INTRODUCTION

International law is an international policy instrument. It is a set of rules, discourses and techniques that its subjects and actors use to regulate their relations and accomplish certain social ends. International law has its own culture and history. It has evolved over several centuries to reach its current form, and is: a fundamental process for regulating and channelling international violence; an essential common language; an instrumental technique in the service of states and of all the actors of international society. It is a promise of peace. In all of this, its force of attraction is very real indeed. But ever since it emerged in the modern era, international law has also been a part of a profoundly unequal international society in which it nurtures as much violence as it appeases. Far from being a straightforward neutral legal technique, it is, and always has been, the projection upon the international stage of the values and interests of international society's main players, at the same time being used by groups resisting that dominant order. In this respect, it is intrinsically ambivalent. It is simultaneously an instrument of domination and an instrument of emancipation for the subjects and actors who use it. It is as much the sword of the mighty as it is the shield of the meek.

International law has changed considerably since 1945, and its many-faceted development contrasts starkly with the uniformity of classical law. We are witnessing a contemporary multiplication of the sources, norms, operators and users

of international law, while the role of sovereign states, until now the foundation of this law, is becoming decidedly less absolute. It is now the law of an international society that emerged from the Second World War and has become a post-colonial and post-Cold War society. These three episodes account for some of the most essential shifts it has undergone. In particular, the classical representation of international law laying down the rules to govern a mosaic of juxtaposed sovereign states is no longer tenable and no longer fits contemporary international law. Sovereignty has weakened, and international institutions, individuals and private economic actors are ever more emancipated in our globalised world. International law is changing and its traditional dividing lines are being redrawn to accommodate new structures, areas of regulation and intervention, subjects, content and scope.

International law is therefore a body of law undergoing wholesale change as the limits of the classical dogmatic presentation of it become apparent everywhere. This change, though, raises many issues of its own that must also be weighed up. International law is currently expanding and evolving in response to unprecedented demand. But it is evolving beyond recognition and control. This paradox is confirmed if we try to discern its most distinctive features more clearly, and it has led me to multiply the angles of approach to this system of law rather than to close in on it from just one direction, a move that might restrict the perspective and skew our understanding. I propose to contemplate international law from three separate vantage points as a way of identifying and discussing its most essential dimensions: international law as history and culture (Chapter 1); international law as a legal order (Chapter 2); and

international law as an instrument of social regulation and intervention (Chapter 3). These three dimensions will enable me to bring out some of the most important issues which international law has raised in different places and at different times, and to critically examine those features, both old and new, that confer on it its legal character.

1

International law as history and culture

International law is a human practice punctuated by a series of changes that have affected its forms and meanings in a process that has been neither linear nor one-directional. It has continually stirred up controversies about its existence and its nature, some of which have become long-standing, others outmoded. International law is comparatively recent law, in that it did not really emerge with the Treaties of Westphalia of 1648 (even if its historiography often cites that date) but later, in the eighteenth century when modern Europe was in its heyday. In this, it is a culture, a European (and more broadly Western) culture, in which law is given an eminent position in the realm of political thought. Ever since the eighteenth century, international law has sought to rule a diverse, plural international society in which resources are unequally shared among states, and populations and individuals are unequally endowed in terms of their wealth, freedom and well-being.

International law was first known as the law of nations before it came to be referred to more frequently as international law in the nineteenth and twentieth centuries. It came into being at the same time as the modern state was being consolidated in Europe, and its initial purpose was to govern the legal rights and duties of states which were considered to be the only subjects of international law. However, it was to be applied to just a small group of European and American states who regarded themselves as the only ones capable of benefiting from

international law. It was therefore to exclude three-quarters of the planet for more than two centuries, thereby establishing discrimination among states in terms of their legal standing that is inseparable from its history. Three characteristic features of its historical evolution shall be surveyed here: it was a liberal pluralist system of law made up of a hard core of fundamental rights and duties of states (section I); it authorised states to resort to war individually as a means of settling disputes (section II); and it was reserved to those states that were considered civilised, so making European colonisation of the rest of the world lawful (section III).

I. A liberal pluralist system of law

The liberal pluralist purpose of classical international law hinged entirely upon the principle of the sovereign state as the sole subject and juristic entity of international law. That purpose was characterised by four distinguishing features that were common to almost all legal discourse and practice from the mid-eighteenth until the mid-twentieth centuries.

First, classical international law was erected on the foundation stone of state sovereignty and freedom. Johann Ludwig Klüber wrote in 1819, 'The state is a *free* and *independent* society since it is made up of individuals and families who, without this association, would live in natural freedom and who have themselves proposed the goal which is the subject of their union.'[1]

[1] J. L. Klüber, *Droit des gens moderne de l'Europe*, Stuttgart: J. G. Cotta, 1819, vol. 1, pp. 66–7. Emphasis added.

The sovereignty of the state as a subject of international law was characterised in the ordinary discourse of international law primarily as a form of freedom and not a form of power. Sovereignty reflected the independence of states and was therefore an anti-hegemonic principle in the international arena. Sovereignty was the legal construct that at the outset prohibited any claim in law by another state, the Pope, or the Holy Roman Emperor to dominate others, and international law was liberal in that it aimed to limit the power of states at the same time as it aimed to ensure their freedom.

Second, the will of the state became the primary source of classical international law accounting for state responsibility, state recognition, the importance of the institution of promising and above all the power to enter into treaties. In much the same way as a man, as the sovereign of his own person, can freely enter into contracts, the free and independent sovereign state had the power to bind itself by a meeting of minds. From the nineteenth century onwards, international treaties were considered to be an essential source of classical international law, every bit as important as the principles of natural law had been since the eighteenth century. It was the age of great doctrinal codification, and legal positivism was becoming dominant. Like Francis Lieber in 1863, Jean Gaspard Bluntschli in 1868 or Pasquale Fiore in 1890, authors compiled codes, setting down in writing the international law of their time. It was also the period in which treatises and textbooks proliferated, standardising people's perception of international law.

Third, classical liberal international law was characterised by the principle of neutrality, which was sometimes

referred to as the principle of tolerance. International law was held to be neutral with regard to the political and religious choices made by states in their domestic orders. It authorised and guaranteed the pluralism of internal political regimes, which might be conservative or liberal, democratic or monarchic. It was also oblivious as to whether individual liberties were observed within each state, and to any state religion, which was a very significant issue at the time. The legal technique that gave substance to this liberal principle of neutrality was quite straightforward. It consisted in dissociating state sovereignty into internal and external sovereignty. This crucial distinction had previously existed but now it was used to trace a dividing line between international law as a strictly external law of relations among states and public law as the internal law of each state. It therefore reduced international law in the nineteenth century to a mere system of law operative among states and external sovereignties, and it left states completely free in terms of their internal sovereignty over their own territory with regard to their own citizens.

The strictly inter-state logic that thus came about was crucial because it was to erect sovereignty as an impenetrable screen for the state behind which none would have any right of scrutiny, supervision or intervention. This resulted in the constant reiteration of the principle of non-intervention in states' internal affairs and soon in the rejection by most international law scholars and politicians of the principle of monarchic legitimacy laid down by the 1815 Vienna Congress. Indeed, all Europe's liberal regimes were to construct themselves *against* the 1815 principle of legitimacy. It is common

knowledge that in the wake of the victory over Napoleon, Europe's sovereigns met in Vienna to rebuild Europe on the double foundations of the principle of legitimacy and the political arrangements of the *Ancien Régime*. The absolutist rulers sought to snuff out any revolutionary movement by forming the celebrated Holy Alliance. Yet European history of the ensuing years marks the gradual destruction of this 1815 order by aspirations to liberalism and nationality. Shaken by the revolutionary waves of 1830 and 1848, the order of 1815 finally collapsed in the second half of the nineteenth century. From then on, no basic textbook of international law continued to defend the principle of legitimacy or the right of intervention that went along with it. In conformance with what has become standard practice, commentators presented the principle of monarchic legitimacy as obsolete in view of the internal transformation of European monarchies into liberal regimes. International law therefore no longer busied itself with states' municipal sovereignty and with what was significantly coming to be called their 'internal' or 'reserved domain'. Intervention in another state's 'internal affairs' was unanimously condemned as a violation of the law of nations. Humanitarian intervention alone survived and, as we know, was to have a bright future. But intervention was only undertaken with respect to non-Europeans and it justified, for example, expeditions by European powers against the Ottoman Empire in 1827, China in 1900 and Morocco in 1909, and France's expedition against Syria in 1860. Interference and intervention among European and civilised states were still formally condemned.

Fourth, classical international law was a liberal law because it was also a formal law of negative coexistence of free sovereign states. The crucial importance accorded to state freedom and sovereignty, to states' will, to the neutrality of law and to pluralism among states made the observance of the individual rights of states imperative over any other considerations or requirements. These were rights and freedoms of which the state could avail itself against any other state seeking to restrict its power of intervention or action, and which rested ultimately on the rule of respect for the equal freedom and sovereignty of others. One state's freedom ended where the freedom of others began. All of classical international law was to be articulated around the celebrated doctrine of the fundamental rights and duties of states. This doctrine, which fully codified practice, was to meet with unbelievable success throughout the nineteenth and twentieth centuries up until the Second World War. It gave precedence to states' rights over their duties towards others, and it drew a distinction between their absolute rights and their secondary and relative rights. Absolute rights prevailed under any circumstances by the simple fact that a political entity was constituted into a state. These rights were permanent and untouchable, whereas relative rights were contingent and dependent on circumstances and treaties made among states. Absolute rights, the crux of the theory, were also called fundamental rights of states. Their definition varied between authors and with state discourse but usually included the famous rights of self-preservation of the state: respect for sovereignty, territorial integrity, trade and equality. In return, by a simple effect of symmetry, states had

the absolute duty to respect these rights in their dealings with other states.

Underpinning this paradigmatic doctrine of fundamental rights was the concept of the legal personality of the state. It was once again taken up by all the classical commentators and considered central, even to the extent that some international law scholars theorised a right to 'respect of states' personality'.[2] The concept commanded the condition of legal independence of the state and the necessary observance of its consubstantial rights by other states. The personality of the state meant more specifically that it was likened to an individual being (despite its corporative character) who remained the exclusive subject of classical international law. The Italian international law scholar P. Fiore expounded this very clearly by claiming that the state had both 'international individuality and personality'.[3]

All told, such a liberal pluralist system of law concerning states as sovereign moral entities which were independent and equal, perfectly encapsulated a system of individual freedoms. It was conceived of as a law of formal *limits* designed to ring-fence and ensure the interplay of freedoms and sovereignties. The exercise of the rights and duties pertaining to the sovereignty of each state was not to interfere with other states' enjoyment of the reciprocal sovereign rights and duties. In this, international law was initially instituted to counter any

[2] A.-W. Heffter, *Le droit international public de l'Europe*, Berlin: Schroeder and Paris: Cotillon, 1866, p. 4.

[3] P. Fiore, *Nouveau droit international public suivant les besoins de la civilisation moderne*, translated and annotated by C. Antoine, 2nd edn, Paris: A. Durand et Pedone-Lauriel, 1885, p. 323.