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INTRODUCTION TO
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PETER MALANCZUK



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Peter Malanczuk is Professor of International Law at the Law Faculty of Erasmus University Rotterdam.

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Seventh revised edition

Peter Malanczuk

*Assessor iur., Dr. iur.,
Professor of International Law, Law Faculty, Erasmus University
Rotterdam,
Former Legal Assistant to the President of the Iran-United States
Claims Tribunal,
Counsel, Lalive & Partners, Attorneys-at-Law, Geneva,
Member, Tianjin Board of Arbitration, China*



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2 History and theory

The origin of international law is a matter of dispute among scholars.¹ Some authors start by examining the relations and treaties between political entities from ancient times (3000 BC), including pre-classical antiquity in the Near East, ancient Greece and Persia, and the Romano-Hellenistic period.² The prevailing view in the study of international law is that it emerged in Europe in the period after the Peace of Westphalia (1648), which concluded the Thirty Years War.

Again we find different opinions in the literature on the proper classification of the subsequent development. In his interesting book on the epochs of the history of international law, the German diplomat and historian Grewe argues that there were three distinct systems of international law after the sixteenth century, each of which was characterized by the interests, ideologies and policies of the power that was predominant in the relevant period: the international legal orders of the Spanish age (1494–1648), the French age (1648–1815) and of the English age (1815–1919)³ (which the Scots and the Welsh, of course, in contrast to Grewe, would prefer to call ‘British’).⁴ The *Encyclopedia of Public International Law*, edited by Rudolf Bernhardt, basically differentiates between the periods from 1648 to 1815, 1815 to the First World War, the inter-war period, and developments since the Second World War.⁵ But it also has separate entries for regional developments in Africa, the Far East, the Islamic world, Latin America, and South and South-East Asia,⁶ to avoid the impression of a Eurocentric approach and to clarify that the development of international rules and principles was not a European matter only. With regard to Asia, the work of C.H.Alexandrowicz especially has brought many new insights which had been lost in the course of European expansion.⁷ As noted by R.P.Anand, it is incorrect

to assume that international law has developed only during the last four or five hundred years and only in Europe, or that Christian civilization has enjoyed a monopoly in regard to prescription of rules to govern inter-state conduct. As Majid Khadduri points out: ‘In each civilization the population tended to develop within itself a community of political entities—a family of nations—whose interrelationships were regulated by a set of customary rules and practices, rather than being a single nation governed by a single authority and a single system of law. Several families of nations existed or coexisted in areas such as the ancient Near East, Greece and Rome, China, Islam and Western Christendom, where at least one distinct civilization had developed in each of them. Within each civilization a body of principles and rules developed for regulating the conduct of states with one another in peace and war’.⁸

¹ See W.G.Grewe, *Epochen der Völkerrechtsgeschichte*, 1984, 19–25; A.Cassese, *International Law in a Divided World*, 1986, 37–8; H.Steiger, *Völkerrecht*, in O.Brunner/W.Conze/R.Koselleck (eds), *Geschichtliche Grundbegriffe*, Vol. 7, 1992, 97–140. For a good collection of documents see W.G.Grewe (ed.), *Fontes Historiae Iuris Gentium: Sources Relating to the History of International Law*, Vol. I:1380 BC–1493 (1985), Vol. II:1493–1815 (1988), Vol. III 1/2:1815–1945 (1992). See also A.Nussbaum, *A Concise History of the Law of Nations*, 1962; J.H.W.Verzijl, *International Law in Historical Perspective*, 11 vols, 1968–1991; P.S.Onuf/N.Onuf, *Federal Union, Modern World, The Law of Nations in an Age of Revolutions, 1776–1814*, 1993; H.Legohérel, *Histoire du droit international public*, 1996.

² W.Preiser, *History of the Law of Nations: Ancient Times to 1648*, *EPIL* II (1995), 716–49.

³ Grewe (1984), *op. cit.*, 43. For an excellent analysis of the strategic-economic reasons for the changes in the international system see P.Kennedy, *The Rise and Fall of the Great Powers, Economic Change and Military Conflict from 1500 to 2000*, 1987. See also C.J.Barlett, *The Global Conflict. The International Rivalry of the Great Powers, 1880–1990*, 2nd edn 1994.

⁴ On the multinational nature of the British unitary state and regionalist tendencies, see P.Malanczuk, *Region und unitarische Struktur in Großbritannien*, 1984.

⁵ *History of the Law of Nations*, *EPIL* II (1995): S.Verosta, 1648 to 1815, 749–67; H.-U.Scupin, 1815 to the First World War, 767–93; W.G.Grewe, the First World War to the Second World War, 839–49; O.Kimminich, Since the Second World War, 849–61.

⁶ *History of the Law of Nations—Regional Developments*, *EPIL* II (1995): T.O.Elias, Africa, 793–802; S.Miyazaki, Far East, 802–9; A.S.El-Kosheri, Islam,

809–18; A.T.Y.Serra, *Latin America*, 818–24; N.Singh, *South and South-East Asia*, 824–39.

7 C.H.Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (16th, 17th and 18th centuries), 1967; *Treaty and Diplomatic Relations Between European and South Asian Powers in the Seventeenth and Eighteenth Centuries*, *RdC* 123 (1968–1), 121 *et seq.* See also J.A.Thomas, *History and International Law in Asia: A Time for Review*, in R.St.J.Macdonald (ed.), *Essays in Honour of Wang Tieya*, 1994, 813–57.

8 R.P.Anand, *The Influence of History on the Literature of International Law*, in R.St.J.Macdonald/D.M.Johnston (eds), *The Structure and Process of International Law*, 1983, 342.

9 See Chapter 22 below, 395–415, 423–30.

10 See Grewe (1984), *op. cit.*; Anand, *op. cit.*, 344. On one aspect see also T. Meron, *The Authority to Make Treaties in the Late Middle Ages*, *AJIL* 89 (1995), 1–20.

11 See text below, 17–18.

The problem of periodization is well-known in historical studies in general. To a large extent the classification of history into periods is arbitrary and depends on the criteria applied. Therefore, not too much importance should be attached to it. For the purposes of this introduction it suffices to broadly distinguish between the ‘classical’ system of international law (1648–1918) and the development of ‘modern’ or ‘new’ international law since the First World War. The classical system was based on the recognition of the modern sovereign state as the only subject of international law. This system was composed of numerous sovereign states considered as legally equal and who accepted the unlimited right to wage war to enforce claims and protect national interests. In essence it reflected the interaction among European powers and the imposition of their international legal order upon the rest of the world in the three centuries following the Peace of Westphalia. From 1919 onwards a fundamental transformation of the international system took place with the attempt to organize the international community and to ban the use of force. The development of modern international law can conveniently be described in the stages from the First World War to the Second World War, including the split of the international community in the wake of the Russian Revolution and the creation of the League of Nations, from the establishment of the United Nations to decolonization (1945–60), and from the further expansion of the international community to the end of the Cold War marked by the dissolution of the Soviet empire (1960–89). The attempt to find a ‘New World Order’ after the end of the bipolar East-West conflict and the difficulties in the current phase of the development of international law will be addressed in the final chapter of this book.⁹

The formation of European international law

Even during the Middle Ages in Western Europe international law existed.¹⁰ But medieval Europe was not very suitable for the development of international law, because it was not divided into states in the modern sense. Nowadays we think of states as having undisputed political control over their own territory, and as being independent of external political control. Medieval kings were not in this position; internally, they shared power with their barons, each of whom had a private army; externally, they acknowledged some sort of allegiance to the Pope and to the Holy Roman Emperor. When strong centralized states, such as England, Spain, France, the Netherlands and Sweden began to emerge, claiming unrestricted sovereignty and no longer submitting to a superior authority, new international standards evolved, also in relation to non-European powers like the Ottoman Empire, China and Japan. In the fifteenth and sixteenth centuries, with the discovery of the sea routes to the Far East and the rediscovery of America, the sea powers transcended the previous limits of the political world of Europe. This was followed by the development of the concept of the sovereign state, first in theory in the sixteenth century by Bodin,¹¹ then in reality in Spain and, in the transition to the seventeenth century, also in France.

Features of European international law in state practice after 1648

In state practice, the year 1648 marking the Peace of Westphalia¹² is considered as a watershed, at least in Europe where a new political order was created, to be replaced only after the defeat of Napoleon by the Vienna Congress of 1815. Within Europe the Peace of Westphalia ended the devastating religious wars between Catholic and Protestant countries and led to the recognition of Protestant powers and of the fact that the state is independent of the Church. Three hundred or so political entities, constituting the remains of the Holy Roman Empire, received the right to enter into alliances with foreign powers under certain restrictions. While Germany was divided into a number of comparatively small states, France, Sweden and the Netherlands were recognized as new big powers, and Switzerland and the Netherlands were accorded the position of neutral states. The Empire disintegrated and the decline of the power of the Church accelerated. As the Italian scholar Cassese notes with regard to the system set up by the Peace of Westphalia: 'by the same token it recorded the birth of an international system based on a plurality of independent states, recognizing no superior authority over them.'¹³

The Peace of Westphalia envisaged a collective security system which obliged parties to defend its provisions against all others. Disputes were to be referred to a peaceful settlement or a legal adjudication. If no solution was found on this basis within three years, all other parties were to come to the assistance of the injured party and allowed to use force. This system was never put into practice. Power politics and continuously shifting military alliances among European states overruled it, reflecting the attempt to maintain a balance of power¹⁴ which was the prevailing political principle in their foreign policy. Friederich Gentz, the collaborator of Metternich, was later (1806) to define the European balance of power accurately as 'an organization of separately existing states of which no single one has the ability to impair the independence or the basic rights of the others without meeting with effective resistance and thus having to risk danger for itself'.¹⁵

What became known as 'European public law' (*ius publicum europaeum*; *droit public de l'Europe*) evolved from the increased diplomatic and violent intercourse and ever-changing alliances among European powers on the basis of this principle, which was to be only temporarily abolished through the conquest of Europe by Napoleon. The French Revolution of 1789, however, had profoundly challenged the basis of the existing system by advocating the ideas of freedom and self-determination of people¹⁶ which were meant to be implemented beyond the boundaries of France, and denied the rights of monarchs to dispose of state territory and population according to their own discretion.

With the restoration of the old order in Europe at the Vienna Congress of 1815,¹⁷ the second attempt in history to create a collective security system was somewhat more successful, of course, under its own terms and historical conditions. The Treaties of Paris created the Holy Alliance of Christian nations between the monarchies of Austria, Russia and Prussia, and an anti-revolutionary military alliance between Austria, Prussia,

¹² See A.-M.de Zayas, Westphalia, Peace of (1648), *EPIL* 7 (1984), 536–9.

¹³ Cassese, *op. cit.*, 37.

¹⁴ See A.Vagts/D.Vagts, Balance of Power, *EPIL* 1 (1992), 313–15.

¹⁵ Cited by Verosta, 1648 to 1815, *op. cit.*, at 751.

¹⁶ See Chapter 19 below, 326–40.

¹⁷ F.Münch, Vienna Congress (1815), *EPIL* 7 (1984), 522–5.

18 See S. Verosta, Aix-La-Chapelle, Congress of (1818), *EPIL I* (1992), 94–5; Verosta, Holy Alliance, *EPIL II* (1995), 861–3.

19 A. Ranzelzhofer, Great Powers, *EPIL II* (1995), 618–22.

20 T. Schieder, Crimean War, *EPIL I* (1992), 867–9.

21 Text in 114 CTS 409. See T. Schieder, Paris Peace Treaty (1856), *EPIL 7* (1984), 376–8.

22 F. Münch, Berlin Congress (1878), *EPIL I* (1992), 387–9.

23 F. Münch, Balkan Wars (1912/1913), *EPIL I* (1992), 319–21.

24 On this period see S. Verosta, *Kollektivaktionen der Mächte des Europäischen Konzerts (1886–1914)*, 1988.

25 J. Fisch, *Die europäische Expansion und das Völkerrecht*, 1984; F. Ermarcora, Colonies and Colonial Régime, *EPIL I* (1992), 662–6.

Russia, and England, joined later also by France, to intervene against liberal and nationalist uprising threatening the established order.¹⁸

The era of cooperation between the Great Powers¹⁹ in Europe came to an end with the dispute over the Balkans and their diverging strategic interests with regard to the declining Turkish empire. The Crimean War,²⁰ in which Russia was defeated by the alliance of France and Great Britain, supported by Piedmont-Sardinia and Turkey, ended with the Paris Peace Treaty of 1856.²¹ But the Berlin Congress of 1878²² failed to solve the Balkan problems and the struggle of European powers over the distribution of spoils emerging in the Orient from the disintegration of the Ottoman Empire culminated in the Balkan Wars of 1912/13,²³ bringing the Concert of Europe to its end.²⁴

Colonization and the relation to non-European powers

One important aspect of the nature of international law in the age of European colonization of the world,²⁵ was the relationship of European states, unified by Christianity, to non-European powers. European expansion abroad in the interest of trade and commerce was promoted in England, the Netherlands and France by ruthless profit-making companies, such as the British East India Company, enjoying privileges which permitted them to perform state functions in overseas territories. On the inter-state level, at first Europeans were prepared to admit that non-European states had at least limited rights under the European system of international law. Non-European states were also often willing to concede that European states had at least limited rights under their various non-European systems of international law, and so legal relations, at the beginning on equal footing, between European and non-European states became possible. However, these relations did not constitute a true universal legal system based on common values or institutions, and states existed separately without any extensive cooperation.

The Europeans recognized the Mogul Empire in India, the Ottoman Empire, Persia, China, Japan, Burma, Siam (renamed Thailand in 1939) and Ethiopia as established political entities, but they were aware that these states did not play a major role in global affairs. By the Paris Peace Treaty of 1856 Turkey was even expressly admitted (as the first non-Christian nation) to the Concert of Europe. On the other hand, the Ottoman Empire, for example, had found it difficult to accept the Christian nations it was confronted with at its borders in Europe as equal and was insisting on its superiority. Similarly, China, ‘the empire in the centre of the earth’, preferred isolation to contact with foreigners, from whom nothing more than tribute was expected to be due. When a British delegation from King George III (1760–1821), backed by some handsome new technical gifts, requested in 1793 that China accept a British envoy, the Emperor responded:

As to your entreaty to send one of your nationals to be accredited to my Celestial Court and to be in control of your country’s trade with China, this request is contrary to all usage of my dynasty and cannot possibly be entertained... Our ceremonies and code of laws differ so completely from your own that, even if your Envoy were able to acquire the rudiments of our civilization, you could not

possibly transplant our manners and customs to your alien soil...Swaying the wide world, I have but one aim in view, namely, to maintain a perfect governance and to fulfill the duties of the state...I set no value on objects strange or ingenious, and have no use for your country's manufactures.²⁶

Japan, after the ascent to power of the Shoguns, ended the infiltration by Christian missionaries and also cut itself off from all alien contact, the only exception being Dutch merchants who were permitted to continue business at a trading post at Nagasaki. It took until the nineteenth century for European powers to re-establish trade with China and Japan with the threat and use of force, invoking, *inter alia*, the alleged legal principle of 'freedom of trade'.

In sum, although legally all members of the international community were equal, in fact, the international system was dominated by the great powers of Britain, France, Spain, Portugal, the United States, Russia, Austria, Prussia and the Netherlands. Following the industrial revolution in Europe after the late eighteenth century, in the nineteenth century the international community to a large extent had virtually become a European one on the basis of either conquest or domination. By about 1880 Europeans had subdued most of the non-European states, which was interpreted in Europe as conclusive proof of the inherent superiority of the white man, and the international legal system became a white man's club, to which non-European states would be admitted only if they produced evidence that they were 'civilized'.

In the case of old powers, such as Turkey, Siam (Thailand), China and Japan, Western states basically relied on the so-called capitulation system, treaties which were designed to establish lasting privileges for European trade and commerce in those states and which exempted Europeans from local jurisdiction. In the case of communities without sufficient central authority, the method was simply conquest and appropriation. Conquest and appropriation became particularly apparent in the scramble for Africa,²⁷ the dividing up of the continent among European powers at the Berlin West Africa Conference 1884/5, which managed to settle the issues among colonial powers without provoking another European war.²⁸

Only rarely were nations which had been selected for colonization able to offer effective resistance, as in the case of Ethiopia in 1896 when Emperor Menelik's forces humiliated the Italians in the battle of Adwa. The fate of China offers an illuminating example. After the Opium War of 1842, fought under the premise of securing the sale of the drug in China, the Treaty of Nanking compelled China to surrender the island of Hong Kong to Britain.²⁹ It was followed by other 'unequal treaties' imposing diplomatic relations and increasing the number of available trading ports.³⁰ The anti-foreign spirit in China in response to Western intervention in the distracted Empire resulted in the famous Boxer rebellion. The Boxers, known in China as 'Patriotic Harmonious Fists', found official support for their 'China for the Chinese' objective. But following attacks on Western legations in Beijing and the murder of Europeans, military intervention led

²⁶ Emperor Ch'eng-lung, cited by Verosta, 1648 to 1815, *op. cit.*, at 761.
²⁷ See T.Pakenham, *The Scramble for Africa 1876–1912*, 1992.

²⁸ F.Münc, Berlin West Africa Conference (1884/1885), *EPIL* I (1992), 389–91.

²⁹ A.D.Hughes, Hong Kong, *EPIL* II (1995), 870–3. See also Harris *CMIL*, 235. On the agreement to return Hong Kong to China in 1997 see Chapter 10 below, 158.

³⁰ See Wang Tiewa, International Law in China: Historical and Contemporary Perspectives, *RdC* 221 (1990–II), 193–369; W.Morvay, Unequal Treaties, *EPIL* 7 (1984), 514–17. See also Chapters 9, 139–40 and 10, 158 below.

31 Hamsworth, *History of the World*, Vol. 2, 1908, 823.

32 See P.Malanczuk, Monroe Doctrine, *EPIL* 7 (1984), 339–44.

33 See text below, 30.

34 See Serra (1995), *op. cit.*; C.Gray, *International Law 1908–1983*, *Leg. Stud.* 3 (1983), 267–82, 269 *et seq.*; J.A.Barberis, *Les Règles spécifiques du droit international en Amérique Latine*, *RdC* 235 (1992–IV), 81–227.

by Admiral Sir Edward Seymour crushed the rebellion at Lang-Fang in June 1900. The Peace Commission of the victors sentenced Princes Tuan and Fukuo to death, which sentence, because of their imperial rank, was converted to penal servitude for life. Prince Chuang and the Presidents of the Board of Censors and Board of Punishment were forced to commit suicide; three other high officials were beheaded. In addition, a protocol, signed on 7 September 1901, fixed the indemnity to be paid by China at 450,000,000 taels, on which 4 per cent interest was to be charged until the capital was paid off at the end of 39 years.³¹

Japan was somewhat more fortunate because it had decided in the nineteenth century to adapt its feudal system to the more advanced foreign technology and organization of the West. This was a reaction to the opening of the country by the cannons of the American Commodore Perry, the subsequent conclusion of a trade and ‘friendship’ treaty in 1854, other treaties with European powers putting their nationals under the jurisdiction of their consuls, and the repeated bombardment of Japanese ports. The adaptation was one of the reasons which later enabled Japan to defeat Russia in the war of 1904/5, to occupy Korea and Manchuria, and gain recognition as a new major power in the Peace of Portsmouth (USA) of 1905. The end of white rule and the complex process of decolonization in Asia was then brought forward by Japanese aggression and initial victories in the Second World War, which helped to destroy the myth of the invincibility of the European colonial masters.

The Western hemisphere

European states, however, were also confronted with new problems in the wake of the American rebellion against Britain. The American Declaration of Independence of 1776, invoking the principle of self-determination, had led to the recognition after seven years of war of a new subject of international law by the mother country, followed at the beginning of the nineteenth century by the independence of Latin-American states from Spain and Portugal. The dissociation from Europe was expressed in the doctrine proclaimed by President Monroe in 1823 against European intervention in the Western hemisphere.³² The Monroe doctrine, never accepted as a legal one in Europe, however, was to become the basis for numerous interventions by the United States in Latin America. Nevertheless, the United States and Latin American countries remained within the system of European international law and made significant contributions to its development. While the practice of the United States, to take one important example, furthered international arbitration to settle disputes,³³ South American states attempted to protect themselves against foreign intervention and European dominance by formulating a new regional American international law.³⁴ On the whole, the general American attitude towards international relations was more idealistic and law-orientated than the traditional realistic and power-motivated perspective of European states. But even the United States, although it cherished freedom from colonial domination in its own history, for example, was engaged in opening up China, and took the Philippines in 1898 after the war with Spain.

From what has been outlined above, it naturally follows that in the 'classical period' the use of force short of war was also covered by international law.³⁵ A famous example for the latter was the failure of the Argentinian Foreign Minister Luis Drago at the beginning of the twentieth century to change the practice of powerful European states using armed force to achieve payment from other states for damage caused to them or their nationals ('gun-boat diplomacy').³⁶ Venezuela demanded that the question of debts owed to Britain, Germany and Italy for civil-war damage, the seizure of ships by the Venezuelan government, and stemming from loans granted to Venezuela for railways, be settled by a Venezuelan commission. The commission refused to accept full compensation of the European claims and, after an ultimatum, in 1902 the European claimant states sank three Venezuelan ships, bombarded Puerto Cabello and imposed a naval blockade upon Venezuela. The reaction of the United States to a note of protest sent by Drago with reference to the Monroe doctrine was negative. In effect, the United States pointed out that foreign intervention would not occur if Latin-American countries respected their international obligations concerning the protection of foreign property.³⁷

Theory: naturalists and positivists

Having outlined some important aspects of state practice, it is now appropriate to turn to doctrine, which has always had much less influence on the actual development of international law than many writers have been willing to admit.³⁸ The notion of European international law was prepared by academic writers who during the formative period of international law provided legal concepts and systematic arguments justifying the interests of the emerging powers, especially with regard to the ambitions of their own respective countries, as may be noted in the development of the law of the sea.³⁹ Since they have, to some extent, left a mark on the modern law, it is necessary to say something about them, and in particular to describe the two main schools of thought: naturalists and positivists, lines of thinking about international law which still belong to the mainstream of Western conceptions of international law today, although they have faced challenge.⁴⁰

The leading naturalist writer was the Dutchman Hugo Grotius (1583–1645), who is often regarded as the founder of modern international law;⁴¹ other important naturalist writers were the Spaniards Vitoria (1486–1546)⁴² and Suarez (1548–1617), Gentili, an Italian Protestant who fled to England (1552–1608),⁴³ and the Englishman Zouche (1590–1661). Although disagreeing about many things, all these writers agreed that the basic principles of all law (national as well as international) were derived, not from any deliberate human choice or decision, but from principles of justice which had a universal and eternal validity and which could be discovered by pure reason; law was to be found, not made.

These basic principles of law were called natural law. But Vitoria's early attempt to establish *ius naturae* as the universal law of humanity to include the so-called 'Indian' nations in the Americas in its sphere of legal protection remained a vain theoretical suggestion.⁴⁴ Natural law was originally regarded as having a divine origin, but Grotius wrote that

³⁵ See Chapter 19 below, 306–9.

³⁶ W. Benedek, Drago-Porter Convention (1907), *EPIL* I (1992), 1102–3.

³⁷ See Chapter 17 below, 260–1.

³⁸ On the role of doctrine as a subsidiary source of contemporary international law see Chapter 3 below, 51–2.

³⁹ See Grewe (1984), *op. cit.*, 300 *et seq.*, 471 *et seq.*, 647 *et seq.*

⁴⁰ See J.P. Egidio, Natural Law, *EPIL* 7 (1984), 344–9; R. Ago, Positivism, *ibid.*, 385–93; H.J. Steiner, International Law: Doctrine and Schools of Thought in the Twentieth Century, *EPIL* II (1995), 1216–27; see also A. Verdross/H.F. Koeck, Natural Law: The Tradition of Universal Reason and Authority, in Macdonald/Johnston (eds), 1983, *op. cit.*, 17–50; M. Bos, Will and Order in the Nation-State System: Observations on Positivism and International Law, *ibid.*, 51–78.

⁴¹ See T.M.C. Asser Instituut (ed.), *International Law and the Grotian Heritage*, 1983; P. Haggrenmacher, *Grotius et la doctrine de la guerre juste*, 1983; A. Dufour/P. Haggrenmacher/J. Toman (eds), *Grotius et l'ordre juridique international*, 1985; H. Bull/B. Kingsbury/A. Roberts (eds), *Hugo Grotius and International Relations*, 1990; C.G. Roelofs, Grotius and the 'Grotian Heritage' in International Law and International Relations, The Quartercentenary and its Aftermath (ca. 1980–1990), *Grotiana* 11 (1990), 6–28; O. Yasuaki (ed.), *A Normative Approach to War. Peace, War, and Justice in Hugo Grotius*, 1993; P. Borschenberg, *Hugo Grotius 'Commentarius in theses XI': An Early Treatise on Sovereignty, the Just War, and the Legitimacy of the Dutch Revolt*, 1994.

⁴² A. Truyol Serra *et al.* (eds), *Actualité de la pensée juridique de Francisco de Vitoria*, 1988.

⁴³ See T. Meron, Common Rights of Mankind in Gentili, Grotius and Suarez, *AJIL* 85 (1991), 110–17.

⁴⁴ M. v. Gelderen, The Challenge of Colonialism: Grotius and Vitoria on Natural Law and International Relations, *Grotiana* 14/5 (1993/4), 3–37.

45 M.W.Janis (ed.), *The Influence of Religion on the Development of International Law*, 1991.

natural law would still have existed even if God had not existed; instead, Grotius considered that the existence of natural law was the automatic consequence of the fact that men lived together in society and were capable of understanding that certain rules were necessary for the preservation of society. According to this line of argument, the prohibition of murder, for instance, was a rule of natural law, independently of any legislation forbidding murder, because every intelligent man would realize that such a rule was just and necessary for the preservation of human society.

The theory of natural law has a long tradition, going back to Roman times, and is still the official philosophy of law accepted by the Roman Catholic Church. But nowadays it is not accepted by many people outside the Roman Catholic Church.⁴⁵ Having religious overtones and being incapable of verification, the theory is suspect in a scientific and secular age. The essence of the theory was that law was derived from justice, and, although lawyers and judges often appeal to justice in order to fill gaps or to resolve uncertainties in the law, the theory of natural law must logically lead to a much more radical conclusion, namely that an unjust rule is not law at all and can be disregarded by the judge; but this is a conclusion which no modern legal system would accept. Even the supporters of the theory have been unable to state principles of natural law with any precision; for instance, 'Thou shalt not kill' may be accepted as a universally valid rule, necessary for the maintenance of human society, but writers on natural law do not agree about the number of exceptions to the rule which ought to be recognized.

However, in the sixteenth and seventeenth centuries the theory was universally accepted, and it performed a very useful function by encouraging respect for justice at a time when the collapse of the feudal system and the division of Europe between Catholics and Protestants might otherwise have led to complete anarchy. It is hard to think of any other foundations on which a system of international law could have been built at that time. Even the vagueness of the natural law theory, which is nowadays such a defect, was less apparent in the time of Grotius, who illustrated his arguments with biblical quotations, references to Greek and Roman history and—above all—analogy drawn from Roman private law, which at that time was admired as a fairly accurate reflection of natural law and was therefore copied by many European countries.

After Grotius' death the intellectual climate became more sceptical, and international law would have lost respect if it had remained based on the theory of natural law. People were beginning to argue by 1700 that law was largely positive, that is, man-made; consequently, law and justice were not the same thing, and laws might vary from time to time and from place to place, according to the whim of the legislator. Applied to international law, positivism (as this new theory was called) regarded the actual behaviour of states as the basis of international law. The first great positivist writer on international law was another Dutchman, Cornelis van Bynkershoek (1673–1743), who was to some extent ahead of his time; positivism had its roots in the eighteenth century but was not fully accepted until the nineteenth century. Unfortunately, apart from collecting the texts of treaties, little attempt was made to study the practice of states scientifically until the twentieth century.

An attempt to combine naturalism and positivism was made by the Swiss writer Emerich von Vattel (1714–67).⁴⁶ He emphasized the inherent rights which states derived from natural law, but said that they were accountable only to their own consciences for the observance of the duties imposed by natural law, unless they had expressly agreed to treat those duties as part of positive law. Vattel exercised a strong and pernicious influence on many writers and states during the eighteenth, nineteenth and early twentieth centuries; even today his influence is still sometimes felt. An intellectual climate which encourages states to assert their rights and to ignore their duties is a sure recipe for disorder.

⁴⁶ N.G.Onuf, *Civitas Maxima: Wolff, Vattel and the Fate of Republicanism*, *AJIL* 88 (1994), 280–303.

⁴⁷ See G.H.Sabine/T.L.Thorson, *A History of Political Theory*, 4th edn 1973, Part III: The Theory of the National State.

The theory of sovereignty

One word which recurs frequently in the writings of Vattel's followers is 'sovereignty', and it is doubtful whether any single word has ever caused so much intellectual confusion and international lawlessness.

The theory of sovereignty began as an attempt to analyse the internal structure of a state. Political philosophers taught that there must be, within each state, some entity which possessed supreme legislative power and/or supreme political power. The theory dates back to the sixteenth century and political scientists usually refer to the writings of Machiavelli (1469–1527), Jean Bodin (1530–1596) and Thomas Hobbes (1588–1679).⁴⁷ But its best-known exponent, as far as lawyers are concerned, was John Austin (1790–1859), who defined law as the general commands of a sovereign, supported by the threat of sanctions. Since international law did not fit his theory, he said that international law was not law. In fact, it is hard to find any legal system which does fit his theory. In federal states like the United States, legislative power is divided by the constitution between the federation and the member states, neither of which has supreme legislative power. Even in England, where the Queen in Parliament has supreme legislative power, legislation is not the only source of law, nor the oldest source of law.

It was easy to argue, as a corollary to this theory, that the sovereign, possessing supreme power, was not himself bound by the laws which he made. Then, by a shift of meaning, the word came to be used to describe, not only the relationship of a superior to his inferiors *within* a state (internal sovereignty), but also the relationship of the ruler or of the state itself towards *other* states (external sovereignty). But the word still carried its emotive overtones of unlimited power above the law, and this gave a totally misleading picture of international relations. The fact that a ruler can do what he likes to his own subjects does not mean that he can do what he likes—either as a matter of law or as a matter of power politics—to other states.

When international lawyers say that a state is sovereign, all that they really mean is that it is independent, that is, that it is not a dependency of some other state. They do not mean that it is in any way above the law. It would be far better if the word 'sovereignty' were replaced by the word 'independence'. In so far as 'sovereignty' means anything in addition to

48 *Wimbledon* case, PCIJ, series A, no. 1, 25. In this case Germany had refused the British steamship *Wimbledon*, chartered by a French company, access to the Kiel Canal on the grounds that the vessel had on board a cargo of munitions and artillery stores consigned to the Polish naval base at Danzig. The refusal was based upon German Neutrality Orders issued in 1920 in connection with the war between Russia and Poland. The court held that Germany had acted in violation of Art. 380 of the Versailles Peace Treaty; see I.v.Münc, *The Wimbledon*, *EPIL* 2 (1981), 293–6.

49 See Chapter 5 below, 80.

50 See L.Wildhaber, *Sovereignty and International Law*, in Macdonald/Johnston (eds), 1983, *op. cit.*, 425–52; F.H.Hinsley, *Sovereignty*, 2nd edn 1986; A.James, *Sovereign Statehood*, 1986; H.Steinberger, *Sovereignty*, *EPIL* 10 (1987), 397–418; I.D.DeLupis, *International Law and the Independent State*, 1988; R.H.Jackson, *Quasi-States: Sovereignty, International Relations and the Third World*, 1990; J.Bartelson, *A Genealogy of Sovereignty*, 1993; G.Gottlieb, *Nation Against State. A New Approach to Ethnic Conflicts and the Decline of State Sovereignty*, 1993; O.Schachter, *Sovereignty—Then and Now*, in Macdonald (ed.), 1994, *op. cit.*, 671–88; L.Henkin, *The Mythology of Sovereignty*, *ibid.*, 351–8; N.Schrijver, *The Dynamics of Sovereignty in a Changing World*, in K.Ginther/E. Denters/P.J.I.M.de Waart (eds), *Sustainable Development and Good Governance*, 1995, 80–9; M.R.Fowler/J.M.Bunck, *Law, Power and the Sovereign State. The Evolution and the Application of the Concept of Sovereignty*, 1995; A.Chayes/A.H. Chayes, *The New Sovereignty. Compliance with International Regulatory Agreements*, 1995; K.M. Meesen, *Sovereignty*, in *Wolftrum UNLPP* II, 1193–201; A.Bleckmann, Article 2(1), in *Simma CUNAC*, 77–87. See also the literature in Chapter 1 above, 3 and Chapter 5 below, 13–80.

51 See Chapter 12 below, 181–94.

52 See Chapter 8 below, 118–26.

53 See Chapter 8 below, 123–9.

54 See Chapter 9 below, 130–46.

55 See Chapter 17 below, 256–69.

56 See Chapter 20 below, 350–1.

‘independence’, it is not a legal term with any fixed meaning, but a wholly emotive term. Everyone knows that states are powerful, but the emphasis on sovereignty exaggerates their power and encourages them to abuse it; above all, it preserves the superstition that there is something in international cooperation as such which comes near to violating the intrinsic nature of a ‘sovereign’ state.

At the end of the nineteenth century, many international lawyers, particularly in Germany, developed the doctrine of sovereignty to the point where it threatened to destroy international law altogether. Since 1914 there has been a reaction. International lawyers in the Western world have rejected the old dogmas about sovereignty and the inherent rights of states; indeed, scientific examinations of the practice of states, which were carried out for the first time in the twentieth century, have shown that those dogmas were never taken half as seriously by states as they were by theorists. In 1923, in the *Wimbledon* case, the Permanent Court of International Justice said: ‘The Court declines to see, in the conclusion of any treaty by which a state undertakes to perform or refrain from performing a particular act, an abandonment of its sovereignty...[T]he right of entering into international engagements is an attribute of state sovereignty.’⁴⁸

Of course, one can imagine treaties containing such far-reaching obligations as depriving a state of its independence—for instance, a treaty whereby one state becomes a protectorate of another state.⁴⁹ But there is no fixed dividing line between independence and loss of independence; it is a matter of degree and opinion; even ‘independence’ shares some of the emotive qualities of the word ‘sovereignty’. For instance, the idea of joining a supranational organization like the European Union, which would have been regarded as an intolerable restriction upon independence a century ago, is nowadays discussed in the more realistic terms of economic advantages and disadvantages. While in the West the doctrine of sovereignty has been losing much ground in view of increasing international interdependence, developing countries still value it highly as a ‘cornerstone of international relations’ to protect their recently gained political independence.⁵⁰

Legal results of the period up to the First World War

What were the main legal results of the development of this ‘classical’ and basically European international law, which seemed to view states as living more in a situation of anarchy than of law and order? In the first place, a number of basic rules and principles of international law emerged in this period, such as the principle of territorial sovereignty securing exclusive control and jurisdiction of states over their territory, the freedom of the high seas,⁵¹ the law on state immunity from the jurisdiction of foreign courts,⁵² the law on diplomatic and consular relations,⁵³ the principle of *pacta sunt servanda* (treaties must be kept) and the law of treaties,⁵⁴ rules on the diplomatic protection of foreigners and their property,⁵⁵ and on neutrality.⁵⁶

The unlimited right to use force

A central feature of classical international law was that it did not place any restriction on the right of states to use force and to go to war which was considered to be an inherent attribute of the sovereignty and equality of states. Effective annexation of conquered foreign territory was a valid legal title to acquire sovereignty over it.⁵⁷ There is also no doubt that the concepts of international law prevailing at this time served to facilitate the process of colonization. Sovereignty could be acquired over *terrae nullius*, territory allegedly belonging to nobody, a notion applied to areas throughout the world lacking a strong central power able to resist conquest. If resistance happened to occur, either treaties with local rulers were available as legal instruments, or war could be used.

The unlimited right to use force was also reflected in the doctrine of intervention.⁵⁸ In the sixteenth century, when the fundament of the theory of the modern sovereign state was laid by Machiavelli⁵⁹ and Bodin,⁶⁰ the specific historical doctrine of intervention, also advocated by such authors as Vitoria, Gentili, and Grotius, was primarily motivated by religious considerations.⁶¹ These were superseded after the Thirty Years War (1618–48) by the practice of more general political intervention. Grewe also refers to comments by Grotius, not usually cited, which seem to indicate that the great writer, in accordance with the spirit of his age, when addressing humanitarian intervention, in reality meant the right of religious intervention founded upon natural law to protect fellow Christians. It is notable that even much later there were still writers such as de Martens who in 1883 justified intervention by the ‘civilized powers’, but only in relation to ‘non civilized nations’, when ‘the Christian population of those countries is exposed to persecutions or massacres’ by ‘common religious interests and humanitarian considerations’.⁶²

In the nineteenth century, the principle of non-intervention, as formulated earlier by Wolff and Vattel, had by then acquired general recognition. Nevertheless, the international legal order of the nineteenth century was characterized by certain exceptions to this principle, namely the right of intervention based on treaties and on the principles of self-help and self-preservation. Attempts by the monarchies of Austria, Russia and Prussia after 1815 generally to establish a principle of military intervention on the basis of the Holy Alliance, and by Napoleon III to find recognition of a right of intervention in favour of national self-determination remained unsuccessful.

However, a new independent reason for intervention based on ‘humanity’ emerged in theory which was related to the ideas of political liberalism and the concept of fundamental human rights. State practice in the nineteenth century increasingly invoked humanitarian reasons to justify intervention—often, however, as a disguise for intervention made for political, economic or other reasons. The doctrine played a role in the intervention by European powers in 1827 in support of the Greek uprising against the Turks, the intervention by Britain and France in 1856 in Sicily, allegedly in view of political arrests and supposed cruel treatment of the prisoners, and the famous intervention of Britain, France, Austria, Prussia, and Russia in Syria in 1860–1 following the murder of thousands of Christian Maronites

⁵⁷ See Chapter 10 below, 151–4.

⁵⁸ For the following see P. Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force*, 1993, 7–11 with references.

⁵⁹ *Il Principe*, written in 1513, published in 1531. Less attention has been paid to Machiavelli's other important work, the *Discorsi*.

⁶⁰ *De Rei publica* (1576), published in French in 1579.

⁶¹ Grewe (1984), *op. cit.*, 211–16.

⁶² F. de Martens, *Traité de droit international*, 1883, 398.

63 Grewe (1984), *op. cit.*, at 578, relying on Martens, Rougier and Dupuis, records that the action, which aimed at a reform of the Turkish administration, was based upon the fiction of an invitation to intervene by the Sultan. The conclusions of the study of the case by I. Pogany, *Humanitarian Intervention in International Law: The French Intervention in Syria Re-Examined*, *ICLQ* 5 (1986), 182, are somewhat different.

64 See Grewe (1984), *op. cit.*, at 579, stressing that the list is by no means exhaustive.

65 Scupin. *op. cit.*, at 771.

66 T. Schieder, *Crimean War*, *EPIL* 7 (1984), 59, at 61.

67 See Chapter 18 below, 273–305.

68 Text in 52 CTS 243. See H.-J. Schlochauer, *Jay Treaty*, *EPIL* 1 (1981), 108–11.

by the Druse Muslims.⁶³ These acts were the prelude to repeated interventions by European powers into the Ottoman Empire in response to uprisings and killings on Crete in 1866, in Bosnia in 1875, Bulgaria in 1877 and Macedonia in 1887. Other instances—of diplomatic intercession—on humanitarian grounds include the protest by Britain, France and Austria, supported by Italy, Spain, Portugal and Sweden in 1863 against the methods used by Russia to suppress the Polish uprising and numerous protests by the Great Powers, including the United States, against the suppression of the Jews. At the turn of the century and later, the intervention by the United States in Cuba in 1898 or the pressure exercised by Britain and the United States on Belgium because of the misery of the indigenous population in the Congo, and in 1912/13 on Peru in view of the ruthless exploitation of the local rubber collectors, could also be mentioned.⁶⁴

This practice revealed a new tendency in the official grounds advanced by states to justify intervention in that period, but not a new rule of customary international law. In reality, states were mostly pursuing their own ends when intervening in another state for alleged humanitarian purposes, and thus the institution of intervention, as Scupin notes, ‘was unable to provide a complete justification for such action’.⁶⁵ Especially the frequent interventions in the Ottoman Empire to protect Christians must be seen in the light of the divergent interests of European powers at stake in the Middle East and the political order of European Turkey. Humanitarian intervention was a welcome pretext in their rivalry to establish influence in the declining Empire of the ‘old man at the Bosphorus’. The Crimean War of 1853, in which Russia went to war with Turkey officially on the grounds of securing stronger guarantees for the protection of Christians and was then confronted with the unexpected French-British military alliance and pressure from Austria, is instructive historical evidence for ‘the rise of a new era of power-political *realpolitik*’.⁶⁶

The peaceful settlement of disputes

At least as a normative concept, the idea of the peaceful settlement of disputes⁶⁷ through negotiations, conciliation, mediation or arbitration evolved since the Peace of Westphalia, although the origins are much older. Arbitration, in the sense of eliminating a dispute by binding third-party decision, however, was not accepted by absolute monarchs in practice. The development of the modern history of arbitration commenced with the 1794 Jay Treaty of Amity, Commerce and Navigation, in which Britain and the United States agreed to settle by an arbitration commission claims for damages by British and American nationals whose property had been confiscated or ships taken by the enemy government.⁶⁸ From 1798 to 1804 the commission rendered over 536 awards, some of which became important precedents for the subsequent development of the law. This successful experience was the starting-point for a series of treaties containing arbitration clauses in the nineteenth century, but the development remained basically limited to bilateral treaties and disputes of subordinate political interest.

Prohibition of the slave trade

One aspect that deserves to be mentioned separately is the prohibition of the slave trade in the name of humanity.⁶⁹ By the eighteenth century, the expansion of European trade had come to cover not only goods, but in an extensive manner also human beings. It was based on a lucrative triangular trade transporting goods from Europe to Africa, African slaves, mostly sold by Arab dealers, to the plantations in America, and finally products and raw materials from America to Europe. The slave trade started in the sixteenth century when Spain granted fixed-term monopoly licences (*asientos*) to private entrepreneurs to introduce African slaves to Spanish America and then later involved other European countries. After Britain had acquired the monopoly from Spain to supply slaves to the Spanish colonies in 1713, it transferred it to the South Sea Company; it is estimated that between the years 1680 and 1786 British dealers alone transported over two million African slaves to America. In total, at least fifteen million Africans were enslaved for shipment to the Americas.

Opposition to this practice, from both in and beyond the United Kingdom, gradually led to its prohibition in international law in the nineteenth century. Following national measures, the first treaty to condemn the slave trade was concluded between France and Britain in 1814.⁷⁰ This humanitarian principle was also adopted at the Vienna Congress of 1815 and in subsequent multilateral treaties leading to the comprehensive General Act of the Brussels Conference relative to the African Slave Trade of 1890. The Act was ratified by all European states, the United States, Persia, Turkey, the Congo and Zanzibar and provided effective military and legal measures to terminate the slave trade, although the status of domestic slavery remained unaffected. In the abolition of the slave trade, the British Royal Navy, ruling the seas, played a central role as a maritime enforcement agency controlling shipping. At the same time, as a side-effect, Britain was placed in the useful position of being able to monitor overseas trade by other states in goods in general.

Humanization of the law of warfare

Furthermore, the humanization of the international law of warfare commenced with agreements concluded by the military commanders of the belligerent parties concerning prisoners of war, the wounded and sick, and the protection of military hospitals already prior to the nineteenth century.⁷¹ Some more relevant developments occurred after the experience of the Crimean War (1853–6) and the lessons of the first modern war, the American Civil War (1861–5), with its enormous casualties on both sides (Union forces: 359,528 dead and 275,175 wounded; Confederate forces: about 258,000 dead and 225,000 wounded),⁷² and the example of the 1863 Instructions for United States Armies in the Field (Lieber Code). The Geneva Convention of 1864, initiated by Henry Dunant, gave some status to work assisting the wounded. It recognized functions in relation to the state parties to the Convention of the International Committee of the Red Cross, founded as a private law association under the laws of the Canton of Geneva in 1863. It was followed by the Petersburg Declaration of 1868

⁶⁹ A.M.Trebilcock, *Slavery*, *EPIL* 8 (1985), 481–4; O.I.Tiunov, *Pacta sunt servanda: The Principle of Observing International Treaties in the Epoch of the Slave-Ownning Society*, *St. Louis ULJ* 38 (1994), 929–45.

⁷⁰ Additional Articles to the Paris Peace Treaty of 30 May 1814, 63 CTS 193.

⁷¹ For the earlier development see M. Keen, *The Laws of War in the Late Middle Ages*, 1993; T.Meron, *Henry's Wars and Shakespeare's Laws: Perspectives on the Law of War in the Later Middle Ages*, 1993.

⁷² See P.Malanczuk, *American Civil War*, *EPIL* I (1992), 129–31.

73 The Institute is a private association of scholars that was founded in 1873 at the same time as the International Law Association, which is larger and more open. See F.Münch, Institut de Droit International, *EPIL* II (1995), 997–1000; R.Stödter, International Law Association, *ibid.*, 1207–8.

74 See Chapter 20 below, 342–63.

75 See D.W.Bowett, *The Law of International Institutions*, 4th edn 1982, 1–13; D.Vignes, The Impact of International Organizations on the Development and Application of Public International Law, in Macdonald/Johnston (eds), 1983, *op. cit.*, 809–55; I.Seidl-Hohenveldern/G.Loibl, *Das Recht der Internationalen Organisationen*, 5th edn 1992, 12–19.

76 F.Meißner, Rhine River, *EPIL* 12 (1990), 310–6.

77 B.Vitányi, Scheldt River, *EPIL* 12 (1990), 341–3.

78 I.Seidl-Hohenveldern, Danube River, *EPIL* I (1992), 934–7.

79 A.Noll, International Telecommunication Union, *EPIL* II (1995), 1379–85.

80 L.Weber, Universal Postal Union, *EPIL* 5 (1983), 383–6.

81 K.Pfanner, Industrial Property, Protection of, *EPIL* II (1995), 964–76.

82 See P.Katzenberger, Literary and Artistic Works, International Protection, *EPIL* 5 (1983), 202–11.

83 J.M.Mössner, Hague Peace Conferences of 1899 and 1907, *EPIL* II (1995), 671–7.

84 See K.J.Partsch, Vital Interests, *EPIL* 10 (1987), 526–8.

85 See A.D'Amato, Domestic Jurisdiction, *EPIL* I (1992), 1090–6. See also Chapters 18, 285–6 and 21, 368–9 below.

86 Text in *AJIL* 10 (1916), Supp. See H.-J.Schlochauer, Bryan Treaties (1913/1914), *EPIL* I (1992), 509–11.

prohibiting the use of small exploding projectiles, which, however, remained insignificant in practice. A conference in Brussels in 1874 and proposals presented by the Institut de Droit International⁷³ in 1880 paved the way for the Hague Peace Conferences of 1899 and 1907 laying down the basis for the development of modern international humanitarian law.⁷⁴

First forms of international organizations

In the nineteenth century also the first rudimentary forms of international cooperation emerged.⁷⁵ Commerce required the internationalization of rivers and the establishment of international river commissions, as in the case of the Rhine (1831/68),⁷⁶ the Scheldt (1839)⁷⁷ and the Danube (1856/ 65).⁷⁸ Furthermore, the development of technology, communications and commerce prepared the way for international administrative unions with legal personality limited to the discharge of particular functions. These included the Geodetic Union (1864), concerned with surveying the earth, the International Telegraph Union (1865) as the forerunner of the current International Telecommunication Union,⁷⁹ the Universal Postal Union (1874),⁸⁰ the Berne Bureau for the Protection of Industrial Property (1883),⁸¹ the Berne Bureau for the Protection of Literary and Artistic Works (1886),⁸² and the Union for the Publication of Customs Tariffs (1890).

The Hague Peace Conferences of 1899 and 1907

The period of 'classical' international law came to an end with the two Hague Peace Conferences of 1899 and 1907,⁸³ the first initiated by Tsar Nicholas II on the basis of his famous peace manifesto, the second by President Theodore Roosevelt. The Conference of 1899 resulted in three conventions and three declarations dealing with the law of land warfare, the law of sea warfare and the peaceful settlement of disputes, which led to the innovation of the establishment of the Permanent Court of Arbitration in The Hague. It also adopted a non-binding resolution on limiting the military expenditure of parties. The 1907 Conference accepted a number of further instruments which partly dealt with the same matters as the earlier Conference. The Conferences, however, failed to address the real issues of the major tensions in the world and were thus unable to prevent the outbreak of the First World War. In addition, important aspects, such as the problem of colonialism, were entirely excluded from the agenda. It was also characteristic that the compromise finally agreed upon with regard to the settlement of conflicts by compulsory arbitration, at the insistence of Britain and France, reserved to states the right to determine for themselves what affected their 'vital interests'⁸⁴ falling within the *domaine réservé* (the domestic jurisdiction of states).⁸⁵ As a consequence, what was in fact excluded from the obligation to arbitrate was left to the discretion of states.

The attempt to remedy the deficiencies of the 'vital interests' clause by the American Secretary of State W.J.Bryan was objected to by the United States Senate. The so-called Bryan Treaties of 1913/14⁸⁶ were actually concluded only with the Western and Eastern European powers, and only after the war had already broken out. The United States and Germany did not enter into such a treaty. The disaster of the First World War itself began

formally in accordance with classical international law, as it stood at that time, with declarations of war.

What happened to the concept of 'European public law' during this process? Towards the end of the nineteenth century, colonialism and relations with territories outside Europe were gradually depriving it of its content. At the Berlin Congress of 1878 only the six major European powers and Turkey were present. At the 1884/5 Berlin Congress twelve states, including the United States, were already participating. The Hague Peace Conference of 1899 assembled twenty-seven states, including the United States and Mexico, as well as Japan, China, Persia and Siam. At the second Peace Conference in 1907, forty-three states took part, among which were seventeen American and four Asian states, but no country from Africa. International law, albeit European in origin, was thus gradually moving towards a universal system.

The watershed after the First World War

The end of the First World War heralded a number of basic changes in the international legal system, reflecting the war experience. Defeated Germany had to take sole responsibility for the war, under Article 231 of the Treaty of Versailles,⁸⁷ lost the few colonies it had managed to acquire as well as one-third of its territory in Europe, and was submitted by the victors to a ruinous system of reparations,⁸⁸ which was severely criticized by the distinguished economist John Maynard Keynes and which helped to sow the seeds for the following war. The relative decline of European powers as major actors on the world level and the rise of the United States to global power manifested itself in the transformation of the British Empire into the British Commonwealth.⁸⁹

Moreover, the old international community was split by the emergence of a new and radically different state, following the Russian Revolution of 1917. The Soviet Union declared itself at odds with the existing system of international law, but eventually came to some form of accommodation in order to be able to maintain economic and political intercourse with the outside world. The revolutionary new state displayed an attitude towards international law which was quite distinct from the mainstream of thinking.⁹⁰ Based upon Marxism, as interpreted by Lenin and later by Stalin, it originally denied that there could be one system of international law that applied equally to capitalist and socialist states and rejected the validity of older customary law and of treaties concluded by the Tsarist government. The attitude changed later,⁹¹ but the Soviet Union remained on the fringe of international affairs until it attained the status of a great power after the Second World War.

The League of Nations

On the institutional level, the creation of the League of Nations was a revolutionary step in inter-state relations.⁹² It followed the call in the last of President Wilson's Fourteen Points⁹³ for the establishment of '[a] general association of nations...under specific covenants for the purpose of affording mutual guarantees of political independence and territorial

⁸⁷ Text in 225 CTS 188. See E.v. Puttkamer, Versailles Peace Treaty (1919), *EPIL* 4 (1982), 276–82.

⁸⁸ I. Seidl-Hohenveldern, Reparations, *EPIL* 4 (1982), 178–80.

⁸⁹ L.C. Green, British Commonwealth, *EPIL* I (1992), 495–9. See also W.Dale, The Making and Remaking of Commonwealth Constitutions, *JCLQ* 42 (1993), 67–83; W.Morvay, *Souveränitätsübergang und Rechtskontinuität im Britischen Commonwealth*, 1974.

⁹⁰ See V.Kartashkin, The Marxist-Leninist Approach: The Theory of Class Struggle and Contemporary International Law, in Macdonald/Johnston (eds), 1983, *op. cit.*, 79–102; T.Schweisfurth, The Role of Political Revolution in the Theory of International Law, *ibid.*, 913–53; *idem*, Socialist Conceptions of International Law, *EPIL* 7 (1984), 417–24.

⁹¹ See the short summary in the sixth edition of this book, 7–19 and K. Grzybowski, Soviet Theory of International Law for the Seventies, *AJIL* 77 (1983), 862–72. See also text below, 33.

⁹² See C.Parry, League of Nations, *EPIL* 5 (1983), 192–201; *The League of Nations in Retrospect: Proceedings of the Symposium*. Organized by the United Nations Library and the Graduate Institute of International Studies, Geneva 6–9 November 1980, 1983 and the review by L.Gross, *AJIL* 80 (1986), 200–15; H.Weber, League of Nations, in *Wolfrum UNLPP II*, 848–53.

⁹³ A.Rustemeyer, Wilson's Fourteen Points, *EPIL* 7 (1984), 539–42, at 540.

94 K.T.Samson, International Labour Organization, *EPIL* II (1995), 1150–6. For the text of the ILO Constitution, see *Brownlie BDIL*, 50.

95 1928 General Treaty for Renunciation of War as an Instrument of National Policy, 94 LNTS 57 (1929). See C.D.Wallace, Kellogg-Briand Pact (1928), *EPIL* 3 (1982), 236–9.

96 K.Zemanek, Treaties, Secret, *EPIL* 7 (1984), 505–6; G.E.do Nascimento Silva, Diplomacy, Secret, *EPIL* I (1992), 1033–4, noting that at Versailles, Wilson himself reverted to secret diplomacy and held more than 150 meetings behind closed doors with Lloyd George, Clemenceau and Orlando.

97 See D.Rauschnig, Mandates, *EPIL* 10 (1987), 288–95.

98 See F.Capotorti, Minorities, *EPIL* 8 (1985), 385–95. On the limited judicial activity of the Permanent Court of International Justice in this respect, see C.Weil, Minorities in Upper Silesia Case (Minority Schools), *EPIL* 2 (1981), 189–91; K.Lamers, Prince von Pless Administration (Orders), *ibid.*, 236–7; C. Weil, Polish Agrarian Reform (Orders), *ibid.*, 230–1; M.Vierheilig, Minority Schools in Albania (Advisory Opinion), *ibid.*, 191–2; Weil, German Minorities in Poland, Cases Concerning the, *EPIL* II (1995), 553–5; W.Benedek, Exchange of Greek and Turkish Populations (Advisory Opinions), *ibid.*, 304–5; C.V. Katte, Greco-Bulgarian 'Communities' (Advisory Opinion), *ibid.*, 622–3. On the current status of the protection of minorities in international law, see Chapters 6, 105–8 and 19, 338–41 below.

integrity to great and small states alike'. The twenty-six articles constituting the League were entered into Part I of each of the European Peace Treaties, just as the constitution of the new International Labour Organization⁹⁴ became incorporated as Part XIII.

The attempt to restrict the use of force

The prime purpose of the League was the promotion of international cooperation and the achievement of peace and security by the acceptance on the part of the parties, in principle, of 'obligations not to resort to war'. The absolute right of states to go to war was not intended to be excluded altogether. Thus, members of the League were submitted to a cooling-off period of three months before going to war. If the League Council, the Permanent Court of International Justice or an arbitral tribunal were concerned with a dispute, war was only permitted three months after a decision by the Court or the tribunal or the submission of the Council report. Members disregarding such obligations under the Covenant were deemed to have committed an 'act of war', entitling, but not obliging, other member states to go to war with the state which had broken the Covenant. In Article 16 the Covenant provided for economic sanctions as an instrument of redress, but Article 10, stipulating that members should undertake 'to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members', was not linked to the sanctions system. Rather, the Council of the League was entrusted with the task of 'advising' on the methods of complying with this obligation. The uncertainty on the precise implications of this provision was the main reason why the United States Senate refused to ratify the Covenant.

The Paris Pact of 1928 on the Banning of War (Kellogg-Briand Pact),⁹⁵ initiated by the United States and France, attempted to achieve a broader prohibition of war, but it also refrained from establishing an effective enforcement mechanism. The right of self-defence, interpreted in a rather wide sense, was not affected. Britain reserved its rights to defend its vital interests in protecting the British Empire, and the United States kept the application of the Monroe Doctrine to its own discretion. Neither the League system nor the Paris Pact were yet able to effectively replace the old customary rule on the right of states to use armed force.

Other functions of the League

The League was further engaged in trying to promote disarmament and open diplomacy to abolish the practice of secret treaties.⁹⁶ Other functions included the establishment of the mandates system, as 'a trust for civilization', under Article 22 which put under international tutelage the nascent nations in the former colonies of the defeated powers and of colonial territories similarly detached.⁹⁷ Moreover, responsibilities were assumed by the League in the field of the treaty-based protection of minorities in Europe⁹⁸ and in social matters, such as health and fair labour standards.

The Permanent Court of Justice

Some advance was made in the inter-war period not only with regard to international legislation dealing with social and economic affairs, but also

in international adjudication with the creation in 1921 of the Permanent Court of International Justice (PCIJ) in The Hague,⁹⁹ the forerunner of the present International Court of Justice, which was later established under the United Nations Charter.¹⁰⁰ The Court handed down thirty-two judgments in contentious cases, mostly between European states, and twenty-seven advisory opinions which assisted in clarifying rules and principles of international law. Operating within a still limited and relatively homogeneous society of nations, it enjoyed considerable authority, more than was to be accorded later to the International Court of Justice. The activity of the Permanent Court of International Justice offers an explanation for why the Permanent Court of Arbitration (PCA), which was established earlier but did not really constitute a standing court, received only a small number of cases.¹⁰¹

Failure of the League system

In the field of peace and security, the refusal of a great power, such as the United States, to join the League naturally placed the novel organization into a difficult position to achieve its objectives. In effect, the League subsequently came to be controlled by the interests of France and Britain. Ratification was also denied by the Hejaz (Arabia) and Ecuador, but it is interesting to note that all other generally recognized states were at some time a member of the League. Originally, the membership of the League was limited to the twenty-seven victor states signing the Treaty of Versailles, plus 'the British Empire' (the United Kingdom, the Dominions of Canada, Australia, New Zealand, South Africa and the still-dependent India), plus thirteen listed neutral states. Later twenty-two new members were admitted, including the former enemy states Austria and Bulgaria (1920), Hungary (1922) and Germany (1926). The Soviet Union, originally excluded, was admitted in 1934. But in the course of time sixteen members also withdrew, including Costa Rica (1927), Brazil (1928), Germany and Japan (1935), Italy (1939) and Spain (1941).

The League system failed for a variety of institutional and political reasons. The most important aspect is perhaps the inherent contradiction in the concept itself of collective security¹⁰² in the form of a mere association of self-interested and sovereign states. The concept assumes that all states have an equally strong interest in preventing aggression, and that all states are willing to take the same risk to achieve this. If a great power is involved in an act of aggression, the validity of this assumption may well be very much open to doubt.¹⁰³ At any rate, it soon became clear that the organs of the League could only function to the extent that the member states were able to agree.

The League remained incapable of dealing with the Japanese aggression against China in 1932 when it occupied Manchuria, and with the Italian aggression against Abyssinia in 1935–6. Limited economic sanctions adopted by some fifty members of the League against Italy failed. This was the first and last attempt to enforce the Covenant against a major power. In the Spanish Civil War (1936–9), which was viewed as a threat to world peace because of the direct and indirect intervention of many states, the League affirmed the principle of non-intervention (the obligation of states

⁹⁹ See H.-J. Schlochauer, *Permanent Court of International Justice*, *EPIL* 1 (1981), 163–79; P. Haggenmacher/R. Perruchoud/H. Dipla (eds), *Cour permanente de justice internationale 1922–1945*, Vols 5–I and 5–II, 1989.

¹⁰⁰ See Chapter 18 below, 281–93.

¹⁰¹ H.-J. Schlochauer, *Permanent Court of Arbitration*, *EPIL* 1 (1981), 157–63. On the reform of the PCA see Chapter 18 below, 294.

¹⁰² Generally on the concept see J. Delbrück, *Collective Security*, *EPIL* I (1992), 646–56; K. Doehring, *Collective Security*, in *Wolfrum UNLPP* I, 110–5; G. Bestermöller, *Die Völkerbunds-idee—Leistungsfähigkeit und Grenzen der Kriegssächung durch Staatensolidarität*, 1995. See also Chapter 22 below, 387–415.

¹⁰³ See H.A. Kissinger, *Diplomacy*, 1994, Chapter 10. For another critical view see A. Eban, *The U.N. Idea Revisited*, *FA* 74 (1995), 39–55.

104 See A.-M. de Zayas, Spanish Civil War, *EPIL* 7 (1984), 434–8.

105 Parry, *op. cit.*, at 200.

106 On Germany's international relations from 1933 to 1945 and the attitude towards international law, see D.F. Vagts, *International Law in the Third Reich*, *AJIL* 84 (1990), 661–704; A. Carty, *Interwar German Theories of International Law: The Psychoanalytical and Phenomenological Perspectives of Hans Kelsen and Carl Schmitt*, *Cardozo LR* 16 (1995), 1235–92.

107 For a new analysis on the basis of declassified documents fifty years later, see B.J. Bernstein, *The Atomic Bombings Reconsidered*, *FA* 74 (1995), 135–52.

108 On the 1996 advisory opinion given by the ICJ, see Chapter 20 below, 346–50.

109 See Chapter 20 below, 354–5.

not to intervene in the internal affairs of other states), demanded the withdrawal of all foreign combatants and condemned the bombardment of open towns, but the League's resolutions had little effect.¹⁰⁴ Japan's renewed aggression against China in 1937 merely produced a condemnation by the League of the aerial bombardment of undefended towns. Germany's attack on Poland in 1939 and the outbreak of the Second World War resulted in nothing more than the postponement of already arranged Assembly and Council sessions. The last action of the League was to expel the Soviet Union in 1939 because it refused to accept mediation of its claim against Finland.

A fair assessment of the failure of the League, however, must take into account its confrontation with the ruthless totalitarian regimes of the period. As noted by Clive Parry:

it was the destiny of the League to encounter a greater measure of deliberate aggression, attended by a wilful and deliberate disregard of all humanitarian considerations, than has ever been manifested—again either before or since—in any comparable span of years. For Japan, Italy and Germany in turn asserted during the life of the League an absolute right to go to war for any reason or no reason, and an indifference to the laws of either war or peace to which the only ultimate answer could be, as in fact it proved to be, likewise war unlimited in scale or method.¹⁰⁵

Development after the Second World War

The international legal system had failed to prevent the outbreak of the Second World War, to constrain the aggression by Hitler and to stop the unspeakable atrocities committed by Nazi Germany throughout Europe.¹⁰⁶ Nor did it prevent, to take a quite different example, the calculated Allied destruction by saturation bombing of German and Japanese cities, causing immense casualties among the civilian population. Before the United Nations Charter, signed on 26 June 1945, entered into force on 24 October 1945, the United States ended the war in the Pacific by using the atomic bomb against Hiroshima and Nagasaki in August 1945. Whether this was necessary, to force Japan into capitulation and save the lives of many American soldiers and further Japanese military and civilian casualties which an invasion of Japan may have resulted in, or was at least equally meant as a warning to Stalin, is still a matter of dispute among historians,¹⁰⁷ as also is the issue of the legality of nuclear weapons under current international law among lawyers.¹⁰⁸ The Nuremberg and Tokyo Trials affirmed the individual responsibility of German and Japanese leaders for committing crimes against peace, war crimes and crimes against humanity, but were often seen as the victor's justice, although the procedures were fair.¹⁰⁹

The prohibition of the use of force and collective security in the United Nations Charter

The decision to establish a new global organization of states to preserve peace after the war had already been prepared by the Atlantic Charter of 1941, in which Roosevelt and Churchill declared their hope 'after the

final destruction of Nazi tyranny...to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries' and 'to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labour standards, economic advancement and social security'.¹¹⁰

The United Nations Charter, sponsored by the United States, Britain, the Soviet Union and China, and originally signed by fifty-one states, was designed to introduce law and order and an effective collective security system into international relations. On the basis of preparatory work done at the 1944 Dumbarton Oaks Conference, the Charter of the United Nations was adopted at the 1945 San Francisco Conference and entered into force on 24 October 1945.¹¹¹ The main innovation was the attempt to introduce a comprehensive ban on the use of force in Article 2(4) of the Charter, with the exception of the right of states to collective and individual self-defence against an armed attack, in Article 51.¹¹² The preservation of peace was made the overriding goal of the United Nations. While the League of Nations had possessed no institutional machinery and executive power to enforce the Covenant and decisions of the League, the United Nations Charter established a collective security system in Chapter VII, giving the Security Council the authority to determine whether there is a threat to or breach of international peace and security and to adopt binding economic and military measures against an aggressor state.¹¹³

The UN collective system did not work, due to the antagonism that developed between the former allies after the war, and during the Cold War in the following four decades, the United Nations failed to achieve its prime objective. Thus, for example, the controversial military 'quarantine' imposed by the United States upon Cuba in 1962 in response to the build-up in Cuba of Soviet missiles with a capability of reaching targets in large parts of the Western Hemisphere, used the regional system of the Organization of American States (OAS) instead of the non-functioning UN collective security system for legitimization.¹¹⁴ Another example of the non-functioning of the UN collective security mechanism during the East-West conflict is the fact that the Vietnam War never led to any decision by the Security Council.¹¹⁵

The recognition of the special military, economic and political status of great powers, however, was built in from the beginning in the regulation of the voting procedure of the Security Council, giving the United States, the Soviet Union, Britain, France and China (originally represented by the government of Taiwan) as 'permanent members' the right to veto any decision they disliked.¹¹⁶ The statement in Article 2(1) of the Charter that the organization 'is based on the principle of the sovereign equality of all its Members' was thus qualified by the fact that the five permanent members of the Security Council were made more equal than the rest of the member states. Similarly, the five official nuclear powers retained a privileged legal position in the later Treaty on the Non-Proliferation of Nuclear Weapons.¹¹⁷ The relative decline of Britain and France as Great Powers became most apparent in the 1956 Suez crisis when the United States and the USSR found a rare occasion to unite in the UN Security Council and forced them to withdraw from their military occupation of the Suez

110 Text in *AJIL* 35 (1941), 191. See H.-J. Schlochauer, *Atlantic Charter* (1941), *EPIL* I (1992), 288–9.

111 See H.-J. Schlochauer, *Dumbarton Oaks Conference* (1944), *EPIL* I (1992), 1115–17; W. Benediks, *The San Francisco Conference on International Organization: April–June 1945*, 1994; W. G. Grewe, *The History of the United Nations*, in *Simma CUNAC*, 1–23; H. Weber, *History of the United Nations*, in *Wolfrum UNLPP* I, 572–80; R. C. Hilderbrand, *Dumbarton Oaks. The Origins of the United Nations and the Search for Postwar Security*, 1990. See Chapters 21, 364–84 and 22, 385–430 below.

112 See Chapter 19 below, 309–18.

113 See Chapter 22 below, 387–415, 425–30.

114 L. Weber, *Cuban Quarantine*, *EPIL* I (1992), 882–5.

115 For a critical assessment see R. S. McNamara (with B. VanDeMark), *In Retrospect: The Tragedy and Lessons of Vietnam*, 1994. See also Chapter 19 below, 325.

116 See Chapters 21, 374–7 and 22, 391 below.

117 See Chapter 20 below, 349.

118 B. Broms, Suez Canal, *EPIL* 12 (1990), 360–5. See also G. Marston, Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government, *ICLQ* 37 (1988), 773. SC Res. 118 of 13 October 1956, UN Doc. S/3675, laid down the requirements for a satisfactory settlement of the dispute and the future status of the Canal.

119 See H.-J. Uibopuu, Socialist Internationalism, *EPIL* 9 (1986), 347–50; S. v. Schorlemer, Blocs and Groups of States, in *Wolftrum UNLPP* I, 69–77.

120 See A. Bleckmann, Decolonization, *EPIL* I (1992), 972–6; W. Morvay, British Territories, *ibid.*, 976–83; A. Bleckmann, French Territories, *ibid.*, 986–90; J. G. C. v. Aggelen, Dutch Territories, *ibid.*, 983–6; F. de Quadros, Decolonization: Portuguese Territories, *ibid.*, 990–3; M. A. Ajomo, International Law, The United Nations and Decolonization, in E. G. Bello/B. A. Ajibola (eds), *Essays in Honour of Judge Taslim Olawale Elias*, 1992, 77–92; P. Kunig, Decolonization, in *Wolftrum UNLPP* I, 390–7.

121 See Chapter 19 below, 326–40.

122 K. Ginther, Liberation Movements, *EPIL* 3 (1982), 245–9. See Chapters 3, 104–5 and 19, 336–8 below.

123 GA Res. 1514 (XV) of 14 December 1960, text in *Brownlie BDIL*, 307. See Chapter 19 below, 327.

124 D. Bindschedler-Robert, Korea, *EPIL* 12 (1990), 202–8; S. Brammer, Conflicts, Korea, in *Wolftrum UNLPP* I, 278–85. See Chapter 22 below, 391–3.

125 See Chapter 21 below, 371–2.

126 On the 'Uniting for Peace' Resolution, see Chapter 22 below, 392–3.

127 See Chapter 15 below, 225–8.

128 For a critical analysis see, N. Harris, *The End of the Third World. Newly Industrializing Countries and the Decline of an Ideology*, 1986.

See also M. S. Rajan/V. S. Mani/C. S. R. Murthy, *The Nonaligned and the United States*, 1987;

A. A. Fatouros, Developing States, *EPIL* I (1992), 1017–24; R. Heuser, Bandung Conference (1955), *ibid.*, 340–2; J. Betz, Developing Countries, in *Wolftrum UNLPP* I, 398–406 and Chapter 15 below, 233–40.

Canal¹¹⁸ area, which they had undertaken (with Israel's simultaneous occupation of the Sinai Peninsula) in response to the nationalization of the Suez Canal Company by the Egyptian Government.

Decolonization and change in the composition of the international community

The composition of the international community had already started to change immediately after the Second World War. The Soviet Union created the 'socialist bloc' with the German Democratic Republic, Poland, Bulgaria, Hungary, Romania and Czechoslovakia under its hegemony, joined by the more independent Yugoslavia.¹¹⁹ But perhaps more important for the structural transition of the international legal system has been the process of decolonization,¹²⁰ based upon the principle of self-determination laid down in the UN Charter and in the common Article 1 of the two 1966 International Human Rights Covenants.¹²¹ The colonial empires of Britain, France, Belgium, the Netherlands, Portugal and Italy, often confronted with liberation movements,¹²² eroded with the political independence, for example, of Syria (1945), Lebanon (1946), India and Pakistan (1947), Israel and Burma (1948), Indonesia (1949), Libya (1951), Tunisia, Morocco, Sudan and Ghana (1956), Malaya (1957) and Guinea (1958). The decolonization process was basically completed by the 1960s, after the landmark of the adoption by the UN General Assembly in 1960 of the Declaration on the Granting of Independence to Colonial Countries and Peoples.¹²³ The increase in the number of states to about 130 by the end of the 1960s, almost half of which were newly independent states, had a profound impact on the international system in general and the operation of international organizations in particular.

At the beginning, the United Nations had remained under the control of the West, which still commanded a majority of the seats in the General Assembly. Thus, it was not difficult to make the Korean War,¹²⁴ the Soviet Union being temporarily absent in the Security Council because of the dispute on the representation of China,¹²⁵ at least pro forma a United Nations operation.¹²⁶ The independence of numerous new states in Asia and Africa changed the whole scenario and the majority in the General Assembly and the assemblies of other international organizations shifted to an alliance between the block of communist countries and the new states of the so-called Third World. However, Western states retained their dominant position in the Security Council and in the relevant international financial institutions, such as the World Bank and the International Monetary Fund, due to their economic power where weighted voting applied according to the share of financial contribution.¹²⁷ Under the leadership of the United States the Western states also remained dominant in the international system in military and political terms.

Attitudes of Third World states towards international law

It is still much less easy to generalize about the so-called Third World¹²⁸ states of Africa, Asia and Latin America than it once was to generalize about the former bloc of communist states controlled by the Soviet Union. The

newly independent states, which organized themselves as non-aligned countries between East and West in the Group of 77 formed during UNCTAD I in 1964, do not form a bloc in any real sense. They have no common ideology. Their governments vary from the far right to the far left of the political spectrum. There are also considerable cultural and economic differences. However, there are certain facts which are true of the vast majority of states in the South, and these facts tend to make most of those states adopt a distinctive attitude towards international law.

Most developing countries were under alien rule during the formative period of international law, and therefore played no part in shaping that law. Occasionally their leaders argue that they are not bound by rules which they did not help to create. However, this argument is used only in relation to rules which go against the interests of the new states, and the argument that those states played no part in shaping the rules is only a subsidiary argument designed to strengthen the main contention that the rules are outmoded. Developing states have never dreamt of rejecting *all* rules of international law which were laid down before they became independent; to do so would mean rejecting many rules which operate to their advantage. The necessity of international law itself as a legal system regulating intercourse between states was accepted.¹²⁹

Most countries in the South are poor (with a few exceptions, such as some of the oil-exporting countries and the 'New Tigers' in the Far East) and are anxious to develop their economies. Those which wished to develop their economies along socialist lines were therefore in the past opposed to the traditional rule of international law which forbids expropriation of foreign-owned property without compensation; but other Third World countries showed themselves prepared to accept the traditional rule as a means of encouraging foreign private investment.¹³⁰ This once fervently argued issue in North-South relations has now lost much of its former significance. The economic interests of developing countries also affect their attitudes to other rules of international law; for instance, if their fishing fleets are dependent on local fisheries, this naturally influences their position on the law of the sea, and some of them have tried to gain exclusive rights to local fisheries by claiming a wide territorial sea, exclusive fishing zone, or exclusive economic zone.¹³¹

Since 1973 Third World states have confronted the richer states more pressingly with their problems of poverty and economic development. Not surprisingly, the UN General Assembly and other assemblies of international organizations became their main forums to ventilate claims for a 'New International Economic Order',¹³² a 'New International Communication Order' (which was one of the reasons why the United States and the United Kingdom left UNESCO), the application of the so-called 'common heritage of mankind' principle to the benefits of deep-sea mining¹³³ and the use of outer space,¹³⁴ and other mechanisms and concepts to attempt to change international law and to effect the recognition of a legal obligation of industrialized states to transfer technology and financial resources to the South. On the whole, Western states have not accepted these demands; they have helped the economic development of poorer states in many ways, but are usually reluctant to recognize or undertake any legal obligation to help poorer states.¹³⁵

Moreover, many developing states have a feeling of resentment about

129 See Wang Tieya, *The Third World and International Law*, in Macdonald/Johnston (eds), 1983, *op. cit.*, 955 *et seq.*; M. Schweitzer, *New States and International Law*, *EPIL* 7 (1984), 349–53; F.E. Synder/S. Sathirathai (eds), *Third World Attitudes Toward International Law: An Introduction*, 1987; Harris *CMIL*, 18–21; M. Kusuma-Atmadja, *The Contribution of New States to the Development of International Law*, *Santa Clara LR* 32 (1992), 889–910; M. Shahabuddeen, *Developing Countries and the Idea of International Law*, in Macdonald (ed.), 1994, *op. cit.*, 721–36; M. Bedjaoui, *La visión de las culturas no occidentales sobre la legitimidad del derecho internacional contemporáneo*, *Anu. DI* 11 (1995), 23–62.

130 See Chapter 15 below, 235–9.

131 See Chapter 12 below, 176–84.

132 See Chapter 15 below, 233–5.

133 See Chapter 12 below, 193–5.

134 See Chapter 13 below, 207–8.

135 See Chapter 15 below, 233–5, 239–40.

- 136 See Chapter 11 below, 164–5.
 137 See Chapter 14 below, 220.
 138 See Chapter 19 below, 326–340.
 139 See Chapter 3 below, 39–48.
 140 See Chapter 3 below, 60–2.
 141 See Chapter 3 below, 52–4.
 142 For example, concerning the continental shelf, see Chapter 12 below, 191–3.
 143 A. Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs*, 1986.
 144 R. Wolfrum, International Law of Cooperation, *EPIL* II (1995), 1242–7.
 145 See M. Lachs, Legal Framework of an International Community, *Emory ILR* 6 (1992), 329–37; H. Mosler, International Legal Community, *EPIL* II (1995), 1251–5.

past exploitation, real or imagined. That is one reason why they usually claim that they have not succeeded to obligations accepted on their behalf by the former colonial powers before they became independent.¹³⁶ Almost all of them showed themselves as strongly opposed to all remaining forms of colonialism and apartheid,¹³⁷ although their reactions to violations of the principle of self-determination in other contexts are much weaker.¹³⁸

For the reasons stated above, developing countries often feel that international law sacrifices their interests to those of Western states. They therefore demand changes in the law. Unfortunately, if there is no consensus, it is often difficult to change international law without breaking it. States may refuse to alter a treaty unless they are forced to do so. States which are dissatisfied with an existing rule of customary law may start following a new custom, but, until the new custom is widely established, they may be denounced as law-breakers by states following the old custom.¹³⁹ One solution for this problem has been the multilateral treaty; conferences called to draw up a treaty codifying the existing law can slip imperceptibly into amending the law.¹⁴⁰ Another solution favoured by developing countries has been to try to use the United Nations General Assembly as if it were a legislature; but the General Assembly is not really a legislature, and it is doubtful if its resolutions can be used as evidence of international law against states which vote against them.¹⁴¹

Nevertheless, major changes in international law have occurred since 1945. Western states were anxious not to drive Third World states into the arms of communist states, and have therefore agreed to many of the alterations sought by the non-aligned countries. Most of the rules which developing countries used to regard as contrary to their interests have changed, or are in the process of being changed. Similarly, when the interests of Western states change, such states are often just as ready as other states to abandon the old rules and to replace them with new rules which are more in keeping with their own interests.¹⁴² Modern international law is not static, but has a dynamic nature and is in a continuous process of change. The accusation that international law is biased against the interests of Third World states is, on the whole, no longer true.

Universality and the challenge to the unity of international law

In the historical process of the transition from the classical system to the modern system, international law definitely lost its European character and was extended from a limited club of nations to a global system now covering some 185 states which are very heterogeneous entities in cultural, economic and political terms. The basic question ever since has been whether a truly universal system of law is possible at all under the conditions of a divided world with such deep cleavages in values, interests, and perceptions. Writers have frequently found that international law is in a ‘crisis’, or has entered into ‘decay’.¹⁴³

At least with respect to the basic normative framework, after 1945 international law entered into a new phase aiming at restricting the unfettered right of states to go to war and, in addition, transforming the previous mere coordination of sovereign states into a system of cooperation and mutual benefit.¹⁴⁴ The concept of the ‘international legal community’¹⁴⁵

emerged in connection with two other basic concepts of international law—*jus cogens*¹⁴⁶ and international public order¹⁴⁷—both referring to principles and rules of international law with a higher legal status than the other parts of international law. There were other significant changes in the international legal system after 1945. The main feature mostly emphasized is the shift from coexistence to cooperation of states, not only to achieve international peace and security, but also to further social and economic goals. This is reflected in the proliferation of international organizations, both global and regional, now numbering about 500 and active in a broad variety of fields, which appeared within a relatively short time as a new category of international legal subjects.¹⁴⁸ It was primarily in the social and economic field in which the United Nations and its specialized agencies were able to make some progress. Connected with this extension of the scope of activity was the enhanced process of the codification of international law.¹⁴⁹

Another new development after 1945, as compared with classical international law, has been a stronger recognition of the position of the individual. While previously the individual was considered a mere 'object' of international regulations adopted by sovereign states, more room has been given to the thought of upgrading the status of human beings in international law. This is reflected in the development of rules on the international protection of refugees, the codification of human rights on the global and regional level following the Universal Declaration of Human Rights, proclaimed by the UN General Assembly in 1948, and the advancement of international humanitarian law in armed conflict with the four Geneva Red Cross Conventions of 1949 and the two Additional Protocols of 1977.¹⁵⁰

The end of the East-West conflict,¹⁵¹ apart from moving North-South issues¹⁵² more to the forefront, has led to the resurgence of nationalism, to the rise of ethnic conflict and civil wars in various parts of the world, and to the hitherto unknown activism of the UN Security Council.¹⁵³ In Western legal literature the end of the Cold War has provoked a controversy on the legality of 'democratic intervention',¹⁵⁴ intervention to support or establish a democratic system of government in another state against 'illegitimate regimes', in connection with the discussion on humanitarian intervention.¹⁵⁵ The general proposition of this intervention theory is that there is a necessary structural link between democracy,¹⁵⁶ as it developed in Western constitutional history, and the effective guarantee of human rights. The problem is, of course, whether Western concepts, including those on the market economy and on human rights, can prevail throughout the world in the face of Asian, African and Islamic perceptions which are different for reasons of history, society and culture.

Moreover, after the wall in Berlin fell, writers, such as Francis Fukuyama,¹⁵⁷ declared the 'end of history' and the victory of Western democracy and capitalism. But, from a different perspective, perhaps the USSR and the United States were and are only experimental states in the long course of the history of a rather mixed international community. Western civilization is certainly not the only form of civilization in the

146 See Chapter 3 below, 57–8.

147 See G.Jaenicke, *International Public Order*, *EPIL* II (1995), 1348–51.

148 See Chapter 6 below, 92–6.

149 See Chapter 3 below, 60–2.

150 See Chapters 6, 100–4, 14, 209–21 and 20, 342–63 below.

151 M.Münchau, *International Relations, East-West*, in *Wolfrum UNLPP II*, 771–7. See also W.M.Reisman, *International Law after the Cold War*, *AJIL* 84 (1990), 859–66; E.McWhinny *et al.* (eds), *From Coexistence to Cooperation: International Law and Organization in the Post-Cold War Era*, 1991; G.Abi-Saab, *A 'New World Order'? Some Preliminary Reflections*, *Hague YIL* 7 (1994), 87–94.

152 J.Betz, *International Relations, North-South*, in *Wolfrum UNLPP II*, 778–88.

153 See Chapter 22 below, 391, 395–415, 423–30.

154 Lukashuk, *The United Nations and Illegitimate Regimes: When to Intervene to Protect Human Rights*, in L.F. Damrosch/D.J.Scheffer (eds), *Law and Force in the New International Order*, 1992, 143; T.M.Franck, *Intervention Against Illegitimate Regimes*, *ibid.*, 159; A.-M.Burley, *Commentary on Intervention Against Illegitimate Regimes*, *ibid.*, 177; V.Nanda, *Commentary on International Intervention to Promote the Legitimacy of Regimes*, *ibid.*, 181. See in this connection also on the entitlement to democracy, to be increasingly promoted and protected by collective international processes, T.M.Franck, *The Emerging Right to Democratic Governance*, *AJIL* 86 (1992), 46 *et seq.*; J.Crawford, *Democracy and International Law*, *BYIL* 64 (1993), 113–34.

155 See Chapter 14 below, 220–1.

156 D.Copp/J.Hampton/J.Roemer (eds), *The Idea of Democracy*, 1995.

157 F.Fukuyama, *The End of History?*, *The National Interest*, 1989, no. 16, 3–18.

158 S.P. Huntington, *The Clash of Civilizations?*, FA 72 (1993), 22–49.

159 See E. Sakakibara, *The End of Progressivism*, FA 74 (1995), 8–14.

160 See *EPIL* 6 (1983), dedicated to Regional Cooperation, Organizations and Problems; S. González Gálvez, *The Future of Regionalism in an Asymmetrical System*, in Macdonald/Johnston (eds), 1983, *op. cit.*, 661–83; R. Wolfrum (ed.), *Strengthening the World Order, Universalism versus Regionalism, Risks and Opportunities of Regionalization*, 1990; J.I. Charney, *Universal International Law*, *AJIL* 87 (1993), 529–51; A. Hurrell, *Explaining the Resurgence of Regionalism in World Politics*, *RIS* 21 (1995), 331–58; C. Schreuer, *Regionalization*, in *Wolfrum UNLPP II*, 1059–67; Schreuer, *Regionalism v. Universalism*, *EJIL* 6 (1995), 477–99.

161 UNGA Res. 2625 (XXV) of 24 October 1970, text in *Brownlie BDIL*, 36; see V.S. Mani, *Basic Principles of Modern International Law. A Study of the United Nations Debates on the Principles of International Law Concerning Friendly Relations and Cooperation Among States*, 1993; V. Lowe/C. Warbrick (eds), *The United Nations and the Principles of International Law—Essays in Memory of Michael Akehurst*, 1994 (with contributions by I. Sinclair, Ch. Gray, J. Merrills, V. Lowe, D. McGoldrick, A. Boyle, D. Freestone, A. James, P. Thornberry, C. Warbrick and G. White); G. Arangio-Ruiz, *Friendly Relations Resolution*, *EPIL* II (1995), 485–90.

162 See B. Simma, *Editorial*, *EJIL* 3 (1992), 215; P. Allott *et al.*, *Theory and International Law: An Introduction*, 1991.

163 See text above, 15–17. On A. Verdross, see the contributions by B. Simma, A. Truyol y Serra, B. Conforti, A. Carty and I. Seidl-Hohenveldern in *EJIL* 6 (1995), 32–115. On D. Anzilotti, see R. Ago, P.-M. Dupuy, G. Gaja, J. M. Ruda and A. Tanca in *EJIL* 3 (1992), 92 *et seq.* On G. Scelles, see H. Thiery, A. Cassese, L. Condorelli, R. J. Dupuy and A. Tanca in *EJIL* 1 (1990), 193 *et seq.*

164 See M. S. McDougal/W. M. Reisman, *International Law in Policy-Oriented Perspective*, in Macdonald/Johnston (eds), 1983, *op. cit.*, 103–29; M. McDougal and Associates, *Studies in World Public Order*, 1987; G. L. Dorsey, *The McDougal-Laswell Proposal to Build a World Public Order*, *AJIL* 82 (1988), 41–50; M. S. McDougal, *The Dorsey Comment: A Modest Retrogression*, *ibid.*, 51–7; H. D. Lasswell/M. S. McDougal, *Jurisprudence for a Free Society*, 2 Vols, 1992.

world, and its values and regulatory systems, including its law, are not necessarily appropriate or acceptable in other parts of the globe. On the other hand, whether Samuel Huntington's prediction¹⁵⁸ that 'civilization identity will be increasingly important in the future, and the world will be shaped in large measure by the interaction among seven or eight civilizations' and will lead to a clash of civilizations in the next century, remains to be seen.¹⁵⁹ Such predictions are not new (and are often false) in history, as we know from Spengler's 'Untergang des Abendlandes'.

Nevertheless, also from a legal perspective, there is no doubt that the question of the universal nature of international law has been reinforced not only by theoretical debate but also by the actual strong tendencies towards economic and political regionalism in the international system.¹⁶⁰ The answer to this question is not easy and needs to take into account the content of contemporary international law in its various fields and the characteristics of the international law-making process. As a starting-point, however, it may be observed that there is at least universal agreement on some basic principles of international law, as laid down in the Friendly Relations Declaration, which after a long process of attempting to clarify the meaning of the United Nations Charter was adopted by all states by consensus in 1970.¹⁶¹ These principles include:

- 1 the prohibition of the threat or use of force by states against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the Charter;
- 2 the peaceful settlement of disputes between states in such a manner that international peace and security and justice are not endangered;
- 3 the duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter;
- 4 the duty of states to cooperate with one another in accordance with the Charter;
- 5 the principle of equal rights and self-determination of peoples;
- 6 the principle of sovereign equality of states; and
- 7 the principle that states shall fulfil in good faith the obligations assumed by them in accordance with the Charter.

New developments in theory

Finally, it should at least be briefly mentioned that there have been some interesting new developments in theory during the past decade.¹⁶² The old schools of natural law and positivism¹⁶³ are still with us, and it seems that the latter today forms the basis of mainstream thinking in international law in one form or another. In addition, the 'policy-orientated' New Haven school founded by the Yale professor Myres S. McDougal¹⁶⁴ gained widespread influence at the height of the Cold War even outside the United States. This perspective regards international law as a constant flow of authoritative decision-making in which legal argument is only one factor among many others; therefore, it has been criticized by positivist views (especially in Europe) as abandoning the very concept of law and legal rules. Often, however, in deciding a practical case in international law, such theories are not much different in their results.

In the West, a new school of 'Critical Legal Studies', which started in the United States, has emerged, vigorously challenging traditional positivist perceptions of international law from a methodological point of view based on analytical language philosophy and a hermeneutical theory of law.¹⁶⁵ The 'deconstruction' of international legal argumentation by these critical legal scholars denies that, in view of its indeterminacy, inconsistency and lack of coherence, international law has a distinct existence of its own. Other modes of inquiry, inspired by the writings of Thomas M. Franck, address basic issues of the 'legitimacy' and 'fairness' of the international legal system from a different angle.¹⁶⁶ In addition, some more Utopian theories have entered the market-place of ideas¹⁶⁷ and there is also now a claim to a 'feminist approach' to international law.¹⁶⁸ Another interesting development to be mentioned is the effort recently being made to attempt to bridge the gap between international law theory and international relations theory.¹⁶⁹

At least for the time being, the Marxist-Leninist theory of international law¹⁷⁰ has vanished from the arena and has become of mere historical interest. After the end of the Cold War and the dissolution of the Soviet Empire, there has been a change in attitude in the former Communist states towards international law in general, the precise implications and durability of which, however, remain to be seen.¹⁷¹ The same applies to the awakening of interest in international law in China.¹⁷² To which extent Islamic perceptions of international law are developing into a separate direction is also an open and interesting question.¹⁷³

The output of theory, on the abstract level, is certainly of academic interest for understanding the nature of the international legal system, but it has limited relevance for the actual practice of states and the problems that have to be solved in daily life. As the enlightened Dutch scholar Rölöng noted in 1960:

In all positive law is hidden the element of power and the element of interest. Law is not the same as power, nor is it the same as interest, but it gives expression to the former power-relation. Law has the inclination to serve primarily the interests of the powerful. 'European' international law, the traditional law of nations, makes no exception to this rule. It served the interest of prosperous nations.¹⁷⁴

The real question is, therefore, which interests does international law now serve in a much more expanded, diverse, but increasingly interdependent world, and the answer requires a closer look at various branches of the 'law in action' in international relations in the following chapters.

165 See D.Kennedy, *A New Stream of International Law Scholarship*, *Wis. ILJ* 7 (1988), 6 *et seq.*;

M.Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 1989; Koskenniemi, *The Politics of International Law*, *EJIL* 1 (1990), 4–32; A.Carty, *Critical International Law: Recent Trends in the Theory of International Law*, *EJIL* 2 (1991), 66 *et seq.*; O.de Schutter, *Les critical legal studies au pays du droit international public*, *Droit et Soc.* 22 (1992), 585–605; G.Dencho, *Politics or Rule of Law: Deconstruction and Legitimacy in International Law*, *EJIL* 4 (1993), 1–14.

166 See T.M.Franck, *The Power of Legitimacy Among Nations*, 1990; T.M. Franck/S.W.Hawkins, *Justice in the International System*, *Mich. JIL* 10 (1989), 127; J.E.Alvarez, *The Quest for Legitimacy: An Examination of the Power of Legitimacy Among Nations*, *NYUJILP* 24 (1991), 199–267; Franck, *Fairness in International Law and Institutions*, 1995. See also D.D.Caron, *The Legitimacy of the Collective Authority of the Security Council*, *AJIL* 87 (1993), 552–88; Caron, *Governance and Collective Legitimization in the New World Order*, *Hague YIL* 6 (1993), 29–44.

167 See the inspiring writings by P. Allott, *Eunomia. New Order for a New World*, 1990; Allott, *Reconstituting Humanity—New International Law*, *EJIL* 3 (1992), 219–52.

168 See, for example, H.Charlesworth/C.Chinkin/S.Wright, *Feminist Approaches to International Law*, *AJIL* 85 (1991), 613–45; D.G.Dallmeyer (ed.), *Reconceiving Reality: Women and International Law*, 1993.

169 See G.Doeker, *Internationale Beziehungen und Völkerrecht als Gegenstand der Forschung und Lehre*, *AVR* 19 (1980–1), 401 *et seq.*, with references to the Anglo-American literature which is traditionally much more open to such questions; K.W. Abott, *Modern International Relations Theory: A Prospectus for International Lawyers*, *Yale JIL* 14 (1989), 335–411; A.-M.Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, *AJIL* 87 (1993), 205–39; S.V.Scott, *International Law as Ideology: Theorizing the Relationship between International Law and International Politics*, *EJIL* 5 (1994), 313–25; D.Frei, *International Relations*, *EPIL* II (1995), 1359–64; A.C.Arend/ R.J.Beck/ R.D.V.Lugt (eds), *International Rules. Approaches from International Law and International Relations*, 1996; V.Rittberger (ed.), *Regime Theory and International Relations*, 1993; C.Brown, *International Relations Theory: New Normative Approaches*, 1992. See further C.A.Kiss/D. Shelton, *Systems Analysis of International Law: A Methodological Inquiry*, *NYIL* 17 (1986), 45–74.

170 See text above, 23. For a recent analysis from a Marxist point of view see B.S.Chimni, *International Law and World Order: A Critique of Contemporary Approaches*, 1993.

171 See *Harris CMIL*, 21–2; J.W.E.Butler (ed.), *International Law and the International System*, 1987; T.Schweisfurth, Das Völkergewohnheitsrecht —verstärkt im Blickfeld der sowjetischen Völkerrechtslehre, *GYIL* 30 (1987), 36; Quigley, *Perestroika and International Law*, *AJIL* 82 (1988), 788–97; Agora: New Thinking by Soviet Scholars, *AJIL* 83 (1989), 494–518 (with contributions by R.A.Mullerson and I.I.Lukashuk); E.McWhinney, The 'New Thinking' in Soviet

International Law: Soviet Doctrines and Practice in the Post-Tunkin Era, *CYIL* 28 (1990), 309–37; W.E.Butler (ed.), *Perestroika and International Law*, 1990; A.Carty/ G.Danilenko (eds), *Perestroika and International Law: Current Anglo-Soviet Approaches to International Law*, 1990.

172 See H.Chun, Chinese Attitudes Toward International Law in the Post-Mao Era, 1978–1987, *IL* 21 (1987), 1127–66; Wang Tieya (1990), *op. cit.*; R.Heuser, Völkerrechtswissenschaft und Völkerrechtstheorie in der Volksrepublik China (1979–88), *ZaöRV* 49 (1989), 301–34.

173 See, for example, A.A.Ana'im, Islamic Ambivalence to Political

Violence: Islamic Law and International Terrorism, *GYIL* 31 (1988), 307; D.A. Westbrook, Islamic International Law and Public International Law: Separate Expressions of World Order, *Virginia JIL* 33 (1993), 819–97; F.Malekian, *The Concept of Islamic International Criminal Law. A Comparative Study*, 1994; M.Khadduri, International Law, Islamic, *EPIL* II (1995), 1236–42. In 1992 the International Law Association (ILA) established a Committee on Islamic Law within International Law.

174 B.V.A.Röling, *International Law in an Expanded World*, 1960, 15.