International Law

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1. Introduction

INTERNATIONAL LAW, also called PUBLIC INTERNATIONAL LAW, or LAW OF NATIONS, the body of legal rules that apply between sovereign states and such other entities as have been granted international personality (status acknowledged by the international community). The term was coined by Jeremy Bentham.

Like precepts of international morality, the rules of international law are of a normative character; that is, they prescribe standards of conduct. They distinguish themselves, however, from moral rules by being, at least potentially, designed for authoritative interpretation by an independent judicial authority and by being capable of enforcement by the application of external sanctions.

International law means public international law as distinct from private international law or the conflict of laws, which deals with the differences between the municipal laws of different countries.

International law forms a contrast to municipal law. While international law applies only between entities that can claim international personality, municipal law is the internal law of states that regulates the conduct of individuals and other legal entities within their jurisdiction.

International law should also be distinguished from quasi-international law, which is the law governing relations similar to those covered by international law but outside the pale of international law because at least one of the parties lacks international personality. Concession agreements between oil companies and sovereign states fall into this category. In case of doubt, they are subject to the municipal law of the state granting the concession.

Transnational law is a purely negative term. It is intended to convey that, in accordance with the intention of contracting parties, a transaction of a consensual character is not or should not be subject to municipal law.

2. Fundamentals of International Law

Views on international law

A view of international law in three complementary perspectives assists in the better understanding of the subject. The sociological perspective offers an explanation of the social functions fulfilled by international law. The historical perspective provides insight into the growth potential of international law. The ethical perspective furnishes a normative measuring rod by which to test the moral adequacy of any particular system.

The sociological perspective

Law is primarily an outgrowth of a specific social environment. In particular, this applies to law in unorganized international society as well as in specific international societies organized on the confederate model, such as the League of Nations and the United Nations. The chief participants — the sovereign states, and especially the strongest among them — tend to view themselves as ultimate ends and are inclined to insist on control of the means indispensable for their survival in any crisis, especially their freedom to arm themselves. They form alliances and counteralliances for aggressive and defensive purposes, create precarious systems of balance of power, and pursue policies of involvement or isolation. (See political power.)

In such situations the primary function of law is to legitimate power; that is, the law assists in maintaining the supremacy of force and the hierarchies established on the basis of power and gives to such quasi-orders the respectability and sanctity of law. International law in unorganized international society serves these purposes in a variety of ways; for example, one of the cornerstones of international customary law is the independence of states, which provides for free-

dom of armament, access to raw materials and markets, and the admission of immigrants. Similarly, whether a state decides to participate in an international congress or conference depends on its own will. Moreover, in the absence of agreement to the contrary, unanimity is required for any decision reached in the assembly of any such international gathering. Finally, any binding third-party settlement of a dispute by reference to law or equity depends on the consent of the parties concerned.

By building international customary law on the foundation of state sovereignty, states make certain of reserving for themselves the choice between peace and war. Moreover, international customary law puts at the disposal of its subjects the right to apply measures short of war by way of reprisal against alleged breaches of international law.

In international confederations, such as the League of Nations and United Nations, the rights of sovereign states to threaten or resort to the use of force are limited by consensual undertakings. Yet, voting procedures providing for unanimity or reserving veto rights and wide escape clauses (such as those contained in articles 51 and 107 of the UN Charter) tend to reduce such peacekeeping systems to relative ineffectiveness, in particular in relation to the major world powers.

In fields less central to the systems of open power politics or power politics in disguise, international law may also fulfill the functions of a law of reciprocity and of a law of coordination. Thus, for example, on the basis of many treaties, an international customary law of diplomatic immunity, codified in the 1961 Vienna Convention on Diplomatic Relations, has developed.

Occasionally, the law of reciprocity — that is, a set of legal rules, compliance with which rests normally on the expectation of mutual advantages rather than on the fear of the application of external sanctions — intrudes even into spheres that are closer to actual power politics. This is always possible on a consensual basis, as in peace treaties, and occasionally has happened, as in the various conventions agreed upon at Lausanne in 1923 that terminated a war between Greece and Turkey. The laws of war are illustrations from international customary law. They include legal rules that apply to wars fought for limited purposes where both sides have exhausted the means of escalation available in systems of power politics but resist the temptation of total war with no legal restraints.

In an unorganized international society based on entities that tend to put their own interest before the commonweal, the scope of a law of coordination, or community law, in which the common interest overrides sectional interests, is limited. An example of this type of law is the gradual outlawry of the slave trade by bilateral and multilateral consensual undertakings, especially the Treaty of Paris (1815) and the Slavery Conventions of 1926 and 1956.

The historical perspective

Since the dawn of history inchoate systems of international law have come into existence in many parts of the world. Though of comparative interest, most have not influenced the evolution of contemporary international law. Leaving aside the borrowing of some Roman-law terminology and legal techniques, such continuity as exists in the practice of international law dates from early medieval international law.

International law is the product of a threefold process initiated in the Western world: the disintegration of the medieval European community into a European society, the expansion of this European society, and concentration of power in a developing world society in the hands of a rapidly declining number of major world powers.

The premises of medieval international law were simple. (1) In the absence of an agreed state of truce or peace, war was the basic state of international relations even between independent Christian communities. (2) Unless exceptions were made by means of individual safe conduct or treaty, rulers saw themselves entitled to treat foreigners at their absolute discretion. (3) The high seas were no-man's-land, where anyone might do as he pleased.

Treaty law was the predominant feature of medieval international law. Sanctions varied from the exchange of hostages, the pledging of towns, castles, and territories, and the mortgaging of the personal property of kings, or their subjects, to the appointment of guardians or the addition of the signatures of powerful dignitaries representing the various estates of a prince's realm. Supernatural sanctions, such as solemn oaths or excommunications of a guilty party, were also employed. The observance of treaties and other engagements rested on the same basis as it did in subsequent phases of international law: self-interest, especially in relation to obligations of a reciprocal character, and the value attached by an obligated party to his moral credit and his respect for the principle of good faith.

With the expansion of European society the spiritual basis of inter-Christian international law was weakened but not eliminated. In particular, the universalist spirit that imbued the naturalist doctrine of international law gave to international law the elasticity needed to adapt itself to a constantly widening international environment. Even so, international law primarily served the purposes of assisting in the process of Western expansion.

In the process of the transformation of international law into a world law, international law exchanged its Christian foundation for that of a law among states that were civilized in a highly formal sense. Civilization was understood as compliance with the minimum requirements of the rule of law, as this term, or its continental equivalents, was used in pre-1914 days in the Western world, especially regarding the treatment of the persons and property of foreign nationals. It took merely a further step to make sovereignty the decisive test of full international personality. In the pre-1939 era of the coexistence of democratic communities with totalitarian states such as the Soviet Union, Fascist Italy, Nazi Germany, and militaristic Japan, international law had become a law among sovereign states.

While the coexistence of sovereign states in a legal system postulates equality, this equality in international law is of a purely formal character. For example, since the formation of the United Nations in 1945, membership has increased threefold. Even though the number of sovereign and equal states has sharply increased, real influence still rests with only a handful of nations. The veto power of the permanent members of the UN Security Council, the weighting of votes according to the financial interest taken in the International Monetary Fund, and the special position accorded to states of chief industrial importance (as in the International Labour Organisation) are indicative of this trend.

The development of the doctrine of international law followed only slowly in the wake of the practice of international law. In the early days of international law it sufficed to have lawyers trained in canon and civil law. They tended to apply to novel situations the concepts of municipal law with which they were familiar. This accounts for the long-continued overemphasis in the doctrine of international law on analogies from these familiar systems of internal community law to systems developed by societies with very different cultural traditions.

The beginnings of European international law and relations are to be found in the microscopic interstate system of the Italian city-states. Here may be seen the beginnings of the doctrine of international law, especially in the writings of two Italian lawyers, Bartolo da Sassoferrato (1314–57) and Baldo degli Ubaldi (1327–1400). When in the late 15th and 16th centuries Spain became the leading Western power, Francisco de Vitoria (*c.* 1486?–1546) founded the Spanish school of international law. In the 17th century it came to be rivaled by the Anglo-Dutch school, particularly in the persons of Alberico Gentili (1552–1608) and Hugo Grotius (1583–1645).

While neither Grotius nor any other exponent of international law was the "father" of international law, Grotius' De Jure Belli ac Pacis (1625; On the Law of War and Peace) acquired a fame far greater than that of the works of his predecessors. This was due to a combination of factors that appealed to his contemporaries and subsequent generations: he stressed the self-defeating character of war, accepted sovereign states as the basic unit of international law, and skillfully blended natural law, Roman law, and state practice in a manner that left in vital matters sufficient discretion to governments to do, without legal hindrance, what they thought opportune.

Samuel von Pufendorf (1632–94), the German publicist and jurist, espoused the priority of natural law over positive law. An extreme naturalist school following his lead attempted to identify international law with natural law. In England, Richard Zouche (1590–1661) laid the foundations of positivism in international law, drawing a sharp distinction between the postulates of natural law and international law as actually supplied in state practice. An eclectic school, sometimes described as Grotian, tried to find a golden mean between the extremes of naturalism and positivism by relying on both natural and positive law. Christian Wolff (1679–1754) and Emerich de Vattel (1714–67) were two of its early exponents.

The one-sidedness and subjectivity of these techniques led to new departures on inductive, interdisciplinary, and relativist lines. The essence of the inductive approach is in the ascertainment of the rules of international law exclusively by means of generally accepted and rationally verifiable evidence. In particular, this involves recognition that the principles, as distinct from the rules, of international law are normally merely abstractions from these rules but do not constitute legitimate law-creating processes. The interdisciplinary treatment makes it possible to view international law from an outside perspective provided by sociology, history, and ethics. Finally, the exploration of the possible forms of the development of international law in a relativist way makes available, side by side, various patterns that exist for the solution of any social problem, providing a detached but constructive approach to problems of international law in the making.

The ethical perspective

In its own speculative framework, the naturalist doctrine of international law provided both sociological and ethical perspectives of the subject. Subsequently, during the reign of positivism, the consideration of these perspectives was neglected.

A less subjective ethical measuring rod than those applied by naturalist writers is that of civilization itself. Links between international law and civilization exist not only historically but also explicitly in one of the three law-creating processes that the International Court of Justice is charged to apply: the general principles of law recognized by civilized nations. Civilization in this sense is more than a mature and rational apparatus of thought and action. It is a continuous process toward, and away from, community relations; its aim is to develop relations based on cooperation and fellowship rather than on fear.

The relations between international law and civilization have varied considerably throughout the history of international law. Ample evidence of this is furnished by state practice regarding the recognition of new governments, states, or nations; the large-scale disregard of the minimum standard regarding the treatment of foreigners; and the ambivalent attitude of states to the legality of weapons of mass destruction. Thus, the relation between international law and civilization is tenuous at the best of times, and it is advisable for any ethical evaluation of contemporary international law to err on the side of caution.

Sources of international law

Certain basic issues call for discussion: the law-creating processes of international law; the law-determining agencies of international law; the relations between international law and municipal law; and the nature of and the relations between rules, principles, and standards of international law.

The law-creating processes of international law

These are the forms in which rules of international law come into existence; *i.e.,* treaties, rules of international customary law, and general principles of law recognized by civilized nations. It is the merit of article 38 of the Statute of the International Court of Justice that this exclusive list of primary law-creating processes has received almost universal consent. States that have assented to, or acquiesced in, resolutions adopted unanimously by the UN General Assembly and stated to be declaratory of existing international law may be thought to be prevented in good faith from contesting any longer the existence of a formerly controversial rule of international law. On a consensual basis and, thus, in accordance with one of the primary law-creating processes, this and other secondary law-creating processes can, and have, come into existence.

International customary law

This is essentially the international law of unofficial international society, and its rules can be summarized under the heads of seven fundamental principles. The two constitutive elements of international customary law are (1) a general practice of states on a universal, general, or regional basis and (2) the acceptance by the states concerned of this practice as law.

The origin of international customary law is frequently found in earlier treaty clauses, which subsequently were taken for granted, as with the rules regarding the minimum standard applicable to foreign nationals and their property. Occasionally, as in the law of the sea and the law of armed conflict, individual rules of international law have developed out of roughly parallel practices of the leading powers.

Treaties

Treaties and other consensual engagements are legally binding undertakings by which, without any requirements of form under international customary law, the subjects of international law may declare, modify, or develop existing international law as they see fit or agree on transactions; *e.g.,* of a territorial character. They are thus able to transform jus strictum into jus aequum, jus dispositivum into jus cogens (see below Jus dispositivum and jus cogens), and vice versa, and unorganized international society into global or regional international societies on confederate or supranational levels of integration.

The general principles of law recognized by civilized nations

Such principles must fulfill two requirements. To qualify under this heading, a legal principle must be a general principle of law, as distinct from a legal rule of a more limited functional scope. It must be recognized and shared by a fair number of civilized nations and probably include representation of at least the principal legal systems.

The general principles of law come into play only as a subsidiary law-creating agency, that is, in the absence of competing rules of international customary law or treaty law. Their existence in the background forestalls any argument that supposed gaps in international law prevent international judicial organs from deciding on the substance of any dispute submitted to their jurisdiction.

The law-determining agencies of international law

These agencies furnish the evidence for the existence of asserted rules of international law. The totality of the subjects of international law constitutes the relevant agency for any rules of universal customary international law. A convincing majority of subjects of international law provides the requisite evidence for the existence of an alleged rule of general customary international law. The ensemble of the parties to a treaty fulfills the same function in relation to any particular consensual engagement. The body of civilized nations forms the relevant law-determining agency regarding general principles of law.

The decisions of international and national courts and tribunals plus the doctrine of international law (*i.e.,* the teachings of the most highly qualified publicists) constitute what are described in article 38 of the Statute of the International Court of Justice as "subsidiary" means for the determination of the rules of international law.

In practice, consensus scarcely ever exists in any of these law-determining agencies. Thus, it is necessary to determine the relative evidential value of any pronouncements made by the elements of law-determining agencies; *i.e.,* the views of individual parties to treaties, relevant diplomatic material, and pertinent decisions of international and national judicial organs. To obtain as objective as possible an evaluation, it is advisable to subject each case to a threefold scrutiny: the degree of generic and individual independence of the element of the law-determining agency concerned, its international outlook, and its professional attainments.

International law and municipal law

International law applies in the relations between the subjects of international law. The relations between subjects and objects, and between objects alone, of international law are governed by municipal law or quasi-international law. (See jurisdiction.)

While international law is a legal system that actually exists, the term municipal law is an abstraction from the multitude of legal systems that are internal to the individual subjects of international law. Thus, actual conflicts can arise only between international law and individual legal systems other than international law, such as United States law or German law. How such conflicts are resolved depends on the level on which they arise. Ultimately, any municipal organ is governed by its own municipal law and must, if needs be, give priority to it. Similarly, international organs, such as the International Court of Justice, may have to give priority to international law and treat municipal law as inferior in an accepted hierarchy of interlocking legal systems. They may even view international law as being exclusive of all other law and treat municipal law as a mere set of facts, which, as the case may be, complies with or contravenes the international obligations of a subject of international law.

Other basic issues of international law

Rules, principles, and standards

The rules of international law are the legal norms that can be verified as the products of one or more of the three generally recognized law-creating processes. For purposes of systematic exposition and legal education, it is also valuable to abstract principles from legal rules. Such principles of international law provide the common denominator for a number of related legal rules. They must not be abused by reversing the procedure for the purpose of deriving from them additional legal rules that cannot be verified independently by reference to the primary or secondary law-creating processes of international law. The more fundamental the rules that underlie any particular principle, the more a justification exists for seeing the principle itself as fundamental. It is possible to summarize the whole of international customary law in a number of fundamental principles, and attempts even have been made to reduce all these rules to a single fundamental principle, or Grundnorm, such as consent, recognition, and good faith.

By way of treaty, subjects of international law are free to create additional principles; *e.g.,* those of freedom of commerce or navigation, or a principle such as that of peaceful coexistence embodied in article 2 of the Charter of the United Nations. Unless parties desire to give unconditional effect to any such optional principle, they have at their disposal counterparts to compulsory rules in the form of optional standards, such as those postulated by most favoured nation and preferential treatment.

Jus dispositivum and *jus cogens*

In terminology derived from Roman law, a distinction is made in mature legal systems of municipal law between rules that may be altered by contracting parties *(jus dispositivum)* and others that may not *(jus cogens)*. As distinct from legal systems with a centralized legal order, around which such *jus cogens* has grown, international customary law, as the law of unorganized international society, does not know of any such peremptory rules. Limitations on the freedom of states imposed by common sense, self-interest, and other pragmatic considerations must not be mistaken for *jus cogens*. Yet, nothing prevents sovereign states from creating peremptory international law by way of treaty; *e.g.,* the seven principles formulated in article 2 of the United Nations Charter.

Jus strictum and jus aequum

Also derived from Roman law, this distinction indicates differences between two other types of rule. Rules of *jus strictum* (*e.g.,* the rules of international customary law on the right of a state to request the recall of a foreign envoy as *persona non grata*) must be interpreted strictly and literally as embodying absolute rights. Others, such as those providing for freedom of communication, must be interpreted as rules of *jus aequum; i.e.,* in a reasonable and equitable manner.

3. Rules of international law

Customary international law

The basic rules of international customary law can be summarized in the following fundamental principles: sovereignty, recognition, consent, good faith, freedom of the seas, international responsibility, and self-defense. In this survey are also included post-1945 codifications of the relevant rules of international customary law.

Sovereignty

Initially, a subject of international law is bound only by applicable rules of universal or general international customary law. Additional international obligations may be imposed on any subject of international law only with its consent. Unless the territorial jurisdiction of a state is excluded or limited by rules of international law, its exercise is exclusively the concern of the state in question. Subjects of international law may claim potential jurisdiction over persons or things outside their territorial jurisdiction. In the absence of permissive rules to the contrary (*e.g.,* the right of hot pursuit from the territorial sea to the high sea, or the right of reprisal) they may exercise such jurisdiction only inside their territories. It follows from the coexistence of sovereign states under international law that, in principle, they are all equal in status.

Recognition

The rules governing recognition cover situations such as the cooption of new subjects of international law, the recognition of territorial claims of another state, the grant and withdrawal of nationality, and the recognition of the maritime flag of a landlocked state.

In principle, recognition is discretionary, but premature recognition of belligerents and insurgents runs counter to the exclusive domestic jurisdiction of the other state concerned and is illegal. The scope and effects of recognition must be ascertained according to the tenor of the act of recognition and its context. It may be unconditional or conditional and may be explicit or implied.

The devices of protest and reservation of rights may be used to prevent silence from being misinterpreted as an implied recognition of a situation or transaction. Notification is a means of bringing a situation or transaction to the attention of a third power with the intent to invite recognition or some other reaction.

In practice, the chief function of recognition is to acknowledge the existence of an entity as a subject of international law with whom another state can maintain diplomatic relations. The main forms of recognition are recognition of a state or government as exercising de facto or de jure authority in a territory or, as it is simply called, de facto and de jure recognition. De facto recognition implies acceptance of the claim of the recognized government to exercise jurisdiction within its own territory. De jure recognition, however, usually implies acceptance of the claim of the recognized government to exercise extraterritorial jurisdiction over, for example, nationalized companies that own ships entitled to sail under the flag of the recognized state.

Recognition, being a matter of intent, may fall short of full recognition and be limited to recognition of a group as belligerents or as insurgents, if such rebels are in de facto control of part of the territory of another state.

Sovereign states are the principal subjects of international law. Yet nothing prevents states from recognizing dependent states with limited international personality, such as international protectorates or the former mandates of the League of Nations. None of the trust territories of the United Nations has international personality. They are, however, under the control of the United Nations. Similarly, states are free to recognize, for all or limited purposes, nontypical subjects, such as the Holy See, international institutions, and even individual persons as subjects of international law. In each case, whether any entity has been so recognized is merely a question of evidence.

Consent

The rules on consent enable subjects of international law, when entering into agreement, to modify and to supplement as they see fit, but without prejudice to the rights of third parties, any of the rules of international customary law or the general principles of law recognized by civilized nations.

Sovereign states have full capacity to enter into any kind of consensual engagement. The capacity of other entities with international personality to undertake consensual commitments under international law is limited according to the scope of their international personality. In the absence of evidence to the contrary, consensual engagements between subjects of international law are governed by international law, but consensual engagements between subjects and objects, or between objects of international law, are outside the pale of international law.

Barring prior obligations to the contrary, as contained, for example, in an undertaking to negotiate or conclude another agreement, the entry into consensual engagements is purely optional.

International customary law does not prescribe any particular form for consensual engagements, unless the parties desire not to create legal obligations. The effect of consent given in accordance with the requirements of international law is to create legal rights and duties between the contracting parties. In the absence of any contrary intention of the parties, the suspension, revision, and termination of consensual engagements depend on the consent or acquiescence of each of the contracting parties.

Excepting agreements entered into by international organizations, the subject of the law of treaties is now codified in the 1969 Vienna Convention on the Law of Treaties.

Good faith

In the early phases of the evolution of international law, good faith meant, primarily, the absence of bad faith. Gradually, however, good faith was identified with the requirements of reasonableness, common sense, and equity.

Thus, parties to consensual engagements and parties responsible for duly communicated unilateral acts, which they intend to have legal effect, must interpret and execute such engagements in good faith. If a consensual engagement that is subject to international ratification has been ratified, good faith regulates also the relations between the parties prior to final ratification. Barring more specialized provisions, acts committed contrary to good faith by any international institution, all of which derive their authority from consensual engagements, are void. Excess of jurisdiction by an international judicial organ or corruption of judges by one of the parties falls in this category. Rules of jus aequum must be interpreted as relative rights; that is, their arbitrary exercise is an abuse of right and a tortious act. In the case of rights derived from rules of jus strictum, a harsh exercise of such rights is not illegal but amounts to an unfriendly act; that is, it is open to retorsion, meaning lawful but unfriendly acts of retaliation. On the international judicial level the consensual nexus within which judges and parties operate tends to transform any absolute rights into relative rights, subject to judicial balancing processes in which considerations of good faith, common sense, and reasonableness play a prominent part.

Freedom of the seas

The inclusion of the rules on the freedom of the high seas (*i.e.,* those parts of the interlinking chain of oceans that lie seaward of the territorial sea) among those of a fundamental character would be justifiable on the ground alone that they apply geographically to two-thirds of the globe. These rules preclude the appropriation by any individual subject of international law of any portion of the high seas as distinct from the subsoil and bed of the sea. The exercise of permitted jurisdiction varies according to the state of peace, intermediacy between peace and war (status mixtus), or war between the states concerned. Subject to a number of exceptions, in time of peace a

state may exercise jurisdiction only over ships entitled to fly its own flag. In a state of intermediacy, states are free, under international customary law, to interfere with one another's shipping by way of reprisal. In time of war, permissible interference with enemy and neutral shipping is regulated by the rules of sea warfare and prize law. The use of the high seas, the airspace above the high seas, and the seabed must be exercised with reasonable regard for the interests of others. The Conventions of 1954, 1962, and 1969 for the Prevention of Pollution of the Sea by Oil provide a limited implementation of this rule. Piracy jure gentium (*i.e.,* illegal acts of violence, detention, or depredation for private ends committed on the high seas) and slave trading are illegal forms of the use of the high seas under international customary law.

The subject is now largely codified in the 1958 Geneva Conventions on the High Seas and on Fishing and Conservation of the Living Resources of the High Seas.

International responsibility

The rules governing the principle of international responsibility complement all other rules of international law. They transform merely admonitory precepts into legal forms and, in this sense, may also be described as sanctions of international law.

The rules on international responsibility can be reduced to two propositions: (1) the breach of any international obligation by the organ of a subject of international law constitutes an illegal act or international tort, and (2) the commission of an international tort involves the duty to make reparation. These are rules of international customary law. Thus, the obligations they create arise independently of the will of any particular subject of international law, and they may be modified by consent and acquiescence. In particular, they can be strengthened by consensual rules that provide for penalties corresponding to those in municipal criminal law (sometimes also described as international criminal law) but, actually, constituting merely internationally postulated rules of municipal law, which may be waived by acquiescence and nonprosecution of claims (also described as extinctive prescription).

Other rules, such as the powers exercised by states in relation to pirates, blockade runners, and war criminals, constitute extraordinary forms of the exercise of national jurisdiction. They are lawful because the home states of these three groups of individuals may not in good faith contest the exercise of such jurisdiction.

Self-defense

In unorganized international society the distinction between the lawful and unlawful use of force was accepted in state practice in situations of status mixtus. In a state of war any limitations of the right to wage war (jus ad bellum) remained a largely ignored postulate of naturalist doctrine on the distinction between just (and legal) and unjust (and illegal) war. The realization of this objective had to await later multilateral treaties, which, by reference to the test of self-defense, incorporated the distinction between legal and illegal wars and other use of force.

Under international customary law measures of self-defense may be taken against illegal acts that are attributable to another subject of international law; against acts of individuals, ships, or aircraft that disentitle any other subject of international law from the grant of protection; and against acts of objects of international law that lack a subject of international law that is entitled to give them diplomatic protection.

The need for self-defense must be compelling and instant. Measures of self-defense comprise any action, including hot pursuit from the territorial sea into the high seas, that is necessary to repel an imminent or present invasion of the rights of a subject of international law.

In cases not covered by the conditions of lawful self-defense, the threat or use of force under international customary law may amount to a legitimate form of self-help. If a subject of international law has committed an international tort and refuses to make reparation, the other party may resort to acts of retorsion or reprisal.

The legal effects of resorting to war under international customary law are to bring into operation the laws of war and neutrality (jus in bello).

International rules governed by treaties and other agreements

The sphere of freedom of action for subjects of international law — what, in relation to typical international persons, may also be termed unlimited state jurisdiction — is governed primarily by the rules on sovereignty. Limitations of this jurisdiction come about as the result of the interplay of the rules underlying some of the other fundamental principles with those on sovereignty.

This interaction of rules has brought about secondary rules and legally determined situations. Five of these are of especial significance: territory, diplomatic law, and immunity; the protection of nationals abroad; freedom of commerce and navigation; extradition and asylum; and succession to international rights and obligations.

Territory

Owing to the preponderance, in a world largely appropriated by sovereign states, of territorial over personal jurisdiction, the rules governing title to territory are of major importance. There are significant exceptions, however, such as the high seas; Antarctica, barred from further exclusive appropriation by the 1959 Antarctic Treaty; and outer space and celestial bodies, excluded under the 1967 Outer Space Treaty. The rules relating to territory rest, first, on sovereignty: occupation, addition by natural causes of new land to riverbanks (accretion, accession, or alluvion), and assumption, under international customary law, of sovereignty over territories whose state apparatuses have been destroyed by conquest (debellatio); second, on recognition that stops third parties from contesting the validity of a recognized title; and, third, on consent — namely, consent of the cession of territory.

The legal function of frontiers is to settle the exact extent of contiguous territories by unilateral action, express consent, recognition, or acquiescence.

The airspace above, and the subsoil below, national territory, including the territorial sea, are treated as appurtenances of a state's territory.

Internal waters include ports, harbours, all waters on the landward side of the baseline of the territorial sea, and historic bays; *i.e.,* bays that, irrespective of their width, are treated, on grounds of acquiescence or recognition, as subject to the jurisdiction of the coastal state.

The normal baseline of the territorial sea is the low-water line along a state's seacoast. It is generally recognized that the minimum breadth of the territorial sea is three miles. The outer limit of the territorial sea, which constitutes also the frontier between national territory and the high sea, is drawn by reference to the baseline.

Most of the sea matters are not codified in the 1958 Convention on the Territorial Sea and Contiguous Zone. While it has proved impossible to reach agreement on the breadth of the territorial sea, it is laid down in the above convention that the contiguous zone — *i.e.,* a geographically limited zone of the high seas contiguous to the territorial sea in which coastal states exercise a limited jurisdiction over foreign ships — should not extend beyond 12 miles from the baseline of the territorial sea. (G.Sc.)

Outer space

The successful launching in 1957 of the first artificial Earth satellite marked the beginning of a new branch of international law, namely, international space law. This refers to those rules within the international legal system that regulate human activities in outer space, including the Moon and other celestial bodies, and in relation to outer space.

International space law embraces, in the first place, all existing and future rules of international customary or treaty law that contain no geographical limitations, expressed or implied, and are consequently applicable to any conduct of subjects of international law. Insofar as international customary law is concerned, these rules include virtually all those governing the principles of recognition, consent, good faith, self-defense, and international responsibility. That, in principle, international law was from the very beginning applicable to outer space has been reaffirmed by the United Nations on several occasions.

International space law includes, second, such new rules, whether of customary or treaty law, that have evolved since the beginning of the space age or that may be developed specifically to regulate the activities of states and their nationals in space or actions in relation to such activities. While a number of bilateral and multilateral agreements as well as international agencies already exist in this field, the United Nations has been particularly active in the development of general international space law. It has adopted a number of resolutions embodying recommended standards of conduct in relation to outer space and has prepared five multilateral treaties for adoption by states.

These multilateral treaties are: (1) the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies; (2) the 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space; (3) the 1972 Convention on International Liability for Damage Caused by Space Objects; (4) the 1975 Convention on Registration of Objects Launched into Outer Space; and (5) the 1979 Agreement

Governing the Activities of States on the Moon and Other Celestial Bodies. The last one proclaims the Moon and other celestial bodies within the solar system, other than the Earth, together with their natural resources, the common heritage of mankind. All five treaties are in force among their respective contracting parties, but the most important of these are doubtless the treaties on principles and on liability. The latter lays down detailed rules governing the recovery of damages for losses caused by space objects.

Many of the provisions of the treaty on principles are not only binding on the contracting parties in terms of treaty law but also have gained wide acceptance from both parties and nonparties as expressing rules of general international law; consequently they are binding on all states. In fact, the technological advances in this sphere have been so fast and the need to adopt appropriate legal rules in response thereto has been so pressing that it has become increasingly apparent that much of the product of what has traditionally been called the law-creating process of international customary law need not rest on custom at all. Such practice as may be required as one of the two constitutive elements of a rule of international customary law needs to have existed only long enough to prove the existence of a general acceptance among states of the norm in question as a rule of international law. In fact, the law-creating process can be reduced to a single act or omission, and its role is reduced to that of merely establishing the acceptance of a given rule as law by the generality of states.

Among the norms of treaty law that appear to have acquired such general acceptance are primarily some of the basic principles found in the 1967 treaty. They include the principles that outer space, including the Moon and other celestial bodies, is not subject to national appropriation (Article II) and that the state of registry of a space object retains jurisdiction and control over such object and over any personnel thereof while in outer space or on a celestial body (Article VIII). If so, this means that under general international law there can be no territorial acquisition or exercise of territorial sovereignty in outer space and on celestial bodies. With regard to this issue, at least some of the rules underlying the principle of freedom of the high seas are capable of being applied by analogy. Two other principles from the 1967 treaty have probably also achieved the same status as rules of general international law: first, states bear international responsibility for national activities in space and must subject such activities, whether conducted by official bodies or private individuals, to authorizations and control (Article VI); and second, states that launch or procure the launching of a space object or from whose territory or facility a space object is launched are internationally liable for damage caused to another state or its nationals by such object (Article VII).

More problematic is Article IV of the 1967 treaty, a key provision from the standpoint of world disarmament. Article IV, in its first paragraph, prohibits the stationing of nuclear weapons or other weapons of mass destruction in outer space or on celestial bodies, while in its second paragraph it prescribes that the Moon and other celestial bodies (without mention of outer space as such) shall be "used . . . exclusively for peaceful purposes." The problem is twofold. First, it is difficult to determine, on the evidence available, whether this provision has been generally accepted as declaratory of general international law. Second, there is a wide division of opinion as to the interpretation of the word peaceful in the second paragraph. One school maintains that it means "nonmilitary," while the other argues that it means simply "nonaggressive." The latter interpretation appears to have gained currency, although it renders the stipulation supererogatory, inasmuch as aggressive activities as such are contrary to international law wherever they may occur.

The arrival of the space age has created many problems crying out for legal regulation. International agencies other than the United Nations have also contributed to the development of international space law. The International Telecommunication Union, for example, has done much to regulate, among other things, the use of radio frequencies for telecommunications and direct television broadcasting by artificial satellites. Many problems remain unresolved and others will no doubt arise. Among those being discussed are the definition of outer space and its delimitation from airspace, equitable use of the geostationary orbit, the use of nuclear-powered satellites, international direct television broadcasting, remote sensing, and the military use of outer space. (Bi.C.)

Diplomatic law and immunity

States and international institutions can act only through individuals. Thus, relations between states — and international institutions — are based on the principle of necessary representation. The chief representative of a state is the head of state who, in principle, has plenary powers to commit his state. After a number of earlier attempts to settle continuous disputes over the precedence of diplomatic envoys, the classes of diplomatic envoys and their privileges and immunities are now codified in the 1961 Vienna Convention on Diplomatic Relations. (See extraterritoriality.)

Similarly, the rights and immunities of consuls — resident officials stationed abroad with the consent of the receiving state for purposes of promoting trade and assisting nationals of the sending country — are codified in the 1963 Vienna Convention on Consular Relations.

The protection of nationals abroad

The relevant rules for such protection grew out of individual safe-conducts and innumerable bilateral treaties of commerce and navigation and, between civilized nations, were gradually taken for granted as rules of international customary law or general principles of law recognized by civilized nations.

These rules imply the application of a minimum standard that complies with the rule of law, as understood in liberal and democratic Western countries, regarding the protection of the life, liberty, dignity, and property of foreign nationals. Regarding property, the freedom of states to expropriate or nationalize private property in the public interest with full (or adequate), prompt, and effective compensation is generally accepted as a rule of international customary law. The rule has behind it the authority of the Permanent Court of International Justice and a considerable number of international tribunals. Doubts that have been raised against the continued validity of the rule (especially in Communist and capital-importing states) are related to the application of the rule in cases of doubtful titles to property rather than to the existence of the rule itself. There is also a widespread mixture of politics, trade, and aid that, on pragmatic grounds, frequently makes inadvisable an insistence by capital-exporting states on strict compliance with the rule.

Freedom of commerce and navigation

Under international customary law the right of foreign nations to trade in a country and use its means of communications, such as roads, rivers, and airspace, is within the exclusive jurisdiction of the territorial sovereign. By way of treaty such rights of commerce and navigation are granted normally on relative terms; *i.e.,* by reference to optional standards. The classical standards of international treaty law in these fields are those of most favoured nation treatment (treatment on the basis of foreign parity), national treatment (treatment on the basis of inland parity), identical treatment, equitable treatment, good-neighbourly treatment, open-door treatment (equal treatment of all concerned in a third sovereign state or a territory such as a United Nations trust territory), and preferential treatment. In state practice, some of these standards are employed cumulatively or alternatively in one and the same treaty.

Extradition and asylum

In accordance with a long-established practice, states have concluded extradition treaties enabling them to secure the return of fugitives from their own territorial jurisdiction. In states in which the rule of law in the Western sense applies, considerable care is taken to define precisely the offenses for which extradition may be granted, and extradition normally is limited to nonnationals of the country requested to grant extradition. While a number of states take a different view of political crimes, it is a liberal Western tradition to exclude political offenders from extradition unless they are charged with an attack on life.

In the absence of consensual undertaking to the contrary, any state may grant asylum in its own territory to any individual. This territorial asylum differs from diplomatic asylum; *i.e.,* asylum that is granted in diplomatic premises situated in another state's territory. In the absence of express treaty rights to this effect, diplomatic asylum may not be granted, but, on humanitarian grounds, the territorial sovereign often acquiesces in such action.

Succession to international rights and obligations

It is necessary to distinguish three typical situations: (1) revolution — this, in principle, is treated as a purely internal affair and does not affect the obligations of the subject of international law concerned; (2) territorial changes — if two states decide on the cession of an insignificant portion of territory, the matter is settled between the parties by the rules on consent and, in relation to third parties, by those on recognition; if a state agrees to its own truncation or if a composite state is dismembered, the legal consequences of such changes are settled by treaty, recognition, or acquiescence; (3) belligerent occupation — in the case of belligerent occupation falling short of debellatio, any territorial changes are treated as temporary while the war lasts. Furthermore, it is presumed that in the absence of any express settlement in a treaty of cession the public property of the ceding state becomes automatically the property of the cessionary state, and the public law of the ceding state is replaced by that of the cessionary state.

There is no general rule of international customary law imposing automatic succession by the cessionary state to the state debts of the ceding state. On equitable grounds, however, a rule to the opposite effect is frequently asserted regarding strictly localized debt. Cession-

ary states are under no obligation to assume any responsibility for tortious acts or omissions of the ceding state.

In principle, treaties are binding only between the contracting parties. Thus, if one of the parties cedes part of its territory, existing treaties are interpreted according to the rule of movable treaty frontiers; that is, the territorial scope of treaty obligations is presumed to be automatically adjusted to subsequent territorial changes. In cases in which the nonexistence of rules of international law on the automatic succession to international obligations would lead to harsh results, these are likely to be mitigated by the need of the new subject of international law concerned to be recognized and the freedom of existing subjects to make recognition dependent on compliance with justified expectations.

4. The role of international organizations

Global multipurpose institutions, such as the League of Nations and the United Nations, are best understood as organizational superstructures of international customary law on a consensual and confederate basis. Their impact on international law is threefold: modification by express consent of the rules underlying the fundamental principles of international law, indirect modification of these rules by acquiescence on the part of member states in the action of organs not actually authorized to exercise lawmaking functions, and initiation of the further codification and development of international law.

The chief modification introduced by the United Nations Charter is the limitation of the rights of subjects of international law under international customary law to threaten or resort to armed reprisals and war. This extends the duties of the former members of the League of Nations and parties to the Kellogg-Briand Pact of 1928. The prohibition covers the threat or use of force in circumstances falling short of war in the formal sense.

The principal means of indirect lawmaking in the United Nations are resolutions of the General Assembly that are adopted unanimously or with the two-thirds majority required for important questions. If such resolutions purport to be declaratory of international law, it is difficult for member states who voted for them to claim that, on the matters involved, the General Assembly is limited to the mere task of making recommendations. If the organs concerned of the United Nations act consistently on particular resolutions, eventually a time comes when even those states that have voted against them will be deemed to have acquiesced in such resolutions. Nonmember states that are admitted to membership in the United Nations after such resolutions have been adopted may find themselves in a similar situation. They have obtained their recognition on the assumption that they will abide by the generally accepted rules of international law, and, increasingly, member states that grant recognition may equate the near-universal law and practice of the United Nations with general international customary law. Moreover, new members must expect that they join this global confederation as they find it.

A number of resolutions passed by the General Assembly fall into this in-between category of law-in-the-making — *e.g.,* those on the Nuremberg Principles that dealt with crimes against peace, war crimes, and crimes against humanity (Res. No. 95[II], 1946); genocide (Res. No. 96[I], 1946); the Universal Declaration of Human Rights (Res. No. 217[III], 1948); the right of peoples and nations to self-determination (Res. No. 637[VII], 1952); permanent sovereignty over natural resources (Res. No. 1803[XVII], 1962); denuclearization (Res. No. 1884[XVIII], 1963); and nonintervention (Res. No. 2131[XX], 1965).

In some instances, as before the adoption of the Universal Declaration of Human Rights, the almost unanimous protestations by speakers in the General Assembly regarding the purely moral character of the precepts enshrined in the declaration provide adequate evidence of the nonlegal character of the resolution in question. In others, such intention may become evident from the self-contradictions contained in the resolutions themselves. In still others, the intimation of the need for further study and the request for codification of the subject may suggest the political rather than legal character of a particular resolution. But if at any subsequent stage it can be shown that large and consistent majorities of the principal organs of the United Nations accept rules laid down in such resolutions as legally binding, the transition from law-in-the-making to new law tends to be made.

The International Law Commission, an auxiliary but autonomous organ of the General Assembly of the United Nations, consists of 25 members of recognized competence in international law (Article 2[1] of the Commission's Statute). It has initiated codification and development in a number of fields of international law. In practice, the commission does not distinguish between its efforts on the codification (*i.e.,* the restatement of existing international law) and the development of international law by draft rules involving changes in existing international customary law. Thus, any of the rules proposed by the commission must be examined from this point of view.

In the field of humanitarian law (*i.e.,* the protection of the individual) the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 and the International Covenants on Civil and Political and on Economic, Social, and Cultural Rights, opened for signature in 1966, were channeled from the United Nations Commission on Human Rights to the General Assembly of the United Nations through the Economic and Social Council. On a level of closer constitutional and ideological homogeneity, the Council of Europe adopted the Rome Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, as subsequently amended, and in the European Commission of Human Rights and the European Court of Human Rights provided the most effective means yet put into operation for the implementation of the protection of human rights.

On specialized topics, such as the law of the sea, international labour law, and international private law, the Inter-Governmental Maritime Consultative Organization, the International Labour Organisation, and the Hague Conference of Private Law, respectively, fulfill drafting functions of a quasi-legislative character. Yet it remains for the sovereign states concerned to decide if they want to limit their freedom of action by such further consensual commitments.

If this will exists, states are not limited to the development of international law on a confederate level. They are free to transform regional areas into federations of a territorial type such as the Commonwealth of Australia. They may also try functional federation on the model of such supranational organizations as the European Union. Under these conditions the wheel has come full circle, and international law turns again into municipal law, but, until such a development becomes universal, international law is likely to remain indispensable in the relations between sectional groupings.

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