. I, p. 58; *Change and Stability in International Law-Making* (eds. A. Cassese and J. Weiler), Leiden, 1988; A. Bos, *A Methodology of International Law*, Amsterdam, 1984; A. Cassese, *International Law*, 2nd edn, Oxford, 2005, chapters 8–10; A. Pellet, 'Article 38' in *The Statute of the International Court of Justice: A Commentary* (eds. A. Zimmermann, C. Tomuschat and K. Oellers-Frahm), Oxford, 2006, p. 677; M. Virally, 'The Sources of International Law' in *Manual of Public International Law* (ed. M. Sørensen), London, 1968, p. 116; C. Tomuschat, 'Obligations Arising for States Without or Against Their Will', 241 HR, 1993, p. 195; B. Simma, 'From Bilateralism to Community Interest in International Law', 250 HR, 1994, p. 219; M. Mendelson, 'The International Court of Justice and the Sources of International Law' in *Fifty Years of the International Court of Justice* (eds. A. V. Lowe and M. Fitzmaurice), Cambridge, 1996, p. 63; G. Abi-Saab, 'Les Sources du Droit International – Un Essai de Déconstruction' in *Le Droit International dans un Monde en Mutation*, Montevideo, 1994, p. 29, and O. Schachter, 'Recent Trends in International Law-Making', 12 Australian YIL, 1992.

necessary mechanism to resolve any disputes about the law is evident. It reflects the hierarchical character of a national legal order with its gradations of authority imparting to the law a large measure of stability and predictability.

The contrast is very striking when one considers the situation in international law. The lack of a legislature, executive and structure of courts within international law has been noted and the effects of this will become clearer as one proceeds. There is no single body able to create laws internationally binding upon everyone, nor a proper system of courts with comprehensive and compulsory jurisdiction to interpret and extend the law. One is therefore faced with the problem of discovering where the law is to be found and how one can tell whether a particular proposition amounts to a legal rule. This perplexity is reinforced because of the anarchic nature of world affairs and the clash of competing sovereignties. Nevertheless, international law does exist and is ascertainable. There are 'sources' available from which the rules may be extracted and analysed.

By 'sources' one means those provisions operating within the legal system on a technical level, and such ultimate sources as reason or morality are excluded, as are more functional sources such as libraries and journals. What is intended is a survey of the process whereby rules of international law emerge.[2]

Article 38(1) of the Statute of the International Court of Justice is widely recognised as the most authoritative and complete statement as to the sources of international law.[3] It provides that:

> 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 teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Although this formulation is technically limited to the sources of international law which the International Court must apply, in fact since

[2] See also, e.g., M. S. McDougal and W. M. Reisman, 'The Prescribing Function: How International Law is Made', 6 *Yale Studies in World Public Order*, 1980, p. 249.

[3] See e.g. Brownlie, *Principles*, p. 5; *Oppenheim's International Law*, p. 24, and M. O. Hudson, *The Permanent Court of International Justice*, New York, 1934, pp. 601 ff.

the function of the Court is to decide disputes submitted to it 'in accordance with international law' and since all member states of the United Nations are *ipso facto* parties to the Statute by virtue of article 93 of the United Nations Charter (states that are non-members of the UN can specifically become parties to the Statute of the Court: Switzerland was the most obvious example of this until it joined the UN in 2002), there is no serious contention that the provision expresses the universal perception as to the enumeration of sources of international law.

Some writers have sought to categorise the distinctions in this provision, so that international conventions, custom and the general principles of law are described as the three exclusive law-creating processes while judicial decisions and academic writings are regarded as law-determining agencies, dealing with the verification of alleged rules.[4] But in reality it is not always possible to make hard and fast divisions. The different functions overlap to a great extent so that in many cases treaties (or conventions) merely reiterate accepted rules of customary law, and judgments of the International Court of Justice may actually create law in the same way that municipal judges formulate new law in the process of interpreting existing law.[5]

A distinction has sometimes been made between formal and material sources.[6] The former, it is claimed, confer upon the rules an obligatory character, while the latter comprise the actual content of the rules. Thus the formal sources appear to embody the constitutional mechanism for identifying law while the material sources incorporate the essence or subject-matter of the regulations. This division has been criticised particularly in view of the peculiar constitutional set-up of international law, and it tends to distract attention from some of the more important problems by its attempt to establish a clear separation of substantive and procedural elements, something difficult to maintain in international law.

[4] See e.g. G. Schwarzenberger, *International Law*, 3rd edn, London, 1957, vol. I, pp. 26–7.

[5] There are a number of examples of this: see below, chapter 4, p. 138.

[6] See e.g. Brownlie, *Principles*, p. 1. See also Nguyen Quoc Dinh *et al.*, *Droit International Public*, pp. 111–12, where it is noted that 'les sources *formelles* du droit sont les *procédés* d'élaboration du droit, les diverses techniques qui autorisent à considérer qu'une règle appartient au droit positif. Les sources *matérielles* constituent les fondements sociologiques des normes internationales, leur base politique, morale ou économique plus ou moins explicitée par la doctrine ou les sujets du droit', and Pellet, 'Article 38' p. 714.

Custom[7]

Introduction

In any primitive society certain rules of behaviour emerge and prescribe what is permitted and what is not. Such rules develop almost subconsciously within the group and are maintained by the members of the group by social pressures and with the aid of various other more tangible implements. They are not, at least in the early stages, written down or codified, and survive ultimately because of what can be called an aura of historical legitimacy.[8] As the community develops it will modernise its

[7] See generally, A. D'Amato, *The Concept of Custom in International Law*, Cornell, 1971; M. Akehurst, 'Custom as a Source of International Law', 47 BYIL, 1974–5, p. 1; M. Mendelson, 'The Formation of Customary International Law', 272 HR, 1999, p. 159; B. Cheng, 'Custom: The Future of General State Practice in a Divided World' in *The Structure and Process of International Law* (eds. R. St J. Macdonald and D. Johnston), Dordrecht, 1983, p. 513; A. E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 AJIL, 2001, p. 757; H. Thirlway, *International Customary Law and Codification*, Leiden, 1972; *Sources of State Practice in International Law* (eds. R. Gaebler and M. Smolka-Day), Ardley, 2002; K. Wolfke, *Custom in Present International Law*, 2nd edn, Dordrecht, 1993, and Wolfke, 'Some Persistent Controversies Regarding Customary International Law', Netherlands YIL, 1993, p. 1; L. Kopelmanas, 'Custom as a Means of the Creation of International Law', 18 BYIL, 1937, p. 127; H. Lauterpacht, *The Development of International Law by the International Court*, Cambridge, 1958, pp. 368–93; J. Kunz, 'The Nature of Customary International Law', 47 AJIL, 1953, p. 662; R. J. Dupuy, 'Coutume Sage et Coutume Sauvage', *Mélanges Rousseau*, Paris, 1974, p. 75; B. Stern, 'La Coutume au Coeur du Droit International', *Mélanges Reuter*, Paris, 1981, p. 479; R. Y. Jennings, 'Law-Making and Package Deal', *Mélanges Reuter*, p. 347; G. Danilenko, 'The Theory of International Customary Law', 31 German YIL, 1988, p. 9; Barberis, 'Réfléxions sur la Coutume Internationale', AFDI, 1990, p. 9; L. Condorelli, 'Custom' in *International Law: Achievements and Perspectives* (ed. M. Bedjaoui), Paris, 1991, p. 206; M. Byers, 'Custom, Power and the Power of Rules', 17 *Michigan Journal of International Law*, 1995, p. 109; H. Thirlway, 'The Law and Procedure of the International Court of Justice: 1960–89 (Part Two)', 61 BYIL, 1990, pp. 3, 31, and Thirlway, 'The Law and Procedure of the International Court of Justice: 1960–89: Supplement, 2005: Parts One and Two', 76 BYIL, 2006, pp. 1, 92; J. Kammerhofer, 'The Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems', 15 EJIL, 2004, p. 523; P. M. Dupuy, 'Théorie des Sources et Coutume en Droit International Contemporain' in *Le Droit International dans un Monde en Mutation*, p. 51; D. P. Fidler, 'Challenging the Classic Conception of Custom', German YIL, 1997, p. 198; R. Müllerson, 'On the Nature and Scope of Customary International Law', *Austrian Review of International and European Law*, 1998, p. 1; M. Byers, *Custom, Power and the Power of Rules*, Cambridge, 1999, and A. Carty, *The Decay of International Law?*, Manchester, 1986, chapter 3. See also the 'Statement of Principles Applicable to the Formation of General Customary International Law' in *Report of the Sixty-Ninth Conference*, International Law Association, London, 2000, p. 713.

[8] See e.g. R. Unger, *Law in Modern Society*, London, 1976, who notes that customary law can be regarded as 'any recurring mode of interaction among individuals and groups,

code of behaviour by the creation of legal machinery, such as courts and legislature. Custom, for this is how the original process can be described, remains and may also continue to evolve.[9] It is regarded as an authentic expression of the needs and values of the community at any given time.

Custom within contemporary legal systems, particularly in the developed world, is relatively cumbersome and unimportant and often of only nostalgic value.[10] In international law on the other hand it is a dynamic source of law in the light of the nature of the international system and its lack of centralised government organs.

The existence of customary rules can be deduced from the practice and behaviour of states and this is where the problems begin. How can one tell when a particular line of action adopted by a state reflects a legal rule or is merely prompted by, for example, courtesy? Indeed, how can one discover what precisely a state is doing or why, since there is no living 'state' but rather thousands of officials in scores of departments exercising governmental functions? Other issues concern the speed of creation of new rules and the effect of protests.

There are disagreements as to the value of a customary system in international law. Some writers deny that custom can be significant today as a source of law, noting that it is too clumsy and slow-moving to accommodate the evolution of international law any more,[11] while others declare that it is a dynamic process of law creation and more important than treaties since it is of universal application.[12] Another view recognises that custom is of value since it is activated by spontaneous behaviour and thus mirrors the contemporary concerns of society. However, since international law now has to contend with a massive increase in the pace and variety of state activities as well as having to come to terms with many different cultural and political traditions, the role of custom is perceived to be much diminished.[13]

together with the more or less explicit acknowledgement by these groups and individuals that such patterns of interaction produce reciprocal expectations of conduct that ought to be satisfied', p. 49. See also R. Dias, *Jurisprudence*, 5th edn, London, 1985, chapter 9, and H. L. A. Hart, *The Concept of Law*, Oxford, 1961.

9 See e.g. D. Lloyd, *Introduction to Jurisprudence*, 4th edn, London, 1979, p. 649, and H. Maine, *Ancient Law*, London, 1861.

10 See e.g. Dias, *Jurisprudence*.

11 See e.g. W. Friedmann, *The Changing Structure of International Law*, New York, 1964, pp. 121–3. See also I. De Lupis, *The Concept of International Law*, Aldershot, 1987, pp. 112–16.

12 E.g. D'Amato, *Concept of Custom*, p. 12.

13 C. De Visscher, *Theory and Reality in Public International Law*, 3rd edn, Princeton, 1960, pp. 161–2.

There are elements of truth in each of these approaches. Amidst a wide variety of conflicting behaviour, it is not easy to isolate the emergence of a new rule of customary law and there are immense problems involved in collating all the necessary information. It is not always the best instrument available for the regulation of complex issues that arise in world affairs, but in particular situations it may meet the contingencies of modern life. As will be seen, it is possible to point to something called 'instant' customary law in certain circumstances that can prescribe valid rules without having to undergo a long period of gestation, and custom can and often does dovetail neatly within the complicated mechanisms now operating for the identification and progressive development of the principles of international law.

More than that, custom does mirror the characteristics of the decentralised international system. It is democratic in that all states may share in the formulation of new rules, though the precept that some are more equal than others in this process is not without its grain of truth. If the international community is unhappy with a particular law it can be changed relatively quickly without the necessity of convening and successfully completing a world conference. It reflects the consensus approach to decision-making with the ability of the majority to create new law binding upon all, while the very participation of states encourages their compliance with customary rules. Its imprecision means flexibility as well as ambiguity. Indeed, the creation of the concept of the exclusive economic zone in the law of the sea may be cited as an example of this process. This is discussed further in chapter 11. The essence of custom according to article 38 is that it should constitute 'evidence of a general practice accepted as law'. Thus, it is possible to detect two basic elements in the make-up of a custom. These are the material facts, that is, the actual behaviour of states, and the psychological or subjective belief that such behaviour is 'law'. As the International Court noted in the *Libya/Malta* case, the substance of customary law must be 'looked for primarily in the actual practice and *opinio juris* of states'.[14]

It is understandable why the first requirement is mentioned, since customary law is founded upon the performance of state activities and the convergence of practices, in other words, what states actually do. It is the psychological factor (*opinio juris*) that needs some explanation. If one left the definition of custom as state practice then one would be faced with the

[14] ICJ Reports, 1985, pp. 13, 29; 81 ILR, p. 239. See also the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, pp. 226, 253; 110 ILR, p. 163.

problem of how to separate international law from principles of morality or social usage. This is because states do not restrict their behaviour to what is legally required. They may pursue a line of conduct purely through a feeling of goodwill and in the hope of reciprocal benefits. States do not have to allow tourists in or launch satellites. There is no law imposing upon them the strict duty to distribute economic aid to developing nations. The bare fact that such things are done does not mean that they have to be done.

The issue therefore is how to distinguish behaviour undertaken because of a law from behaviour undertaken because of a whole series of other reasons ranging from goodwill to pique, and from ideological support to political bribery. And if customary law is restricted to the overt acts of states, one cannot solve this problem.

Accordingly, the second element in the definition of custom has been elaborated. This is the psychological factor, the belief by a state that behaved in a certain way that it was under a legal obligation to act that way. It is known in legal terminology as *opinio juris sive necessitatis* and was first formulated by the French writer François Gény as an attempt to differentiate legal custom from mere social usage.[15]

However, the relative importance of the two factors, the overt action and the subjective conviction, is disputed by various writers.[16] Positivists, with their emphasis upon state sovereignty, stress the paramount importance of the psychological element. States are only bound by what they have consented to, so therefore the material element is minimised to the greater value of *opinio juris.* If states believe that a course of action is legal and perform it, even if only once, then it is to be inferred that they have tacitly consented to the rule involved. Following on from this line of analysis, various positivist thinkers have tended to minimise many of the requirements of the overt manifestation, for example, with regard to repetition and duration.[17] Other writers have taken precisely the opposite line and maintain that *opinio juris* is impossible to prove and therefore

[15] *Méthode d'Interprétation et Sources en Droit Privé Positif*, 1899, para. 110.

[16] See e.g. R. Müllerson, 'The Interplay of Objective and Subjective Elements in Customary Law' in *International Law – Theory and Practice* (ed. K. Wellens), The Hague, 1998, p. 161.

[17] See e.g. D. Anzilotti, *Corso di Diritto Internazionale*, 3rd edn, 1928, pp. 73–6; K. Strupp, 'Les Règles Générales du Droit International de la Paix', 47 HR, 1934, p. 263; Tunkin, *Theory of International Law*, pp. 113–33, and 'Remarks on the Juridical Nature of Customary Norms of International Law', 49 *California Law Review*, 1961, pp. 419–21, and B. Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?', 5 *Indian Journal of International Law*, 1965, p. 23.

of no tremendous consequence. Kelsen, for one, has written that it is the courts that have the discretion to decide whether any set of usages is such as to create a custom and that the subjective perception of the particular state or states is not called upon to give the final verdict as to its legality or not.[18]

The material fact

The actual practice engaged in by states constitutes the initial factor to be brought into account. There are a number of points to be considered concerning the nature of a particular practice by states, including its duration, consistency, repetition and generality. As far as the duration is concerned, most countries specify a recognised time-scale for the acceptance of a practice as a customary rule within their municipal systems. This can vary from 'time immemorial' in the English common law dating back to 1189, to figures from thirty or forty years on the Continent.

In international law there is no rigid time element and it will depend upon the circumstances of the case and the nature of the usage in question. In certain fields, such as air and space law, the rules have developed quickly; in others, the process is much slower. Duration is thus not the most important of the components of state practice.[19] The essence of custom is to be sought elsewhere.

The basic rule as regards continuity and repetition was laid down in the *Asylum* case decided by the International Court of Justice (ICJ) in 1950.[20] The Court declared that a customary rule must be 'in accordance with a constant and uniform usage practised by the States in question'.[21] The case concerned Haya de la Torre, a Peruvian, who was sought by his government after an unsuccessful revolt. He was granted asylum by Colombia in its embassy in Lima, but Peru refused to issue a safe conduct to permit Torre to leave the country. Colombia brought the matter before

[18] 'Théorie du Droit International Coutumier', 1 *Revue International de la Théorie du Droit*, 1939, pp. 253, 264–6. See also P. Guggenheim, *Traité de Droit International Public*, Paris, 1953, pp. 46–8; T. Gihl, 'The Legal Character of Sources of International Law', 1 *Scandinavian Studies in Law*, 1957, pp. 53, 84, and *Oppenheim's International Law*, pp. 27–31.

[19] See D'Amato, *Concept of Custom*, pp. 56–8, and Akehurst, 'Custom as a Source', pp. 15–16. Judge Negulesco in an unfortunate phrase emphasised that custom required immemorial usage: *European Commission of the Danube*, PCIJ, Series B, No. 14, 1927, p. 105; 4 AD, p. 126. See also Brownlie, *Principles*, p. 7, and the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 43; 41 ILR, pp. 29, 72.

[20] ICJ Reports, 1950, p. 266; 17 ILR, p. 280.

[21] ICJ Reports, 1950, pp. 276–7; 17 ILR, p. 284.

the International Court of Justice and requested a decision recognising that it (Colombia) was competent to define Torre's offence, as to whether it was criminal as Peru maintained, or political, in which case asylum and a safe conduct could be allowed.

The Court, in characterising the nature of a customary rule, held that it had to constitute the expression of a right appertaining to one state (Colombia) and a duty incumbent upon another (Peru). However, the Court felt that in the *Asylum* litigation, state practices had been so uncertain and contradictory as not to amount to a 'constant and uniform usage' regarding the unilateral qualification of the offence in question.[22] The issue involved here dealt with a regional custom pertaining only to Latin America and it may be argued that the same approach need not necessarily be followed where a general custom is alleged and that in the latter instance a lower standard of proof would be upheld.[23]

The ICJ emphasised its view that some degree of uniformity amongst state practices was essential before a custom could come into existence in the *Anglo-Norwegian Fisheries* case.[24] The United Kingdom, in its arguments against the Norwegian method of measuring the breadth of the territorial sea, referred to an alleged rule of custom whereby a straight line may be drawn across bays of less than ten miles from one projection to the other, which could then be regarded as the baseline for the measurement of the territorial sea. The Court dismissed this by pointing out that the actual practice of states did not justify the creation of any such custom. In other words, there had been insufficient uniformity of behaviour.

In the *North Sea Continental Shelf* cases,[25] which involved a dispute between Germany on the one hand and Holland and Denmark on the other over the delimitation of the continental shelf, the ICJ remarked that state practice, 'including that of states whose interests are specially affected', had to be 'both extensive and virtually uniform in the sense of the provision invoked'. This was held to be indispensable to the formation of a new rule of customary international law.[26] However, the Court emphasised in the *Nicaragua* v. *United States* case[27] that it was not necessary that the

[22] *Ibid.* [23] See further below, p. 92.

[24] ICJ Reports, 1951, pp. 116, 131 and 138; 18 ILR, p. 86.

[25] ICJ Reports, 1969, p. 3; 41 ILR, p. 29.

[26] ICJ Reports, 1969, p. 43; 41 ILR, p. 72. Note that the Court was dealing with the creation of a custom on the basis of what had been purely a treaty rule. See Akehurst, 'Custom as a Source', p. 21, especially footnote 5. See also the *Paquete Habana* case, 175 US 677 (1900) and the *Lotus* case, PCIJ, Series A, No. 10, 1927, p. 18; 4 AD, p. 153.

[27] ICJ Reports, 1986, p. 14; 76 ILR, p. 349.

practice in question had to be 'in absolutely rigorous conformity' with the purported customary rule. The Court continued:

> In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.[28]

The threshold that needs to be attained before a legally binding custom can be created will depend both upon the nature of the alleged rule and the opposition it arouses. This partly relates to the problem of ambiguity where it is not possible to point to the alleged custom with any degree of clarity, as in the *Asylum* case where a variety of conflicting and contradictory evidence had been brought forward.

On the other hand, an unsubstantiated claim by a state cannot be accepted because it would amount to unilateral law-making and compromise a reasonably impartial system of international law. If a proposition meets with a great deal of opposition then it would be an undesirable fiction to ignore this and talk of an established rule. Another relevant factor is the strength of the prior rule which is purportedly overthrown.[29] For example, the customary law relating to a state's sovereignty over its airspace developed very quickly in the years immediately before and during the First World War. Similarly, the principle of non-sovereignty over the space route followed by artificial satellites came into being soon after the launching of the first sputniks. Bin Cheng has argued that in such circumstances repetition is not at all necessary provided the *opinio juris* could be clearly established. Thus, 'instant' customary law is possible.[30]

This contention that single acts may create custom has been criticised, particularly in view of the difficulties of proving customary rules any other way but through a series of usages.[31] Nevertheless, the conclusion must be that it is the international context which plays the vital part in the creation of custom. In a society constantly faced with new situations because of the dynamics of progress, there is a clear need for a reasonably speedy method of responding to such changes by a system of prompt rule-formation. In

[28] ICJ Reports, 1986, p. 98; 76 ILR, p. 432.

[29] See D'Amato, *Concept of Custom*, pp. 60–1, and Akehurst, 'Custom as a Source', p. 19. See also Judge Alvarez, the *Anglo-Norwegian Fisheries* case, ICJ Reports, 1951, pp. 116, 152; 18 ILR, pp. 86, 105, and Judge Loder, the *Lotus* case, PCIJ, Series A, No. 10, 1927, pp. 18, 34.

[30] Cheng, 'United Nations Resolutions'.

[31] See e.g. Nguyen Quoc Dinh *et al.*, *Droit International Public*, pp. 325–6.

new areas of law, customs can be quickly established by state practices by virtue of the newness of the situations involved, the lack of contrary rules to be surmounted and the overwhelming necessity to preserve a sense of regulation in international relations.

One particular analogy that has been used to illustrate the general nature of customary law was considered by de Visscher. He likened the growth of custom to the gradual formation of a road across vacant land. After an initial uncertainty as to direction, the majority of users begin to follow the same line which becomes a single path. Not long elapses before that path is transformed into a road accepted as the only regular way, even though it is not possible to state at which precise moment this latter change occurs. And so it is with the formation of a custom. De Visscher develops this idea by reflecting that just as some make heavier footprints than others due to their greater weight, the more influential states of the world mark the way with more vigour and tend to become the guarantors and defenders of the way forward.[32]

The reasons why a particular state acts in a certain way are varied but are closely allied to how it perceives its interests. This in turn depends upon the power and role of the state and its international standing. Accordingly, custom should to some extent mirror the perceptions of the majority of states, since it is based upon usages which are practised by nations as they express their power and their hopes and fears. But it is inescapable that some states are more influential and powerful than others and that their activities should be regarded as of greater significance. This is reflected in international law so that custom may be created by a few states, provided those states are intimately connected with the issue at hand, whether because of their wealth and power or because of their special relationship with the subject-matter of the practice, as for example maritime nations and sea law. Law cannot be divorced from politics or power and this is one instance of that proposition.[33]

The influence of the United Kingdom, for example, on the development of the law of the sea and prize law in the nineteenth century when it was at the height of its power, was predominant. A number of propositions later accepted as part of international customary law appeared this way.

[32] De Visscher, *Theory and Reality*, p. 149. See also Lauterpacht, *Development of International Law*, p. 368; P. Cobbett, *Leading Cases on International Law*, 4th edn, London, 1922, p. 5, and Akehurst, 'Custom as a Source', pp. 22–3.

[33] See e.g. the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 42–3; 41 ILR, pp. 29, 71–3.

Among many instances of this, one can point to navigation procedures. Similarly, the impact of the Soviet Union (now Russia) and the United States on space law has been paramount.[34]

One can conclude by stating that for a custom to be accepted and recognised it must have the concurrence of the major powers in that particular field. A regulation regarding the breadth of the territorial sea is unlikely to be treated as law if the great maritime nations do not agree to or acquiesce in it, no matter how many landlocked states demand it. Other countries may propose ideas and institute pressure, but without the concurrence of those most interested, it cannot amount to a rule of customary law. This follows from the nature of the international system where all may participate but the views of those with greater power carry greater weight.

Accordingly, the duration and generality of a practice may take second place to the relative importance of the states precipitating the formation of a new customary rule in any given field. Universality is not required, but some correlation with power is. Some degree of continuity must be maintained but this again depends upon the context of operation and the nature of the usage.

Those elements reflect the external manifestations of a practice and establish that it is in existence and exhibited as such. That does not mean that it is law and this factor will be considered in the next subsection. But it does mean that all states who take the trouble can discover its existence. This factor of conspicuousness emphasises both the importance of the context within which the usage operates and the more significant elements of the overt act which affirms the existence of a custom.

The question is raised at this stage of how significant a failure to act is. Just how important is it when a state, or more particularly a major state, does not participate in a practice? Can it be construed as acquiescence in the performance of the usage? Or, on the other hand, does it denote indifference implying the inability of the practice to become a custom until a decision one way or the other has been made? Failures to act are in themselves just as much evidence of a state's attitudes as are actions. They similarly reflect the way in which a nation approaches its environment. Britain consistently fails to attack France, while Chad consistently fails to send a man to the moon. But does this mean that Britain recognises a

[34] See e.g. Cheng, 'United Nations Resolutions'; C. Christol, *The Modern International Law of Outer Space*, New York, 1982, and Christol, *Space Law: Past, Present and Future*, The Hague, 1991. See further below, chapter 10.

rule not to attack its neighbour and that Chad accepts a custom not to launch rockets to the moon? Of course, the answer is in the first instance yes, and in the second example no. Thus, a failure to act can arise from either a legal obligation not to act, or an incapacity or unwillingness in the particular circumstances to act. Indeed, it has been maintained that the continued habit of not taking actions in certain situations may lead to the formation of a legal rule.[35]

The danger of saying that a failure to act over a long period creates a negative custom, that is a rule actually not to do it, can be shown by remarking on the absurdity of the proposition that a continual failure to act until the late 1950s is evidence of a legal rule not to send artificial satellites or rockets into space. On the other hand, where a particular rule of behaviour is established it can be argued that abstention from protest by states may amount to agreement with that rule.

In the particular circumstances of the *Lotus* case[36] the Permanent Court of International Justice, the predecessor of the International Court of Justice, laid down a high standard by declaring that abstention could only give rise to the recognition of a custom if it was based on a conscious duty to abstain. In other words, states had actually to be aware that they were not acting a particular way because they were under a definite obligation not to act that way. The decision has been criticised and would appear to cover categories of non-acts based on legal obligations, but not to refer to instances where, by simply not acting as against a particular rule in existence, states are tacitly accepting the legality and relevance of that rule.

It should be mentioned, however, that acquiescence must be based upon full knowledge of the rule invoked. Where a failure to take a course of action is in some way connected or influenced or accompanied by a lack of knowledge of all the relevant circumstances, then it cannot be interpreted as acquiescence.

What is state practice?

Some of the ingredients of state activities have been surveyed and attempts made to place them in some kind of relevant context. But what is state practice? Does it cover every kind of behaviour initiated by the state, or

[35] See e.g. Tunkin, *Theory of International Law*, pp. 116–17. But cf. D'Amato, *Concept of Custom*, pp. 61–3 and 88–9.

[36] PCIJ, Series A, No. 10, 1927, p. 18; 4 AD, p. 153.

is it limited to actual, positive actions? To put it more simply, does it include such things as speeches, informal documents and governmental statements or is it restricted to what states actually do?

It is how states behave in practice that forms the basis of customary law, but evidence of what a state does can be obtained from numerous sources. Obvious examples include administrative acts, legislation, decisions of courts and activities on the international stage, for example treaty-making.[37] A state is not a living entity, but consists of governmental departments and thousands of officials, and state activity is spread throughout a whole range of national organs. There are the state's legal officers, legislative institutions, courts, diplomatic agents and political leaders. Each of these engages in activity which relates to the international field and therefore one has to examine all such material sources and more in order to discover evidence of what states do.[38]

The obvious way to find out how countries are behaving is to read the newspapers, consult historical records, listen to what governmental authorities are saying and peruse the many official publications. There are also memoirs of various past leaders, official manuals on legal questions, diplomatic interchanges and the opinions of national legal advisors. All these methods are valuable in seeking to determine actual state practice.

In addition, one may note resolutions in the General Assembly, comments made by governments on drafts produced by the International Law Commission, decisions of the international judicial institutions, decisions of national courts, treaties and the general practice of international organisations.[39]

[37] See e.g. Pellet, 'Article 38', p. 751, and *Congo* v. *Belgium*, ICJ Reports, 2002, pp. 3, 23–4; 128 ILR, pp. 60, 78–80.

[38] See e.g. *Yearbook of the ILC*, 1950, vol. II, pp. 368–72, and the *Interhandel* case, ICJ Reports, 1959, p. 27. Note also Brierly's comment that not all contentions put forward on behalf of a state represent that state's settled or impartial opinion, *The Law of Nations*, 6th edn, Oxford, 1963, p. 60. See also Brownlie, *Principles*, p. 6, and Akehurst, 'Custom as a Source', p. 2.

[39] The United States has produced an extensive series of publications covering its practice in international law. See the Digests of International Law produced by Wharton (1887), Moore (1906) and Whiteman (1963–70). From 1973 to 1980 an annual *Digest of US Practice in International Law* has been produced, while three composite volumes covering the years 1981–8 have appeared. The series resumed with effect from the year 2000. See also H. A. Smith, *Great Britain and the Law of Nations*, London, 2 vols., 1932–5; A. D. McNair, *International Law Opinions*, Cambridge, 3 vols., 1956; C. Parry, *British Digest of International Law*, London, 1965, and E. Lauterpacht, *British Practice in International Law*, London, 1963–7. Several yearbooks now produce sections devoted to national practice, e.g. *British Yearbook of International Law* and *Annuaire Français de Droit International.*