1 Introduction

The problem of defining international law

The term 'international law' was first used by Jeremy Bentham in 1780 in his *Introduction to the Principles of Morals and Legislation*. Since about 1840, in the English and Romance languages it has replaced the older terminology 'law of nations' or 'droit de gens' which can be traced back to the Roman concept of *ius gentium* and the writings of Cicero.[1] In the German, Dutch, Scandinavian and Slavic languages the older terminology is still in use ('Völkerrecht', 'Volkenrecht', etc.).

Until the period between the two World Wars, writers found no difficulty in defining (public) international law,[2] in one formulation or another, as the law that governs the relations between states amongst each other. The prevailing positivist doctrine[3] of the nineteenth century and first half of the twentieth century held that only states could be subjects of international law, in the sense of enjoying international legal personality[4] and being capable of possessing international rights and duties, including the right to bring international claims.[5]

However, this did not quite reflect reality even at that time. The Holy See,[6] although not a state, was recognized to have international legal personality, and so, for certain purposes, were insurgents[7] and some forerunners of modern international organizations.[8] Since the inter-war period, the matter has become more complicated due to both the expansion of the scope of international law into new areas and the emergence of actors other than states on the international plane, such as intergovernmental organizations established by states, non-governmental organizations created by private individuals, transnational companies, individuals and groups, including minorities and indigenous peoples.[9] Some of these new actors have also acquired international legal personality or, at least, certain rights under international law, even if only granted by treaties concluded between states.

This development is reflected, for example, in the change of the definition in the *Restatement (Third)* by the American Law Institute of the *Foreign Relations Law of the United States*, according to which international law

> consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *Inter se,* as well as with some of their relations with persons, whether natural or juridical.[10]

Some recent textbooks refrain from any attempt to define international

1 See, for example, Cicero, *De officiis,* lib. III, 17, 69.
2 For the meaning of private international law see Chapter 4 below, 71–4.
3 See Chapter 2 below, 16–17.
4 See Chapter 6 below, 91–2.
5 See Chapters 17, 256–7 and 18, 262–9 below.
6 See Chapter 5 below, 76.
7 See Chapters 6, 104–5 and 19, 318–26 below.
8 See Chapters 2, 22 and 6, 92–6 below.
9 See Chapters 6, 105–8 and 19, 338–41 below.
10 *Restatement (Third)*, para. 101, 22–4. The previous *Restatement only* referred to 'those rules of law applicable to a state or international organization that cannot be modified unilaterally by it', *ibid.,* at 24. The concept of 'foreign relations law of the United States' is broader than 'international law as it applies to the United States'. It includes 'domestic law that has substantial significance for the foreign relations of the United States or has other substantial international consequences.', *ibid.,* para. 1, at 7.

law and enter directly into the discussion of its 'sources'.[11] On a similar basis, Sir Robert Jennings, the distinguished writer and former President of the International Court of Justice, has even called into question the general need for an objective definition of international law with regard to actually using and applying it.[12] At any rate, in the exposition of the subject in a textbook, emphasis must be placed at the outset on the circumstance that, although increasing global interdependence and the emergence of new players on the international level have put into question the role of the state in international affairs,[13] international law is still *predominantly* made and implemented by states. International organizations are to a large extent dependent upon these territorial entities and the willingness of their governments to support them. Only states can be members of the United Nations,[14] only states are entitled to call upon the UN Security Council if there is a threat to international peace and security,[15] only states may appear in contentious proceedings before the International Court of Justice,[16] and only states can present a claim on behalf of a national who has been injured by another state,[17] if there is no treaty to the contrary. The individual has no individual rights in this respect under customary international law and is dependent on the political discretion of the home state as to whether or not to present the claim. In other words, the international legal system is still *primarily* geared towards the international community of states, represented by governments.[18]

General and regional international law

'General international law' refers to rules and principles that are applicable to a large number of states, on the basis of either customary international law or multilateral treaties.[19] If they become binding upon all states, they are often referred to as 'universal international law'. But there is also regional international law, which applies only to certain groups of states, such as, for example, certain rules on diplomatic asylum recognized only by South American states,[20] or the law of the European Union. Moreover, the term 'particular international law' is used to denote rules which are binding upon two or a few states only. Mere usage, in the sense of widespread practice observed between states without any sense of legal obligation, is often called international comity.[21]

Regionalism tends to undermine the universality of international law, but it is an important existing feature of the international system.[22] The universality of international law was at one stage challenged by the Communist theory of international law and at a later stage by the numerous new states emerging from the process of decolonization after the Second World War.[23] These challenges in principle no longer appear. But obviously the community of more than 185 states in existence today is rather heterogeneous in terms of military, political and economic power, territorial size and population, political structure, and cultural and ideological orientation. This diversity also affects the interpretation and operation of international law to a considerable extent.[24] Almost all of the existing states, however, are members of the United Nations and of regional organizations of various kinds and agree on certain fundamental principles of international

11 See, for example, I.Brownlie, *Principles of Public International Law,* 4th edn 1990. On the sources of international law see Chapter 3 below, 33–62.
12 R.Y.Jennings, International Law, *EPIL* II (1995), 1159–78, at 1165.
13 See M.Koskenniemi, The Future of Statehood, *Harvard ILJ* 32 (1991), 397; C.Schreuer, The Waning of the Sovereign State: Towards a New Paradigm for International Law?, *EJIL* 4 (1993), 447–71; L.A.Khan, *The Extinction of Nation-States. A World Without Borders,* 1996 and Chapter 2 below, 17–18 on the doctrine of state sovereignty.
14 See Chapter 21 below, 369–73.
15 Article 35, UN Charter, text in *Brownlie BDIL,* 1. See Chapter 22 below, 385–430.
16 Article 34(1), Statute of the ICJ, *ibid.,* 438. See Chapter 18 below, 281–93.
17 See Chapter 17 below, 256–7.
18 See Chapter 5 below, 75–90.
19 See Chapter 3 below, 36–48.
20 See O.Schindler, Regional International Law, *EPIL* 7 (1984), 404–9 and Chapters 2, 14–15 and 3, 41 below.
21 See Chapter 3 below, 44.
22 See Chapter 2 below, 30–2.
23 See Chapter 2 below, 28–33.
24 See E.McWhinney, *United Nations Law Making: Cultural and Ideological Relativism and International Law Making for an Era of Transition,* 1984; R.-J.Dupuy (ed.), *The Future of International Law in a Multicultural World,* 1984; A.Cassese, *International Law in a Divided World,* 1986.

law as laid down in the United Nations Charter and the Friendly Relations Declaration of 1970.[25]

Characteristics of international law

International law has a number of special characteristics making it completely different from highly developed national legal systems which are connected with the existence of the modern state and its apparatus. The modern state which emerged in Europe after the fourteenth century centralized the use of force by making it a state monopoly, developing a standing army and a more or less efficient bureaucracy.[26] It increasingly engaged in economic and social regulation, and created a sophisticated system of legal institutions, principles and rules regulating society.

The Western concept of law, with its national and philosophical variations, became a central instrument for the organization and development of both state and civil society. In a systematic sense, this is reflected in the distinction between the three functions, typically entrusted to central organs, of law-making (legislature), law determination (courts and tribunals), and law enforcement (administration, police, army). Domestic law is addressed to a large number of governmental bodies and private individuals and groups of individuals. International law, on the other hand, is primarily concerned with the legal regulation of the international intercourse of states which are organized as territorial entities, are limited in number and consider themselves, in spite of the obvious factual differences in reality, in formal terms as 'sovereign' and 'equal'.[27] Thus, international law is a horizontal legal system, lacking a supreme authority, the centralization of the use of force, and a differentiation of the three basic functions of law-making, law determination, and law enforcement typically entrusted to central organs. The United Nations General Assembly is not a world legislature,[28] the International Court of Justice in The Hague can operate only on the basis of the consent of states to its jurisdiction,[29] and the law-enforcement capacity of the United Nations Security Council is both legally and politically limited.[30]

Nevertheless, a state which violates an international obligation is responsible for the wrongful act towards the injured state, or, under certain circumstances, to the international community as a whole.[31] The injured state can raise an international claim which it may pursue on the basis of special remedies, if available, or by resorting to third-party mediation or conciliation, arbitration or judicial proceedings.[32] In the end, however, the role of self-help by states in cases of a violation of their rights is predominant in international law, as compared with the restricted admissibility of self-help of individuals in national legal systems.

If one state commits an illegal act against another state, and refuses to make reparation or to appear before an international tribunal, there is (or was until recently) only one sanction available to the injured state: self-help.[33] Self-help exists as a sanction in all legal systems. In earlier primitive legal systems, most sanctions involved the use of self-help in one form or another. Even in modern legal systems an individual may defend himself against assault, retake property which has been stolen from him, evict

25 Text in *Brownlie BDIL,* 36. See Chapter 2 below, 32.
26 For a recent study see H.Spruyt, *The Sovereign State and Its Competitors,* 1995, See also Chapter 2 below, 10, 17–18.
27 See B.Broms, *The Doctrine of Equality of States as Applied in International Organizations,* 1959; R.P. Anand, Sovereign Equality of States in International Law, *RdC* 197 (1986), 13–228; G.Jaenicke, States, Equal Treatment and Non-Discrimination, *EPIL* 10 (1987), 456–65; J.M.Castro Rial, States, Sovereign Equality, *ibid.,* 477–81.
28 See Chapters 3, 52–4 and 21, 377–9 below.
29 See Chapter 18 below, 281–93.
30 See Chapters 18, 292–3, 21, 373–7 and 22, 390–1, 425–9 below.
31 See Chapters 3, 58–60 and 17, 254–72 below.
32 See Chapter 18 below, 273–305.
33 B.-O.Bryde, Self-Help, *EPIL* 4 (1982), 215–17.

trespassers from his land and terminate a contract if the other party has broken a major term of that contract. But in modern societies self-help has become the exception rather than the rule, whereas in international law it has remained the rule.

At one time states might even go to war to enforce their legal rights. However, this is no longer lawful, with certain exceptions such as self-defence against armed attack.[34] The remaining forms of self-help are countermeasures, such as retorsion and reprisals.[35]

Retorsion is a lawful act which is designed to injure the wrongdoing state —for example, cutting off economic aid (this is lawful because there is no legal obligation to provide economic aid, apart from under special treaty provisions).

Reprisals are acts which would normally be illegal but which are rendered legal by a prior illegal act committed by the other state. For instance, if state A expropriates property belonging to state B's citizens without compensation, state B can retaliate by doing the same to the property of state A's citizens. Reprisals must be proportionate to the original wrong; for instance, state B could not expropriate property worth several times the value of the property which its citizens had lost; still less would it be entitled to kill or imprison state A's citizens.

One disadvantage of retorsion and reprisals is that the state imposing these measures may injure itself as much as the state against which they are directed; this is particularly so when one state cuts off trade with another state. A recent example has been the reluctance of the United States to use trade sanctions to enforce its criticism of human rights practices in China, in view of the huge Chinese market opportunities for American companies. A more serious disadvantage of self-help is that it works effectively only if the injured state is in some way more powerful or more determined than the wrongdoing state.

Not surprisingly, therefore, there has been a recent tendency for sanctions to be imposed by large groups of states, working through international organizations such as the United Nations.[36] But the United Nations Security Council can impose sanctions only in limited circumstances, and in the past was often paralysed by the power of veto possessed by each of its five permanent members. The United Nations General Assembly is not subject to the veto, but its resolutions are usually not legally binding (although they are an institutionalized form of public opinion and can be instruments of political pressure).[37] Both the Security Council and the General Assembly, being political rather than judicial bodies, base their decisions on political considerations and sometimes pay little attention to the legal rights and wrongs of a dispute.[38]

International organizations with more specialized functions may exercise a more effective control over their members, especially if, like the International Monetary Fund, they provide essential services.[39] A state which was excluded from membership of the Fund would be unable to borrow gold and foreign currency from the Fund to meet a balance of payments crisis. And regional organizations may exercise an even stricter discipline over their members; for instance, the Court of Justice of the European Union has compulsory jurisdiction over member states which are accused of breaking the rules of Community law.[40]

34 See Chapter 19 below, 306–18.
35 See Chapter 17 below, 271–2.
36 See Chapter 22 below, 387–415.
37 See Chapter 3 below, 52–4.
38 See Chapters 21, 373–9 and 22, 385–416, 425–30 below.
39 See Chapter 15 below, 225–7.

However, it must be admitted that sanctions work less effectively in international law than in national law. States are few in number and unequal in strength, and there are always one or two states which are so strong that other states are usually too weak or too timid or too disunited to impose sanctions against them. But this does not mean that international law as a whole works less effectively than national law—only that it works in a different way.

In international law there is considered to be collective responsibility of the whole community of a state which has committed an internationally wrongful act. Thus, the civilian population of Iraq, in spite of some precautions taken, was in effect made to suffer under the sanctions adopted by the international community in response to the invasion and occupation of Kuwait by the Iraqi Government in the Second Gulf War.[41] International law has, therefore, often been described as a 'primitive legal system'. But this is a rather misleading characterization. It is true that the impact of power and politics is much more immediately recognizable and directly relevant in international law than in national law. It is also true that international law, due to the lack of central institutions, is heavily dependent on national legal systems (often called 'municipal law')[42] for its implementation. There are also other features which explain the comparison of the international legal system to the unsophisticated institutions, principles and rules of pre-modern societies. However, on the whole, this characterization fails to distinguish the different nature of international law (as a horizontal, decentralized legal system governing primarily the relations between states) and of developed (centralized and institutionalized) national legal systems. It also does not adequately reflect the relatively high degree of differentiation of international law with regard to the areas it now covers, the proliferation of multilateral and bilateral treaties, the considerable increase since 1945 of the main traditional subjects of international law and the emergence of new actors on the international level, in particular the large number of international organizations created by states for a broad variety of functions.

International law as 'law'

There is an old dispute going back to the early writings of Hobbes and Pufendorf, reinforced in the nineteenth century by Austin's influential legal theory, on the issue whether international law may be properly called 'law'.[43] The controversy has focused on the relevance of the lack of sanctions in cases of violation of international norms as compared to municipal law and it has often confused the question of whether international law is 'law' with the problem of the effectiveness and enforcement of international law.[44] In foreign policy thinking, the reductionist perception of international law is still prevalent in the 'realist' school which emphasizes the role of power and of national interest in international relations and is connected with names such as Morgenthau,[45] Kennan and is also reflected in the latest book by Henry Kissinger.[46]

40 Articles 169 and 170, EC Treaty.
41 See the report by C.Jochnick/R. Normand/S.Zaidi, *Unsanctioned Suffering—A Human Rights Assessment of United Nations Sanctions on Iraq,* Centre for Social and Economic Rights, 1996; R.Provost, Starvation as a Weapon: Legal Implications of the United Nations Food Blockade Against Iraq and Kuwait, *Colum. JTL* 30 (1992), 577–639; E.J. Garmise, The Iraqi Claims Process and the Ghost of Versailles, *NYULR* 67 (1992), 840–78; R.Normand/C. Jochnick, The Legitimation of Violence: A Critical Analysis of the Gulf War, *Harvard ILJ35* (1994), 387–416; B. Graefrath, Iraqi Reparations and the Security Council, *ZaöRV* 55 (1995), 1–68. See also Chapter 22 below, 396–9.
42 See Chapter 4 below, 63–71.
43 See *Harris CMIL,* 1–17.
44 On the problem of the enforcement of international obligations, see the Colloquium in Commemoration of the 600th Anniversary of the University of Heidelberg, 22 and 23 September 1986, *ZaöRV* 47 (1987), 1 *et seq.* (with contributions by R.Jennings, R. Bernhardt, K.Zemanek, K.Doehring, E. Stein, J.A.Frowein, G.K.A.Ofosu-Amaah, T.Stein, R.Dolzer and S. Rosenne); P.van Dijk, Normative Force and Effectiveness of International Norms, *GYIL* 30 (1987), 9; W.E.Butler (ed.), *Control Over Compliance with International Law,* 1991; J.Delbrück (ed.), *The Future of International Law Enforcement. New Scenarios-New Law?,* 1993; A.P.Rubin, Enforcing the Rules of International Law, *Harvard ILJ* 34 (1993), 149–61; J.Delbrück (ed.), *Allocation of Law Enforcement Authority in the International System,* 1994.
45 H.J.Morgenthau, *Politics Among Nations. The Struggle for Power and Peace,* 1948. See also the earlier work by E.H.Carr, *The Twenty Years Crisis 1919–1939. An Introduction to the Study of International Relations,* 1940.
46 H.A.Kissinger, *Diplomacy,* 1994. See also Chapter 2 below, 32–3.

Certainly, the actual role and capability of international law in governing the relations between states must not be exaggerated, in view of the decisive significance of military, economic, political and ideological factors of power. In fact, the role of international law in international relations has always been limited, but it is rarely insignificant.[47] Its function in structuring the international system has been enhanced because of increasing global interdependence and the self-interest of states in regulating their intercourse rationally on the basis of reciprocity.[48] Therefore, disputes between states are usually accompanied by—in a given case naturally often conflicting—references to international law.

Foreign ministries do not unnecessarily employ a regular staff of legal advisors.[49] States continuously conclude and implement bilateral and international treaties and establish and operate international organizations. More and more compilations of state practice in international law have been appearing.[50] Serious efforts are being made to codify international law.[51] Modern national constitutions usually contain references to international law.[52] All of this corresponds to the empirical fact that most states are careful to observe most obligations of international law most of the time,[53] even in the absence of a compulsory dispute settlement procedure and centralized enforcement agency. Spectacular cases of violation of international law, which attract the attention of the media more than regular conduct, are exceptional and should not be confused with the ordinary course of business between states.

The old discussion on whether international law is true 'law' is therefore a moot point. First, it should be noted that the general concept of 'law' itself and its relative status in society is subject to quite divergent views throughout the world, as has been shown by the modern discipline of comparative legal studies.[54] It is based on different ideas, methods and traditions, as a consequence of historical and cultural diversity,[55] including the Anglo-Saxon common law tradition in England, the Commonwealth states and the United States, the European continental civil law tradition based on notions of Roman law, the Marxist conception of law as a product of class struggle and historical formations of society, the Islamic concept of law with no separation between state, society and religion, and special traditions in Asia and in Africa. This diversity is also relevant for proper understanding of the different national perceptions on the role and interpretation of international law itself.

Secondly, as regards international law as 'law', the arguments of the critics centred upon the absence of a legislature and, more recently, upon the topic of sanctions and compliance without recognizing the historical, structural and functional differences between legal systems within states and the international legal system as the necessary starting point of analysis. A horizontal system of law operates in a different manner from a centralized one and is based on principles of reciprocity and consensus rather than on command, obedience and enforcement. A system of law designed primarily for the external relations of states does not work like any internal legal system of a state. After all, there is no reason to assume that the international legal system must, or should, follow the historical models of centralized systems of national law. In effect, what distinguishes the rules and principles of international law from 'mere

47 R.St.J.Macdonald, Foreign Policy, Influence of Legal Considerations Upon, *EPIL* II (1995), 442–6; S.A.Watts, The International Rule of Law, *GYIL* 36 (1993), 15–45.
48 B.Simma, Reciprocity, *EPIL* 7 (1984), 400–4.
49 On the role of Legal Advisers and the impact of international law on foreign policy decision-making see the Symposium in *EJIL* 2 (1991), 132 *et seq.* (with contributions by S.M. Schwebel, G.Guillaume, M.Krafft and A.D.Watts); A.Cassese, The Role of Legal Advisers in Ensuring that Foreign Policy Conforms to International Legal Standards, *Mich. JIL* 14 (1992), 139; B. Mawhinney/ K.Girtel, Fourth Legal Advisers' Meeting at UN Headquarters in New York, *AJIL* 88 (1994), 379–82; M.A.G.Félix, Fifth Legal Advisers' Meeting at UN Headquarters in New York, *AJIL* 89 (1995), 644–9.
50 See Chapter 3 below, 39–40.
51 See Chapter 3 below, 60–2.
52 See Chapter 4 below, 65–71.
53 See L.Henkin, *How Nations Behave,* 2nd edn 1979. For an instructive description of how governments, courts, international organizations and other bodies apply international legal norms in the course of their work see R.Higgins, *Problems and Process: International Law and How We Use It,* 1994.
54 See M.Fromont, *Les Grands Systèmes de droit contemporains,* 1987; K.Zweigert/H.Kötz, *Introduction to Comparative Law,* 2nd edn 1992; C. Varga, *Comparative Legal Culture,* 1992; *International Encyclopedia of Comparative Law,* Vol. II, Chapter 1: The Different Conceptions of the Law; J. Kropholler, Comparative Law, Function and Methods, *EPIL* I (1992), 702–7; W.E.Butler, Comparative Law and International Law, *ibid.,* 699–702; M. Hilf, Comparative Law and European Law, *ibid.,* 695–9; R.A.Danner/M.-L. Bernal (eds), *Introduction to Foreign Legal Systems,* 1994.
55 For an example of the differences in the area of constitutional law in two Western federal systems of government see W.J.Josef, The Role of Basic Values in the Constitutional Hermeneutics of Germany and the United States, *ZaöRV* 56 (1996), 178–204. See further S.P. Sinha, *Legal Polycentricity and International Law,* 1996; P.Legrand, European Legal Systems Are Not Converging, *ICLQ* 45 (1996), 52–81.

morality' is that they are accepted in practice as legally binding by states in their intercourse because they are useful to reduce complexity and uncertainty in international relations. While international law is clearly weaker than municipal law from the viewpoint of independent enforcement, it still provides the external relevant terms of legal reference for the conduct of states in their international relations, based on the fact that, in spite of all differences, they are members of an existing international community.[56]

The scope of international law

The process of change in international law from a system of coordination of the international intercourse of mainly European states in limited areas, such as diplomatic relations and war, to a universal system of cooperation in numerous fields between quite different entities reflects the advances of natural sciences and technology,[57] increasing global economic and political interdependence and the need to address problems which can no longer be properly dealt with within a national framework, such as in the fields of communications, international trade, economics and finance, environment and development, or the massive problem of refugee flows. The concept of 'sovereignty' of states, although particularly cherished due to their historical experience by the new states which have emerged from the process of decolonization since the 1960s, is becoming more and more antiquated in view of the globalization of the economy and increasing interdependence of states.[58]

International law now covers vast and complex areas of transnational concern, including traditional topics, such as the position of states,[59] state succession,[60] state responsibility,[61] peace and security,[62] the laws of war,[63] the law of treaties,[64] the law of the sea,[65] the law of international watercourses,[66] and the conduct of diplomatic relations,[67] as well as new topics, such as international organizations,[68] economy and development,[69] nuclear energy,[70] air law and outer space activities,[71] the use of the resources of the deep sea,[72] the environment,[73] communications,[74] and, last but not least, the international protection of human rights.[75] This development has resulted in increasing specialization in both academia and legal professions in practice. As noted by Oscar Schachter:

> It is no longer possible for a 'generalist' to cope with the volume and complexity of the various branches of international law. Increasingly, the professional international lawyer, whether practitioner or scholar, is a specialist in a particular branch of the law and each branch develops its own complicated and often arcane doctrine.[76]

This specialization reflects the fact that international law has 'through maturity, acquired complexity',[77] but the development also now poses problems with regard to the unity of the academic subject.[78] The literature on international law has indeed become an immense area of study. While the total production of books on international law had amounted to about

56 See R.Jennings/A.Watts (eds), *Oppenheim's International Law,* Vol. I, Part 1, 9th edn 1992, 8–14; H.Mosler, International Legal Community, *EPIL* II (1995), 1251–5.
57 M.Lachs, Thoughts on Science, Technology and World Law, *AJIL* 86 (1992), 673–97.
58 On the doctrine of sovereignty see Chapter 2 below, 17–18.
59 See Chapters 5, 75–90, 7, 109–17 and 8, 118–29 below.
60 See Chapter 11 below, 161–72.
61 See Chapter 17 below, 254–72.
62 See Chapter 22 below, 385–430.
63 See Chapters 19, 306–41 and 20, 342–63 below.
64 See Chapter 9 below, 130–46.
65 See Chapter 12 below, 173–97.
66 See Chapter 16 below, 242–3.
67 See Chapter 8 below, 123–7.
68 See Chapters 6, 91–6 and 21, 364–84 below.
69 See Chapter 15 below, 222–40.
70 See Chapter 16 below, 244.
71 See Chapter 13 below, 198–208.
72 See Chapter 12 below, 173–5, 193–5.
73 See Chapter 16 below, 241–53.
74 See Chapter 13 below, 201–3.
75 See Chapter 14 below, 209–21.
76 O.Schachter, *International Law in Theory and Practice,* 1991, 1.
77 T.M.Franck, *Fairness in International Law and Institutions,* 1995, 5.
78 See L.A.N.M.Barnhoorn/K.C. Wellens (eds), *Diversity in Secondary Rules and the Unity of International Law,* 1995.

2,000 titles in 1785, by 1967 it had reached the figure of 80,000 books. Currently some 700 books and 3,000 articles on international law are published annually.[79]

The present book offers only a first introduction to fundamental elements and selected areas of international law. Furthermore, European Community law, which, although part of international law, has become a highly specialized area,[80] is outside the scope of this introduction, except for some reference to certain essential characteristics to describe the uniqueness of the 'supra-national' European Union as compared with other forms of international organizations.[81]

79 J.Schwietzke, Review of: E.Beyerly, *Public International Law. A Guide to Information Sources, ZaöRV* 52 (1992), 1052–3.
80 See, for example, D.Wyatt/A. Dashwood, *European Community Law,* 3rd edn 1993; D.A.O.Edward/ R.C. Lane, *European Community Law,* 2nd edn 1995; and the articles in *EPIL* II
81 See Chapter 6 below, 95–6.

2 History and theory

The origin of international law is a matter of dispute among scholars.[1] Some authors start by examining the relations and treaties between political entities from ancient times (3000 BC), including pre-classical antiquity in the Near East, ancient Greece and Persia, and the Romano-Hellenistic period.[2] The prevailing view in the study of international law is that it emerged in Europe in the period after the Peace of Westphalia (1648), which concluded the Thirty Years War.

Again we find different opinions in the literature on the proper classification of the subsequent development. In his interesting book on the epochs of the history of international law, the German diplomat and historian Grewe argues that there were three distinct systems of international law after the sixteenth century, each of which was characterized by the interests, ideologies and policies of the power that was predominant in the relevant period: the international legal orders of the Spanish age (1494– 1648), the French age (1648–1815) and of the English age (1815–1919)[3] (which the Scots and the Welsh, of course, in contrast to Grewe, would prefer to call 'British').[4] The *Encyclopedia of Public International Law,* edited by Rudolf Bernhardt, basically differentiates between the periods from 1648 to 1815, 1815 to the First World War, the inter-war period, and developments since the Second World War.[5] But it also has separate entries for regional developments in Africa, the Far East, the Islamic world, Latin America, and South and South-East Asia,[6] to avoid the impression of a Eurocentric approach and to clarify that the development of international rules and principles was not a European matter only. With regard to Asia, the work of C.H.Alexandrowicz especially has brought many new insights which had been lost in the course of European expansion.[7] As noted by R.P.Anand, it is incorrect

> to assume that international law has developed only during the last four or five hundred years and only in Europe, or that Christian civilization has enjoyed a monopoly in regard to prescription of rules to govern inter-state conduct. As Majid Khadduri points out: 'In each civilization the population tended to develop within itself a community of political entities—a family of nations—whose interrelationships were regulated by a set of customary rules and practices, rather than being a single nation governed by a single authority and a single system of law. Several families of nations existed or coexisted in areas such as the ancient Near East, Greece and Rome, China, Islam and Western Christendom, where at least one distinct civilization had developed in each of them. Within each civilization a body of principles and rules developed for regulating the conduct of states with one another in peace and war'.[8]

1 See W.G.Grewe, *Epochen der Völkerrechtsgeschichte,* 1984, 19–25; A.Cassese, *International Law in a Divided World,* 1986, 37–8; H.Steiger, Völkerrecht, in O.Brunner/W.Conze/R. Koselleck (eds), *Geschichtliche Grundbegriffe,* Vol. 7, 1992, 97–140. For a good collection of documents see W.G.Grewe (ed.), *Fontes Historiae Iuris Gentium: Sources Relating to the History of International Law,* Vol. I:1380 BC-1493 (1985), Vol. II:1493–1815 (1988), Vol. III 1/2:1815–1945 (1992). See also A.Nussbaum, *A Concise History of the Law of Nations,* 1962; J.H.W.Verzijl, *International Law in Historical Perspective,* 11 vols, 1968–1991; P.S.Onuf/N.Onuf, *Federal Union, Modern World, The Law of Nations in an Age of Revolutions, 1776–1814,* 1993; H.Legohérel, *Histoire du droit international public,* 1996.

2 W.Preiser, History of the Law of Nations: Ancient Times to 1648, *EPIL* II (1995), 716–49.

3 Grewe (1984), *op. cit.,* 43. For an excellent analysis of the strategic-economic reasons for the changes in the international system see P.Kennedy, *The Rise and Fall of the Great Powers, Economic Change and Military Conflict from 1500 to 2000,* 1987. See also C.J. Barlett, *The Global Conflict. The International Rivalry of the Great Powers, 1880–1990,* 2nd edn 1994.

4 On the multinational nature of the British unitary state and regionalist tendencies, see P.Malanczuk, *Region und unitarische Struktur in Großbritannien,* 1984.

5 History of the Law of Nations, *EPIL* II (1995): S.Verosta, 1648 to 1815, 749–67; H.-U.Scupin, 1815 to the First World War, 767–93; W.G.Grewe, the First World War to the Second World War, 839–49; O.Kimminich, Since the Second World War, 849–61.

6 History of the Law of Nations—Regional Developments, *EPIL* II (1995): T.O.Elias, Africa, 793–802; S.Miyazaki, Far East, 802–9; A.S.El-Kosheri, Islam,

809–18; A.T.Y.Serra, Latin America, 818–24; N.Singh, South and South-East Asia, 824–39.
7 C.H.Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (16th, 17th and 18th centuries), 1967; Treaty and Diplomatic Relations Between European and South Asian Powers in the Seventeenth and Eighteenth Centuries, *RdC* 123 (1968– I), 121 *et seq*. See also J.A.Thomas, History and International Law in Asia: A Time for Review, in R.St.J.Macdonald (ed.), *Essays in Honour of Wang Tieya,* 1994, 813–57.
8 R.P.Anand, The Influence of History on the Literature of International Law, in R.St.J.Macdonald/D.M.Johnston (eds), *The Structure and Process of International Law,* 1983, 342.
9 See Chapter 22 below, 395–415, 423–30.
10 See Grewe (1984), *op. cit.*; Anand, *op. cit.*, 344. On one aspect see also T. Meron, The Authority to Make Treaties in the Late Middle Ages, *AJIL* 89 (1995), 1–20.
11 See text below, 17–18.

The problem of periodization is well-known in historical studies in general. To a large extent the classification of history into periods is arbitrary and depends on the criteria applied. Therefore, not too much importance should be attached to it. For the purposes of this introduction it suffices to broadly distinguish between the 'classical' system of international law (1648–1918) and the development of 'modern' or 'new' international law since the First World War. The classical system was based on the recognition of the modern sovereign state as the only subject of international law. This system was composed of numerous sovereign states considered as legally equal and who accepted the unlimited right to wage war to enforce claims and protect national interests. In essence it reflected the interaction among European powers and the imposition of their international legal order upon the rest of the world in the three centuries following the Peace of Westphalia. From 1919 onwards a fundamental transformation of the international system took place with the attempt to organize the international community and to ban the use of force. The development of modern international law can conveniently be described in the stages from the First World War to the Second World War, including the split of the international community in the wake of the Russian Revolution and the creation of the League of Nations, from the establishment of the United Nations to decolonization (1945–60), and from the further expansion of the international community to the end of the Cold War marked by the dissolution of the Soviet empire (1960–89). The attempt to find a 'New World Order' after the end of the bipolar East-West conflict and the difficulties in the current phase of the development of international law will be addressed in the final chapter of this book.[9]

The formation of European international law

Even during the Middle Ages in Western Europe international law existed.[10] But medieval Europe was not very suitable for the development of international law, because it was not divided into states in the modern sense. Nowadays we think of states as having undisputed political control over their own territory, and as being independent of external political control. Medieval kings were not in this position; internally, they shared power with their barons, each of whom had a private army; externally, they acknowledged some sort of allegiance to the Pope and to the Holy Roman Emperor. When strong centralized states, such as England, Spain, France, the Netherlands and Sweden began to emerge, claiming unrestricted sovereignty and no longer submitting to a superior authority, new international standards evolved, also in relation to non-European powers like the Ottoman Empire, China and Japan. In the fifteenth and sixteenth centuries, with the discovery of the sea routes to the Far East and the rediscovery of America, the sea powers transcended the previous limits of the political world of Europe. This was followed by the development of the concept of the sovereign state, first in theory in the sixteenth century by Bodin,[11] then in reality in Spain and, in the transition to the seventeenth century, also in France.