CHAPTER 1

The Nature and History of International Law

Reading

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Anghie, A, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press, Cambridge, 2004).
Koskenniemi, M, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers' Publishing Co, Helsinki, 1989).
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See generally, *Journal of the History of International Law* (Martinus Nijhoff Publishers), since 1999.

Aim

By the end of this chapter you should know and understand:

- the main schools of thought concerning definitions and the boundaries of international law;
- a brief history of international law; and
- some of the critiques of international law.

Principles

The Nature of International Law

[1.10] Public international law is often defined as the law governing relations between nation-states. In the SS Lotus case (PCIJ ser A No 10, 18), the Permanent Court of International Justice (PCIJ) defined international law as follows:

> *'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these coexisting independent communities or with a view to the achievement of common aims.'*

Since the emergence of non-state actors onto the international stage, this definition has evolved. For example, the Office of International Law in the Australian Attorney-General's Department states: 'International law consists of the laws and principles governing actors at the international level. These actors include governments as well as international organisations': see www.ag.gov.au/www/agd/agd.nsf/Page/InternationalLaw_InternationalLaw.

A consideration of states as subjects of law

[1.20] States are the political institutions in which sovereignty is embodied. Sovereignty refers to the supreme political authority that a state has within its territory. At the international level, sovereignty is used to refer to 'the totality of powers that States may have under international law' (Crawford 2006, p 33). Thus, a *sovereign* state is a modern legal entity within which a government makes the law and enforces and determines

the law by employing the use of violent force in a lawful manner within a defined territorial and national jurisdiction without being subject to the jurisdiction of other states, international organisations or tribunals except by consent. Since no state or group of states has sovereignty over another state, international legal relations are said to be structured *horizontally*. This is exactly the point being made by the PCIJ in the *SS Lotus* case (cited above) in its emphatic references to the independent nature of states.

A state entity is defined at international law by certain objective criteria (see Chapter 4). Once a state is recognised as such, it becomes a subject of international law: it has a right to bring a claim under international law, and if it violates international law, it can be held responsible by the injured state or states, or in some cases by the international community as a whole (see Chapter 7). States are sometimes associated with a nation of peoples defined by common descent, history, language and culture, but the concept of nation and the concept of state are not the same. There are also territories that do not fit the definition of a nation-state that still have legal capacity at international law. The most common example is the Vatican, which was created by a series of treaties between Italy and the Roman Catholic Church in 1929.

International law provides states with a legal personality distinct from their national population, much like a corporation is considered a legal person distinct from its board of directors or shareholders. Unlike a natural person, a state is 'neither conscious nor sentient. States neither bleed nor starve nor are forced to flee for their lives' (Scobbie 2003, Pt 1, p 82). Feminist international lawyers such as Orford argue that 'the image of the state as separate, secure and autonomous …' reinforces a vision of international order as essentially consisting of an 'aggregate of independent private spaces, socialised and connected through contractual relations' that erases the democratic and diverse wills of the people who live within state boundaries (Orford 2003, pp 147-148). And yet, as Cassese also points out, states 'can only operate through individuals, who do not act on their own account but as State officials, as the tools of the structures to which they belong' (Cassese 2005, p 4). Both of the above statements are a consequence of the fact that people must first obtain the status of a sovereign state before they obtain full *legal* capacity on the world stage. Some theorists, such as Allott, have gone so far as to propose that states be removed as the primary subjects of international law in a manner that enables individuals to take responsibility for making new systems of law that are more responsive to humankind (Allott 2001). Hall makes the point that many states that participate in the generation of international law 'are not representative of their populations and frequently exercise domestic power and use their international authority directly against their people's wishes and fundamental interests' (Hall 2006, p 8). This in turn has an adverse affect on the 'development of international law in directions genuinely beneficial to international society as a whole' (Hall 2006, p 8). These concerns have led to cosmopolitan approaches to international law that propose a shift away from statist visions of international relations in an attempt to foster a globalised human community based around transnational solidarities (Portes et al 1999).

Hence, the legal status or capacity of states is connected to larger questions about democratic representation in an international rule of law and, ultimately, international law's legitimacy. If no other entities but states were able to influence the creation and interpretation of international law, then international law could readily be criticised for having a narrow, illegitimate grounding. While this is in many ways the case, a wide range of individual and group actors do play a role in guarding and deciding upon

the legitimacy of international laws. Such legitimacy is fundamental to protecting and promoting international law's obligatory nature and its use as a rightful instrument of international policy.

International law as a manifestation of state sovereignty

[1.30] The sources of public international law are discussed in detail in Chapter 2. International law is generally considered to be a manifestation of sovereign state decision-making albeit directed at some level by (arguably western) natural law concepts of justice and morality, as well as the maintenance of peace and order. The reason why it is said that states are the sovereign law makers of international law is because there is no single international legislative body to undertake that task. In effect, this means that a rule or norm cannot be defined as part of international law unless states, as its principal subjects, have consented to it, or have otherwise practised and treated a rule or norm as binding in a way that demonstrates that it is 'customary international law'. Thus international law comprises customary laws as well as treaty law consented to by states (see Chapter 2).

There are legal principles referred to as *soft law* that are not binding on states but which play an influential role in either influencing state behaviour or in developing or interpreting binding international laws. These soft laws include non-binding instruments prepared by international governmental and non-governmental organisations.

While the laws, rules, norms and/or principles of international law may originate in the will of states, Henkin suggests that law is made by political actors, 'through political procedures, for political ends'. Law then, according to Henkin, is a political force (Henkin 1989). As well as lawyers and state legislators working on domestic and international policy, law is, of course, also made by judges sitting in international and national tribunals. The idea of law as politics is common and ought to be considered in the light of the different power structures existing at any one time in international society. These forces may involve interactions between individuals or socially constructed actors such as states, markets or corporations.

The enforcement of international law

[1.40] At the domestic level, law is enforced by judicial or non-judicial measures that induce or compel compliance, or punish non-compliance. That enforcement is backed by the state and the legitimate use of force when necessary. Since the end of World War II, international law has prohibited the use of force by states against other states, except in certain circumstances including the right to use force in self-defence (see Chapter 10). The invasion of Iraq in 2003 demonstrates how states will not always rely on the dispute settlement mechanisms of international law to resolve their disputes.

Putting practices of hegemony and imperialism to one side, international law rests on the presumed principle that all states are independent and have sovereignty over their own affairs. This means, if a state refuses to submit to the jurisdiction of an international court or tribunal, or refuses to make reparations for the injuries it has caused, there is little an injured state can do to bring the state accused of wrongdoing to justice. At the international level, there is no single legitimate enforcement agency, such as an international police force or international prosecutor, to charge and try a state with the violation of an international crime, and ensure that it is held responsible

for conduct for which it is found to be responsible. Nor is there a court with global criminal or civil jurisdiction, although in certain circumstances a state may be subject to the jurisdiction of certain international tribunals. This raises the question of how international law is enforced (and a more theoretical question of whether international law is law at all, as discussed further below).

Quite often, a state will not resort to a formal dispute settlement mechanism but will simply rely on the use of self-help remedies including the use of countermeasures such as economic sanctions or the reduction of foreign aid to the state that is said to be in violation of international law. These forms of self-help are examined in Chapter 7. The jurisdiction of states to enforce their own law is explained in Chapter 6. Under general international law, there is only one regime of legal remedies applicable to state responsibility, which is explored in Chapter 8. However, as general international law fragments into specialised substantive fields of law (such as trade, human rights or the law of the sea), as well as into various particular jurisdictions (such as the ICJ, WTO, ECHR), special remedies are being applied in the same way that the domestic law systems of the common law, for example, apply different remedies depending on whether the wrongful act falls within the field of contract, tort or criminal law.

Indirect consequences of enforcement measures

[1.50] The main dilemma with punishing a state for a violation of international law is that the remedies available at international law often affect people living in the state even though those people may have played no role in the violation itself. For instance, the comprehensive sanctions imposed against Iraq by the United Nations (UN) Security Council on August 6, 1990 after the Iraqi invasion of Kuwait directly harmed the people of Iraq, particularly children. Those sanctions remained in place for over a decade until the United States (US)-led invasion of Iraq in 2003, even though the coalition war had ousted Iraq from Kuwait in the year following Iraq's invasion. As the then UN Secretary General Boutros Boutros-Ghali stated in 1995, those sanctions 'raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behaviour is unlikely to be affected by the plight of their subjects' (UN doc, A/50/60). Reforms have since been initiated to ensure the harsh consequences of the sanctions against Iraq are not repeated, but the critique of sanctions remains valid.

Subjects of international law other than states

[1.60] In one of its early decisions about the status at international law of the UN, the ICJ acknowledged the existence of other legal persons in addition to states. In doing so the ICJ commented that 'subjects of international law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community' (*Reparations* case, at [178]). The identification of the subjects of international law is, at least for the ICJ, a functional exercise. As the ICJ puts it: 'the requirements of international life and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States' (*Reparations* case, at [178]).

The consequence of this decision is that some non-state actors may in certain contexts be considered subjects of international law. To date, only international organisations such as the UN or the WTO have been granted legal personality under

international law (see Chapter 5). Other non-state actors – including multinational corporations such as Microsoft or Nike, non-governmental organisations like Amnesty or Oxfam International, or individuals – are yet to be recognised as functional subjects of international law. Nevertheless, these actors still have the power to influence state behaviour and the development of international law. In the meantime, states can, but rarely are, held responsible for the acts of non-state actors. This is a concern, particularly in the arena of human rights protection, given the weakening of many state functions through processes of privatisation and economic liberalisation which have removed the provision of many essential services such as health care, access to water or education from the state to private organisations. One response to these trends has been to argue for greater accountability of non-state actors at international law. This would require them to be granted rights and obligations at international law. This begs the question, however, about the general effectiveness of international law compared to domestic law remedies.

Traditionally, individuals were said to be the objects of international law rather than its subjects. This means individuals have had to rely on their own state to provide them with diplomatic protection for any claim they may have arising from an internationally wrongful act of another state that caused them injury. Since the end of World War I, individuals have been given standing to pursue international claims on their own behalf pursuant to a number of treaties. However, the state-centric nature of international legal decision-making still places serious limitations on those individuals who look to international law for protection. Individual claims are financially and procedurally difficult to attain and they rely on the consent of states that are party to the relevant dispute settlement mechanism. Although many individuals look to international human rights law for protection against their state government, it is state governments that are charged with the implementation of human rights law in their territories as well as on the international stage. As a consequence, an individual's protection from a violation of their human rights or freedoms is only as strong as the political willingness to enable those rights to be enforced at a national or international level.

Compared to individual rights, the responsibility of individuals at international law has a much longer history (see Chapter 5). Piracy is perhaps the most longstanding international crime (see Chapter 15); more recently, individuals have also been held responsible for civil wrongs at international law such as environmental torts (see Chapter 13).

The universality and temporality of international law

[1.70] Although public international law is the general body of law applicable on the international plane, it is not a universal body of law. This is so not only because of the considerable diversity amongst its principal subjects – states – but also because of its history and its particular derivations in European imperialism and western conceptions of justice, politics and dispute settlement.

The imperial aspect of international law is discussed below. It is sufficient to state here that although the principle of sovereignty in international law declares each state to be equal, military, political, economic and cultural power strongly influence the effect and legitimacy of international law at various times and in different places. The challenges of international law as a universal set of principles emerge as an issue throughout this book.

Suffice to say, international law arrives in different forms in different places and is constantly changing. Even within a particular specialisation, international lawyers may disagree about issues of interpretation or the emergence of a new principle, obligation or right. Indeed, there is a branch of legal principles in international law that is concerned with how a tribunal ought to deal with a case where the rights or obligations of the parties to the dispute are derived from customary or treaty law of times long past. These sorts of concerns are discussed to some extent in Chapter 8 on the law and interpretation of treaties.

The fragmentation of international law

[1.80] Another point to note about the nature of international law is its fragmentation into different fields of law. As Koskenniemi has observed, '[i]t is a well-known paradox of globalisation that while it has led to increasing uniformisation of social life around the world, it has also led to its increasing fragmentation – that is, to the emergence of specialised and relatively autonomous spheres of social action and structure' (Koskenniemi 2006, at [7]). As foreshadowed earlier, one such consequence is that international law is now a general field of law that encompasses specialist fields such as those described in later chapters in this book, including 'Trade Law', 'Law of the Sea', 'Environmental Law', 'Human Rights Law' and 'Criminal Law'.

The fragmentation of international law can mean that a single dispute based on the same set of facts, for example, might be subject to resolution by three international law tribunals respectively specialising in human rights law, trade law or environmental law. One concern arising out of such a scenario is whether the inevitable differences in legal principles created by the various tribunals harm the unity of international law as a general body of law. On the other hand, international tribunals may benefit from the increasing development of principles across a range of fields such that trade law disputes, for instance, might be influenced by principles emerging in international environmental law or human rights law. Problematic issues such as these are dealt with in Chapter 8 of this book in an examination of the law of treaties and in Chapter 9 on dispute resolution by international tribunals.

In addition to general international law, one might also refer to regional international law as another form of fragmentation. Regional international law only applies to a particular group of states. The European Union, for example, is governed to a certain extent by principles of public international law, which are themselves shaped to suit the context of European integration. For example, the jurisprudence of the European Court of Human Rights draws on principles of international human rights law to judge the human rights obligations of states within the European Union. The jurisprudence of the European Court is then drawn on by international human rights lawyers in other international and domestic jurisdictions. Thus we see how international law is both general and particular in terms of its sources and application.

The relationship between international and domestic law

[1.100] Since international law may regulate how states behave, it can affect how national governments govern their own populations and territories. To that extent, it can be argued that international law does more than govern the conduct of states *inter se* (that is, as between themselves). Indeed, not all international laws are concerned with the behaviour of states on the international stage. Much of international law is concerned

with subject-matter that is best dealt with by domestic regulation within state territory (such as the implementation of carbon trading schemes or the protection of the right to freedom from torture by public officials). In those latter cases, international legal rights or obligations are implemented by national legal systems incorporating the relevant international legal rights or obligations either directly or indirectly into domestic law. This process is described in detail in Chapter 3.

How does public international law differ from private international law?

[1.110] International law is divided into public and private spheres. As stated above, public international law is concerned with the conduct of sovereign states or relations between individuals or organisations and states. Private international law is the field of law that regulates private relationships across national borders. Commonly referred to as the study of the 'conflict of laws', private international law principles are used to determine the appropriate national or international forum or jurisdiction to adjudicate a particular dispute between private parties dealing with each other across state borders; as well as determining which state's laws are to apply; or how foreign judgments are enforced in local jurisdictions. Some of these issues will be touched on in Chapter 6, but otherwise this book deals only with issues of public international law.

Is international law really law?

[1.120] Given the lack of an overarching sovereign to enforce international law, some legal and political theorists have argued that international law is not law at all but rather it is of the same class as 'the rules of honour' or 'the law set by fashion' (Austin 1832). These doubts are based on arguments by the philosopher, Austin (1790–1859), who argued that because the international community of states does not have a sovereign to impose sanctions in cases of violation of international law it is not 'law properly so called' (Austin 1832).

> *'Laws properly so called are a species of* commands. *But, being a* command, *every law properly so called flows from a* determinate *source* …
>
> *And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author … [t]he law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils in case they shall violate maxims generally received and respected.'*

Subsequent legal realists, such as Morgenthau (1904–1980) or Hallett Carr (1892–1982) have also argued that international law is irrelevant to the decision-making and conduct of states except as a moral or ethical force. As a result, Orford suggests that international law suffers a 'pervading crisis of authority', to which international lawyers respond by exempting one power from the law, say a particular hegemonic state, or by envisioning 'a world organisation capable of representing an international community and operating as the agent of a unified and coherent system of international law' (Orford 2007a, pp 1–2). Higgins views international law as process rather than rules:

> *'When … decisions are made by authorised persons or organs, in appropriate forums, within the framework of certain established practices and norms, then what occurs is* legal *decision-making. In other words, international law is a continuing process of authoritative decisions. This view rejects the notion of law merely as the impartial application of rules. International law is the entire decision-making process, and not just the reference to the trend of past decisions which are termed "rules". … International law is the whole process of competent persons making authoritative decision in response to claims which various parties are pressing upon them, in respect of various views and interests. The claimants are all seeking to attain various objectives, and it is the task of the judge to decide the distribution as between them of values at stake, but taking into account not only the interests of the parties but the interests of the world community as a whole.' (Higgins 1968, pp 58–59)*

Hence, international law is justified as a type of rule or at the very least a regulatory process, whether or not it is strictly enforced. As a consequence, commentators have suggested that international law is law simply because it is in the interests of both state and non-state actors to treat it as such for pragmatic reasons, such as ensuring that goods, mail, people and services move relatively efficiently and freely around the globe. Moreover, as Hall argues, '[w]hen friction arises between States, it is usually because international law does not (yet) prescribe a relevant rule, or because the States concerned genuinely disagree over what the relevant rule requires. This is also frequently true in the case of friction among individuals operating under the shadow of domestic law' (Hall 2006, p 19). Indeed, the increasing number of treaties entered into each year is strong evidence that international law is valuable to states – even powerful ones. Between 2004 and 2007, for instance, the US entered into 10 bilateral free trade agreements with Australia, Bahrain, Chile, the Dominican Republic, El Salvador, Honduras, Guatemala, Morocco, Nicaragua and Singapore. The question left begging is to what degree these legally binding treaties are a *consequence* of political, military and financial power rather than a *solution* to such realities. This raises the question of how and to what extent international law is in fact a manifestation of political and economic power.

Falk says that international law has four functional aspects. First is the 'management of complexity' whereby sovereign states have learned 'to contrive mutually beneficial ways of dealing with the … implications of interdependence'. The second concerns the 'containment of conflict within tolerable limits', and the third concerns 'the promotion of decency in the world', particularly relating to equity and development, human rights and the protection of individual human dignity. The fourth has to do with 'the avoidance of catastrophe', such as the management of weapons of mass destruction (Falk 1993, pp 91–93).

The above theories are based largely on the presumption that international law is positivist in nature. That is, laws are posited by and agreed to by states rather than emerging from a divine source or in nature. These transcendental 'natural' sources of law are discussed below as part of the history and theory of international law, although they remain fundamental to our understanding of international law's character and legitimacy.

Histories of international law

International law and the nation-state

[1.130] The choice of where one commences a history of public international law will depend on how one defines international law itself. As many textbook authors

point out, often as if reciting folklore (since these assertions are rarely referenced), there is evidence of treaties being made concerning support for dynastic and military alliances in Mesopotamia by rulers of city-states as long ago as 3100BC (Triggs 2006, p 6). However, in adhering to the modern definition of international law (*ie* as the law that governs relations between sovereign states), there is the requirement to find the moment in history when states themselves emerged and formed a community with its own law. Anyone familiar with modern history will know that no such moment exists. However, generally speaking, states began to emerge as autonomous subjects with legal personality in the 16th century.

Until the modern concept of state sovereignty gained universal acceptance, the people within Europe, at least, were subject to a number of political authorities, some defined by geographical territory and some not. The event that many say marks the birth of the modern international community, and thus the origin of international law, is the signing of two treaties collectively known as the 1648 *Peace of Westphalia*, which marked the end of the Thirty Years' War and the Eighty Years' War respectively. These treaties were ratified by a small group of European states, who at that time were only aware of a section of the world's territory. The reason why most textbooks on international law treat these two European peace treaties as the founding moment of international law is because the parties to the treaties, which included emperors, monarchs, princes and a republic, are all said to have agreed to respect each other's territorial integrity and not to intervene in each other's domestic jurisdiction. In other words, the *Peace of Westphalia* is considered to mark the advent of the independent sovereign state. In fact, the *Peace of Westphalia* was largely concerned with the right of a sovereign to enforce its own religious faith within its territory. This move toward religious freedom eventually weakened the Holy Roman Empire and the temporal powers of the Catholic Church such that the authority of monarchs increased over the power of a 'universal' church. Once state entities began to multiply, so too did their interests, and a new conceptual form of authority was required to explain the relations that took place internationally, as well as to explain the entities themselves. The former undertaking had already been started by theologians and philosophers such as Aquinas (1225–1274), de Vitoria (1485–1546), Suárez (1548–1617), Hobbes (1588–1679), Grotius (1583–1645), von Pufendorf (1632–1694) and Locke (1632–1704). Theories on internal state sovereignty were developed by theologians and political philosophers such as Luther (1483–1546), Machiavelli (1469–1527) and Bodin (1530–1596). The Dutch jurist Grotius (1583–1645) was one of the first writers to speak of 'the law of nations' as a body of legal rules binding on the emerging sovereign states of Europe in his treatise of 1625, *The Law of War and Peace*. Further writers such as Zouche (1590–1660), Pufendorf (1632–1694), Bynkershoek (1673–1743), Wolff (1679–1754), Moser (1701–1795), von Martens (1756–1821), and Vattel (1714–1767) developed further Grotius' theses regarding the definition of the law of nations. As Starke writes, 'there proceeded naturally a kind of action and reaction between customary rules and the works of these great writers; not only did their systematic treatment of the subject produce the best evidence of the rules, but they suggested new rules of principles where none had yet emerged from the practice of states' (Shearer 1994, pp 11–14). Since all of the above philosophers were writing from the perspective of European experience, international law's heritage must be said to be Christian, primarily capitalist and closely connected to imperial practices. The imperial history of international law is discussed at [1.200].

International law and optimism during the period between the World Wars

[1.140] The self-interest of European power was diminished somewhat following the enormous loss of life caused by World War I. One of the major developments of this inter-war period was the creation of the first international organisation, the League of Nations. As Bedjaoui has argued, until the League was established, 'international law was simply a European law, arising from the combination of regional fact with material power, and transposed as a law dominating all international relations' (Bedjaoui 1979, pp 62–63).

A brief history of the Covenant establishing the League is provided in Chapter 10. The Covenant is best known for the unsuccessful attempt to engage states in the peaceful settlement of their disputes. The establishment of the League also marks the beginnings of a period of quasi-decolonisation insofar as the Covenant provided that the colonies formerly occupied by the states defeated in World War I were to be recognised as sovereign territories but held on trust by certain League members. Anghie's argument is that the Mandate System established by the Covenant did not break from the existing imperial nature of international relations. Anghie argues that although there may have been a formal transfer of sovereignty to colonial territories, the system perpetuated their subjection through the application of new theories and policies of governance emerging in the social sciences. Thus the recognition of statehood in colonial territories became contingent not just on the formal criteria of territory, population and government, but also on the satisfaction of rules and standards in areas such as economic development, health and mortality rates, and the reform of native political institutions, which Anghie views as the origins of development policy (Anghie 2004, p 189). According to Anghie, international legal theories also removed the obvious traces of racism from its discourse and shifted to more neutral language to describe the problems of the 'rest of the world' not as differences in civilisation but in terms of economic and technological development.

The second major development of the inter-war period was the establishment of the Permanent Court of International Justice in 1921, which remained in operation until 1945 (see Chapter 9).

Post-World War II and the United Nations

[1.150] Following World War II, the emergence of the US and the USSR as superpowers and the successive decolonisation of former colonial territories removed power from Europe and spread further the notion of international law as a general, universal body of law governing relations among states. The trial of many Japanese and Nazi criminals significantly developed the principles of international criminal law and individual responsibility at international law (see Chapter 15). The protection of human rights also emerged as a new field of international law as these rights were recognised in the *Universal Declaration of Human Rights* (1948) and subsequently in two international covenants on civil and political (1966) and economic, social and cultural rights (1966) respectively (see Chapter 14). It was also in the post-war period that the international law of the sea began to receive significant attention (see Chapter 12).

As newly formed states began to emerge through the process of decolonisation, they began to challenge the norms and substance of international law. During this

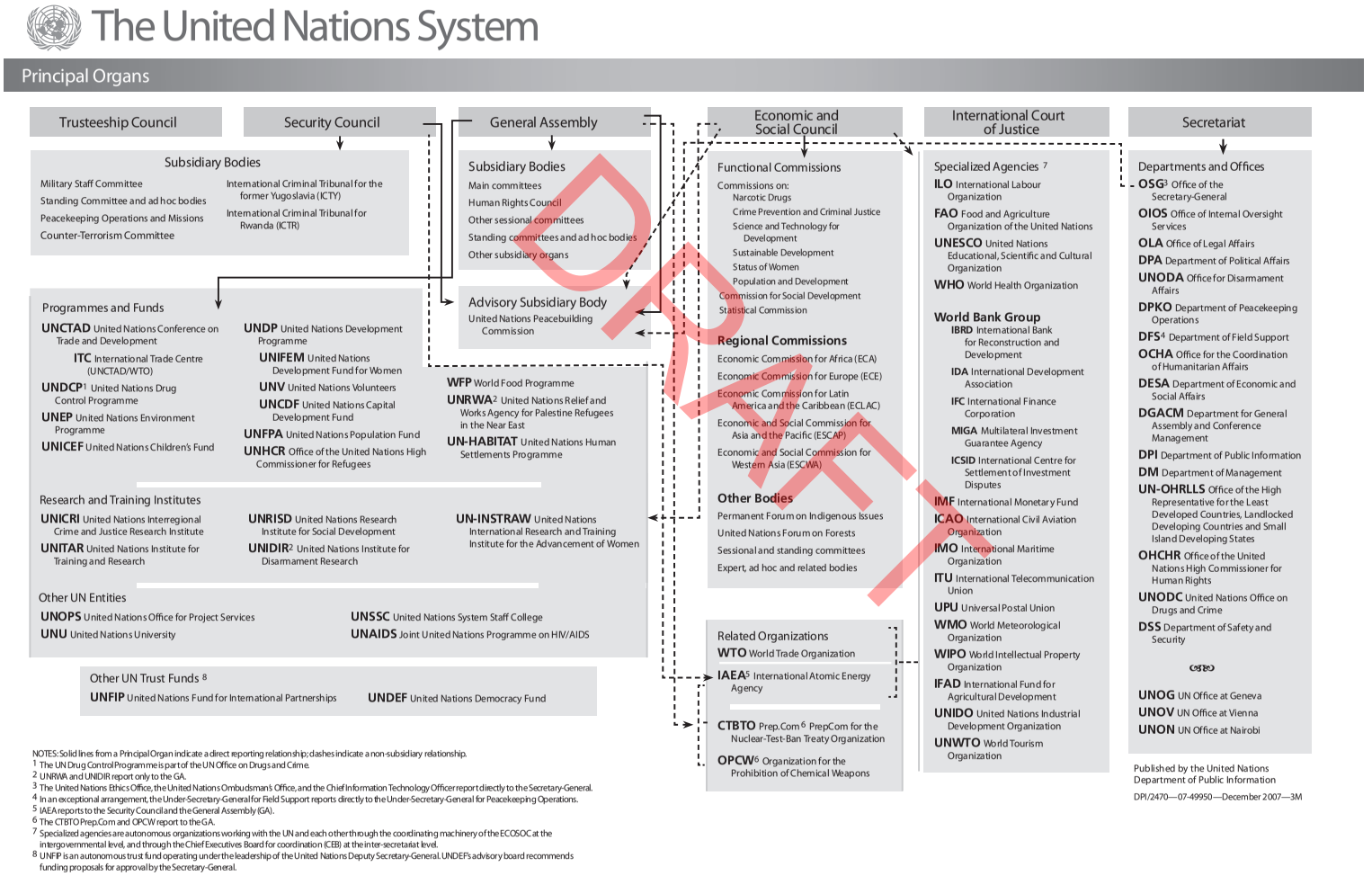
period of decolonisation, a tension began to emerge in international law between the existing principles supporting national, sovereign self-interest and more nascent ideas about transnational, collective solidarities. One example of how Third World states – a term coined at the Bandung Conference of 1955 by a group of states that declared themselves unaligned to either the West or the Communist bloc – attempted to put these theories of re-structuring into practice is their attempt to establish a New International Economic Order (NIEO) in the 1960s and 1970s. During this period, law was a significant instrument for implementing global economic and social development. As Kennedy explains, the UN 'was seen as a centralised legislative vehicle for global policy making. International law was to provide the tools to support nascent global welfare-state – top-down regulation to restructure relative bargaining powers of developing nations and the private market actors of the North, administrative arrangements to stabilise prices, implement social programs, and distribute resources to achieve development objectives' (Kennedy 2006, p 117). In 1979, UNESCO published what was to become a classic text of the movement by the Algerian jurist (and later ICJ president), Bedjaoui, called *Towards a New International Economic Order.* This text marks a turn toward critical studies of international law, which were written in opposition to earlier positivist writings of the 19th and 20th centuries. The NIEO was lost to the debt crisis, neo-liberal economic restructuring and the deterioration of the terms of trade for developing countries. International law also began to be seen from a pragmatic, policy-orientated perspective in opposition to the rule-based conceptions of international law by scholars such as Schachter (1915–2003) and Franck. 'Developing states' remain concerned with international trade law, human rights and environmental laws and their connections to structural reforms. These reforms are in turn based on what some might argue to be European normative grounds such as justice and fairness, equality, political democracy and a belief in fundamental human rights to life, liberty and the basic necessities of life. Note should also be made of the international human rights movement, which emerged during this period to place limits on the conduct of sovereign governments.

The United Nations

[1.160] In terms of international organisation in the post-World War II era, the League was replaced by the United Nations, established by a treaty that came into force on 24 October 1945. The UN consists of six principal organs: the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the ICJ and the Secretariat.

The main achievement of the UN Charter has been the prohibition of 'the threat or use of force' in art 2(4), which is subject to the right of self defence in art 51. Nonetheless, as the violent nature of international relations demonstrates, the use of force remains a common means of state relations (see Chapter 10). The UN is discussed in more detail in Chapter 5 below; however, it is valuable to note here that in March 2005, the UN Secretary-General Kofi Annan prepared a report on the reform of the UN called *In Larger Freedom* (see Chapter 5), which provides a good sense of the primary concerns of the UN in its current form. Given the challenges involved in amending the UN Charter, however, major organisational reforms are yet to be implemented.

Figure 1.1: The United Nations System



Post-war dispute settlement

[1.170] The emergence of international tribunals and organisations such as the ICJ and the UN has meant that writers of international law now play less of a role in determining principles of international law than the findings of international tribunals, state practice and international organisations. In particular, international tribunals have become attuned to law's functional role and its relationship to regulatory theories, policy and pragmatism. As Orford writes, '[i]nstitutional and political developments since the end of the Cold War have led to a revival of public interest in international law and cosmopolitan legality. This has intensified with the violent attacks on the US of 11 September 2001, and the use of force against the territory and people of Afghanistan and Iraq carried out in response'. Orford concludes that critical legal scholars 'complicate the tendency to see international law as offering an answer to the questions generated by the war on terror, globalisation and related events. Rather than look to international law or institutions for answers or as the source of a pre-packaged programme of reforms which can solve the problems of domestic politics … [critical legal scholars ask] "How has the world come to take this form?"' (Orford 2007b, pp 1–2).

Theories of international law

International law as a natural phenomenon

[1.180] During the shift in Europe away from a Catholic empire to a system of independent territorial sovereign states there emerged a need for a new set of theories to address the absence of a divine source of universal law authorised by a single overriding power (historically the Roman Catholic Church). The first set of theories to emerge was based on the belief that law was a natural phenomenon that was valid universally.

An early example of how the laws of nature were used to explain and regulate early international relations is the work of de Vitoria (1483–1546). In his two texts written in the 16th century: *De Indis Noviter Inventis* and *De Jure Bellis Hispanorum in Barbaros*, Vitoria argued that law is universally valid because it can be ascertained by human reason. As a consequence, he argued, these laws of nature are best suited to resolve the legal issues arising from the discovery by Europeans of New World territories and the encounter between the Spanish Empire and the indigenous peoples of the Americas in particular. Vitoria's work is a good example of how claiming a particular set of laws to be universal – in this case, natural law – enables law to be used legitimately to regulate people living in diverse jurisdictions other than that of the theorist. As Anghie points out, '[t]he problem confronting Vitoria … was not the problem of order among sovereign states, but the problem of creating a system of law to account for relations between societies which he understood to belong to two very different cultural orders, each with its own ideas of propriety and governance' (Anghie 2004, p 16). Vitoria uses the theory of a secular natural law to argue first that the Indians are human (not barbarians or animals) and they therefore possess reason. Since they are in possession of reason, they are able to ascertain the laws of nature: *ius gentium*. Hence, the encounter between European and indigenous peoples was brought within the scope of what was thought to be reasonable and therefore natural, universal laws. Those laws in turn lent legitimacy to imperial conquests and the possession of settled territory. In terms of the argument put forward by Vitoria, this meant that any attempt by the Indians to refuse

the Spanish entry to their territory would be a violation of the natural law rights of peoples to travel and sojourn, amounting to an act of war (Anghie 2004, p 16).

Grotius (1584–1645) also distinguished natural law from divine law in his work *De jure belli ac pacis*, published in 1625. He argued more particularly that the 'law of nations' was a body of law based on the will of states, which was itself distinct from natural law. This theoretical development is best understood in the context of the growing significance of the nation-state system and the expansion of European sovereign power into the New World that had, according to Grotius, 'no reverence left for divine or human law' (Grotius 1625, p 28).

Today, natural law theories have been weakened even further by the fact that the majority of states do not share that same heritage but also because of the secularisation of political and legal thought and the increasing influence of science and technology. However, natural law theories still ground some aspects of international law, particularly in moral debates centred on the fundamental nature of individual human rights or the rights of peoples to sovereign self-determination. International law is now haunted by the lost universality of the Roman Catholic Empire and the idea that human reason is an objective form of knowledge. As theorists of international law such as Orford and Koskenniemi point out, international law is constantly failing to fulfil its claims to represent the international community in a unified and transcendental way. This tension between a teleological understanding of international law as a means to a just and peaceful order and a realist view of law as a set of norms consented to by sovereign states according to power politics and custom has been described by Koskenniemi as placing international law between apology and utopia. Koskenniemi argues thus:

> *'international law is singularly useless as a means for justifying or criticising international behaviour. Because it is based on contradictory premises it remains both over– and underlegitimising: it is overlegitimising as it can ultimately be invoked to justify any behaviour (apologism); it is underlegitimating because [it is] incapable of providing a convincing argument on the legitimacy of any practices (utopianism).' (Koskenniemi 1989, p 48)*

Positivism

[1.190] Positivism is a theory of law that provides that law is posited by people; law is not 'found' in nature or created by divine intervention. By 1758, de Vattel (1714–1767) was writing *The Law of Nations*, the first systematic treatise on the body of legal principles that make up international law based on theories of natural and positive law. Important theorists of positivism in international law include writers mentioned above such as Bynkershoek, Moser and von Martens, as well as later jurists such as Westlake (1828–1913) and Oppenheim (1858–1919), both of whom argued that sovereign states create and consent to law. Positivist theories were in large part a response to the argument put by positivists such as Austin that international law was not law properly so called because law was 'set by a sovereign individual or a sovereign body of individuals, to a person or persons in a state of subjection to its author' (Austin 1873). Law thus became an object of scientific investigation to be discovered by observation of sovereign state practice rather than theorising about reason, justice or morality. Natural law theories were further weakened as the state system was consolidated by European power politics during events such as the Congress of Vienna in 1815, the Congress of Berlin in 1878 and the scramble for Africa in the mid-1870s. These events strengthened the

Westphalian ideal of independent, sovereign territorial entities. A good example of international laws emerging from the upheaval of sovereign, territorial nations can be seen in the attempts made to provide legal protection to individuals wounded in the armed conflicts that resulted. The Geneva International Conference of 1863, which resulted in the establishment of the Red Cross and the *Geneva Conventions of 1864, 1906, 1929 and 1949, and the Additional Protocols of 1977* variously established principles of law to protect armed combatants, prisoners of war and civilians from the worst of the violence of states.

In general, positivism has failed to explain the normative power of international law with respect to state conduct. As Koskenniemi concludes:

> *'As international lawyers …, we [are] not relieved from the painful task of living and choosing in the midst of political conflict. Instead of impartial umpires or spectators, we [are] cast as players in a game, members in somebody's team. It is not that we need to play the game better, or more self-consciously. We need to reimagine the game, reconstruct its rules, redistribute the prizes' (Koskenniemi 1989, p 501).*

International law and its imperial nature

[1.200] Anghie has argued that colonialism was central to the constitution of international law because many of its doctrines emerged as conceptual manifestations of the relationship between European and non-European powers. In making his argument, Anghie presents us with an alternative narrative about the origins of international law than the emergence of Westphalian sovereignty in Europe. Anghie writes:

> *'the characterisation of non-European societies as backward and primitive legitimised European conquest of these societies and justified the measures colonial powers used to control and transform them. Equally, however, the assertion of this dichotomy between the two worlds, the civilised and the uncivilised, posed several novel problems for European jurists who sought to account for the colonial project in legal terms. How could it be claimed that European civilisation, in all its avowed specificity, was somehow universal and binding on non-European states?'*

Postcolonial scholars such as Grovogui argue that Western Christendom (and later, the West) created 'juridical instruments with which to maintain exploitative relations with other continents within presumed universal orders' (Grovogui 1996, p 16). For example, the 14th century papal bulls of Boniface VIII proclaimed that all humankind was to be saved by the Christian church and therefore subject to the Pope. By the 15th century, Pope Alexander VI was dividing the new world territories between the Christian kingdoms of Spain and Portugal. As a result of these imperial actions, the territories newly discovered by European powers were brought under a European *dominium*, ostensibly based on universal values. Rights such as sovereignty could then be granted to non-European peoples pursuant to a European legal order which they neither recognised nor chose. Bedjaoui argues:

> *'[b]efore the First World War there was an "exclusive club" of States which created what has been called a "European international law" or a "European public law", which broadly speaking, governed relations not only among members of the "club" but also between them and the rest of the world. If the scope of this law, which was geographically specific, has a universal character, it has nevertheless been conceived*

simply for the use and benefit of its founders, the states that were called "civilised".' (Bedjaoui 1991, p 5)

Cassese describes in a doctrinal way the two principal kinds of legal relations European powers had with non-European powers. These two kinds of relations depended on whether European states could recognise the governance of the 'other' peoples as state-like or not. The first system, which began in the 16th century, is known as the capitulation system, named after the capitulation agreements entered into with what were then Muslim, Arab and other states such as Siam, Persia, China and Japan. Essentially these agreements were designed to protect Europeans living in foreign, non-European countries. Cassese lists their characteristic terms as follows:

'(1) Europeans who were nationals of a party to the agreement could not be expelled from the country without the consent of their consul; (2) they had the right to practise public worship of their Christian faith [and] could erect their own churches and graveyards; (3) they enjoyed freedom of trade and commerce and were exempted from certain import and export duties; (4) reprisals against them were prohibited, especially in case of insolvency; (5) jurisdiction over disputes between Europeans belonged to the consul of the defendant or, in criminal cases, of the victim … while in the case of disputes between a European and a national of the territorial State the jurisdiction devolved upon the judges of the latter State.' (Cassese 2005, p 27)

The rest of the non-European world – that is, the Americas, Africa, much of Asia and Australasia – was colonised by violent and lawful force. International law was crucial in legitimising such invasion of territories which were often occupied by people already living in society. In some cases, the presence of peoples in a territory was simply ignored. For example, the presence of people in what is now Australia was understood legally by England as if the land were *terra nullius* (unoccupied) and the possession of the territory was therefore 'legal'. While respect for the principles of territorial integrity and the sovereign jurisdiction of other states may have been espoused in the Westphalian narratives of international law, these principles certainly had little life in the encounter between European and non-European worlds until the period of decolonisation following World War II.

As Thuo Gathii points out, a major aim of rewriting the history of international law is 'to correct the historical record: to rescue non-Europeans from their assigned place in the history of international law as backward, barbaric and uncivilised and hence incapable of participating in the international legal order' (Thuo Gathii 1998, p 192). There is now an increasing body of postcolonial critiques of international law which attempt a more structural critique of international law by examining relations of power, hierarchy and ideology in international relations, particularly with respect to how Western hegemony supports and sustains conditions of sovereignty and self-determination.

Feminist theories of international law

[1.210] In international law numerous treaties establish the principle that everyone is entitled to equality before the law and to the enjoyment of human rights and fundamental freedoms without distinction of any kind including sex. These treaties suggest, at least in a formal sense, that states support a positivist, feminist agenda based on equality and non-discrimination. However, some feminists argue that the state system itself is

structured in a way that is detrimental to women and their diverse interests. For example, the fact that states are understood as rational, abstract entities means that they mirror an arguably 'male organisational and normative structure' (Charlesworth et al 1991, p 614). Feminists have argued that 'we inhabit a world in which men of all nations have used the statist system to establish economic and nationalist priorities to serve male elites, while basic human, social and economic needs are not met' (Charlesworth et al 1991, p 615). Both states and international organisations, for instance, are largely governed by men. This means women are excluded from decision-making, although women make up over half of the world's population. In terms of legal decision-making, only one woman has sat as a judge on the ICJ. As Charlesworth, Chinkin and Shelley argue, 'because men generally are not the victims of sex discrimination, domestic violence, and sexual degradation and violence, for example, these matters can be consigned to a separate sphere and tend to be ignored' (Charlesworth et at 1991, p 625). The fact that these issues of concern are ignored is one example of the poor attention given to women's issues in international relations generally. For example, feminists have argued that if violence against women, 'were considered by the international legal system to be as shocking as violence against people for their political ideas, women would have considerable support in their struggle' (Charlesworth 1991, p 629). Indeed, women are generally more likely than men to be oppressed in the economic, social and cultural realms of human activity, and these are the spheres where international law is perhaps at its weakest.

Just as there is no one school of feminist thought, there are numerous feminist approaches to the study and practice of international law. Women in the Third World experience the effects of colonialism in ways that are particular to their own post-colonial circumstances, which are in turn different to the circumstances of Western women. Not only are Third World women exploited as a result of their global positioning in the world economy, but the development of group rights, for example, which is an important jurisprudential development from the point of view of non-Western peoples, may not take into account the specific effects these rights have on women within these groups. Feminist critiques are useful in training lawyers to be aware of the diverse limitations which restrict a woman's freedom to choose her own way of life. This includes using caution when speaking of or on behalf of women bound into the essentialist category of 'Third World women', which Mohanty suggests is presented as 'a homogenous, undifferentiated group leading truncated lives, victimised by the combined weight of "their" traditions, cultures and beliefs, and "our" (Eurocentric) history' (Mohanty 1989, p 180). As Howe cautions, 'white feminists must … be constantly on our guard against those universalising self-authorising moves which assume a right to speak for all women' (Howe 1994, p 67). Dalton explains that 'no single feminist narrative or theory should imagine it can speak univocally for *all* women. We know that grand male theories have traditionally left out of their evidentiary bases and their intellectual formulations the experiences and perspectives not only of women (of all sorts) but also of minority or otherwise disadvantaged groups of men – why should we have different expectations of grand feminist theories?' (Dalton 1988, p 7). Spivak argues that '[b]etween patriarchy and imperialism, subject-constitution and object-formation, the figure of the woman disappears, not into pristine nothingness, but into a violent shuttling which is the displaced figuration of the "Third World Women" caught between tradition and modernisation' (Spivak 1985, p 128).

Practice Questions

1.1 Name the subjects of international law and discuss why these and not other entities are recognised as such.

1.2 Is international law universal in its application? Discuss why or why not.

Answers to Practice Questions

1.1 The principal subject of public international law is considered to be the sovereign state, which is bestowed with distinct legal personality upon the recognition of its statehood. This means that a state is entitled to bring a claim under international law, or may be held responsible for any violations of international law it commits. In certain contexts, non-state actors will also be its deemed subjects:

- International organisations such as the United Nations and World Trade Organization have been granted international legal personality.
- Increasingly, individuals have been permitted to pursue legal claims under international law, such as under international human rights regimes, although crucial limitations stemming from the state-centric nature of international law nonetheless hinder an individual's ability to obtain redress.
- Non-governmental organisations and multinational corporations are yet to be bestowed with distinct legal personality, although they can contribute to the development of soft law.

1.2 Whilst in theory international law is premised on the notion of state equality, many commentators suggest that in practise the universality of international law is challenged. Although certain international laws and norms purport to apply to all states, a given state's political, economic, military and cultural power influences the degree to which it considers itself bound by a particular legal rule or norm. Anghie notes how the foundations of international law are intertwined with European imperialism, which universalised European systems of statehood as the international norm, and acted to entrench material power differences between European and non-European states. Similarly, the recent invasion of Iraq demonstrates that states will at times act outside of the international legal regime to achieve their ends.

Tutorial Question

The history and nature of international law is often tested by means of an essay question. These questions have conventionally focused on the philosophical battle between legal positivism and naturalism, each an attempt to resolve issues concerning

what international law is, its origins or sources, and how it can be used as an instrument of justice or policy. More recent approaches to this topic concentrate on critiques of international law more generally, in terms of both its European history and its contemporary imperial effects.

- In your revision of this Chapter, consider first the nature of international law: is it positive law, natural law, or not law at all?
- Having decided what international law is, provide a critique of international law as you have defined it. Justify why you have chosen that particular critical position and explain why it will assist international lawyers to understand and engage with their field of law.

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