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International law

International Law, after all, is simply a system of manners written large.[1]

Higgins, *Problems and Process*, Oxford, 1994, pp. 1–55 ('Higgins')
Shaw, *International Law*, 6th edn, Cambridge, 2008, pp. 43–137 ('Shaw')
Oppenheim, *Oppenheim's International Law*, 9th edn, London, 1992, pp. 3–115 ('Oppenheim')
Brownlie, *Principles of Public International Law*, 7th edn, Oxford, 2008, pp. 3–68 ('Brownlie')

Introduction

First, let us clear away any misunderstandings about, so-called, *private* international law and *transnational* law.

Private international law

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 that is applicable when a legal issue contains a foreign element, and it has to be decided whether a domestic rule should apply foreign law or relinquish jurisdiction to a foreign court.[3] The cases which give rise to the problem concern mostly divorce, care of children, probate and contract. Many of the rules are now found in legislation. Naturally, over time the respective domestic rules grow closer as States and their courts come to adopt similar solutions to the same problems, but they remain domestic rules. Established in 1893, the Hague Conference on Private International Law seeks primarily to harmonise domestic rules on conflict of laws, and since 1954 has concluded nearly forty multilateral treaties.[4] These must be distinguished from treaties that seek to

[1] Alexander McCall Smith, *The Sunday Philosophy Club* (paperback edn, 2005), p. 158. As they say: discuss.
[2] See p. 11 below, including its relationship to international law.
[3] Collier, *Conflict of Laws*, 3rd edn, Cambridge, 2001, pp. 386–94.
[4] See, for example, the Choice of Court Agreements Convention, 2005, ILM (2005) 1291. For all about the Hague Conference, go to its excellent website (www.hcch.net), and see Oppenheim, p. 7.

unify or harmonise States' substantive domestic law, such as on carriage by air or sea, or intellectual property.[5]

UNCITRAL is that part of the United Nations charged with promoting the harmonisation of international trade law.[6] But, the name, UNIDROIT, is most misleading. It neither part of the United Nations, nor even a UN specialised agency. It is an international organisation with sixty-three Member States that seeks to harmonise domestic laws, especially commercial.[7] Since 1964, it has concluded eleven conventions.

A legal matter may raise issues of both international law and conflict of laws, particularly on questions of jurisdiction.[8] Today, the distinction between international law and conflict of laws can be blurred as more international law, treaties in particular, reaches 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 invented 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 domestic laws of different States deal with a particular area or issue of domestic concern), supranational law (European Union law) and public international law, particularly in the commercial field. It may bring useful insights into the development of law, in particular how different types of law may influence others. 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 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 the latter term can lead to misunderstandings. Whatever the connections which international law has with other systems of law, it is clearly distinguished by the fact that it is not the product of any one national legal system, but of States. The United Nations now has 192 States which are Members. They now account for the vast majority of States which make up our world. In the past, international law was referred to as the Law of Nations.[10]

[5] Oppenheim, p. 6, n. 11. [6] See p. 359 below. [7] See www.unidroit.org
[8] See p. 42 below. [9] See p. 430 below.
[10] See J. Brierly, *The Law of Nations*, 6th edn, Oxford, 1963, esp. pp. 1–40 on the origins of international law.

Although it has developed over many centuries,[11] international law as we know it today is commonly said to have begun 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, general 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 evolve 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 law students. The answer depends on what is meant by 'law'. Whereas the binding nature of domestic law is not questioned, new law students are usually confronted with the issue: is international law merely a collection of principles that a State is free to ignore when it suits it? Whereas newspapers report ordinary crimes on a daily basis, it is usually only when a serious breach of international law is alleged to have occurred that the media take notice. This can give a distorted impression of the nature of international law. Because it has no easy sanction for its breach, and 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 Hart argued,[13] law derives its strength from acceptance by society that its rules are binding, not from its enforceability, then international law is law. 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

[11] See Shaw, pp. 13–42; A. Nussbaum, *A Concise History of the Law of Nations*, rev. edn, New York, 1954.
[12] 1 CTS p. 3. [13] *The Concept of Law*, Oxford, 1961.

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.

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 the immunity of diplomats and freedom of the high seas. The latter was crucial to the increase in international trade, the famous 1654 Treaty of Peace and Commerce between Queen Christina and Oliver Cromwell epitomising this.[14]

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 each day. Some foreign ministry legal departments are large: the US State Department has some 200 legal advisers; the UK Foreign and Commonwealth Office about forty, including some eight posted abroad in Brussels, Geneva, New York, The Hague, and elsewhere. To qualify to be an FCO legal adviser one must first be qualified to practise law in the United Kingdom. Like other legal advisers to ministries of foreign affairs, the task of the FCO legal advisers is to advise on a host of legal matters (both international and domestic) that arise in the conduct of foreign affairs. They also have the conduct of cases involving international law in international, foreign and domestic courts and tribunals. The legal departments of other foreign ministries are often staffed by diplomats who have legal training but may not be qualified to practise law; and they may well alternate between legal and political posts. Most foreign ministries have few, if any, legal advisers who during their careers do little other than law. But, if international law is not law, then legal advisers to foreign ministries are all drawing their salaries under false pretences.

Although, fortunately, more students are studying international law, it is not easy for a young private legal practitioner to practise it. Even in large law firms that have international law departments, the bulk of the work is international commercial arbitration. The involvement of legal practitioners in international law is usually incidental to their normal domestic work. Most of those who appear before international courts or tribunals are professors of international law who may not even be practitioners in their own domestic legal system. But there are also jobs for international lawyers in the United Nations and other international organisations, and NGOs.

International lawyers

Sometimes the media will describe a person as an 'international lawyer', yet at most he may 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

[14] 1 BSP 691.

express their, often critical, opinions. They are not always wrong, but can display a lack of familiarity with international law, apparently believing that the reading of a textbook or an (apparently simple) instrument such as 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 (now the Supreme Court) had in grappling with international law in the *Pinochet* case, despite having been addressed by several experts in international law, 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 necessarily having first a good grounding in international law generally. Yet, an expert in tax law will necessarily have a sound knowledge of contract, tort and other basic areas of domestic law. Without such knowledge, it would be difficult to advise effectively.

The sources of international law

International law differs from domestic law in that it is sometimes even more difficult to find out what the law is on a particular matter. Domestic law is usually more 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 (at least formal) hierarchy of international courts and tribunals. As with the (mainly unwritten) British Constitution, an initial pointer to the international law on a given topic is often best found in up-to-date 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, see its Article 92) as:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognised by civilized 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) above to 'international conventions' is to bilateral and multilateral treaties. For the moment, it is enough to say that, as with domestic

[15] *Pinochet (No. 3)* [2000] 1 AC 147; [1999] 2 WLR 825; [1999] 2 All ER 97; 119 ILR 135.
[16] The article provides that decisions of the Court are in law binding only on the parties to the case (*res judicata*), though they naturally have considerable influence on other States and courts.

legislation, treaties now play a crucial role in international law. Important areas of customary international law have now been codified in multilateral treaties which are widely accepted even by States which are not parties to such 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 'customary law'. The latter term usually refers to domestic law which is an important part of the law of some States 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 take a considerable or a short time. There must first be evidence of substantial uniformity of practice by a substantial number of States. In 1974, the ICJ found that a rule of custom (now superseded) that States had the exclusive right to fish within their own 12 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), certain unanimous or consensus resolutions of the UN General Assembly and, increasingly, in soft-law instruments (see p. 11 below). 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 Nuremberg 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 rule of custom, 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 rule of custom. This is a controversial matter.[19]

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*

[17] See p. 7 below, and Aust MTLP, pp. 11–14.
[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. 297 below.
[19] See Shaw, esp. pp. 77–81.

juris (*not* the opinions of jurists). Sometimes 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,[20] nor a favourable mention in a UN resolution, even when it is adopted by a large majority, are conclusive as to the emergence of a new rule of custom. But, in *Nicaragua* v. *US (Merits)* (1986)[21] the International Court of Justice found that the acceptance by States of the Friendly Relations Declaration of the UN General Assembly[22] constituted *opinio juris* that the Charter prohibition on the use of force now also represented a new rule of custom. There is however a growing tendency for international courts and tribunals, without making a rigorous examination of the evidence, to find that a new rule of custom has emerged. In *Tadić* the International Criminal Tribunal for the Former Yugoslavia ruled that it had jurisdiction over war crimes committed during an internal armed conflict, even though its Statute does not provide for this.[23]

Establishing *opinio juris* can be difficult, and everything will depend on the circumstances.[24] 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,[25] 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 rules of custom, 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 just over one hundred parties.[26] Although some provisions of the UN Convention on the Law of the Sea 1982 (UNCLOS) went in many respects beyond mere codification of rules of custom, the negotiations proceeded on the basis of consensus.[27] It was therefore that much easier, during the twelve years before UNCLOS entered into force, for most of its provisions to be accepted as representing customary international law.

[20] See what the ICJ said in the *Namibia*, Advisory Opinion, *ICJ Reports* (1971), p. 6; paras. 87–116; 49 ILR 2; and in the *Legality of Nuclear Weapons*, Advisory Opinion (UN), *ICJ Reports* (1996), p. 226, paras. 64–73; 110 ILR 163. The point is even more so for those advisory opinions which deal with highly political issues: see, for example, not only the advisory opinion on the *Legality of Nuclear Weapons*, but also the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *ICJ Reports* (2004), p. 136; 129 ILR 37; ILM (2004) 1009, and the request in 2008 for an advisory opinion on whether the unilateral declaration of independence by Kosovo is in accordance with international law. For more on advisory opinions, see p. 427 below.

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

[22] UNGA Res. 2625(XXV); ILM (1970) 1292.

[23] See the decision of the Appeals Chamber: www.icty.org, Case IT-94-1, paras. 65 et seq.; 105 ILR 453.

[24] Shaw, pp. 84–9. [25] See n. 27 below.

[26] See p. 50 below. See also Aust, 'Limping Treaties: Lessons from Multilateral Treaty-making' (2003) NILR 243, at 248–51.

[27] See H. Caminos and M. Molitor, 'Progressive Development of International Law and the Package Deal' (1985) AJIL 871–90.

An accumulation of bilateral treaties on the same subject, such as investment treaties, may in certain circumstances also be evidence of a rule of custom.[28]

General principles of law recognised by 'civilized' nations[29]

Compared with domestic law, international law is relatively underdeveloped and patchy, although in the last sixty 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 legal reasoning and analogies drawn from private law, such as good faith and estoppel.[30]

Good faith

The obligation to act in good faith is a fundamental principle of international law, and includes equity.[31] 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.[32] The principle is not restricted to treaties but applies to all international law 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.[33]

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 do 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,[34] who saw international law as at the top of a hierarchy of law. The term is used more by lawyers brought up in the

[28] See p. 345 below.
[29] 'Civilized' should not be seen as demeaning; the Statute is merely referring to States which have reached an advanced state of legal development.
[30] 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.
[31] Oppenheim, pp. 38 and 44. [32] See further pp. 75 and 84 below, respectively.
[33] Oppenheim, pp. 1188–93. See p. 54 below about the possible legal consequences of an MOU.
[34] *General Theory of Law and State*, Harvard, 1945.

civil law tradition, than lawyers in the common law tradition. It may be useful in a theoretical analysis of certain international law issues.[35] Unfortunately, it is also used loosely to cover not only established principles and rules but also *lex ferenda* (see below), and sometimes without a clear distinction being made between ones which have been established and mere aspirations.[36] It is unusual for the term 'norm' to be 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 on the development of international law. This is because judgments result from careful consideration of particular facts and legal arguments and therefore usually carry authority. There are relatively few international courts and tribunals, but tens of thousands of domestic ones. Moreover, most cases involving international law come before *domestic* courts, often final courts of appeal.[37] The cumulative effect of such decisions on a particular legal point can be evidence of custom, although domestic courts sometimes get international law very wrong. One must be chary of many advisory opinions, especially those delivered by international courts.[38]

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 cited are works of scholarship, that is to say, based on thorough research into what the law is said to be (*lex lata*) rather than comparing the views of other writers as to what they think 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, and therefore includes those treaty principles or rules that have become accepted as also customary international law.[39]

[35] See for example D. Shelton, 'International Law and "Relative Normativity"', in M. Evans (ed.), *International Law*, 2nd edn, Oxford, 2006, pp. 159–85.
[36] See also so-called soft law, p. 9 below.
[37] See the cumulative indexes to *International Law Reports*, published by Cambridge University Press.
[38] See pp. 427–9 below.
[39] See p. 6 above. See also, R. Jennings, 'What is International Law and How Do We Tell It When We See It? (1981) 37 *Swiss Yearbook of International Law*, p. 59. On statements of international law, see (2003) BYIL 585–6.

Obligations *erga omnes*

In *Barcelona Traction* (Second Phase), the International Court of Justice pointed out that certain obligations of a State are owed to all States, or *erga omnes* (to all the world). These include *jus cogens* and important human rights.[40] Certain treaties have been held to create a status or regime valid *erga omnes*.[41] Examples include those providing for neutralisation or demilitarisation of a certain territory or area, such as Svalbard or outer space; for freedom of navigation in international waterways, such as the Suez Canal; or for a regime respecting a special area, such as Antarctica.[42]

Jus cogens

Jus cogens (or a peremptory or absolute rule of general international law) is, in the words of Article 53 of the Vienna Convention on the Law of Treaties 1969:

> a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The concept was once controversial.[43] Now it is more its scope and applicability that is unclear.[44] There is no agreement on the criteria for identifying which principles of general international law have a peremptory character: everything depends on the particular nature of the subject matter. Perhaps the only generally accepted examples of *jus cogens* are the prohibitions on the use of force (as laid down in the UN Charter)[45] and on aggression, genocide, slavery, racial discrimination, torture and crimes against humanity.[46] This is so even where such acts are prohibited by treaties from which parties can withdraw.[47] Despite what may be said or written, it is wrong to assume that many important provisions of human rights treaties, such as due process, are *jus cogens*, or, for that matter, even rules of customary international law.[48] Whether self-determination is a *jus cogens* is open to question given that the principle may be very difficult to apply in practice: see the tricky debate about Kosovo.[49]

[40] See *Legal Consequences* (n. 20 above), paras. 154–9.
[41] See M. Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford, 1997, pp. 24–7; and p. 327 below.
[42] See pp. 327 et seq. below for details about the regime.
[43] See I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edn, Manchester, 1984, pp. 203–41.
[44] For an in-depth discussion of *jus cogens*, see Sinclair (see above note), pp. 203–26. See also p. 376, nn. 2–4, below for references to them, and Crawford's useful book (n. 46 below).
[45] See p. 204 below.
[46] See the ILC Commentary on Art. 26 of its draft Articles on State Responsibility (go to www.un.org/law/ilc/) or see Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge 2002, pp. 187–8.
[47] See p. 93 below. [48] See p. 228 below. [49] See pp. 17, 21 and 362 n. 4 below.