INTERNATIONAL LAW AND THE MODERN WORLD

1 THE INCREASED SCOPE OF INTERNATIONAL LAW

Victory for the Allied Powers in 1945 had been achieved at a considerable cost; the major European states would need to embark on large programmes of social reconstruction. Although it was not immediately apparent, the post-1945 world would be dominated by the United States and the Soviet Union. European influence would be limited and the defeat of Japan was so comprehensive that potential aggression from that state was no longer a cause of concern. The United Nations had been born of a mixture of both American idealism and realism; the decision to locate the headquarters in New York reflected the new post-war realities. Within months of the signing of the Charter, events only served to emphasise the need for improved methods of co-operation; the employment of nuclear weapons in August 1945[1] and the reaction to the Truman Declaration of September 1945[2] indicated the need to foster improved methods of international understanding and co-operation. The end of the conflict had left the United States as the dominant industrial power, possessing nuclear weapons and being one of the few states with a constitutional structure intact and whose governing class had not been discredited. The only other major power capable of giving a lead in the reconstruction of international order was the United Kingdom, but it had been exhausted by the effort of victory and viewed its long term interests as being best served by co-operation with its major ally rather than by launching any distinctly European initiatives. International order was to be restored by the efforts of the United States.

Although much of the planning had been done prior to 1945, Franklin Roosevelt had had to grapple with the isolationist trend in American life. However, the experience of the League of Nations convinced both President Roosevelt[3] and President Truman that international order would require to be based on rules. Just as the United States had been held together by the constitution of 1787, so it was hoped that international society could coalesce around certain agreed rules. These rules would draw upon principles of American constitutional law, such as democracy and the rule of law, together with principles of decolonisation, the peaceful settlement of disputes, and a degree of free trade and open markets. International society would be managed through the United Nations and the task of economic reconstruction would fall to those institutions

1 The nature of the devastation prompted demands to limit such technology and to continue with the disarmament objectives of the League of Nations. The last effect was to persuade statesmen that the cost of any further major European conflict would simply be too high. This was later to have the effect of tempting the Soviet Union to intervene in minor disputes in other parts of the world.

2 The Truman Declaration of that month was concerned with the continental shelf and waters adjacent to the United States; it marks the beginning of the modern law of the sea. The difficulty was that unilateral action by the United States was followed by extensive maritime claims by other states leading to a degree of uncertainty as to the precise law of the sea. See Chapter 13.

3 The death of President Roosevelt on 12 April 1945 meant that it fell to President Truman to give effect to plans drawn up during the Second World War.

established after the Bretton Woods Conference of July 1944.[4] The general objective was well expressed by President Truman at San Francisco in June 1945,[5] when he observed that 'The United Nations Charter is dedicated to the achievement and observance of human rights and fundamental freedoms. Unless we can attain these objectives for all men and women everywhere – without regard to race, language or religion – we cannot have permanent peace and security'.

However, the desire to build an international order modelled on American constitutional law had to yield to events. While American influence could be employed to reform Japanese political life, it could not prevent the ascent to power of communist forces in China after 1949 and it was powerless to restrain excesses of Soviet influence in Eastern Europe. The realisation that Western Europe depended on the United States for its defence lead to the signing of the North Atlantic Treaty in 1949 and thereafter there was a tendency to view the world as divided between the American led western democracies founded on the rule of law and market economies as against those states which were subject to Communist party rule; the view that communist regimes were minded to expand served to lead to distrust and made co-operation in the Security Council very difficult in the 1950s. It also contributed to high levels of tension in 1956 in respect of the invasion of Hungary and later such suspicion manifested itself in the form of the Cuban Missile Crisis of 1962.[6]

First, although decolonisation would begin immediately after 1945, many writers are minded to view the subsequent half century as divided into a number of distinct periods. The initial period extended down to 1960 when the United Nations and General Assembly were dominated by those powers that had been victorious in the Second World War. Secondly, it is possible to point to the period after 1960 when the General Assembly had increased in size and began to reflect the influence of newly decolonised states. Thirdly, one can point to the period after 1985[7] when political change in the Soviet Union, and then in Eastern Europe, led to a reduction in tension and it made it possible for the Security Council to operate with less fear of the veto; it also allowed action to be taken against rogue states. These are, of course, only broad categories but they serve to emphasise that international law had to develop after 1945 against a background not only of an unprecedented increase in the number of states but also one of ideological conflict between competing blocs.

However, in reviewing the evolution of international society after 1945, while it is sensible to acknowledge the difficulties posed by ideological conflicts between states,[8] it is also important to recognise that there were a number of factors emerging that would contribute to the broadening of the scope of international law. First, technical change

4 The International Bank for Reconstruction and Development (IBRD) (the World Bank), designed to promote reconstruction by facilitating capital investment, and its close relative, the International Monetary Fund (IMF), designed to promote international trade through exchange rate stability.

5 In closing the San Francisco conference; these remarks were to be legally relevant because the United Nations Charter contained a number of references to the maintenance of human rights.

6 See Q Wright, 'The Cuban quarantine' (1963) 57 AJIL 546.

7 1985 marks the arrival in power of Mikhail Gorbachev; the collapse of Soviet power in Eastern Europe is normally dated from 1988–89.

8 Difficulties with the Soviet Union would prompt the resignation of the first Secretary General of the United Nations. Trygve Lie would describe the office as 'the most impossible job on this earth'.

would lead to the exploration of both outer space and the sea bed; to prevent an undignified scramble to assert rights it was necessary to put in place an international regulatory regime. Secondly, improvements in communications emphasised and served to accentuate the interdependence of the modern world in areas such as civil aviation and telecommunications. Thirdly, as statesmen reflected on the lessons to be drawn from the conflict of 1939–45, it became evident that international institutions would have to be developed to permit more detailed diplomatic exchanges and to avoid the threat to peace posed by the possible proliferation of nuclear weapons. The role of the international institutions was recognised in the Advisory Opinion of the International Court of Justice in 1949 in the *Reparation for Injuries* case.[9] After 1949, regional organisation to promote co-operation or military alliances would lead to a proliferation of international organisations. Fourthly, the process of decolonisation would increase the number of states but it was evident that many were economically backward, operating with an immature political culture. In these circumstances, regional and international organisations would be required to concentrate on work of humanitarian assistance. Fifthly, the conflict of 1939–45 was a watershed in the century. Modern technology in the form of newsreels would inform a scarcely believing world of the genocide perpetrated during the years after 1938. The establishment of an international tribunal at Nuremberg contributed to a steady growth in interest in matters of human rights. The judgment of the tribunal was endorsed by the General Assembly[10] and within a couple of years the Universal Declaration on Human Rights (1948) would set out certain basic principles. The law on human rights which would emerge is directly traceable to the events of 1933–45 and the conviction began to develop that, in certain circumstances, the manner in which a state treated its own nationals was a concern of the wider international community.

After 1945, there were three basic economic models that a developed state might adopt. The first was the free market model which would require a regime of free trade to be implemented by treaty. The conviction grew that open trade was likely to lead not only to economic growth through larger markets but also to a reduced risk of conflict. In Western Europe, the establishment of the Benelux Union in 1948 was built on in the Treaty of Paris in 1950. Seven years later, six European states would sign the Treaty of Rome and establish the European Economic Community. Secondly, the social democratic governments that took office after 1945 were influenced by Keynesian economics[11] and sought to avoid mass unemployment by international co-operation, both to promote economic growth and to counter the effect of trade cycles.[12] Thirdly, those governments influenced by Marxist thinking favoured trading activities being conducted by state

9 *Reparation for Injuries Suffered in the Service of the United Nations* (1949) ICJ 174; 16 ILR 318.

10 GA Res 95 (I), GAOR Res 1st Session (1946), p 188.

11 Maynard Keynes (1883–1946) had been a member of the delegation at Versailles and played an important role at the Bretton Wood Conference. He was influential in promoting the view that economic co-operation at an international level was as important in securing peace as that of conventional diplomatic exchanges. For a review of his work in establishing the post-war institutions, see D Moggridge, *Maynard Keynes* (1992); for an account of his early years and his reflections on Versailles, see Robert Skidelsky, *John Maynard Keynes*, Vol I, 1983; Vol II, 1992; and Vol III, 2000. In the years 1939–45, Keynes played an important role, not only raising funds to continue the war but he played a significant part with Harry Dexter White in establishing the post-war international organisations that operate today.

12 It is of interest that some social democratic thinkers stressed the protection of the environment as an objective, see CAR Crossland, *The Future of Socialism*, 1956.

bodies and this prompted developments in traditional concepts of immunity as the courts in Western nations sought to draw a distinction between sovereign functions and trading activities.[13]

Although one of the central objectives of the United Nations Charter was to promote the peaceful settlement of disputes, it was clear that in an increasingly interdependent world one of the roles of international law would be to facilitate co-operation between states in those areas where the state could not act alone. This prompted the establishment of the International Law Commission in 1947 charged by the General Assembly with the progressive development of international law and its codification. The far reaching work of this specialist body is to be found in a number of multilateral law making treaties.[14] The Commission[15] comprises 34 members from Africa, Asia, America and Europe who serve for a five year period and who are appointed from lists furnished by national governments. Much of the work of the International Law Commission consists of preparing the first drafts for international law making treaties. In some instances, drafts produced by the International Law Commission may serve as evidence of rules of customary law.

2 DECOLONISATION

The colonial Empires acquired by European powers had grown up in the years since 1500 when improvements in navigation made expansion into the new world possible. Some colonies had been lost early on; the revolt of the American colonies after 1776 and the liberation of Latin America in the years after 1815 indicated the difficulties that a European power would experience in seeking to retain possessions far from Europe. Attitudes to overseas possessions varied; the British had been content to accord Dominion status to Australia and Canada but after 1919 the political debate tended to focus upon India.

The Congress of Berlin in 1878 had required the Ottoman rulers to pay regard to the interests of their minorities and, in 1885, the same European powers indicated that colonies were to be held on trust. However, at the end of the century liberal intellectuals began to contend that colonies were being acquired as a means to export capital and as a solution to the problems of under consumption. JA Hobson's *Imperialism*, published in 1902, had linked colonial expansion to structural problems in the capitalist system.[16] Such

13 This is considered in detail in the chapter concerned with immunity from jurisdiction. For a contemporary case indicating judicial reservations as to the scope of immunity see *Krajina v Tass Agency* [1949] 2 All ER 274.

14 The Geneva Conventions of 1958 on the Territorial Sea, High Seas, and Continental Shelf; Vienna Convention on Diplomatic Relations (1961); Vienna Convention on the Law of Consular Relations (1963).

15 See I Sinclair, *The International Law Commission*, 1987; B Graeforth, 'The International Law Commission tomorrow: improving its organisation and methods of work' (1991) 85 AJIL 597.

16 JA Hobson had, before 1902, advanced a theory of under consumption. He argued that the products of industry could not be all consumed by the rich and could not be afforded by the poor. In his work *Imperialism* in 1902 he argued both that capital would tend to be exported and that competitive imperialism would tend to lead to war. Hobson's theories of under consumption would influence Maynard Keynes when he came to write his *General Theory of Employment, Interest and Money*, 1936.

works tended to detract from the appeal of colonies abroad. At the end of the 18th century a wider electoral suffrage in many Western European countries was creating demands for social reform; such measures could only be paid for by curtailing defence and other expenditures. Some argued that colonialism had played its part in the outbreak of the First World War and this questionable analysis was extended by VI Lenin in his *Imperialism: The Highest Stage of Capitalism*.[17] Although this view was not accepted by all,[18] and there was much evidence to contradict it, by 1919 much liberal intellectual opinion favoured some form of self-determination on the basis of language and cultural ties; such an approach was also endorsed by Woodrow Wilson. The danger that self-determination might simply create a new set of minorities was not always appreciated. Thus, in the Covenant of the League of Nations the duties owed in respect of mandated territory were clearly spelled out. Article 22 indicated that such territory and its peoples should form 'a sacred trust of civilisation'. The duties on the Mandatory required it to raise the standard of living of the people so as to prepare the territory for independent statehood. The same general obligation was continued in the United Nations Trusteeship system.[19] The duties towards mandated territories and the granting of Dominion status indicated that some European powers realised that decolonisation was inevitable. By the mid-1920s both Australia[20] and Canada[21] had acquired full internal autonomy and the power to conduct external relations.

The duration and intensity of conflict in the Second World War was to place a heavy strain on European states and after that date decolonisation began in earnest. As regards the United Kingdom, the effort of securing victory had exhausted national resources and future revenues would be needed for social reform at home.[22] The administration of Clement Attlee acted to grant independence to India[23] and this process of decolonisation was then followed by subsequent administrations in the 1950s. In the case of the United Kingdom, the Suez debacle prompted a re-assessment of objectives[24] and applications to join the European Economic Community followed shortly thereafter.

The return of De Gaulle[25] to power in 1958 lead to a re-assessment of French foreign policy and the role of France in the world. Acting with considerable speed, De Gaulle had

17 *Imperialism: The Highest Stage of Capitalism*, 1917.

18 In his *Zur Soziologie des Imperialismus* (Imperialism and Social Classes), 1919, Joseph Schumpeteer pointed out that capitalism appears to prosper in conditions of peace and free trade and that colonialism could be explained on the basis of the mistaken self interest of a ruling class.

19 Articles 73–76 of the United Nations Charter (1945).

20 See Commonwealth of Australia Act 1900.

21 British North America Act 1867; the position clarified further in the Statute of Westminster 1931.

22 The economic difficulties encountered by the United Kingdom after 1940 are set out in detail in Robert Skidelsky's *John Maynard Keynes: Fighting for Britain (1937–1946)*, 2000.

23 Clemant Attlee (Deputy Prime Minster 1940–45; Prime Minster 1945–51). Attlee had served on the Simon Commission in 1928–29 and had first hand knowledge of the Indian problem which, in the 1920s, he regarded as 'particularly intractable and nearly insoluble'. In retirement he was to consider the granting of independence to India as the achievement of which he was most proud: see Francis Beckett, *Clem Attlee: A Biography*, 1997.

24 The long term effect of Suez being to emphasise the financial cost of foreign obligations as well as the need for the United Kingdom to reassess its foreign policy priorities. Negotiations for entry into the EEC began in 1961 although entry would not take place until 1973.

25 Charles de Gaulle (1890–1970) had served as head of the provisional government in 1944 before resigning in 1946 over the constitution of the Fourth Republic. He served as the first President of the Fifth Republic (1958–69).

by 1960 secured the effective independence of those territories in French West Africa,[26] but had underwritten such a transition by varying forms of association with France. At the same time, De Gaulle moved to extricate France from Algeria where it had been the colonial power since 1830. Such action was taken following a sober reappraisal of the role of France and the need for it to focus upon assisting Germany in seeking to mould the European Community which had come into existence in 1958. However, such an approach to decolonisation was in line with the demands of international law. On 14 December 1960, the General Assembly passed the Declaration on the Granting of Independence to Colonial Countries and Peoples[27] which required that:

> ... immediate steps shall be taken in Trust and non self-governing Territories, or in all other Territories which have not yet attained independence, to transfer all powers to the people of those Territories without any conditions whatsoever ... The inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

The experience of Suez and the emerging forms of European co-operation prompted the United Kingdom to reconsider its role in the world. In theory the British Empire had always been based on the principle that colonies would be guided towards self-government but the administration of Harold Macmillan[28] decided to expedite the process. Pressures to implement social reforms required strict control of defence spending; the circle could be squared by reducing foreign commitments. Macmillan followed the path of De Gaulle, outlining his philosophy in the 'Winds of Change' speech in 1960.[29] In 1961, preparatory work began on an application for membership of the European Community. Although the formal application of 1963 would fail decolonisation proceeded apace. The United Kingdom therefore followed France in seeking an exit from Africa. The hope was that economic and cultural ties would remain and that the newly independent states would adopt democratic constitutional structures and participate in the work of the United Nations. Although there were difficulties in the case of Southern Rhodesia[30] the pattern followed that of France. The presence of a non-democratic regime in Portugal had the consequence that decolonisation of Portuguese colonies was delayed until after the 1974 revolution.[31]

In retrospect, decolonisation was inevitable but what was surprising is the speed of disengagement. In 1945 colonial rule extended across a considerable part of the globe; after 1965 it was largely gone.[32] European states lacked the will or the resources to stay and domestic electorates demanded increases in welfare spending that could only be

26 The territories of the then Ivory Coast, Malagasy, Senegal, Niger, Cameroon, Gabon, Chad.

27 Resolution 1514 (XV) 14 December 1960.

28 Harold Macmillan (1894–1986) (Prime Minister 1957–63).

29 Delivered in Cape Town on 3 February 1960.

30 See Southern Rhodesia Act 1965; Southern Rhodesia Act 1979; Zimbabwe Act 1979. For a discussion of the constitutional position, see *Madzimbamuto v Lardner Burke* [1969] 1 AC 645.

31 Mozambique became independent in 1975; Frelimo forces had struggled for independence from Portugal since 1962; in Angola the struggle for independence from Portugal began in 1961 but was plagued by differences between the left leaning MPLA and the right leaning UNITA. Independence from Portugal was achieved in 1975.

32 Eg, India (1947), Pakistan (1947), Burma (1948), Ghana (1957), Cyprus (1960), Nigeria (1960), Tanganyika/Tanzania (1962), Uganda (1962), Malaysia (1963), Kenya (1963), Northern Rhodesia/Zambia (1964).

afforded by tight control of external obligations. Negotiations for independence were normally conducted with small elites who tended to be more optimistic than the facts warranted about the prospects on independence. The consequence was that many small states were poor and laboured under problems of a limited infrastructure; in Africa, ethnic tensions produced unstable governments and, in some cases, constitutionalism gave way to military rule.

Thus, in the 1960s international law was having to operate in a greatly changed environment. The main contours were an ideological struggle between the Soviet Union and the United States, the relative decline of Europe and an increase in the number of third world states, many of whom were plagued by problems of poverty, illiteracy and lack of investment. International law, which might still have been viewed as Eurocentric in 1900, now had to accommodate a much larger number of states ranging from the very prosperous to the near bankrupt. Such diversity was without precedent and raised the problem of how to reconcile such interests.

A sign of the changing international scene was the Afro-Asian conference summoned by President Sukarno[33] to Bandung in April 1955. The gathering was attended by 23 states from Asia and four from Africa. The conference was called at a time when there was a degree of euphoria amongst newly independent states and a reluctance to acknowledge how intractable some of the problems of underdevelopment would prove to be. The conference contained a demand for African and Asian countries to refrain from siding with either grouping in the Cold War.

Although, of course, the increase in the number of states augmented the membership of the General Assembly and thereby superficially increased the influence of newly decolonised states, this may have been a mirage. In the case of Africa and, to a lesser extent, in Asia, the domestic problems of such states were considerable; with high levels of illiteracy and poverty, many were plagued by underdevelopment and political instability. In Africa, several passed from constitutional rule to *de facto* military dictatorship. Those that sought to increase the gross domestic product by some form of socialist planning were at first able to rely on support from the Soviet Union but, after the death of Leonid Brezhnev in 1982, those holding power in Moscow became more concerned with their own internal problems. The experience of such states contrasts with Western Europe and the United States, where the years after 1945 witnessed a steady increase in domestic prosperity. A period of peace allowed considerable progress to be made in the areas of education, transport, health provision and welfare. The most radical transformation was in Germany where the country defeated and occupied in 1945 was, under the leadership of Konrad Adenauer,[34] able to play a significant role in the establishment of the European Community as provided for in the Treaty of Rome in 1957.

The effect of such post-war developments was that although international society contained a greater number of states the diversity in social and economic conditions was without precedent. In some states, constitutional government under the rule of law

33 Achmed Sukarno (1901–70), President of Indonesia (1945–67).

34 Konrad Adenauer (1876–1967) Chancellor of West Germany (1949–63). The *Wirtshaftswunder* of the Adenauer-Erhard period is a matter of record, But it is also sensible to reflect on French success. Notwithstanding the political difficulties of the Fourth Republic (1946–58), industrial production tripled in the period 1952–72.

provided the conditions for the economic growth that permitted steady increases in standards of health, housing, education, transport and leisure. In other states, the absence of political stability and problems of under investment caused continuing problems of poverty, illiteracy and premature death. Thus, the task of the United Nations and of international law has been to construct those institutions and rules that will permit beneficial co-operation between the affluent world and the poorer states. After 1945 the emphasis in international law has been to facilitate measures of co-operation.

3 THEORIES AS TO THE NATURE OF INTERNATIONAL LAW

One of the consequences of the abuses perpetrated during the Second World War was a revival of interest in natural law thinking. The conduct of the rulers of Germany in the period 1933–45 served to demonstrate the dangers of those schools of extreme positivism which placed no limitations on state sovereignty. In the aftermath of the Holocaust it[35] was obvious that the international community should seek to maintain minimum standards of state conduct. Such objectives are set out in the United Nations Charter (1945) and the Universal Declaration of Human Rights (1948). At the same time, many states produced new constitutional documents designed either to confer basic guarantees of human rights or to provide that established rules of international law should be incorporated into municipal law.[36] On the international plane, the revival of the natural law tradition is to be found in the expansion of the law on human rights and, in the related sphere of private international law, the same guiding principles is to be detected in the reluctance of municipal courts to acknowledge and enforce foreign laws objectionable on ethical grounds.[37] Natural law thinking is also identifiable in the provisions of the United Nations Charter (1945) designed to restrain aggression and to restrict the use of force. Of all the horrors arising in the Second World War, the systematic destruction of the Jewish population in Europe was the gravest. Thus, the natural law emphasis on minimum international standards is to be found not only in the judgment of the Nuremberg tribunal but also in the Genocide Convention (1948) and the Convention Relating to the Status of Refugees (1951). Moreover, the natural law emphasis on the peaceful settlement of disputes and the avoidance of armed conflict was particularly pertinent when, after 1945,[38] the world had become aware of the likely cost of a nuclear conflict. It is therefore possible to view the years after 1945 as giving greater emphasis to

35 Although the precise figure will never be known, it is accepted by most historians that the figure of innocent victims was in the region of 6 million; see *Attorney General of Israel v Eichman* (1961) 36 ILR 5. Historical research indicates that six million of Europe's eight million Jews perished. For a detailed treatment, see Martin Gilbert, *The Holocaust*, 1986.

36 The most obvious example being the provisions as to basic rights in the German Constitution of 1949 which, by Art 19, may not be encroached upon. Article 25 provides for general rules of public international law to be part of federal law and to take precedence. This was not a fresh start as Art 4 of the 1919 Weimar Constitution had carried a like provision.

37 *Oppenheimer v Cattermole* [1976] AC 249.

38 Although nuclear weapons were not used against Japan until August 1945, several weeks after the signing of the United Nations Charter; the preparatory work on the United Nations Charter had taken place in the years 1943–45, at the same time that research on nuclear weapons was being conducted. President Roosevelt was, of course, aware that the nature of such weapons made it imperative that the United Nations framework was robust enough to restrain international conflict.

arguments based upon natural law and natural rights, in particular in the attempts to develop an international law of human rights.

While decolonisation and the tension of the Cold War would influence the development of international law, the impact of theory should not be underestimated. Positivism had dominated the subject since the 18th century; it was a theory that accorded with the rationalist and optimistic spirit of the enlightenment and in the 19th century it was congenial to the practitioners of *Realpolitik* such as Cavour and Bismarck who sought to avoid any restraints on state conduct. However, positivist theories would themselves influence the teaching, if not the practice, of international law.

One of the most influential writers was Hans Kelsen (1881–1973), who drew upon Immanuel Kant's theory of knowledge to put forward his own analysis of legal systems. Kant had argued that knowledge was not merely an aggregate of sense impressions but depended on the categories and concepts imposed by human beings themselves. Kelsen[39] asserted that law and a legal system should be subject to a similar analysis. Law, he held, should be analysed by reference to its constituent elements without reference to extraneous political, cultural or social phenomena. A legal system under such a 'pure' analysis was but a hierarchy of norms or ought propositions where each norm is validated by reference to a prior norm until one reaches the fundamental norm or *Grundnorm*. The *Grundnorm* would not be the constitution itself but the constitutional evolution which validates it. In relation to international law, Kelsen adopted a monist approach and tended to the view that the *Grundnorm* was based on the principle of customary law that *pacta sunt servanda*. He viewed law as a unified area of knowledge and once it was conceded that international law comprised legal rules binding upon states, it followed that it must be part of a single system. Kelsen viewed international law as being based on a hierarchy of custom, treaty and judicial and arbitral decisions.

The difficulties with this approach are considerable. First, the monist theory is certainly not accepted by most states and appears to have been adopted to fit Kelsen's general theory into the scheme of international law. Secondly, the uncertain nature of customary law makes it an unsuitable choice for a *Grundnorm* and the principle of *pacta sunt servanda* lacks the requisite element of effectiveness. Thirdly, any attempt to analyse international law without reference to historical, social or economic conditions must be open to serious question. Although Kelsen's analysis of international law has attracted considerable textbook comment, there is no evidence of it being relied upon in international tribunals and treatment in municipal courts has been equivocal at best.[40]

While the relevance of Kelsen's thought to international law has been deemed questionable, considerable attention has been paid to the analysis of the philosopher and jurist HLA Hart whose *The Concept of Law* was published in 1961; this volume was widely read and precipitated a considerable volume of scholarly comment. Professor Hart[41] was

39 For Hans Kelsen, see 'Pure theory of law' (1934) 50 LQR 485; (1935) 51 LQR 517; *General Theory of Law and State* (trans A Wedberg), 1949; *Pure Theory of Law* (trans M Knight), 1967. For comment on Kelsen, see Jones (1935) 16 BYIL 5; Harris (1971) CLJ 103; Harris (1977) 36 CLJ 353; Paulson (1980) 39 CLJ 172.

40 See *The State v Dosso* (1958) Pak LD SC 533; *Jilani v The Government of Punjab* (1972) Pak LD SC 139; *Madzimbamuto v Lardner Burke* (1968) 2 SA 284.

41 HLA Hart (1907–92), philosopher and jurist. The most influential legal philosopher in England after 1945 and Professor of Jurisprudence at Oxford University 1954–69.

a writer in the Benthamite tradition who contended strongly for the separation of law and morals but also, as a linguistic philosopher, was concerned to emphasise how language was actually used. Hart viewed a legal system as being concerned to render certain forms of conduct 'non optional or obligatory'. He considered a legal system to depend on the interaction of primary and secondary rules. The function of primary rules is to regulate behaviour while the function of secondary rules is to permit the changing of primary rules and to provide means of adjudication. In an advanced society, there will be a rule of recognition that permits the identification of primary rules, while a primitive legal system will be characterised simply by primary rules. This theoretical construct has not passed without criticism, in particular as to whether it makes sufficient allowance for the differences between rule making institutions.[42]

Professor Hart devoted particular attention to the nature of international law. He viewed international law as a primitive legal system which, being devoid of a legislature and without a rule of recognition or primary norm, was but simply a collection of primary rules, although the author was careful to distinguish between claims made under international law and moral claims.[43] Professor Hart conceded that obligations arose under the United Nations Charter (1945) and that the judgments of the International Court of Justice were normally respected,[44] but he asserted that international law was distinct from a developed municipal legal system in lacking secondary rules of adjudication and a rule of recognition. Although, it should be observed that Professor Hart thought that international law was subject to evolution and might develop into a system closer to an advanced system of municipal law.[45]

To the extent that the analyses of Kelsen and Hart were intended to apply regardless of the system or its culture; both represent modified forms of positivism. These analyses have been subject to criticism, on the ground that they place too great an emphasis on rules and thus attach too little importance to the principles and rights that judges, bound by precedent, seek to sustain or the policies and goals that legislatures seek to develop.[46] However, given the evolving and different nature of international law, Professor Hart is surely correct to indicate that it may yet evolve in a manner analogous to a developed system of municipal law.

Those seeking support for positivism as an influential theory in the present century often refer to the judgment of the Permanent Court of International Court of Justice in the *Lotus* case[47] where the court observed 'the rules of law binding upon States ... emanate from their own free will ... restrictions upon the independence of States cannot therefore be presumed'. Moreover, after 1945, Marxist governments tended to adopt a positivist approach, as did newly independent states who often advanced positivist arguments to stress the role of treaties and to diminish the position of customary international law.

42 See J Raz, 'The institutional nature of law' (1975) 38 MLR 489. See, also, R Summers (1963) 98 Duke Law Journal 629; MS Blackman (1977) 94 SALJ 415.

43 See *The Concept of Law*, 2nd edn, 1994, p 227.

44 *Ibid*, p 232.

45 *Ibid*, p 237.

46 Notably by Ronald Dworkin in *Taking Rights Seriously*, 1977; *A Matter of Principle*, 1986; *Law's Empire*, 1986; *Freedom's Law*, 1996. On this writer generally, see Stephen Guest, *Ronald Dworkin*, 2nd edn, 1997.

47 The *Lotus* case (1927) PCIJ, Ser A, No 10, p 18.

Positivism as a theory has always been favoured by those states seeking freedom of action in all spheres save those where voluntary restraints have been accepted.

One of the most significant developments in the 19th century was the emergence of sociology as a distinct academic discipline. Although this subject may have many different schools,[48] a consistent theme has been the desire to emphasise the study of law and legal institutions in relation to society as a whole. Such an approach might be political, reformist or revolutionary but the usual technique was to analyse law against the society in which it operates. Thus, the Marxist view of the evolutionary and determinist nature of social change directly influenced the approach of the Soviet Union to questions of international law. One of the consequences of the sociological approach has been that there came to be an increasing emphasis on empirical evidence rather than formal theories. Although it is possible to trace the sociological approach back to Jeremy Bentham, the figure most associated with the movement is Roscoe Pound.[49] Pound argued that the formation, interpretation and application of law should take account of social facts; such an approach could only be based on an objective interpretation of empirical evidence.[50] The objective was a society that was efficient and biased towards the elimination of waste; the task of the lawyer and administrator was seen as analogous to that of the engineer. The importance of this approach was that it first took root in the the United States, the state which would dominate international society after 1919; secondly, the movement coincided with the writings of those jurists held to belong to the realist school.

American realism has been described as a combination of the positivist and the sociological approach. It may be an exaggeration to speak of the movement as a school and it might simply be regarded as a gloss upon the sociological school; thus the sociological approach would examine how the law reacted to other social forces, while the realists tended to analyse how the legal system worked in practice. Realism was said to draw on the extra judicial writings of Oliver Wendell Holmes Jr,[51] although it would be unwise to categorise that learned judge as belonging to the school. Other writers in the United States who followed such an approach would be Jerome Frank[52] and Karl Llewelyn.[53] Related to these forms of legal realism is the realism to be detected amongst scholars of international relations who view international conduct as grounded in the self-

48 It is sometimes argued that one can distinguish (i) the political sociology of Montesquieu (1689–1755) and De Tocqueville (1805–59); (ii) those sociologists grouped around Auguste Comte (1798–1857), who probably first coined the term 'sociology' in 1830. Comte, who had trained as a mathematician, placed emphasis on scientific research, industrial application and an ethical system based on reason; (iii) those sociologists who followed the evolutionary, determinist and utopian thought of Karl Marx (1818–83). The seizure of power by VI Lenin resulted in a state government dedicated to pursue a Marxist approach in the conduct of international relations.

49 Roscoe Pound (1870–1964): see 'The scope and purpose of sociological jurisprudence' (1911) 24 HLR 591; (1912) 25 HLR 140, p 489; 'A survey of social interests' (1944) 57 HLR 1.

50 See, also, J Stone, 'The golden age of Pound' (1962) 4 Sydney Law Review 1.

51 Oliver Wendell Holmes Jr (1841–1935). Before becoming a Supreme Court Judge in 1902, Holmes had taught at the Harvard Law School alongside John Chipman Gray (1839–1915) another writer within the realist school. For the career of Holmes and his influence on younger lawyers see GE White, *Justice Oliver Wendell Holmes*, 1993.

52 Jerome Frank (1889–1957), *Law and the Modern Min*, 1949.

53 Karl Llewelyn (1893–1962), 'Some realism about realism' (1931) 44 HLR 1222; *The Bramble Bush*, 1930; *The Common Law Tradition*, 1960; see also W Twining, *Karl Llewelyn and the Realist Movement*, 1973.

interest of particular nation states.[54] Both the legal realist and the scholar of international relations tended to focus on the actual conduct of states.

The influence of such approaches in the United States was to move the terms of the discussion away from formal theories towards actual conduct. Such a method could easily be applied to international law and had an obvious affinity with the developing discipline of international relations.[55] The increasing number of regional and international organisations provided subjects for such analysis.

The influence of the American realist movement was at first domestic but, in the 1950s, as the Cold War deepened and concern about possible nuclear conflict grew, the influence of realism extended to international affairs where writers asked whether relations between the United States and the Soviet Union were determined by international law or by some other principle. One approach to this was the so called New Haven school, whose leading proponent was Professor Myers S McDougal.[56] This school, based at the Yale Law School, New Haven, Connecticut, tended to view that international law was no more than a process of decision making whereby law was but a factor amongst a number of elements in contributing to the resolution of problems on the international plane. Scholars of the New Haven school stress both the role of values and the processes by which policy decisions are made. In theory, the school rejects natural law as too subjective and positivism as being unconcerned with human dignity. However, it is arguable that the school is a mixture of both classical theories, in that it embraces the concern of the natural lawyer with values and it acknowledges the concern of the positivist with formal methods of decision making. In its emphasis on context it draws on the interdisciplinary tradition in the United States and has some affinity with the related discipline of international relations.[57]

This approach is subject to a number of reservations. First, it downgrades the role of law in the process and probably underestimates the need for the requisite degree of certainty. Secondly, it is one thing to argue that, in certain important matters, strict compliance with legal forms may not be the only consideration,[58] it is quite another to argue that rules generally are but one factor amongst many. Thirdly, although the school originates in the United States, it is not borne out by the conduct of the Department of State which tends to assert the importance of the maintenance of rules voluntarily assumed.[59] Fourthly, some later writers seen as adopting this approach have tended to respond to these criticisms by placing a greater emphasis on legal rules.[60] Fifthly, while

54 H Morgenthau, *Politics Among Nations: The Struggle for Power and* Peace, 5th edn, 1973.

55 In the years prior to 1945, those studying international relations tended to have been trained in the disciplines of classics, history or law; after 1945. the subject began to emerge as a discipline in its own right. See PA Reynolds, *An Introduction to International Relations*, 1st edn, 1970; 3rd edn, 1994. It was not until as late as 1919 that a chair in the subject was first established at a United Kingdom university. In the period since 1945, the subject has grown steadily in importance and has tended to focus on the study of the work of international and regional organisations.

56 Of Yale University.

57 R Falk, 'Casting the spell: the New Haven school of international law' (1995) 104 YLJ 1991.

58 An example being NATO operations against Kosovo in March 1999, where some expressed concern as to the absence of a prior Security Council Resolution.

59 See the traditional United States assertion that states participating in the General Agreement on Tariffs and Trade (GATT) should meet the letter and spirit of the rules.

60 Eg, Professor Falk in *Human Rights and State Sovereignty*, 1981; *On Human Governance*, 1995.

such an approach may have value in explaining conduct on the international plane, it is of limited utility when a judge in a municipal court is seeking to ascertain and apply a rule of public international law. Sixthly, some writers have questioned whether the approach of the school is either too subjective[61] or too vague[62] or too much a cultural product of the Cold War.[63] It is not without significance that this approach began to emerge in the decade after 1945 when scholars in the United States began to reflect on how United States foreign policy should react to the ideological opposition of communist states. American political thought has tended to be divided between those who argue[64] that the United States should seek to extend its constitutional traditions to other states and those who argue that the United States should simply provide a model for other states to follow if they are minded to.

In addition to the policy based approach of Professor McDougal, other writers have sought to explain international law as being grounded on considerations of 'fairness' or 'legitimacy'[65] or considerations of humanity.[66] Some writers view international law as a mode of justifying international conduct,[67] while others see the system as grounded in self-interest where most states will consider the advantages of obedience to outweigh the disadvantages of non-compliance.[68] In this context, the writings of Thomas M Franck have attracted a considerable degree of interest. Professor Franck has asked the question 'Why do states observe rules of international law?' He then argues that if a rule is viewed as legitimate, then it is likely to be observed; the greater the degree of legitimacy, the more likely the observance. It is argued that the legitimacy of a rule is capable of determination on the basis of particular evidentiary criteria. The learned writer takes his argument further in arguing that legitimacy and justice are two elements of the aspect of fairness which he views as a central element in international law.[69] The liberal democratic approach of Professor Franck brings together the concerns of both constitutional law and international law. The individual citizen consents to the institutions of the state while the

61 O Young, 'International law and social science: the contributions of Myers S McDougall' (1972) 66 AJIL 60.

62 G Dorsey, 'The McDougall-Lasswell proposal to build a world public order' (1988) 82 AJIL 41.

63 See the different views on nuclear testing in the 1950s: E Margolis, 'The hydrogen bomb experiments and international law' (1955) 64 YLJ 629 and M McDougal and N Schlei, 'The hydrogen bomb tests in perspective: lawful measures for security' (1955) 64 YLJ 648.

64 The traditional divide in United States political life between those favouring the export of American constitutional traditions and those of a more isolationist approach is traceable back to the debates between Woodrow Wilson and Theodore Roosevelt. The history of the debate is set out in detail by Henry Kissinger in *Diplomacy*, 1994, New York.The division of opinion is of importance today because it is linked with the question of how far the United States (or any other state) should go in seeking to sustain the observance of human rights.

65 Thomas M Franck, *The Power of Legitimacy among Nations*, 1990; *Fairness in International Law and Institutions*, 1995; 'Legitimacy in the international system' (1988) 82 AJIL 705. This writer sees a relationship between the degree of legitimacy of a rule and the pressure upon a state to comply.

66 P Allott, *Eunomia: New Order for a New World*, 1990; 'Reconstituting humanity – new international law' (1992) 3 EJIL 219.

67 M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 1989.

68 L Henkin, *How Nations Behave*, 2nd edn, 1979. In this context, it cannot be said that states such as Lybia, Iraq, South Africa (in respect of the apartheid period), Indonesia (in respect of East Timor) derived any benefit from defiance of the wishes of the international community.

69 See TM Franck, 'Fairness in the international legal and institutional system' (1993) 240(III) HR 9-498.

state itself consents to the basic principles of international law. Thus, international law is sustained by a form of liberal social contract involving both citizen and state.

One of the schools of thought that has emerged in the last two decades is that of the critical legal studies movement. Deriving from the United States in the unsettled period of the early 1970s,[70] the critical legal studies movement follows the American realists in emphasising actual conduct, but it rejects the liberal outlook of that movement and, in particular, the assumption that legal reasoning is distinct from the society that it serves. The movement follows Marxist thought in examining the economic interests served by a particular legal rule. So that the principle of freedom of contract is viewed not an essential element within liberal society,[71] but as a doctrine designed to promote the interests of private capital. The movement itself is hostile to black letter formal legal rules and places emphasis on an extreme degree of scepticism. Broadly, the movement tends to the view that, at best, law tends to favour the *status quo* and, at worst, it may serve to confer legitimacy on unjust social structures. Scholars of the critical legal studies movement stress the political, social and cultural background of a legal system; the possibility of a distinct legal system with an objectively determined rule is denied. Writers such as Koskenniemi[72] urge public international lawyers to focus less on the technical analysis of rules and more on seeking justice within a particular context. In short, such writers seek to minimise the importance of general rules and stress the importance of an analysis of the context in which the dispute arises.

The critical legal studies movement asserts that law plays an important role in moulding social change and so the movement might be viewed as part of the general post modernist view that it is ideas rather than the economic base that constitute modern society. However, economic considerations are not ignored; one of its most influential writers, Roberto Unger, has placed considerable emphasis on providing greater access to capital in contemporary society.[73] In the context of international law, writers[74] have tended to focus on the role of law in promoting conflict resolution and have emphasised the conduct of the individual participants. Such writers reject a universal definition of law and regard international difficulties as forms of social conflict to be resolved by political means. It has to be recognised that while such views may have had some impact on the teaching of international law they are very much at the margin if not *de lege ferenda* and thus have had little impact in practice.

70 Coinciding with the protests in the United States as to the conduct of the Vietnam War and the polarised nature of the American political process in the years 1972–74, which culminated in the enforced resignation of President Nixon in August 1974. The election of President Carter in November 1976 resulted in a greater emphasis being placed on human rights questions in the conduct of American Foreign Policy.

71 The traditional statement being that of Sir George Jessel MR in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, p 465. George Jessel had served as a Liberal MP and Solicitor General in the first administration of WE Gladstone (1868–74).

72 M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 1989.

73 RM Unger, *The Critical Legal Studies Movement*, 1983; 'Legal analysis as institutional imagination' (1996) 59 MLR 11.

74 D Kennedy, 'A new stream of international law scholarship' (1988) 7 Wis ILJ 6; A Carty, *The Decay of International Law*, 1986; 'Critical international law: recent trends in the theory of international law' (1991) 2 EJIL 66; M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 1989; 'The politics of international law' (1990) 1 EJIL 4; G Dencho, 'Politics or rule of law: deconstruction and legitimacy in international law' (1993) 4 EJIL 1.

A school of thought that has developed in the last two decades is that of the feminist analysis of international law.[75] In essence, feminism is viewed as 'a mode of analysis, a method of approaching life and politics, a way of asking questions and seeking for answers',[76] in the specific context of international law, criticism has tended to focus on male domination of state elites. To an extent, this is a problem that is being remedied as women are beginning to hold a greater number of governmental positions in both the United States and Western Europe.[77] However, it is argued that women are disproportionately affected by abuses of human rights in third world countries. It is difficult to obtain precise statistics on such matters but such persons will benefit by the general movement to improve human rights that has been part of international law since 1945. While most Western European states have some form of equal pay[78] and sex discrimination legislation, feminists have directed attention to the commercial exploitation of women in third world countries. The principle of sex equality is alluded to in the preamble to the United Nations Charter and specific reference is made in Art 1(3) and Art 8. Moreover, some feminist writers point to the under representation of women in international organisations; to an extent this problem is in the process of being resolved as increasingly women take advantage of the educational opportunities and the level of female participation in public life increases in each state.[79]

Amongst writers of the feminist school, there are a number of approaches. Some, such as liberal feminists, stress the need for non-discrimination and equality of opportunity,[80] while cultural feminists point to the male domination within the international legal

75 For a general survey, see Hilaire Barnett, *Introduction to Feminist Jurisprudence*, 1998. On the specific aspect of international law, see Hilary Charlesworth, Christine Chenkin and Shelley Wright, 'Feminist approaches to international law' (1991) 85 AJIL 613. For a detailed exposition, see H Charlesworth and C Chinkin, *The Boundaries of International Law: A Feminist Analysis*, 2000.

76 Nancy Harstock in *Feminist Theory and the Development of Revolutionary Strategy*, in ZR Eisenstein (ed), *Capitalist Patriarchy and the Case for a Socialist Feminism*, 1979. See, also, Nancy Harstock, *Money, Sex and Power: Toward a Feminist Historical Materialism*, 1983.

77 A conspicuous example being Madeleine Albright who served as United States Ambassador to the United Nations before assuming the office of Secretary of State in 1997.

78 Equal Pay Act 1970; Sex Discrimination Acts 1975, 1986. An example of the early emphasis by Western Europe on equality of the sexes is to be found in Art 119 of the Treaty of Rome (1957).

79 It is interesting to observe the increasing numbers of women serving as members of legislatures or as government ministers. Sometimes this is a result of a left leaning progressive regime, such as after the election of François Mitterand in France in 1981 or Bill Clinton in the United States in 1992. In the United Kingdom, Margaret Thatcher became the first woman Prime Minister in May 1979. The election of Tony Blair as Prime Minster in 1997 coincided with record numbers of women being elected to the House of Commons. The number of female cabinet ministers increased steadily under both John Major (1990–97) and Tony Blair. In 1995, the United Kingdom provided the first female judge to the International Court of Justice. No woman has yet served as United Kingdom Foreign Secretary, although several have served in the Foreign and Commonwealth Office as junior ministers. No woman has yet served as United Nations Secretary General, although Mary Robinson (former President of Ireland) was a serious candidate in 1996. Women have, of course, served as European Commissioners, of whom the best known is Edith Cresson, a former Prime Minster of France.

80 L Finley 'Transcending equality theory: a way out of the maternity and workplace debate' (1986) 86 Columbia Law Review 1118.

order.[81] In contrast, radical feminists, such as Catherine MacKinnon,[82] stress the need for legal action as a method of remedying wrongs against women. Such writers, however, tend to come from affluent developed countries and it is noticeable that different opinions are expressed by those writers described as third world feminists, who are concerned with problems of economic and racial exploitation, illiteracy and poverty. Although there are differences of approach, it is possible to see in all the viewpoints a common humanitarian concern and a desire to use national and international institutions to achieve a measure of social justice and equality for women. However, it is accepted by most[83] that the problems faced by women in the poorest countries are often the most severe, often lacking food, health care or educational opportunity.

Feminist writers further argue that international law has failed to curb practices that undermine the human rights of women in third world countries; they point to the continuance of forced sterilisation, trafficking in women, interference in family life and the practice of female circumcision. Feminist writers allege that international bodies are reluctant to confront cultural and religious traditions that subordinate the role of women. Attention has also been directed by feminist writers to the limited educational opportunities available for women and the commercial exploitation of women and children. On the international plane, the Convention on the Elimination of All Forms of Discrimination against Women (1979) has attracted a considerable number of accessions but many instruments have been accompanied by reservations designed to preserve religious or cultural requirements. The allegation made by some feminist writers is that respect for state sovereignty allows the continuance of practices that discriminate against women. This is particularly frustrating for American feminist writers who have placed emphasis on using constitutional law and liberal interpretation to improve the legal position of women.[84]

Although many of the analyses of international law since 1945 have tended to seek to relate the legal rules to the social facts, much depends on the actual facts under consideration. There are a number of writers who stress that, in the final analysis, the continued operation of international society depends on the capacity and willingness of dominant states to deploy social, economic and military power. Such writers accept that, for the most part, international law is observed by states out of motives of self-interest. As the United States was the dominant power after 1945, it is perhaps not surprising such an approach has found favour there. Such writers accept that while international law can regulate day to day activities and serves as a basis for co-operation, there will be a limited

81 C Gilligan, *In a Different Voice: Psychological Theory and Women's Development*, 1992.

82 C Mackinnon, *Feminism Unmodified: Discourses on Life and Law*, 1987, Cambridge, Mass: Harvard University Press.

83 See C Johnson-Odim, 'Common themes, different contexts', in C Mohanty, A Russo and L Torres (eds), *Third World Women and the Politics of Feminism*, 1991.

84 Thus being in line with the tendency in the United States for social and ethical disputes to be translated into matters of constitutional interpretation. See Catherine Mackinnon, *Towards a Feminist Theory of the State*, 1989. This of course is possible in the United States where the Constitution in the First Amendment requires 'wholesale neutrality' between church and state. (See *School of Abington Township v Schempp* (1963).)

number of situations in which compliance can only be obtained by the willingness to deploy economic and military power.[85]

All such analyses are concerned with the traditional question, 'What is the theoretical basis of international law and why do states observe it?'. It is unlikely that one can reach agreement on this question and, as Oscar Schachter[86] noted, there are such a wide number of theoretical justifications for the existence of International Law. One aspect that requires comment is the revival in natural law thinking. In the years after 1945 it is possible to detect such a movement. The reasons are not difficult to determine. The loss of life and the systematic genocide of the years 1939–45 enacted in the heart of Europe had a profound effect on statesmen seeking to build the post-war world. Further, the employment of nuclear weapons in 1945 prompted a movement to internationally agreed minimum standards of conduct. Although there had been conflicts in the past resulting in great loss of life, technical advances in film and photography enabled the wider public to learn directly of the abuses of state power that led to Auschwitz, Belsen, Birkenau and Treblinka. Moreover, public opinion was able to make a connection between political extremism and abusive conduct. The conclusion that many drew was that there had to be limits to the positivist emphasis on state sovereignty which appeared to permit the ethically unacceptable under a cloak of legality. Positivism had flourished with the optimism of the Enlightenment and the scientific advances of the 19th century. Such optimism ended in 1914 and the subsequent history of the 20th century was characterised by consistent abuses of state power. The modern revival in natural law thinking and the emphasis on observance of human rights is founded upon a reaction to past abuses of state power.

4 MARXIST APPROACHES[87]

The seizure of power by the Bolshevik party in 1917 resulted in a European government being under the control of a political organisation dedicated to promoting the philosophy of Karl Marx (1818–83) and Friedrich Engels (1820–95). Although Karl Marx had spent a short period of time as an undergraduate in law,[88] his later writings were not marked by

85 R Aron, *Paix et Guerre entre des Nations*, 1984. H Morgenthau, *Politics Among Nations*, 6th edn, 1985; H Kissinger, *Diplomacy*, 1994.

86 Hamilton Fish Professor Emeritus of International Law at Columbia University. In an article in (1968) 8 Va JIL 300, the learned writer noted that one could formulate more than 12 justifications, namely: (i) the consent of states; (ii) customary practice; (iii) a sense of 'rightness' or conscience; (iv) natural law or natural reason; (v) social necessity; (vi) the will of the international community; (vii) direct intuition; (viii) common purpose; (ix) effectiveness; (x) sanctions; (xi) systematic goals; (xii) shared expectations as to authority; (xiii) rules of recognition.

87 See generally, GI Tunkin, *Theory of International Law*, 1970 (trans London: 1974); GI Tunkin (ed) *International Law*, 1986; 'Co-existence and international law' (1958) 95 HR 1; 'The legal nature of the United Nations' (1966) 119 HR 1; 'International law and the international system' (1975) 147 HR 1; 'Politics, law and force in the interstate system' (1989) 219 HR 227; 'The contemporary Soviet theory of international law' (1978) CLP 177. For the traditional Marxist position, see VI Lenin, *State and Revolution*, 1916.

88 He spent a year at the University of Bonn studying law (or rather *not* studying law) before transferring to the University of Berlin to study philosophy. For the man, see I Berlin, *Karl Marx: His Life and Environment*, 1978; David McLellan, *Karl Marx: His Life and Thought*, 1973; P Singer, *Marx*, 1980.

a great deal of attention to legal matters. In the preface to his *Contribution to the Critique of Political Economy* (1859), Marx had viewed law and the legal system (together with religion, philosophy and aesthetics) as being part of the social superstructure resting upon an economic base. With the expansion of the Soviet Union and the absorption of Eastern Europe, by 1950 nearly one-half of the world's population was under a regime that, at least in theory, adopted a Marxist philosophy. In these circumstances it is sensible to say a little about such states.

Traditional Marxist thought had viewed legislation not as eminating from the autonomous will of the legislature but being dictated by the interests of the economically superior class. Later writers would assert that oppression arose when a ruling group imposed its views and values on other groups within society; law was viewed as an instrument of oppression.[89]

International Law has traditionally centred around the concept of the state. However, Engels had asserted that the state was likely to 'whither away'.[90] On seizing power in 1917, VI Lenin had modified this approach by asserting that the *corpus* of the state would remain intact until the proletarian revolution had rendered it redundant. In this transitional period, the question arose as to which laws should apply either internally or internationally. Although Marxist thought had rejected the Diceyan notion of the rule of law as a mask concealing the interests of bourgeois industrial power, some doctrine was needed to preserve the situation during the transitional period.

In respect of legal developments, it is possible to draw a distinction between events between 1920 and 1936 and developments subsequent to that date. During the first period, Soviet economic policy fluctuated between the period of war communism, the period of the New Economic Policy and the later period of the five year plans. In the early years, it was necessary to compromise with private ownership and some form of legal theory was needed. This was provided by EB Pashukanis (1893–1937),[91] who argued that law was divorced from the interests of the state and was grounded in a desire to reduce those conflicts between individuals that would somehow disappear when class antagonisms were eliminated. He further held that law would 'whither away', as indeed at a later date would the state. Pashukanis had sought to advance a legal theory that was in general conformity with Marxist teaching but met the pragmatic requirements of the transitional period. Pashukanis argued that bourgeois forms of municipal law or of international law could be employed until the historically inevitable accomplishment of world socialism was effected by proletarian revolution. Although there were elements of this that deviated from classic Marxist thought, this was a heroic attempt to reconcile theory with reality.

89 Engels, in particular recognising the role of the ideological superstructure: see Anti Duhring at pp 308–09 (English edn, 1942).

90 See F Engels, *Origin of the Family, Private Property and the State*, 1884, advanced the ideas: (i) of the state being under the direction of those who controlled the means of production; (ii) appeared to link patriarchy with the development of private property. Engels had reflected on urban poverty in *The Condition of the Working Class in England* (1845) and had participated in the drafting of The Communist Manifesto (1848). Engels was influenced by positivism and Darwinian thinking. Although there are differences between Marx and Engels, it should be noted: (i) Engels regarded the two as holding identical views; (ii) both held the view that the state would wither away but this would not mean an end of government.

91 EB Pashukanis, *Allgemeine Staatslehre und Marxismus* (German edn, 1927).

By 1936, if not earlier, it was clear that there was unlikely to be an upsurge of revolutionary activity within Europe. Secondly, the re-establishment of capitalist states after 1919, and the failure of revolutionary movements in other countries, had given way to the emergence of National Socialist governments. The international climate had ceased to be so tranquil after 1933 with the accession of Adolf Hitler to power in Germany and the instability caused by continuing high levels of unemployment and rapid re-armament. In these circumstances, the new Soviet Constitution of 1936 had placed emphasis on building a strong centralised state to resist capitalist encirclement. The emphasis of Pahukanis on law as a medium of conflict resolution in a transitional period was now far less important, as efforts were made to outlaw private capital and private enterprise. Law was now to be employed as a method of social domination and control in the service of the Communist Party. The views of Pashukanis that law would in time 'whither away' were no longer acceptable and he perished in the purges of 1936–38; these purges and show trials in which large numbers of innocent person died owed much to the efforts of the public prosecutor Andrei Vyshinsky[92] and it was his views that came to dominate Soviet legal thinking both domestically and internationally.

Just as domestic legal thinking reflected economic imperatives, so the same relationship can be detected in the approach to international law. In the immediate period after 1917, Pahukanis had argued that international law was a class based system and that the Soviet Union would need to compromise until the inevitable victory of the forces of international socialism. After the Soviet Union had been recognised by other European states[93] and then by the United States, a modification of attitude can be detected. Following the eclipse of Pashukanis, legal policy fell into the hands of Andrei Vyshinsky who started from the theoretical position that the Soviet Union was only bound by those rules that it had expressly consented to. Given that the policy was now to build socialism in a single country, Vyshinsky stressed the sovereign equality of states and the principle of non-interference. Beyond this, it would not be sensible to attribute to Andrei Vyshinsky any coherent theory of International Law. He viewed all law as a form of party discipline and considered the task of the legal system as 'an application of the law as a political expression of the Party and the Government'; in respect of the judicial function, he felt that 'the judge must be a political worker, rapidly and precisely applying the directives of the Party and the Government'.[94] Pashukanis had followed the traditional Marxist position that law was a product of economic relations of production and exchange. Vyshinsky viewed law as an instrument to effect the dictatorship of the party and his conduct of the Moscow trials indicated that he viewed the judicial branch as an

92 Andrei Vyshinsky (1883–1954) served as a commissor of justice and prosecutor at the treason trials of 1936–1938; he later succeeded VM Molotov, in 1949, and served as Foreign Minister until 1953. Vyshinsky bore a heavy personal responsibility for the brutal conduct of the Moscow trials in the period 1936 until 1938, when large numbers of defendants were tortured into providing false confessions. Vyshinsky appears to have modelled his conduct on Fouquier Tinville during the period of Robespierre's Terror. For a time, Vyshinsky represented the Soviet Union at the United Nations and, in a bizarre incident, was actually entertained to dinner by the judges during the Nuremberg Trials.

93 The Soviet Government was accorded *de facto* recognition by the United Kingdom in 1921 and *de jure* recognition; the United States accorded recognition under the Litvinov Agreement of 1933. For municipal case law turning on recognition, see *Luther v Sagor* (1921) 3 KB 532; *United States v Belmont* (1937) 301 US 324.

94 A Vyshinsky, *Judicial Organisation in the USSR*, 1937.

instrument of executive power. It was not until 1956 that it could be openly acknowledged that the legal system in the 1930s had given rise to serious abuses and injustice.

The need to obtain the help of the Soviet Union in securing victory over Nazi Germany served to minimise differences. During the war years, the Soviet Union participated in the wartime conferences and, on victory, acquired a permanent seat in the Security Council. Whatever the theoretical objections to International Law, the provision of veto powers for permanent members gave the Soviet Union a privileged position within the United Nations structure. Full participation in international affairs was now on offer.

This offer was not accepted. The years after 1945 witnessed an increase in tension partly caused by the level of Soviet military spending and partly by the attitude adopted to client states in Eastern Europe; the Cold War had the effect of freezing international relations on ideological lines. However, scholars in the Soviet Union increasingly tended to the view that international law constituted a single system in a society in which capitalist and socialist states could co-exist peacefully;[95] it was argued that the role of international law was to provide rules to promote co-operation and thus, by reducing conflict, served to sustain the overriding principle of peaceful co-existence.[96] Indeed, by the late 1950s, Soviet scholars were ready to discuss the question as to when a rule of customary international law might be of universal application.[97]

The influence of the Soviet Union was bolstered by its position as a nuclear power, permanent membership of the Security Council and its theoretical leadership of the socialist/communist bloc. In the 1950s, weaknesses in Soviet society were not as clear as they were later to become. The nature of superpower rivalry tended to increase the role of international law because it led to a proliferation of international and regional organisations such as NATO, the Warsaw Pact and COMECON.

After the arrival in power of Nikita Khrushchev,[98] the principal Soviet foreign policy[99] theme was that of peaceful co-existence; this principle carried with it the associated doctrines of respect for state sovereignty and non-interference in the domestic affairs of other states. Although the attitude of the Soviet government might sometimes be described as unco-operative and, occasionally, a violation of International Law, attempts were made to justify conduct if only to preserve good relations with socialist parties in Western Europe.[100] The interventions in Hungary (1956) and Czechoslovakia (1968) were justified by reference to the desire to sustain a socialist system of government.

95 GI Tunkin, 'Co-existence and international law' (1958) 95(III) HR 1-82.

96 Professor Kozhevnikov in *International Law*, 1961; see, also, GI Tunkin, 'The contemporary Soviet theory of international law' (1978) CLP 177.

97 GI Tunkin, 'Co-existence and international law' (1958) 95(III) HR 1, p 18.

98 Nikita Khrushchev (1894–1971) General Secretary of Communist Party 1953–64. His resignation in 1964 was forced by mishandling of relations with China and the Cuban Missile crisis (1962).

99 Consistency in Soviet Foreign Policy was partly due to the long tenure of Andrei Gromyko (1909–89) who served as Foreign Minister from 1957 until 1985; the negative and defensive nature of his stewardship is illustrated by the fact that, when serving as the representative at the United Nations in the years 1946–49, he exercised the Soviet veto more than 25 times.

100 See J Hazard, 'Codifying peaceful co-existence' (1961) 55 AJIL 111.

The doctrine[101] was propounded that the Soviet Union was entitled to intervene in the affairs of those states within its Eastern European sphere of influence to protect the socialist system from capitalist subversion.[102] It was argued that the ethical superiority of socialism justified this approach; such an explanation carried little conviction in Western Europe, particularly as many of the interventions appeared to be motivated by a desire to restrain the exercise of basic civil liberties.

However, the general emphasis of the Soviet approach to international law founded upon state sovereignty and autonomy was attractive to those newly independent African states seeking to resist western influence and attempting to build an economy on collective or socialist lines. Soviet foreign policy, which tended to avoid direct confrontation with the United States,[103] was content to seek influence and promote its objectives by entering into alliances with newly independent African states. In some cases, the desire for influence was accompanied by the use of force. The installation of a friendly regime in Afghanistan in 1979 was secured by the employment of considerable numbers of Soviet troops. Such action was in clear violation of the United Nations Charter and would have been condemned by the Security Council had the Soviet Union not vetoed the resolution.[104]

The appointment of Mikhail Gorbachev as General Secretary of the Communist Party in 1985 represented an important generational change. Adopting flexible policies of *perestroika* (restructuring) and *glasnost* (openness), Gorbachev drew upon his previous experience in economic affairs[105] to promote internal reform and a measure of civil liberty.

Gorbachev and his Foreign Minister Edward Shevardnadze[106] realised that the Soviet Union would require western assistance to raise domestic living standards. As with other states, foreign policy had to change to facilitate national objectives. Soviet foreign policy, in seeking a better relationship with the West, moved towards a policy of detente, disarmament and respect for International Law. The emphasis was on solving problems

101 The doctrine came to be referred to as the 'Brezhnev doctrine' after Leonid Brezhnev (1906–82) who was a protégé of Stalin and had joined the Politburo in 1952; he became ceremonial President of the USSR in 1960 and in 1964 ousted Krushchev and assumed full power as General Secretary of the Communist Party. Although technically the ruler of the Soviet Union until his death in 1982, serious illness after 1976 leaves it open to question as to how far he was responsible for acts in breach of international law, such as the invasion of Afghanistan in 1979. During his period of rule, economic problems increased and Brezhnev became associated with policies of stagnation, conservatism and corruption.

102 See E McWhinney and K Grzybowski, 'Soviet theory of international law for the seventies' (1983) 77 AJIL 862.

103 Save in respect of the Cuban Missile Crisis of 1962.

104 On 7 January 1980.

105 Two themes in Gorbachev's policies were traceable to his earlier career. As a young man he had studied law at Moscow University and, perhaps in consequence, sought to promote the rule of law within the Soviet Union and in the sphere of international relations. More relevantly, he needed to secure a measure of arms control to allow rebuilding of the Soviet Economy. This would require treaty negotiations with the United States and agreements for verification and compliance. Secondly, Gorbachev had been a member of the Politburo since 1980 and had direct personal experience of the problems posed by inefficiency and corruption within the economy.

106 Edward Shevardnadze (b 1928) had succeeded Andrei Gromyko as Foreign Minister in 1985. As with President Gorbachev, he regarded it as important to improve international relations in order to pursue reform of the Soviet Economy.

of common interest through the structures of the United Nations. As President Gorbachev tried to reform the Soviet Union and construct a society based on the rule of law with an independent judiciary, so foreign policy began to emphasise the importance of the United Nations as an institution for resolving problems of common concern.[107] The accident at the Chernobyl nuclear reactor in 1986 seemed to demonstrate clearly the need for an improved level of international co-operation.

The collapse of Soviet rule in Eastern Europe in 1989 and the efforts by the Moscow leadership to seek a better working relationship with the West marked the effective end of the Cold War. The disintegration of the Soviet Union in 1991 seemed to offer the prospect of a more stable environment. However, much of this optimism was misplaced. Although it became common to talk of a New World Order, this seemed to be of little direct relevance. The phrase 'New World Order' seemed to refer to a situation in which the Security Council could play a greater role in ordering international affairs.[108] However, the disappearance of communist rule led to the emergence of ethnic and religious conflict in the former republics of the Soviet Union and later, after 1992, in the former Republic of Yugoslavia.

The United Nations Charter (1945) had been remarkably successful in curbing direct conflict between states but it was not best suited to restrain the outbreak of civil wars and, even if the Security Council could agree on a course of action, it was often unable to persuade states to contribute the necessary armed forces. The ideological divisions of the Cold War had ended in Eastern Europe only to be replaced by a much more volatile situation, as was illustrated by the disintegration of the Federal Republic of Yugoslavia in the years 1992–95.

There can be little doubt that one consequence of the end of the Cold War was an excessive degree of optimism as to what might be possible. Some thought that, with superpower rivalry a thing of the past, the Security Council would be able to function free of the ideological veto and thus constitute a surer instrument of international order. It was also hoped that regional problems in the Middle East or Africa might prove easier to resolve by direct negotiation; this has not proved to be the case. The first problem was that, while the Security Council might pass resolutions in respect of particular problems, actual enforcement depended on the willingness of states to contribute military forces; in many instances there was a tendency to desist unless the United States gave a firm indication that it would provide resources. Secondly, it was evident that in some cases the particular goal was unclear and when objectives were frustrated recriminations tended to increase. Thirdly, some of the difficulties that faced the United Nations in the New Word Order were intractable problems of ethnic tensions in situations of *de facto* civil war.[109] In such circumstances, many states were reluctant to provide resources for effective United Nations intervention. Fourthly, the effectiveness of United Nations action often depended

107 R Quigley, '*Perestroika* and International Law' (1988) 82 AJIL 788; R Mullerson, 'Sources of international law: new tendencies in Soviet thinking' (1989) 83 AJIL 494; W Reisman, 'International law after the Cold War' (1990) 84 AJIL 859.

108 It was symbolised by the efforts of US President, George Bush and Secretary of State, James Baker to build a coalition of states to conduct the Gulf War (August 1990–February 1991)

109 For example, the practical difficulties encountered by the United Nations in giving effect to Security Council resolutions in Somalia (1992–93), Rwanda (1994) and Bosnia (1992–95). See Boutros Boutros Ghali, *Unvanquished: A US-UN Saga*, 1999.

on the willingness of the United States, as the sole remaining superpower, to assist; in the 1990s it became clear that the conduct of United States foreign policy was made more difficult by the need to accommodate various groupings within the United States Congress,[110] some of whom held isolationist views.

Although direct rivalry between the superpower blocks ended in 1989, international society has had to grapple with a number of difficult problems posed by ethnic conflict, regional tension[111] and civil wars. Flagrant defiance of the United Nations Charter has been reversed by force[112] but in more complex situations, such as the disintegration of Yugoslavia, a clear international approach was often difficult to detect. The number of states has grown steadily to over 185 but many labour under problems of poverty, illiteracy and under investment.

5 THE DEVELOPING WORLD

As indicated above, the number of states has increased steadily since 1945 and much of the increase has been due to decolonisation. The entitlement to independence was recognised in the General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples (1960)[113] and, thereafter, the pace of decolonisation increased. Many newly independent states tended to view with suspicion 19th century concepts of international law that had permitted imperialism and exploitation; such states tended to be sceptical of rules of customary international law, preferring to accept obligations arising only under treaty. In some cases, resentment against a prior colonial power or a desire to establish a collective economy lead to a movement towards Marxism and the Soviet Union. However, after 1982 the Soviet Union had other priorities leaving newly independent states with little choice but to co-operate within existing international organisations. Such states have for some years had a majority in the General Assembly and are specifically provided for in the rules pertaining to membership of the Security Council, the International Court of Justice and the International Law Commission; in many cases such states have required assistance from the the International Monetary Fund or the World Bank.

It would be wrong to view all such states as being subject to like problems; some possess oil or other natural resources, some enjoy constitutional stability and high levels of foreign investment, while others are land locked and afflicted by poverty and internal dissent. A large number of decolonised states are to be found in Africa and such states

110 For the relations between the United States and the United Nations in a period where only one superpower existed see Warren Christopher, *In the Stream of History*, 1998; Boutros Boutros Ghali, *Unvanquished: A US-UN Saga*, 1999; Michael Dobbs, *Madeleine Albright: A Twentieth Century Odyssey*, 1999; Henry Holt, Ann Blackman, *Seasons of Her Life: A Biography of Madeleine Korbel Albright*, 1998.

111 Although the emphasis since 1945 has been on international disarmament; one of the problems posed in the last two decades has been that of the proliferation of nuclear technology.

112 In the Falklands Conflict (1982) and the Gulf Conflict (1990–91). The subsequent military action in Kosovo in 1999 raised the question as to whether international law recognised a right of international humanitarian intervention.

113 General Assembly Resolution 1514 (XV), 14 December 1960.

collectively express their views through the Organisation of African Unity, established in 1963.

In general, developing states tend to accept the basic rubric of international law, if only because the subject proceeds on the basis of the sovereign equality of states. Particular areas of international law tend to attract the attention of specific states. Those states threatened with secession tend to stress the principle of territorial integrity.[114] Many developing states express resentment at the role of international economic organisations or reject customary rules pertaining to the compensation of foreign investors.[115] Most stress the entitlement of each state to determine its own social and economic system. Some states invoke principles of state sovereignty[116] to resist probing on matters of human rights.[117] Other states are concerned with sovereignty over natural resources or rights in respect of the sea; indeed the precise contents of the United Nations Law of the Sea Convention (1982)[118] owes much to the desire to accommodate the concerns of developing states.

Finally, while developing states may object to particular aspects of international law all are members of the United Nations and thus bound by the terms of the United Nations Charter (1945). Moreover, in many instances, access to economic assistance by international organisations is contingent on observance of international norms. In short, the developing state has an interest in subscribing to the general principles of international law, particularly if it wishes to stimulate economic growth by attracting foreign investment.

6 CONCLUDING OBSERVATIONS

Attention above has been directed to those theories that seek to explain the nature and scope of international law. It is sensible to conclude by making limited reference to those principles that international civil society seeks to sustain. Since 1945, the United Nations Charter has set twin objectives of the peaceful settlement of disputes[119] and the promotion of social progress and better standards of life.[120] In the last two decades scholars[121] have argued that these objectives might best be attained the the promotion of

114 See Chapter 7 on territory.

115 See Chapter 19 on international economic law.

116 See Chapter 5 on the subjects of international law.

117 A particular example being afforded by the reaction of the government of Nigeria in the late 1990s to external criticism of its conduct.

118 For the Law of the Sea and the concerns of developing states, see Chapter 13.

119 See Preamble and Art 33 of United Nations Charter.

120 See Preamble and Arts 13 and 55 of United Nations Charter.

121 See T Franck, 'The emerging right to democratic governance' (1992) 86 AJIL 46; T Franck, *Fairness in International Law and Institutions*, 1995; C Crena, 'Universal democracy: an international legal right or the pipe dream of the west?' (1995) 27 New York Journal of International Law and Politics 289; G Fox, 'The right to political participation in international law', 'National sovereignty revisited: perspectives on the emerging norm of democracy in international law (1992) Proceedings of the American Society of International Law 249. This is not the view of all; see T Carothers, 'Empirical perspectives on the emerging norm of democracy in international law' (1992) Proceedings of the American Society of International Law 261.

the norm of democratic government It is argued that by promoting democratic constitutional government within the rule of law together with observance of human rights is likely to best achieve the objectives of the United Nations Charter. The general view of many states[122] is that by establishing such internal constitutional safeguards it is more likely that the state will be able to secure foreign investment and less likely that such a state will seek to threaten its neighbours. By the promotion of constitutional law, it is argued, international law is likely to prosper.

122 It is argued by some that while full democracy may not be attainable immediately, the United Nations should seek to ensure, at the minimum, non corrupt government. It is certainly arguable that a contract made abroad to bribe a government official will not be enforced in England as contrary to public policy in accordance with traditional principles of private international law; see *Lemenda Trading Company Limited v African Middle East Petroleum Company Ltd* [1988] QB 448.