# 1

# The nature and development of international law

In the long march of mankind from the cave to the computer a central role has always been played by the idea of law – the idea that order is necessary and chaos inimical to a just and stable existence. Every society, whether it be large or small, powerful or weak, has created for itself a framework of principles within which to develop. What can be done, what cannot be done, permissible acts, forbidden acts, have all been spelt out within the consciousness of that community. Progress, with its inexplicable leaps and bounds, has always been based upon the group as men and women combine to pursue commonly accepted goals, whether these be hunting animals, growing food or simply making money.

Law is that element which binds the members of the community together in their adherence to recognised values and standards. It is both permissive in allowing individuals to establish their own legal relations with rights and duties, as in the creation of contracts, and coercive, as it punishes those who infringe its regulations. Law consists of a series of rules regulating behaviour, and reflecting, to some extent, the ideas and preoccupations of the society within which it functions.

And so it is with what is termed international law, with the important difference that the principal subjects of international law are nation-states, not individual citizens. There are many contrasts between the law within a country (municipal law) and the law that operates outside and between states, international organisations and, in certain cases, individuals.

International law itself is divided into conflict of laws (or private international law as it is sometimes called) and public international law (usually just termed international law).[1] The former deals with those cases, *within* particular legal systems, in which foreign elements obtrude, raising questions as to the application of foreign law or the role of foreign courts.[2]

[1] This term was first used by J. Bentham: see *Introduction to the Principles of Morals and Legislation*, London, 1780.

[2] See e.g. C. Cheshire and P. North, *Private International Law*, 13th edn, London, 1999.

For example, if two Englishmen make a contract in France to sell goods situated in Paris, an English court would apply French law as regards the validity of that contract. By contrast, public international law is not simply an adjunct of a legal order, but a separate system altogether,[3] and it is this field that will be considered in this book.

Public international law covers relations between states in all their myriad forms, from war to satellites, and regulates the operations of the many international institutions. It may be universal or general, in which case the stipulated rules bind all the states (or practically all depending upon the nature of the rule), or regional, whereby a group of states linked geographically or ideologically may recognise special rules applying only to them, for example, the practice of diplomatic asylum that has developed to its greatest extent in Latin America.[4] The rules of international law must be distinguished from what is called international comity, or practices such as saluting the flags of foreign warships at sea, which are implemented solely through courtesy and are not regarded as legally binding.[5] Similarly, the mistake of confusing international law with international morality must be avoided. While they may meet at certain points, the former discipline is a legal one both as regards its content and its form, while the concept of international morality is a branch of ethics. This does not mean, however, that international law can be divorced from its values.

In this chapter and the next, the characteristics of the international legal system and the historical and theoretical background necessary to a proper appreciation of the part to be played by the law in international law will be examined.

## Law and politics in the world community

It is the legal quality of international law that is the first question to be posed. Each side to an international dispute will doubtless claim legal justification for its actions and within the international system there is no independent institution able to determine the issue and give a final decision.

Virtually everybody who starts reading about international law does so having learned or absorbed something about the principal characteristics of ordinary or domestic law. Such identifying marks would include the

[3] See the *Serbian Loans* case, PCIJ, Series A, No. 14, pp. 41–2.

[4] See further below, p. 92.

[5] *North Sea Continental Shelf* cases, ICJ Reports, 1969, p. 44; 41 ILR, p. 29. See also M. Akehurst, 'Custom as a Source of International Law', 47 BYIL, 1974–5, p. 1.

existence of a recognised body to legislate or create laws, a hierarchy of courts with compulsory jurisdiction to settle disputes over such laws and an accepted system of enforcing those laws. Without a legislature, judiciary and executive, it would seem that one cannot talk about a legal order.[6] And international law does not fit this model. International law has no legislature. The General Assembly of the United Nations comprising delegates from all the member states exists, but its resolutions are not legally binding save for certain of the organs of the United Nations for certain purposes.[7] There is no system of courts. The International Court of Justice does exist at The Hague but it can only decide cases when both sides agree[8] and it cannot ensure that its decisions are complied with. Above all there is no executive or governing entity. The Security Council of the United Nations, which was intended to have such a role in a sense, has at times been effectively constrained by the veto power of the five permanent members (USA; USSR, now the Russian Federation; China; France; and the United Kingdom).[9] Thus, if there is no identifiable institution either to establish rules, or to clarify them or see that those who break them are punished, how can what is called international law be law?

It will, of course, be realised that the basis for this line of argument is the comparison of domestic law with international law, and the assumption of an analogy between the national system and the international order. And this is at the heart of all discussions about the nature of international law.

At the turn of the nineteenth century, the English philosopher John Austin elaborated a theory of law based upon the notion of a sovereign issuing a command backed by a sanction or punishment. Since international law did not fit within that definition it was relegated to the category of 'positive morality'.[10] This concept has been criticised for oversimplifying and even confusing the true nature of law within a society and for overemphasising the role of the sanction within the system by linking it to every rule.[11] This is not the place for a comprehensive summary of Austin's

[6] See generally, R. Dias, *Jurisprudence*, 5th edn, London, 1985, and H. L. A. Hart, *The Concept of Law*, Oxford, 1961.

[7] See article 17(1) of the United Nations Charter. See also D. Johnson, 'The Effect of Resolutions of the General Assembly of the United Nations', 32 BYIL, 1955–6, p. 97 and below, chapter 22.

[8] See article 36 of the Statute of the International Court of Justice and below, chapter 19.

[9] See e.g. *Bowett's Law of International Institutions* (eds. P. Sands and P. Klein), 5th edn, London, 2001, and below, chapter 23.

[10] See J. Austin, *The Province of Jurisprudence Determined* (ed. H. L. A. Hart), London, 1954, pp. 134–42.

[11] See e.g. Hart, *Concept of Law*, chapter 10.

theory but the idea of coercion as an integral part of any legal order is a vital one that needs looking at in the context of international law.

## The role of force

There is no unified system of sanctions[12] in international law in the sense that there is in municipal law, but there are circumstances in which the use of force is regarded as justified and legal. Within the United Nations system, sanctions may be imposed by the Security Council upon the determination of a threat to the peace, breach of the peace or act of aggression.[13] Such sanctions may be economic, for example those proclaimed in 1966 against Rhodesia,[14] or military as in the Korean war in 1950,[15] or indeed both, as in 1990 against Iraq.[16]

Coercive action within the framework of the UN is rare because it requires co-ordination amongst the five permanent members of the Security Council and this obviously needs an issue not regarded by any of the great powers as a threat to their vital interests.

Korea was an exception and joint action could only be undertaken because of the fortuitous absence of the USSR from the Council as a protest at the seating of the Nationalist Chinese representatives.[17]

Apart from such institutional sanctions, one may note the bundle of rights to take violent action known as self-help.[18] This procedure to resort to force to defend certain rights is characteristic of primitive systems of law with blood-feuds, but in the domestic legal order such procedures and

[12] See e.g. W. M. Reisman, 'Sanctions and Enforcement' in *The Future of the International Legal Order* (eds. C. Black and R. A. Falk), New York, 1971, p. 273; J. Brierly, 'Sanctions', 17 *Transactions of the Grotius Society*, 1932, p. 68; Hart, *Concept of Law*, pp. 211–21; A. D'Amato, 'The Neo-Positivist Concept of International Law', 59 AJIL, 1965, p. 321; G. Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement', 19 MLR, 1956, p. 1, and *The Effectiveness of International Decisions* (ed. S. Schwebel), Leiden, 1971.

[13] Chapter VII of the United Nations Charter. See below, chapter 22.

[14] Security Council resolution 221 (1966). Note also Security Council resolution 418 (1977) imposing a mandatory arms embargo on South Africa.

[15] Security Council resolutions of 25 June, 27 June and 7 July 1950. See D. W. Bowett, *United Nations Forces*, London, 1964.

[16] Security Council resolutions 661 and 678 (1990). See *The Kuwait Crisis: Basic Documents* (eds. E. Lauterpacht, C. Greenwood, M. Weller and D. Bethlehem), Cambridge, 1991, pp. 88 and 98. See also below, chapter 22.

[17] See E. Luard, *A History of the United Nations*, vol. I, *The Years of Western Domination 1945–55*, London, 1982, pp. 229–74, and below, chapter 22.

[18] See D. W. Bowett, *Self-Defence in International Law*, Manchester, 1958, and I. Brownlie, *International Law and the Use of Force by States*, Oxford, 1963.

methods are now within the exclusive control of the established authority. States may use force in self-defence, if the object of aggression, and may take action in response to the illegal acts of other states. In such cases the states themselves decide whether to take action and, if so, the extent of their measures, and there is no supreme body to rule on their legality or otherwise, in the absence of an examination by the International Court of Justice, acceptable to both parties, although international law does lay down relevant rules.[19]

Accordingly those writers who put the element of force to the forefront of their theories face many difficulties in describing the nature, or rather the legal nature of international law, with its lack of a coherent, recognised and comprehensive framework of sanctions. To see the sanctions of international law in the states' rights of self-defence and reprisals[20] is to misunderstand the role of sanctions within a system because they are at the disposal of the states, not the system itself. Neither must it be forgotten that the current trend in international law is to restrict the use of force as far as possible, thus leading to the absurd result that the more force is controlled in international society, the less legal international law becomes.

Since one cannot discover the nature of international law by reference to a definition of law predicated upon sanctions, the character of the international legal order has to be examined in order to seek to discover whether in fact states feel obliged to obey the rules of international law and, if so, why. If, indeed, the answer to the first question is negative, that states do not feel the necessity to act in accordance with such rules, then there does not exist any system of international law worthy of the name.

## The international system[21]

The key to the search lies within the unique attributes of the international system in the sense of the network of relationships existing primarily, if not exclusively, between states recognising certain common principles

[19] See below, chapter 19. See also M. Barkin, *Law Without Sanctions*, New Haven, 1967.

[20] See e.g. H. Kelsen, *General Theory of Law and State*, London, 1946, pp. 328 ff.

[21] See L. Henkin, *How Nations Behave*, 2nd edn, New York, 1979, and Henkin, *International Law: Politics and Values*, Dordrecht, 1995; M. A. Kaplan and N. Katzenbach, *The Political Foundations of International Law*, New York, 1961; C. W. Jenks, *The Common Law of Mankind*, London, 1958; W. Friedmann, *The Changing Structure of International Law*, New York, 1964; A. Sheikh, *International Law and National Behaviour*, New York, 1974; O. Schachter, *International Law in Theory and Practice*, Dordrecht, 1991; T. M. Franck, *The Power of Legitimacy Among Nations*, Oxford, 1990; R. Higgins, *Problems and Process*, Oxford, 1994, and *Oppenheim's International Law* (eds. R. Y. Jennings and A. D. Watts), 9th edn, London, 1992, vol. I, chapter 1.

and ways of doing things.[22] While the legal structure within all but the most primitive societies is hierarchical and authority is vertical, the international system is horizontal, consisting of over 190 independent states, all equal in legal theory (in that they all possess the characteristics of sovereignty) and recognising no one in authority over them. The law is above individuals in domestic systems, but international law only exists as between the states. Individuals only have the choice as to whether to obey the law or not. They do not create the law. That is done by specific institutions. In international law, on the other hand, it is the states themselves that create the law and obey or disobey it.[23] This, of course, has profound repercussions as regards the sources of law as well as the means for enforcing accepted legal rules.

International law, as will be shown in succeeding chapters, is primarily formulated by international agreements, which create rules binding upon the signatories, and customary rules, which are basically state practices recognised by the community at large as laying down patterns of conduct that have to be complied with.

However, it may be argued that since states themselves sign treaties and engage in action that they may or may not regard as legally obligatory, international law would appear to consist of a series of rules from which states may pick and choose. Contrary to popular belief, states do observe international law, and violations are comparatively rare. However, such violations (like armed attacks and racial oppression) are well publicised and strike at the heart of the system, the creation and preservation of international peace and justice. But just as incidents of murder, robbery and rape do occur within national legal orders without destroying the system as such, so analogously assaults upon international legal rules point up the weaknesses of the system without denigrating their validity or their necessity. Thus, despite the occasional gross violation, the vast majority of the provisions of international law are followed.[24]

[22] As to the concept of 'international community', see e.g. G. Abi-Saab, 'Whither the International Community?', 9 EJIL, 1998, p. 248, and B. Simma and A. L. Paulus, 'The "International Community": Facing the Challenge of Globalisation', 9 EJIL, 1998, p. 266. See also P. Weil, 'Le Droit International en Quête de son Identité', 237 HR, 1992 VI, p. 25.

[23] This leads Rosenne to refer to international law as a law of co-ordination, rather than, as in internal law, a law of subordination, *Practice and Methods of International Law*, Dordrecht, 1984, p. 2.

[24] See H. Morgenthau, *Politics Among Nations*, 5th edn, New York, 1973, pp. 290–1; Henkin, *How Nations Behave*, pp. 46–9; J. Brierly, *The Outlook for International Law*, Oxford, 1944, p. 5, and P. Jessup, *A Modern Law of Nations*, New York, 1948, pp. 6–8.

In the daily routine of international life, large numbers of agreements and customs are complied with. However, the need is felt in the hectic interplay of world affairs for some kind of regulatory framework or rules network within which the game can be played, and international law fulfils that requirement. States feel this necessity because it imports an element of stability and predictability into the situation.

Where countries are involved in a disagreement or a dispute, it is handy to have recourse to the rules of international law even if there are conflicting interpretations since at least there is a common frame of reference and one state will be aware of how the other state will develop its argument. They will both be talking a common language and this factor of communication is vital since misunderstandings occur so easily and often with tragic consequences. Where the antagonists dispute the understanding of a particular rule and adopt opposing stands as regards its implementation, they are at least on the same wavelength and communicate by means of the same phrases. That is something. It is not everything, for it is a mistake as well as inaccurate to claim for international law more than it can possibly deliver. It can constitute a mutually understandable vocabulary book and suggest possible solutions which follow from a study of its principles. What it cannot do is solve every problem no matter how dangerous or complex merely by being there. International law has not yet been developed, if it ever will, to that particular stage and one should not exaggerate its capabilities while pointing to its positive features.

But what is to stop a state from simply ignoring international law when proceeding upon its chosen policy? Can a legal rule against aggression, for example, of itself prevail over political temptations? There is no international police force to prevent such an action, but there are a series of other considerations closely bound up with the character of international law which might well cause a potential aggressor to forbear.

There is the element of reciprocity at work and a powerful weapon it can be. States quite often do not pursue one particular course of action which might bring them short-term gains, because it could disrupt the mesh of reciprocal tolerance which could very well bring long-term disadvantages. For example, states everywhere protect the immunity of foreign diplomats for not to do so would place their own officials abroad at risk.[25] This constitutes an inducement to states to act reasonably and moderate

[25] See *Case Concerning United States Diplomatic and Consular Staff in Tehran*, ICJ Reports, 1980, p. 3; 61 ILR, p. 502. See also the US Supreme Court decision in *Boos* v. *Barry* 99 L. Ed. 2d 333, 345–6 (1988); 121 ILR, p. 499.

demands in the expectation that this will similarly encourage other states to act reasonably and so avoid confrontations. Because the rules can ultimately be changed by states altering their patterns of behaviour and causing one custom to supersede another, or by mutual agreement, a certain definite reference to political life is retained. But the point must be made that a state, after weighing up all possible alternatives, might very well feel that the only method to protect its vital interests would involve a violation of international law and that responsibility would just have to be taken. Where survival is involved international law may take second place.

Another significant factor is the advantages, or 'rewards', that may occur in certain situations from an observance of international law. It may encourage friendly or neutral states to side with one country involved in a conflict rather than its opponent, and even take a more active role than might otherwise have been the case. In many ways, it is an appeal to public opinion for support and all states employ this tactic.

In many ways, it reflects the esteem in which law is held. The Soviet Union made considerable use of legal arguments in its effort to establish its non-liability to contribute towards the peacekeeping operations of the United Nations,[26] and the Americans too, justified their activities with regard to Cuba[27] and Vietnam[28] by reference to international law. In some cases it may work and bring considerable support in its wake, in many cases it will not, but in any event the very fact that all states do it is a constructive sign.

A further element worth mentioning in this context is the constant formulation of international business in characteristically legal terms. Points of view and disputes, in particular, are framed legally with references to precedent, international agreements and even the opinions of juristic authors. Claims are pursued with regard to the rules of international law and not in terms of, for example, morality or ethics.[29] This has brought into being a class of officials throughout governmental departments, in

[26] See *Certain Expenses of the United Nations*, ICJ Reports, 1962, p. 151; 34 ILR, p. 281, and R. Higgins, *United Nations Peace-Keeping; Documents and Commentary*, Oxford, 4 vols., 1969–81.

[27] See e.g. A. Chayes, *The Cuban Missile Crisis*, Oxford, 1974, and Henkin, *How Nations Behave*, pp. 279–302.

[28] See e.g. *The Vietnam War and International Law* (ed. R. A. Falk), Princeton, 4 vols., 1968–76; J. N. Moore, *Law and the Indo-China War*, Charlottesville, 1972, and Henkin, *How Nations Behave*, pp. 303–12.

[29] See Hart, *Concept of Law*, p. 223.

addition to those working in international institutions, versed in international law and carrying on the everyday functions of government in a law-oriented way. Many writers have, in fact, emphasised the role of officials in the actual functioning of law and the influence they have upon the legal process.[30]

Having come to the conclusion that states do observe international law and will usually only violate it on an issue regarded as vital to their interests, the question arises as to the basis of this sense of obligation.[31] The nineteenth century, with its business-oriented philosophy, stressed the importance of the contract, as the legal basis of an agreement freely entered into by both (or all) sides, and this influenced the theory of consent in international law.[32] States were independent, and free agents, and accordingly they could only be bound with their own consent. There was no authority in existence able theoretically or practically to impose rules upon the various nation-states. This approach found its extreme expression in the theory of auto-limitation, or self-limitation, which declared that states could only be obliged to comply with international legal rules if they had first agreed to be so obliged.[33]

Nevertheless, this theory is most unsatisfactory as an account of why international law is regarded as binding or even as an explanation of the international legal system.[34] To give one example, there are about 100 states that have come into existence since the end of the Second World War and by no stretch of the imagination can it be said that such states have consented to all the rules of international law formed prior to their establishment. It could be argued that by 'accepting independence', states consent to all existing rules, but to take this view relegates consent to the role of a mere fiction.[35]

[30] See e.g. M. S. McDougal, H. Lasswell and W. M. Reisman, 'The World Constitutive Process of Authoritative Decision' in *International Law Essays* (eds. M. S. McDougal and W. M. Reisman), New York, 1981, p. 191.

[31] See e.g. J. Brierly, *The Basis of Obligation in International Law*, Oxford, 1958.

[32] See W. Friedmann, *Legal Theory*, 5th edn, London, 1967, pp. 573–6. See also the *Lotus* case, PCIJ, Series A, No. 10, p. 18.

[33] E.g. G. Jellinek, *Allgemeine Rechtslehre*, Berlin, 1905.

[34] See also Hart, *Concept of Law*, pp. 219–20. But see P. Weil, 'Towards Relative Normativity in International Law?', 77 AJIL, 1983, p. 413 and responses thereto, e.g. R. A. Falk, 'To What Extent are International Law and International Lawyers Ideologically Neutral?' in *Change and Stability in International Law-Making* (eds. A. Cassese and J. Weiler), 1989, p. 137, and A. Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making', 12 Australian YIL, 1992, p. 22.

[35] See further below, p. 88.

This theory also fails as an adequate explanation of the international legal system, because it does not take into account the tremendous growth in international institutions and the network of rules and regulations that have emerged from them within the last generation.

To accept consent as the basis for obligation in international law[36] begs the question as to what happens when consent is withdrawn. The state's reversal of its agreement to a rule does not render that rule optional or remove from it its aura of legality. It merely places that state in breach of its obligations under international law if that state proceeds to act upon its decision. Indeed, the principle that agreements are binding (*pacta sunt servanda*) upon which all treaty law must be based cannot itself be based upon consent.[37]

One current approach to this problem is to refer to the doctrine of consensus.[38] This reflects the influence of the majority in creating new norms of international law and the acceptance by other states of such new rules. It attempts to put into focus the change of emphasis that is beginning to take place from exclusive concentration upon the nation-state to a consideration of the developing forms of international co-operation where such concepts as consent and sanction are inadequate to explain what is happening.

Of course, one cannot ignore the role of consent in international law. To recognise its limitations is not to neglect its significance. Much of international law is constituted by states expressly agreeing to specific normative standards, most obviously by entering into treaties. This cannot be minimised. Nevertheless, it is preferable to consider consent as important not only with regard to specific rules specifically accepted (which is not the sum total of international law, of course) but in the light of the approach of states generally to the totality of rules, understandings, patterns of behaviour and structures underpinning and constituting the international system.[39] In a broad sense, states accept or consent to the general system of international law, for in reality without that no such system could possibly operate. It is this approach which may be characterised as consensus

[36] See e.g. J. S. Watson, 'State Consent and the Sources of International Obligation', PASIL, 1992, p. 108.

[37] See below, chapter 3.

[38] See e.g. A. D'Amato, 'On Consensus', 8 Canadian YIL, 1970, p. 104. Note also the 'gentleman's agreement on consensus' in the Third UN Conference on the Law of the Sea: see L. Sohn, 'Voting Procedures in United Nations Conference for the Codification of International Law', 69 AJIL, 1975, p. 318, and UN Doc. A/Conf.62/WP.2.

[39] See e.g. J. Charney, 'Universal International Law', 87 AJIL, 1993, p. 529.

or the essential framework within which the demand for individual state consent is transmuted into community acceptance.

It is important to note that while states from time to time object to particular rules of international law and seek to change them, no state has sought to maintain that it is free to object to the system as a whole. Each individual state, of course, has the right to seek to influence by word or deed the development of specific rules of international law, but the creation of new customary rules is not dependent upon the express consent of each particular state.

## The function of politics

It is clear that there can never be a complete separation between law and policy. No matter what theory of law or political philosophy is professed, the inextricable bonds linking law and politics must be recognised.

Within developed societies a distinction is made between the formulation of policy and the method of its enforcement. In the United Kingdom, Parliament legislates while the courts adjudicate and a similar division is maintained in the United States between the Congress and the courts system. The purpose of such divisions, of course, is to prevent a concentration of too much power within one branch of government. Nevertheless, it is the political branch which makes laws and in the first place creates the legal system. Even within the hierarchy of courts, the judges have leeway in interpreting the law and in the last resort make decisions from amongst a number of alternatives.[40] This position, however, should not be exaggerated because a number of factors operate to conceal and lessen the impact of politics upon the legal process. Foremost amongst these is the psychological element of tradition and the development of the so-called 'law-habit'.[41] A particular legal atmosphere has been created, which is buttressed by the political system and recognises the independent existence of law institutions and methods of operation characterised as 'just' or 'legal'. In most countries overt interference with the juridical process would be regarded as an attack upon basic principles and hotly contested. The use of legal language and accepted procedures together with the pride of the legal profession reinforce the system and emphasise the degree

[40] See e.g. R. Dworkin, *Taking Rights Seriously*, London, 1977.

[41] See e.g. K. Llewellyn, *The Common Law Tradition*, Boston, 1960, and generally D. Lloyd, *Introduction to Jurisprudence*, 4th edn, London, 1979.

of distance maintained between the legislative–executive organs and the judicial structure.[42]

However, when one looks at the international legal scene the situation changes. The arbiters of the world order are, in the last resort, the states and they both make the rules (ignoring for the moment the secondary, if growing, field of international organisations) and interpret and enforce them.

While it is possible to discern an 'international legal habit' amongst governmental and international officials, the machinery necessary to enshrine this does not exist.

Politics is much closer to the heart of the system than is perceived within national legal orders, and power much more in evidence.[43] The interplay of law and politics in world affairs is much more complex and difficult to unravel, and signals a return to the earlier discussion as to why states comply with international rules. Power politics stresses competition, conflict and supremacy and adopts as its core the struggle for survival and influence.[44] International law aims for harmony and the regulation of disputes. It attempts to create a framework, no matter how rudimentary, which can act as a kind of shock-absorber clarifying and moderating claims and endeavouring to balance interests. In addition, it sets out a series of principles declaring how states should behave. Just as any domestic community must have a background of ideas and hopes to aim at, even if few can be or are ever attained, so the international community, too, must bear in mind its ultimate values.

However, these ultimate values are in a formal sense kept at arm's length from the legal process. As the International Court noted in the *South-West Africa* case,[45] 'It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.'[46]

International law cannot be a source of instant solutions to problems of conflict and confrontation because of its own inherent weaknesses

[42] See P. Stein and J. Shand, *Legal Values in Western Society*, Edinburgh, 1974.

[43] See generally Henkin, *How Nations Behave*, and Schachter, *International Law*, pp. 5–9.

[44] See G. Schwarzenberger, *Power Politics*, 3rd edn, London, 1964, and Schwarzenberger, *International Law*, 3rd edn, London, 1957, vol. I, and Morgenthau, *Politics Among Nations*.

[45] ICJ Reports, 1966, pp. 6, 34.

[46] But see Higgins' criticism that such a formulation may be question-begging with regard to the identity of such 'limits of its own discipline', *Problems*, p. 5.

in structure and content. To fail to recognise this encourages a utopian approach which, when faced with reality, will fail.[47] On the other hand, the cynical attitude with its obsession with brute power is equally inaccurate, if more depressing.

It is the medium road, recognising the strength and weakness of international law and pointing out what it can achieve and what it cannot, which offers the best hope. Man seeks order, welfare and justice not only within the state in which he lives, but also within the international system in which he lives.

## Historical development[48]

The foundations of international law (or the law of nations) as it is understood today lie firmly in the development of Western culture and political organisation.

The growth of European notions of sovereignty and the independent nation-state required an acceptable method whereby inter-state relations could be conducted in accordance with commonly accepted standards of

[47] Note, of course, the important distinction between the existence of an obligation under international law and the question of the enforcement of that obligation. Problems with regard to enforcing a duty cannot affect the legal validity of that duty: see e.g. Judge Weeramantry's Separate Opinion in the Order of 13 September 1993, in the *Bosnia* case, ICJ Reports, 1993, pp. 325, 374; 95 ILR, pp. 43, 92.

[48] See in particular A. Nussbaum, *A Concise History of the Law of Nations*, rev. edn, New York, 1954; *Encyclopedia of Public International Law* (ed. R. Bernhardt), Amsterdam, 1984, vol. VII, pp. 127–273; J. W. Verzijl, *International Law in Historical Perspective*, Leiden, 10 vols., 1968–79, and M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960*, Cambridge, 2001. See also W. Grewe, *The Epochs of International Law* (trans. and rev. M. Byers), New York, 2000; A. Cassese, *International Law in a Divided World*, Oxford, 1986, and Cassese, *International Law*, 2nd edn, Oxford, 2005, chapter 2; Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, p. 41; H. Thierry, 'L'Evolution du Droit International', 222 HR, 1990 III, p. 9; P. Guggenheim, 'Contribution à l'Histoire des Sources du Droit des Gens', 94 HR, 1958 II, p. 5; A. Truyol y Serra, *Histoire de Droit International Public*, Paris, 1995; D. Gaurier, *Histoire du Droit International Public*, Rennes, 2005; D. Korff, 'Introduction à l'Histoire de Droit International Public', 1 HR, 1923 I, p. 1; P. Le Fur, 'Le Développement Historique de Droit International', 41 HR, 1932 III, p. 501; O. Yasuaki, 'When was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilisational Perpective', 2 *Journal of the History of International Law*, 2000, p. 1, and A. Kemmerer, 'The Turning Aside: On International Law and its History' in *Progress in International Organisation* (eds. R. A. Miller and R. Bratspies), Leiden, 2008, p. 71. For a general bibliography, see P. Macalister-Smith and J. Schwietzke, 'Literature and Documentary Sources relating to the History of International Law', 1 *Journal of the History of International Law*, 1999, p. 136.