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International law

> The truth is that international law is neither a myth on the one hand, nor a panacea on the other, but just one institution among others which we can use for the building of a better international order.[1]

Oppenheim. *Oppenheim's International Law*, 9th edn, London, 1992, p. 3–115
Shaw, *International Law*, 5th edn, Cambridge, 2003, pp. 1–246
Higgins, *Problems and Process*, Oxford, 1994, pp. 1–55
Brownlie, *Principles of Public International Law*, 6th edn, Oxford, 2003, pp. 3–68
Parry, *The Sources and Evidences of International Law*, Cambridge, 1965

First let us clear away any misunderstandings about private international law and transnational law.

Private international law/conflict of laws

Private international law is an unfortunate term for what is more properly and accurately called *conflict of laws*. That is the body of rules of the domestic law[2] of a state which applies when a legal issue contains a foreign element, and it has to be decided whether a domestic court should apply foreign law or cede jurisdiction to a foreign court.[3] Many of the rules are now found in legislation. Naturally, over time the domestic rules grow closer as states come to adopt similar solutions to the same problems, but they remain domestic law. Established in 1893, the Hague Conference on Private International Law seeks primarily to harmonise domestic rules on

[1] J. Brierly, *The Law of Nations*, 5th edn, Oxford, 1955, Preface, reprinted *ibid.* in 6th edn, Oxford, 1963.
[2] See p. 12 below, including its relationship to international law.
[3] Dicey and Morris, *Conflict of Laws*, 13th edn, London, 2000, p. 3; Cheshire and North, *Private International Law*, 13th edn, London, 1999, p. 7; J. Collier, *Conflict of Laws*, 3rd edn, Cambridge, 2001, pp. 386–94.

conflict of laws, and since 1954 has concluded some thirty-six multilateral treaties.[4] These must be distinguished from treaties that seek to unify or harmonise states' substantive domestic laws, such as on carriage by air or sea, or intellectual property.[5] UNIDROIT is an international organisation with fifty-nine member states that seeks to harmonise domestic laws, especially commercial.[6] Despite its name, it is neither a UN body nor a UN specialised agency. But UNCITRAL *is* a UN body charged with promoting the harmonisation of international trade law.[7]

A legal matter can raise issues of both international law and conflict of laws, particularly on questions of jurisdiction,[8] and today the distinction between international law and conflict of laws can be blurred as more international law, treaties in particular, reaches right down into the internal legal order, as exemplified by the law of the European Union.[9] Nevertheless, it is still vital to appreciate the distinctions between different categories of law, their purpose and how they develop.

Transnational law

This term seems to have been coined to describe the study of any aspect of law that concerns more than one state, in particular conflict of laws, comparative law (the study of how the laws of different states deal with a particular area or issue of domestic law), supranational law (European Union law) and public international law, particularly in the commercial field. It may bring useful insights into the development of law, but one should not be led into believing that we are now living in a world where all laws of whatever type are rapidly converging. Within many states, especially federations and even in the United Kingdom, there are separate systems of domestic law, and this is likely to continue for a very long time.

The nature of international law

International law is sometimes called *public* international law to distinguish it from private international law, though, as already explained, even this can lead to misunderstandings. Whatever the connections international law has with other systems of law, it is clearly distinguished by the fact that it is not the product of any national legal system, but of the states

[4] Oppenheim, p. 7. See www.hcch.net. [5] Oppenheim, p. 6, n. 11.
[6] See www.unidroit.org. [7] See p. 389 below. [8] See p. 43 below.
[9] See p. 466 below.

(now over 190) that make up our world. In the past, international law was referred to as the Law of Nations.[10] Although it had been developing over many centuries,[11] international law as we know it today is commonly said to have begun properly with the Dutch jurist and diplomat, Grotius (Hugo de Groot), 1583–1645, and with the Peace of Westphalia 1648.[12] That event marked not only the end of the Thirty Years War but also the end of feudalism (and, with the Reformation, obedience to the Pope) and the establishment of the modern state with central governmental institutions that could enforce control over its inhabitants and defend them against other states. But since those states had to live with each other, there had to be common rules governing their external conduct. Although rudimentary rules had been developing ever since civilised communities had emerged, from the mid-seventeenth century they began to develop into what we now recognise as international law.

But is international law really law?

Unfortunately, this question is still being asked, and not only by students. The answer depends on what is meant by law. Whereas the binding nature of domestic law is not questioned, new students of international law are confronted with the issue: is international law merely a collection of principles that a state is free to ignore when it suits it? Whereas every day newspapers report crimes, it is usually only when a flagrant breach of international law occurs that the media take notice of international law. This can give a distorted impression of the nature of international law. International law has no ready sanction for its breach. Because there is no international police force or army that can immediately step in, international law is often perceived as not really law. Yet the record of even the most developed domestic legal systems in dealing with crime does not bear close scrutiny.

Although it is as invidious as comparing apples and oranges, in comparison with domestic crime states generally do comply rather well with international law. If, as H. L. A. Hart argued,[13] law derives its strength from acceptance by society that its rules are binding, not from its enforceability,

[10] See J. Brierly, *The Law of Nations*, 6th edn, Oxford, 1963. See especially pp. 1–40 on the origins of international law.
[11] See Shaw, pp. 13–41; A. Nussbaum, *A Concise History of the Law of Nations*, rev. edn, New York, 1954.
[12] 1 CTS pp. vi, 70, 198 and 319
[13] *The Concept of Law*, Oxford, 1961.

then international law is law. The raison d'être of international law is that relations between states should be governed by common principles and rules. Yet what they are is determined by national interest, which in turn is often driven by domestic concerns. Those matters on which international law developed early on included freedom of the high seas and the immunity of diplomats. Both were vitally important for the increasing international trade, the famous 1654 Treaty of Peace and Commerce between Queen Christina and Oliver Cromwell epitomising this new reality.[14] As we will see when we look at the sources of international law, its binding force does not come from the existence of police, courts and prisons. It is based on the consent (express or implied) of states, and national self-interest: if a state is seen to ignore international law, other states may do the same. The resulting chaos would not be in the interest of any state. While the language of diplomacy has changed over the centuries from Latin to French to English, international law has provided a vitally important and constantly developing bond between states. As this book will show, today in many areas of international law the rules are well settled. As with most domestic law, it is how the rules are to be applied to the particular facts that cause most problems.

To look at the question from a more mundane point of view, international law is all too real for those who have to deal with it daily. Foreign ministries have legal departments. Some are large: the US State Department has some 150 legal advisers; the UK Foreign and Commonwealth Office thirty-five, including some seven posted in Brussels, Geneva, New York and The Hague. Their task is to advise on a host of legal matters that arise in the conduct of foreign affairs. They also have the conduct of cases involving international law in international, foreign and UK courts and tribunals. If international law is not law, then they and their legal colleagues in other foreign ministries are drawing their salaries under false pretences. Which brings one to international lawyers.

International lawyers

Although more students are studying international law, it is not easy for a young lawyer to practise it. Even in large law firms that have international law departments, the bulk of their work is commercial arbitration. The involvement of barristers and advocates in international law is usually

[14] 1 BSP 691.

incidental to their normal work. Most of the distinguished practitioners of international law who appear before international courts or tribunals are professors of international law. As a rule, foreign ministry legal departments are staffed by diplomats who have legal training, but who alternate between legal and political posts. Few have legal advisers who during their careers do little other than law, the British Diplomatic Service being a prime exception. There are jobs for international lawyers also in the United Nations and other international organisations.

Sometimes the media will describe a person as an 'international lawyer', yet he may at most have a practice with many foreign clients, and be concerned more with foreign law and conflict of laws. Yet, when the media is full of stories questioning the lawfulness of a state's actions, some domestic lawyers rush to express their opinions, usually critical. They are not always wrong, but usually display a lack of familiarity with international law, apparently believing that the reading of a textbook or an (apparently simple) instrument like the UN Charter is enough. The fact that some textbooks are lucid and make international law accessible, does not mean that a domestic lawyer, however eminent, can become an expert on it overnight. The difficulties that the judges of the House of Lords (the UK's final appeal court) had in grappling with international law in the *Pinochet* case, despite having been addressed by several international law experts, are amply demonstrated by their differing separate opinions.[15] Some domestic lawyers have specialised in particular areas of international law such as aviation, human rights or the environment, without a good grounding in international law generally. A tax law expert will necessarily have a sound knowledge of contract, tort and other basic areas of domestic law, without which it would be difficult to advise effectively.

The sources of international law

International law differs from domestic law in that it is not always that easy to find out what the law is on a particular matter. Domestic law is reasonably certain and found mostly in legislation and judgments of a hierarchy of courts. In contrast, international law is not so accessible, coherent or certain. There is no global legislature (the UN General Assembly does not equate to a national legislature), and no formal hierarchy of international courts and tribunals. As with the (mainly unwritten) British

[15] *R.* v. *Bow Street Stipendiary Magistrate, ex parte Pinochet (No. 3)* [2000] 1 AC 147; [1999] 2 WLR 825; [1999] 2 All ER 97; 119 ILR 135.

Constitution, an initial pointer to the international law on a given topic is often best found in the textbooks. They will explain that international law is derived from various sources, which are authoritatively listed in Article 38(1) of the Statute of the International Court of Justice (annexed to the UN Charter) as:

(a) international conventions, whether general or particular, establishing rules expressly recognised by the contracting states;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognised by civilised nations;
(d) subject to the provisions of Article 59,[16] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Treaties

The reference in (a) to 'international conventions' is to bilateral and multilateral treaties. For the moment it is enough to say that, as with domestic legislation, treaties now play a crucial role in international law, important areas of customary international law having now been codified in widely accepted treaties. In consequence, custom and the other sources of international law are no longer as important as they used to be. But that does not mean that custom is on a lower level than treaties. There is no formal hierarchy of the sources of international law. As between parties to a treaty, the treaty binds them. As between a party to a treaty and a non-party, custom will apply, including custom derived from treaties.[17] General principles of law, judgments and the opinions of writers are of less importance as sources. (The law of treaties is dealt with in some detail in Chapter 5.)

Customary international law

Customary international law – or simply 'custom' – must be distinguished from the customary law that is an important part of some states' domestic law and deals largely with family matters, land and suchlike. In international law a rule of custom evolves from the *practice* of states, and this can

[16] Decisions of the Court are binding only on the parties to the case (*res judicata*).
[17] See p. 8 below.

take a considerable or a short time. There must be evidence of substantial uniformity of practice by a substantial number of states. In 1974 the ICJ found that a customary rule (now superseded) that states had the right to exclusive fishing within a twelve nautical mile zone had emerged.[18] State practice can be expressed in various ways, such as governmental actions in relation to other states, legislation, diplomatic notes, ministerial and other official statements, government manuals (as on the law of armed conflict), and certain unanimous or consensus resolutions of the UN General Assembly. The first such resolution was probably Resolution 95(I) of 11 December 1946 which affirmed unanimously the principles of international law recognised by the Charter of the Nürnberg International Military Tribunal and its judgment.

When a state that has an interest in the matter is silent, it will generally be regarded as acquiescing in the practice. But if the new practice is not consistent with an established customary rule, and a state is a *persistent objector* to the new practice, the practice either may not be regarded as evidence of new custom or the persistent objector may be regarded as having established an exception to the new customary rule.

But to amount to a new rule of custom, in addition to practice there must also be a general recognition by states that the practice is settled enough to amount to an obligation binding on states in international law. This is known as *opinio juris* (*not* the opinions of jurists). Sometimes the recognition will be reflected in a court judgment reached after legal argument based on the extensive research and writings of international legal scholars. In themselves, neither judicial pronouncements nor favourable mention in a UN resolution, even when adopted by a large majority, are conclusive as to the emergence of new custom.[19] But in *Nicaragua* v. *US* (Merits) (1986)[20] the International Court of Justice found that the acceptance by states of the Friendly Relations Declaration of the General Assembly[21] constituted *opinio juris* that the Charter prohibition on the use of force now also represented custom. There is however a growing tendency for international courts and tribunals, without making a rigorous examination of the evidence, to find that a customary rule has emerged. In *Tadić* the International Criminal Tribunal for the Former

[18] *Fisheries Jurisdiction (UK* v. *Iceland*; *Germany* v. *Iceland)*, *ICJ Reports* (1974), p. 3, at pp. 23–6; 55 ILR 238. For the present law, see p. 319 below.

[19] See the *Namibia* Advisory Opinion, *ICJ Reports* (1971), p. 6; paras. 87–116; 59 ILR 2; and the *Legality of Nuclear Weapons* Advisory Opinion, *ICJ Reports* (1996), p. 226, paras. 64–73; 110 ILR 163.

[20] *ICJ Reports* (1986), p. 14, paras. 183–94; 76 ILR 1.

[21] ILH (1970) 1292.

Yugoslavia ruled that it had jurisdiction over war crimes committed during an internal armed conflict even though its Statute does not provide for this.[22]

Establishing *opinio juris* can be difficult and everything will depend on the circumstances.[23] It is easiest when the purpose of a new multilateral treaty is expressed to be codification of customary international law. Even if the treaty includes elements of progressive development,[24] if it is widely regarded by states as an authoritative statement of the law, and constantly and widely referred to, it will soon come to be accepted as reflecting the customary rules, sometimes even before it has entered into force. This was certainly the case with the Vienna Convention on the Law of Treaties 1969, which even now has only 101 parties.[25] Although many provisions of the UN Convention on the Law of the Sea 1982 (UNCLOS) went beyond mere codification of customary rules in most respects, the negotiations proceeded on the basis of consensus.[26] It was therefore that much easier during the twelve years before UNCLOS entered into force for most of its provisions to become accepted as representing customary law.

An accumulation of bilateral treaties on the same subject, such as investment treaties, may in certain circumstances also be evidence of a customary rule.[27]

General principles of law recognised by civilized nations[28]

Compared with domestic law, international law is relatively underdeveloped and patchy, though in the last fifty years it has developed several important new specialised areas. International courts and tribunals have always borrowed concepts from domestic law if they can be applied to relations between states, and by this means have developed international law by filling gaps and strengthening weak points. Such concepts are chiefly

[22] See the decision of the Appeals Chamber: www.icty.org, Case IT-94-1, paras. 65 et seq; 105 ILR 453.
[23] Shaw, pp. 68–72. [24] See n. 26 below.
[25] See p. 52 below. See also A. Aust, 'Limping Treaties: Lessons from Multilateral Treaty-making' (2003) NILR 243 at 248–51.
[26] See H. Caminos and M. Molitor, 'Progressive Development of International Law and the Package Deal' (1985) AJIL 871–90.
[27] See p. 373 below.
[28] 'Civilized' should not be seen as a demeaning term; the Statute is merely referring to states that have reached an advanced state of legal development.

legal reasoning and analogies drawn from private law,[29] such as good faith and estoppel.

Good faith

The obligation to act in good faith is a fundamental principle of international law, and includes equity.[30] Article 2(2) of the UN Charter requires all Members to fulfil their Charter obligations in good faith. Similarly, the Vienna Convention on the Law of Treaties 1969 requires parties to a treaty to perform the treaty (Article 26), and to interpret it (Article 31(1)), in good faith.[31] The principle is not restricted to treaties but applies to all international obligations.

Estoppel

Known as preclusion in civil law systems, estoppel has two aspects. A state that has taken a particular position may be under an obligation to act consistently with it on another occasion. And when a state has acted to its detriment in relying on a formal declaration by another state, the latter may be estopped from denying its responsibility for any adverse consequences.[32]

Norms

Sir Robert Jennings, a former President of the International Court of Justice, once famously said that he would not recognise a norm if he met one in the street. But, some international lawyers speak of norms of international law. In English, norm means a standard. Use of the word seems to have been popularised by Professor Hans Kelsen,[33] who saw international law as at the top of the hierarchy of law. The term is used more by civil lawyers than common lawyers. It may be useful in theoretical analysis of certain international law issues.[34] Unfortunately, it is also used loosely to cover not only principles and rules but also *lex ferenda* (see

[29] See H. Lauterpacht, 'Private Law Sources and Analogies of International Law', in E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Sir Hersch Lauterpacht*, Cambridge, 1970–8, vol. 2, pp. 173–212; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge, 1953, reprinted 1987.

[30] Oppenheim, pp. 38 and 44. [31] See further pp. 79 and 90 below, respectively.

[32] Oppenheim, pp. 1188–93. See p. 57 below about the possible legal consequences of an MOU.

[33] *General Theory of Law and State*, Harvard, 1945.

[34] See for example D. Shelton, 'International Law and "Relative Normativity"', in M. Evans (ed.), *International Law*, Oxford, 2003, pp. 145–72.

below), but without a clear distinction being made between established law and aspirations.[35] The term is very rarely found in treaties.

Judicial decisions

Although, formally, judgments of courts and tribunals, international and domestic, are a subsidiary source of international law, in practice they may have considerable influence. Because judgments result from careful consideration of particular facts and legal arguments, they carry persuasive authority. There are relatively few international courts and tribunals, but thousands of domestic ones; and most cases involving international law come before domestic courts, often final courts of appeal.[36] The cumulative effect of such decisions on a particular legal point can be evidence of custom, though domestic courts sometimes get international law wrong.

Teachings of the most highly qualified publicists

The role played by writers on international law is also subsidiary. In the formative days of international law their views may have been more influential than they are today. Now their main value depends on the extent to which the books and articles are works of scholarship, that is to say, based on thorough research into what the law is (*lex lata*), or may be, rather than comparing the views of other writers as to what the law ought to be (*lex ferenda*). A work of rigorous scholarship will inevitably have more influence on a court, whether domestic or international.

General international law

One sees this phrase from time to time. It is a rather vague reference to the corpus of international law other than treaty law, and therefore includes those treaty principles or rules that have become accepted as also customary international law.[37]

Obligations erga omnes

In *Barcelona Traction* (Second Phase), the International Court of Justice pointed out that certain obligations on a state are owed to all states,

[35] See 'Soft law', p. 11 below.
[36] See the cumulative indexes to *International Law Reports*, published by Cambridge University Press.
[37] See p. 6 above. On Statements of international law, see (2003) BYIL 585–6.