

International Law

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A. Introduction: What is International Law? A Preliminary Definition

1. Preconditions for the Development of International Law

- 1 International law is the legal order which is meant to structure the interaction between entities participating in and shaping international relations (Besson 163). This rather wide definition deliberately avoids a reference to States. Although States play a significant role in today's international relations, they are not the only actors. International organizations and other international law subjects, as well as groups of individuals, → *non-governmental organizations*, and even individuals, contribute to the development of international relations. The development that groups of individuals and individuals participate in international relations acting on their own and not on behalf of States is a recent one.
- 2 Public international law has to be distinguished from national public law as well as from → *supranational law*. The distinction between national public law and public international law is not a matter of applicability or of substance covered, but a matter of the procedure in which the law was generated. If the law in question was developed by → *subjects of international law*, it belongs in principle to public international law; if it has been developed in an international organization having the competence to enact binding legal rules by majority, it may be referred to as being supranational. The concentration on the procedure is due to the fact that international law and supranational law cover issues which were traditionally reserved for, and which are still covered by, national legislation. This excludes a qualification based upon substance. International law, as well as supranational law, may be directly applicable at the national level (Besson 167), which excludes the use of direct applicability as the decisive feature for supranational law in comparison to public international law (→ *Treaties, Direct Applicability*).
- 3 The wide definition of what should be considered as international law has the advantage of expanding the views to developments of international law at the beginning of statehood in Europe as well as in other parts of the world, namely before the consolidation of modern statehood.
- 4 Frequently, it has been argued that modern international law began with the collapse of the European Middle Ages and with the advent of the Westphalian Peace Treaties of 1648 (→ *Westphalian System*). Such an interpretation is inspired by euro-centric thinking in the 19th century and the beginning of the 20th century on statehood. What is required for international law to develop—which does not mean it will necessarily develop under these circumstances—is the existence of several independent entities, which meet each other on the level of equality and which are willing to engage in peaceful relations rather than being in a permanent state of war with each other. Apart from that, the development of international law depends upon whether the subjects accept or are unified by a common basis for their mutual relations. Such a common basis may be intensive—even leading to an → *international community*—or less so. In the early beginnings of international law the basis was the wish to avoid military confrontations.
- 5 As Preiser has established, the existence of subjects meeting each other on the basis of equality—he referred to the necessary political equilibrium—was met in the ancient Middle East from the middle of the 15th century BCE until the invasion of the so-called maritime people around 1200 BCE. Several independent entities existed, such as Egypt; Babylonia; the Hittite Kingdom of Asia Minor; the Mitami from the north-west of Mesopotamia; and the Assyrian Empire. Among these entities a network of international relations came into existence which resulted in various agreements or arrangements. As Preiser has set out, the Hittite Great King recognized as his equals the rulers of Egypt, Babylonia, Assyria, and Mitanni. This treaty-based relationship between independent entities was followed by another one between Egypt, Neo-Babylonia, and the Lydian Kingdom. Still, it is disputed whether these treaties should be classified as international law. At a minimum, these entities contributed to the rules on treaty-making, on diplomatic relations, and on the conduct of war (Bedermann 31).
- 6 In ancient Greece an equivalent to today's international law came into being at the moment when internally autonomous and externally independent city or municipality States had been created, at the latest by the end of the 7th or at the beginning of the 6th century BCE. The Greek city States contributed additionally to the system of arbitration.
- 7 It is an open question whether all these entities are to be considered States in today's meaning of the term. Furthermore, it is questionable whether the arrangements of 1270 BCE made, for example, between the Pharaoh of Egypt, Ramses II, and the Great King of Hittiti, Hattusili III, constituted an international treaty. As far as its content was concerned it may be qualified as such. It was a treaty of friendship dealing with issues such as keeping peace, mutual assistance, and extradition. But it was rather a treaty between rulers than with legal entities which leads Ipsen (19 et seq) to

conclude that it should be considered as a contractual arrangement rather than law. This is a perception based upon a State-centred approach towards international law which, apart from that, does not take into consideration that this arrangement served as a model for similar arrangements among the rulers of this region.

- 8 It is to be noted that the equivalent of international treaty law can also develop, and has developed, between non-State entities when they meet each other outside the realm of national jurisdictions and on the basis of independence and formal equality. Such entities must have the ultimate power to regulate their affairs within, and with respect to, other entities having the same qualification. Therefore agreements such as the treaties among the rulers in the ancient Middle East should be qualified as international law, whereas arrangements among multinational corporations of today, for example, should not be considered international law.
- 9 Accepting the approach that for the potential development of international law it is necessary for different independent entities to exist which meet each other on the level of equality, it is evident that no international law could develop under the aegis of the Chinese Empire or the Roman Empire, since both claimed superiority towards all other entities neighbouring them.
- 10 To briefly conclude, what is essential for the development of an equivalent to international law is the existence of several entities which accept others as an equal counterpart in their mutual relations and are willing to enter into peaceful relations with them.

2. Is International Law Law?

- 11 'International law is not law; it is a series of political and moral arrangements that stand or fall on their own merits, and anything else is simply theology and superstition masquerading as law' (Bolton 48).
- 12 In particular the structure and the 'haziness' of international law lead to the question: is 'international law' really 'law'? Undoubtedly there is a tradition of scepticism about the nature of international law. International law has indeed been challenged and attacked. Critics, such as John R Bolton, even go as far as completely denying international law its legal quality. This approach is not a particularly new one.
- 13 It is to be admitted that there are fundamental differences between national and international law. Generally, within international law the law-maker—mainly States and international organizations—and the subjects of international law—again States and international organizations—are identical. Considering this fact, it is argued that international law lacks the basic prerequisites for → *legitimacy* since no coherent structural framework can be found in the international legal system. Sources of law are therefore neither identifiable nor authoritative. Hence the binding effect of international law for its subjects is doubted. Due to the lack of coercive authority, → *compliance* with international law completely depends, so it is argued, on the political will of the State concerned. Big and powerful States are favoured over small or less potent States. It is further argued that even within the framework of the United Nations—with almost universal membership representing the international community as a whole—no unified system of sanctions exists. Actions to promote → *community interest[s]*, it is emphasized, require co-operation between a multitude of States and especially between the five permanent UN Security Council members. As history clearly has shown, joint action by any of the great powers depends on their vital interests (Slaughter 223). In sum, international law is considered only as a mirror of the reality of politics in international relations. International law is held solely to constitute political or moral obligations from which States can pick or choose according to their wishes (Posner [2003] 1918).
- 14 Legal theory always concerns itself with the nature of law, not only in respect of international law, but also concerning national law. In fact, it seems to be difficult to explain legally the nature of law without having recourse to extralegal explanations. In national law the question about the basis for its binding nature is usually answered by referring to the constitution of any State, which provides for the legal basis of the organs, in particular the parliament, to issue binding rules. National law is binding because it is based on a constitutional order and adopted in a procedure provided for in the constitution concerned. The question as to why the constitution can provide for a mechanism to issue binding rules has so far never been compellingly answered (Doehring 3).
- 15 Attempts to substantiate international law go back to its roots. They range from positivist approaches (→ *Legal Positivism*), to religion, ethics, rationality, and the nature of law (→ *Natural Law and Justice*). None could satisfactorily provide a solution to the question why international law is binding. As will be shown in the following, international law

is valid because it is necessary for the establishment of a sustainable structure of international relations. The basis for its binding nature rests in the objective of international law itself.

- 16 As early as the 19th century, a particular turning to international law as an instrument for the shaping of international relations can be seen. Nowadays, the scope of issues which may become a subject of international relations—ie where common actions of States and international organizations are required to achieve the desired result or, to put it differently, where a desired result cannot be achieved unilaterally—has increased considerably. Without a minimum of compliance with international law rules, international relations, either in the form of sole co-existence or the ever more important form of co-operation rules (→ *Co-operation, International Law of*), are unworkable. Anarchy, complete instability, and chaos would be the consequence. Engagement with international law offers stability in international politics. A system of 'international life' has to contain rules decisive for its participants, and these rules have to reflect a basic standard for requirements of international relations.
- 17 To explore the capability of international law to provide a legal framework for international relations, it is necessary to reiterate the main challenges of today's international relations. These basically are to preserve international peace and security; to protect the individual; to manage common spaces such as the → *high seas*, → *outer space*, and → *Antarctica*; to protect the interests of the international community as a whole, such as the environment, the climate, and the cultural legacy of humankind; and to level existing social and economic differences within different regions or even among States.
- 18 These challenges show the need of a basic framework for co-operation. The principal elements of such a framework for co-operation are the procedures to develop law and the basic procedure for international co-operation, starting from the mere exchange of information to qualified → *consultation*. Finally, international law governs the institutionalization of international co-operation through the formation of international organizations or other more flexible forms of co-operation among the various subjects of international law.
- 19 In spite of its unique attributes, which distinguish international law from national law and also from supranational law, such as European Union law, some basic norms—a *ius necessarium*—are recognized by all subjects of international law (Shaw 9). One of these principles is the concept of → *pacta sunt servanda*, or rather the respect of and adherence to law. Without the recognition of this principle international relations would fall back to anarchy. International law, however, does not only consist of treaty law, → *customary international law*, as well as international principles, remain of significant relevance. Customary international law, as well as international principles, reflect the growing consensus of the international community on commonly held values. In particular, international principles are the indispensable foundation of international law, providing the fundamentals for the already mentioned second layer of international law, namely treaty law and customary international law.
- 20 As indicated, the critics of international law place some emphasis on the fact that international law does not provide for sanctions as effective as those within municipal law. However, it is a misconception to believe that law becomes law only if and to the extent that it is enforceable through criminal law or through administrative law sanctions. The implementation of municipal law very much depends on the insight that the obligation in question is legitimate. Sanctions, be they criminal law sanctions or administrative law enforcement mechanisms, are only a means of last resort. This fact, however, is not meant to deny that international law is heavily embedded within, and cannot be divided from, its political context. It is generally accepted that international law is of a horizontal character, meaning it is developed between its subjects, compared to the vertical nature of national law which is developed by institutions empowered with this task. International law is, as far as its sources and its foundation are concerned, not uniform. Nevertheless it should be seen as one system, as emphasized by the → *International Law Commission (ILC)* in its report 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' ([2006] GAOR 61st Session Supp 10, 400).
- 21 Apart from that, international law has developed its particular implementation and enforcement mechanisms differently from those of national law. They reflect the nature of international law as a legal system based on co-ordination and co-operation among equals.

B. Development of International Law: Its Epochs

1. Problems of Identifying Epochs

- 22 Grewe, in particular and similar to Nussbaum, made the attempt to develop a periodization in the history of international law. He distinguished broadly between the Middle Ages, based upon the occidental Christian community; the law of

nations in the Spanish Age (1494–1648; → *History of International Law, Ancient Times to 1648*); the international legal order during the French Age (1648–1815; → *History of International Law, 1648–1815*); the international legal order of the British Age (1815–1919; → *History of International Law, 1815 to World War I*); the international legal order in the interwar period (1919–44; → *History of International Law, World War I to World War II*); the period under the aegis of the UN featured by the bipolar US-Soviet influence and the rise of the Third World; and finally the development of an international legal community (→ *History of International Law, since World War II*).

- 23 The problem of this periodization is that the historical development of international law is clearly perceived from the point of view of European States and of the development of State → *sovereignty* in that region. Shaw put it succinctly by stating:

The foundations of international law (or the law of nations) as it is understood today lie firmly in the development of Western culture and political organisation. The growth of European notions of sovereignty and the independent nation-State required that an acceptable method whereby inter-State relations could be conducted in accordance with commonly accepted standards of behaviour, and international law filled the gap (at 13).

- 24 However, it is doubtful whether founding today's international law so absolutely on developments within the 'Western culture' is conclusive since it disregards developments in other parts of the world which equally had an influence on the development of international law. Further, it contributes to the scepticism about the validity of international law from other regions outside Europe. Apart from that, this approach is tailored to States such as those developed in Europe, thus rendering it more complicated to accept other actors in international relations.
- 25 It seems therefore, a more appropriate approach is to identify the common basis of international relations.

2. The Religious Basis of International Law in Europe

- 26 According to Grewe a concept of humanity had developed in the Hellenic period and was in theory the 'spiritual background' of the Roman Empire (at 51). Others argue that the legacy of the Roman Empire period is the idea of justice (Neff 33).
- 27 Compared to that, the common bond of the nations in the occident, as well as in the Greco-Byzantine region was, apart from Latin as the common language of the educated, the consciousness of belonging to the Christian Community (Grewe 51) united in the Roman Church (Verosta 51). This bond was reinforced by the defence against the Islamic World. A unifying factor thus became the fight against the infidel.
- 28 In spite of this, the rulers in the Middle Ages maintained political relations with non-Christian entities. They concluded treaties with them, occasionally even alliances against Christian rulers. These agreements were considered binding. According to Grewe the Christian consciousness of unity was governed by the idea of a structural community; Christendom as conceived as a *communitas communitatum*, that is to say that in spite of the claims of the Pope, and to a lesser extent the Emperor, the differentiation of the entities of the Christian World was not put into question (at 54). As Grewe summarizes, the elements on which the solidarity of the medieval Christian family rested were at the same time differentiated and sustainable (at 57–8).

3. Loss of the Common Religious Basis in Europe

- 29 The loss of a common religious basis in Europe only gradually had an impact upon the formation of the law of nations. The law of nations was developed on the basis of the scholastic tradition by Spanish thinkers such as Vitoria and Suarez, on which Grotius based his writings. According to Vitoria, natural law was the primary and supreme source of the law of nations, the latter consisting of treaty law as well as customary law. Natural law was preordained from the beginning in the divine world order. In comparison thereto, Suarez grounded the law of nations on the → *consent* of States and derived its binding force from natural law which was inherent in the legal system as such.
- 30 Grotius only gradually shifted away from the divine foundation of natural law. However, he clearly distinguished between the law of nations and natural law. Apart from that, the law of nations was not considered as a body of law governing human affairs in general but applied only to the rulers of States. The term international law was coined by Jeremy Bentham (Nussbaum 135). He already alluded to a universal human society, an approach further enforced by Samuel

von Pufendorf and Christian Wolff, emphasizing the existence of a universal legal community of all mankind whose rules derived from abstract principles of reason. It is evident that the meaning of natural law underwent a development. From governing the relations of States, it developed into a system parallel to the law of nations. As far as its origin is concerned, it was perceived as law not dependent upon the will of human authority but rooted in extralegal considerations or as an expression of the essence of the law itself.

4. International Law after the Consolidation of Modern Statehood

- 31 The consolidation of modern statehood—a development which took place in Europe and was followed at the beginning of the 19th century—marked a shift away from the reference point of the ‘universal human society’ to the society of civilized nations. A reference to this can be found in the preamble to the first Hague Convention on the Laws and Customs of Land Warfare (Convention with Respect to the Laws and Customs of War by Land and its Annex: Regulations Respecting the Laws and Customs of War on Land [signed 29 July 1899, entered into force 4 September 1900] [1898-99] 187 CTS 429), but was invoked already in the Declaration relative to the Universal Abolition of the Slave Trade ([signed 8 February 1815] [1813-15] 63 CTS 473). This formula, in fact, meant to exclude other States from the family of civilized nations until they had reached the same level of development (Koskenniemi 127 et seq). But this approach was not one-sided, the American States—at least for a certain period—were reluctant to entertain close political relations with Europe.
- 32 Grewe classified the international system as being ‘unorganized’ but factually ‘interconnected’ until the European-dominated international law opened to the States outside this region (at 461). This development, which ultimately leads to → *universality*, has perhaps even now not yet been fully completed (see para. 37 below).
- 33 This period of international relations (beginning of the 19th century to 1918) was dominated, as far as legal theory is concerned, by positivism. This means in this context that international law is considered an entirely human institution depending upon the will of the subjects concerned. The Permanent Court of International Justice formulated it succinctly: ‘the rules of law binding upon States ... emanate from their own free will’ (*The ‘Lotus’ [France v Turkey]* PCIJ Series A No 10, 18; → *Lotus, The*).

5. The Rise of International Organizations after 1918

- 34 The establishment of the League of Nations marked the beginning of the evolutionary process making international organizations a prominent actor for interaction among States. This equally initiated the move from away from bilateralism, as the then dominant feature of international law, to a growing emphasis on communitarism (see Simma), which is reflected in international law by supplementing the existing rules based upon the principle of co-existence by those on co-operation (see paras 49–65 below).
- 35 The experience of World War I led to a rethinking of legal positivism, as developed in the 19th until the beginning of the 20th century, and a dogmatic return to Suarez and Grotius (see Kelsen; Verdross). They based the binding force of international law on a meta-legal ‘fundamental norm’ (*Grundnorm*) rooted in the law of nature (see Koskenniemi 240 et seq).
- 36 A new theoretical basis of international law developed only gradually with the recognition of the existence of an international community (see Paulus).

6. The Establishment and Consolidation of a Common Normative Basis

- 37 In the period after World War II the development of international law was marked by an increase in treaty-making initiated by the UN and specialized agencies such as the → *International Labour Organization (ILO)*, the → *International Maritime Organization (IMO)*, and the → *Food and Agriculture Organization of the United Nations (FAO)*, as well as the → *International Law Commission (ILC)*, which constituted in part codification of customary international law, as well as its progressive development. The reasons behind this development are manifold. One of the reasons is the increase in the number of States and international organizations, which resulted in the interests of the subjects of international law being less homogeneous than before. Apart from that, it was uncertain whether the States having gained independence due to the → *decolonization* process would accept the customary international law so far developed among the European States only. The codification process thus reflected the need for more legal certainty in international relations, as well

as a mechanism to establish and to secure—as far as possible—the universality of international law. Another driving force for this codification was the growing → *interdependence* among States concerning economic, environmental, and other matters. Finally, an increasing number of issues were considered to be of common concern, or at least of interest, such as common spaces (seas and outer space) or issues such as human rights, the protection of the environment, → *international economic law*, the fight against poverty, etc. This development resulted in a change of the typology of international law. Whereas treaty as well as the customary international law of the 19th and the beginning of the 20th century was to be considered as being based upon the principle of the co-existence of States, the norms developed after the establishment of the League of Nations increasingly reflect the principle of co-operation. This trend has significantly increased under the aegis of the UN and is supplemented further by the principle of solidarity (→ *Solidarity, Principle of*).

- 38 This broadening, and at the same time deepening, of the corpus of international law has modified the international legal community. The unifying bond is the corpus of international law, its underlying values such as human rights, and the acceptance that the management of common spaces and persistence of interests of humankind require common actions.

C. Guiding Structural Principles of International Law

1. Law of Co-ordination

(a) Introduction

- 39 The terms 'law of co-ordination' and 'law of co-operation' do not identify different phases in the development of international law; they rather constitute different techniques of legal regulation (Abi-Saab [1998] 250). The same subject may be regulated according to either of the approaches; and the UN Convention on the Law of the Sea ([concluded 10 December 1982, entered into force 16 November 1994] 1833 UNTS 397) provides a good example of using both approaches. It is to be acknowledged though that these techniques infringe upon the sovereignty of States in a differing intensity. Further, these techniques result in creating different entities; the establishment of international organizations is the direct and logical result of focusing on co-operation. Also the law of co-operation has an impact upon the understanding of the international community and raises particular problems as far as achieving universality is concerned. Finally, it is to be noted that in recent years the number of international treaties tailored according to the principle of co-operation has increased.
- 40 In particular the law of the UN Convention on the Law of the Sea (→ *Law of the Sea*) demonstrates that international treaties may reflect every approach: the principle of co-ordination, the principle of co-operation, as well as the principle of solidarity. Another example to that extent is the → *Lisbon Treaty* (Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community [signed 13 December 2007, entered into force 1 December 2009] [2007] OJ C306), which emphasizes the sovereign equality of its Member States: Art. 3 (a) (2), provides for co-operation among its members, as well as with the organization to serve a common goal referred to in Art. 2, and equally refers to the principle of solidarity (Art. 2 (3)) between Member States as well as generations.
- 41 The law of co-ordination does not presume the existence of a community of States; it just endeavours to establish a minimum of order between independent and separate entities. They not only deny the existence of any authority superior to themselves (see Abi-Saab *Cours général de droit international public* [1987]) but they also deny the existence of a common value system. Both aspects, the non-reliance on the existence of a community of States and the rejection of a superior authority to States, distinguish this system from the system based upon co-operation.

(b) Purpose of the Law of Co-ordination

- 42 It is the main purpose of the law of co-ordination to keep the subjects of international law peacefully apart and to organize unilateral or common action where an issue cannot be managed effectively by each subject alone. The basic presumption of the law of co-ordination is that all subjects are equally sovereign, equality being understood as formed. States are the dominant actors in international relations. Even if it comes to the establishment of international organizations, individual States' interests are preserved either by attributing to such international organizations technical matters only, such as managing communications systems, or by providing that decisions can only be taken by unanimity.
- 43 If international law envisages nothing more than co-ordination among the subjects concerned, this necessarily has an impact upon the nature of obligations and the means of their implementation.

(c) The Nature of Obligations

- 44 The role of international organizations changed only under the law of co-operation. In a system based on the law of co-ordination, obligations are essentially those of 'not doing' or of abstention, and this system is based upon the assumption that what is not prohibited is permitted (Abi-Saab [1998] 252). As the purpose of the system is ideally 'to keep its subjects peacefully apart, that is to say in a state of negative peace or the absence of war, it suffices to impose on them the obligation of respecting each other's sovereignty; ie, not to encroach on each other's spheres of competence, so that the conditions of equilibrium may be satisfied' or at least not endangered (ibid 252). To the extent that common actions are to be taken, the procedure through which such decisions are taken so as to achieve a result which can only be achieved by a common positive action such as, for example, the demilitarization of the → *Åland Islands*, guarantees that the co-ordinative nature of the action taken is preserved.
- 45 In principle the international norms governed by the structural principle of co-ordination, may be schematically classified in two general categories, namely those legally articulating sovereignty or aspects thereof dealing with several sovereignties, and those norms dealing with inter-State relations or transactions.
- 46 As far as the former category is concerned, it comprises all norms which reiterate, reinforce, or build upon the sovereignty of individual States. In particular the norms on the prohibition of having recourse to military force (Art. 2 (4) UN Charter), the reference to the inherent right of → *self-defence* (Art. 51 UN Charter), and the prohibition of interference in internal affairs (Art. 2 (7) UN Charter), fall into this category. This is equally so for the norms on → *State immunity*, as well as the principle that the settlement of international disputes through international courts or tribunals requires the consent of the States concerned. Whereas the obligations under these norms are obligations of abstention (not to have recourse to armed force, for example), there are further norms guided by the principle of co-ordination which contain positive obligations, procedural as well as substantive ones. These are, for example, the classical legal regimes on the law of international treaties, on diplomatic and consular relations, on the law of State succession, and on rules concerning the freedom of the high seas.

(d) Mechanisms of Implementation

- 47 The mechanisms of implementation reflect the nature and objective of the obligations. Under the law of co-ordination, States do not consent, as a matter of principle, to implementation and enforcement through international organizations. International commitments are enforced—if at all—on the basis of bilateral relations. The settlement of disputes through international courts or tribunals is not a mandatory one, but rather depends upon the consent of the States concerned.
- 48 Thus, for the law of co-ordination, there is only one mechanism of application: self-regulation. Given that this is essentially a question of abstention, each State undertakes to respect its obligations without having to go through another organ or be submitted to it. The law of co-ordination is thus, ideally speaking, a non-institutional and non-organic form of law. It is the subjects themselves, by way of their actions and reactions, who make the system work (Abi-Saab [1998] 252).

2. The Law of Co-operation

(a) In General

- 49 The term 'law of co-operation' has been developed as a counterpart to the term 'law of co-ordination' (Friedmann). As indicated earlier, the law of co-operation does not replace the law of co-ordination but constitutes an additional dimension, supplementing, and in some places reinforcing, the former. As demonstrated by Art. 1 UN Charter, both endeavours are combined in the UN system. The obligation to co-operate, as set out in Art. 1 (1) and (3) UN Charter, entails co-operation among States, and co-operation with the UN in the maintenance of international peace and security, as well as in the solving of international problems of an economic, social, cultural, or humanitarian character. However, the UN Charter equally emphasizes the sovereignty of States, as well as their equality (Art. 2 (1) UN Charter)
- 50 The term co-operation has never been defined by an international treaty or a resolution of the UN General Assembly. Even the → *Friendly Relations Declaration (1970)* (UNGA Res 2625 [XXV] 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations' [24 October 1970] GAOR 25th Session Supp 28, 121) proceeds from a preconceived terminology. An analysis, however, of this declaration demonstrates that the term describes the voluntary, co-ordinated action of two or more States which takes place under a legal regime and serves an agreed, specific objective. To this extent it marks the effort of States to accomplish an objective by joint action, where the activity of a single State cannot or may not achieve the same result.

Thus, the duty to co-operate means the obligation to enter into such co-ordinated action so as to achieve a specific goal. The significance and value of co-operation depends upon the goal to be achieved, whereas co-operation as such has no inherent value.

(b) Purpose of the Law of Co-operation

- 51 The objective of co-operation may be twofold; it may envisage the promotion of the interests of the States involved or of those of a greater community such as the international community. This requires the existence of community interests. Co-operation may, however, only further the interests of one State or a specific group of States, such as the developing States.
- 52 All international organizations represent areas where the duty to co-operate has been established and institutionalized. Such co-operation may serve the interests of all relevant States Parties or a larger group, or it may benefit only a special group of them. These objectives are not mutually exclusive, as the deep seabed mining regime of the UN Convention on the Law of the Sea demonstrates. According to Art. 153 (1) UN Convention on the Law of the Sea, activities in the Area are carried out on behalf of mankind as a whole, although the → *International Seabed Authority (ISA)* is composed only of the States Parties to the convention (Art. 162 (1)).
- 53 It is a matter of discussion whether a general obligation to co-operate exists under customary international law. Even though a general obligation may not yet exist, such an obligation has been created by recent international agreements for the use of common spaces and concerning issues in the interest of the international community. Such agreements reflect the increased concern of the world community over the effective and reasonable use of spaces beyond national jurisdiction (common spaces), and the realization that the administration of such areas, as well as the realization of objectives in which the international community has an interest—such as the protection of the environment or the protection of human rights and the development of a sustainable international economic system accommodating the interests of all States—cannot be achieved by the unco-ordinated action of individual States.
- 54 The law of co-operation approach is more ambitious than that of the law of co-ordination; both with regard to the role and tasks that it attributes to law. It envisages that law should guide the doings of society by initiating and regulating social change, thus claiming a structuring function.
- 55 The law of co-operation requires as a prerequisite, the establishment and agreement on a common goal to be achieved—a community interest. Such community interest is the source of legitimacy for the obligations to co-operate, as specified in a given legal regime based upon the principle of co-operation.
- 56 Different from the law of co-ordination, the law of co-operation approach is oriented towards the establishment of international institutions as the focal point for co-operation, since there exists a co-relation between the 'normative density' and the consequential 'institutional density' necessary to implement the norms concerned and to progressively develop them (*Abi-Saab Cours général de droit international public* [1987] 95). This does not necessarily mean the establishment of an international organization properly speaking. The institutional law of international law has undergone substantive changes—now also encompassing, besides international organizations, meetings of States Parties, summits, and meetings of the heads of States and governments such as the G20. They all reflect the need for an intensified institutionalized co-operation.

(c) Co-operation as to Common Spaces

- 57 The obligation to co-operate is established for Antarctica and outer space, as well as the management, exploration, and exploitation of the deep seabed (the Area), each of these having been declared the → *common heritage of mankind*. Under these legal regimes the duty to co-operate always entails procedural and substantive obligations, and sometimes includes institutional obligations.
- 58 As far as procedural obligations are concerned, they require the States Parties to co-operate with the other parties within the institutional framework established. Only the UN Convention on the Law of the Sea has established an international organization, the International Seabed Authority. Accordingly, the obligations to co-operate are vis-à-vis the other States Parties as well as towards the Authority. The substantive obligations vary significantly, but in any case they go beyond abstention and co-ordination. They are tailored to, and determined by, the common goal the legal regime in question is meant to achieve.

(d) Co-operation in International Environmental Law

- 59 International environmental law is a prime example where an international obligation to co-operate has been established and plays an important role in progressively developing or implementing the legal regimes in question. Principle 7 of the Rio Declaration on Environment and Development (UN Conference on Environment and Development [14 June 1992] UN Doc A/CONF. 151/26/Rev 1 vol I, 3; → *Stockholm Declaration [1972] and Rio Declaration [1992]*) may be considered as a model clause. It reads: 'States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem'. The reliance on an obligation to co-operate is apparent in environmental agreements with a restricted membership as well as in universal environmental agreements.
- 60 Although all international environmental agreements refer to the obligation to co-operate, the ensuing obligations differ. They entail procedural, institutional, and substantive obligations. In particular, the substantive obligations may be far-reaching and may require substantial changes in the municipal law, as, for example, the obligations under the legal regime against climate change demonstrate.

(e) Co-operation in the Protection of Human Rights

- 61 The basic obligation of co-operation with respect to human rights is found in Arts 1, 55, and 56 UN Charter, in which members 'pledge themselves to take joint and separate action in cooperation with the Organization' for the achievement of the purposes of the UN, which includes 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'. A similar obligation is reiterated in the Preamble to the → *Universal Declaration of Human Rights (1948)* (UNGA Res 217 A [III] [10 December 1948] GAOR 3rd Session Part I Resolutions 71), as well as in the Friendly Relations Declaration. Art. 2 (1) → *International Covenant on Economic, Social and Cultural Rights (1966)* ([adopted 16 December 1966, entered into force 3 January 1976] 993 UNTS 3) is more specific by es-tablishing an undertaking 'to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with the view to achieving progressively the full realization of the rights' in question. Other international human rights agreements, such as the Convention relating to the Status of Refugees ([signed 28 July 1951, entered into force 22 April 1954] 189 UNTS 150) and the Protocol relating to the Status of Refugees ([done 31 January 1967, entered into force 4 October 1967] 606 UNTS 267), specify undertakings to co-operate with the Office of the UN High Commissioner for Refugees or other international bodies.
- 62 A perusal of the international human rights agreements reveals two different types of co-operation, namely co-operation among States Parties—as, for example, under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ([adopted 10 December 1984, entered into force 26 June 1987] 1465 UNTS 112), where they undertake to afford one another the greatest measure of assistance in connection with criminal proceedings—and co-operation with an institution or a treaty body of the international agreement in question. Here again the substantive obligations may require modifications of the national law as far as prescription and implementation are concerned.

(f) Co-operation in International Economic Law

- 63 International economic law is another reference area depending upon international co-operation. There are several reasons for justifying this approach. International economic law is concerned with a common public good, namely global welfare as referred to in Art. 55 UN Charter and reiterated in substance by the Preamble to the Marrakesh Agreement Establishing the World Trade Organization ([adopted 15 April 1994, entered into force 1 January 1995] 1867 UNTS 154; 'WTO Agreement'). International co-operation has two facets in international economic relations; one dealing with the co-operation among States with the view of fostering individual State interests and the other dealing with co-operation within and with international organizations advancing public interests. The → *World Trade Organization (WTO)* system reflects the second approach.

(g) The Mechanism of Implementation and Enforcement

- 64 As stated above, the mechanisms of implementation reflect the nature and objective of the obligations. Accordingly, implementation and enforcement require procedures different from those traditionally invoked for obligations under the principle of co-ordination; whereas the latter belong, as a matter of principle, to the confrontational procedures, such as → *countermeasures*, → *sanctions*, and invocations of → *State responsibility*. A different, or rather a supplementary, approach is called for concerning obligations to co-operate. Certainly, confrontational measures are used to force the full implementation of human rights, but, for example, in international environmental law incentive-based procedures are gaining ground. In general, it is thought that non-confrontational measures are more responsive to the different reasons why States Parties do not comply with their international commitments to co-operate.

65 International law has not yet developed a generally accepted solution for the enforcement of obligations owed to the international legal community as a whole, unless one considers every member of the international community to have standing to defend community interests. Art. 48 Draft Articles on State Responsibility (UN ILC [1996] GAOR 51st Session Supp 10, 125) points in this direction (see Wolfrum [2011]).

3. Solidarity

(a) Introduction

66 The principle of solidarity envisages equalizing deficits which result from the fact that jurisdictional powers of States are necessarily limited. Therefore States acting merely on an individual basis and serving individual State interests cannot provide satisfactorily for solutions which the interests of the community demand. Such demands require a common action. This means the more community interests are being defined and the more community ori-ented regimes are established, the more States face the necessity to co-operate. The principle of solidarity reflects the transformation of international law into a value-based international legal order.

67 Furthermore, the principle of solidarity may strive for the amelioration of inequalities of opportunities or possibilities of particular States in comparison to others. This means that when trying to achieve a common goal the contributions of some may exceed those of others. In particular cases, solidarity-based actions may be designed to benefit some States or even only one. Such balancing is contrary to the general matrix of international law understood as serving merely the co-existence of States, namely the formal equality of States. Thus the principle of solidarity has three different aspects: the achievement of common objectives; the achievement of common objectives through differentiated obligations; and actions to benefit particular States.

68 The reference to the principle of solidarity as a structural principle is actually not a new one. The idea that States in their relations should be guided by the principle of solidarity was discussed from the 17th to the 19th century. The origins of international law were significantly influenced by the perception of a *universitas christiana* based upon common Christian values (Grewe 51). After the severance of the connection of early international law from its religious roots, attempts were made in the 18th century to construe a State community on the basis of a common perception of the human being. For example, Samuel von Pufendorf refers in the sixth chapter of his book *De Officio Hominis et Civis* (1673) to the obligations of each individual towards all other human beings. This concept was further elaborated upon by Christian Wolff in his book *Ius Gentium Methodo Scientifica Pertractatum* (1749). The same ideas were advocated by Emery de Vattel. While referring to a *société civile* he formulated: 'Un Etat doit à tout autre Etat ce qu'il se doit à soi-même, autant que cet autre a un véritable besoin de son secours, et qu'il peut le lui accorder sans négliger ses devoirs envers soi-même' ('One state owes to another state whatever it owes to itself, so far as that other stands in real need of its assistance, and the former can grant it without neglecting the duties it owes to itself' [E de Vattel *The Law of Nations or the Principles of Natural Law Applied to the Conduct and the Affairs of Nations and of Sovereigns* (1758) (Johnson Law Booksellers Philadelphia 1839) book II chapter I §3]).

(b) International Law Guided by the Principle of Solidarity

(i) In General

69 In addition to the law of co-operation that covers significant parts of international law, there are certain branches of international law which are guided by the principle of solidarity, thus adding further features to international law as such. This means—generally speaking—that as far as these issues are concerned, States, in shaping their positions, may not only take into consideration their own individual interests but also those of other States or the interests of the community of States or both. The second aspect referred to, which has as an objective the amelioration of existing deficiencies or disparities, can be identified only in a few regimes. However, for these regimes, this aspect of the principle of solidarity is quite determining.

(ii) Solidarity as a Structural Principle in the International System on the Protection of Peace

70 The most significant change to international law was the ban on the resort to armed force in the → *Kellogg-Briand Pact* (1928) (General Treaty for Renunciation of War as an Instrument of National Policy [signed 27 August 1928, entered into force 25 July 1929] 94 LNTS 57); this prohibition has been expanded by Art. 2 (4) UN Charter. One of the exceptions to the prohibition to have recourse to military force is the inherent right of States to individual or collective self-defence, which reflects the right of each State to preserve its existence and its position as a sovereign and equal member in the community of States. The right of self-defence also covers instances where a non-attacked State lends its support to

an attacked State. Since the State lending its support to a State which has become the victim of an → *armed attack* does not have to pursue an interest of its own, it performs, when intervening for the protection of another State, an act of solidarity by making the case of that State one of its own. That such intervention may be qualified as an act of solidarity is well expressed in Art. 5 North Atlantic Treaty ([signed 4 April 1949, entered into force 24 August 1949] 34 UNTS 243), as well as in other security pacts. Technically speaking this provision creates a legal fiction, namely that the attack launched against one of the parties is to be considered as an attack against all of them. Therefore it is appropriate to refer to the → *North Atlantic Treaty Organization (NATO)* as a community based upon the principle of solidarity established by international agreement. Its objective is the protection of the safety of each of its parties through a solidarity action of its members and through this, the protection of peace in the region.

71 The system of → *collective security* also includes elements of solidarity, although its set-up is different.

(iii) Solidarity as a Structural Principle in International Environmental Law

72 The Rio Declaration of 1992 emphasizes in its preamble the integral and interdependent nature of the Earth and, on this basis, calls upon States for the establishment of a new and equitable partnership. This declaration which, in a nutshell, summarizes the objectives meant to guide and pre-structure the progressive development of international environmental law, clearly indicates the necessity for States to co-operate with a view to meeting a common objective. International environmental law, treaty law, and customary law, have been developed on the basis of several principles, two of which are of relevance in this context, namely the principle of → *sustainable development* and the principle of common but differentiated responsibility.

73 The principle concerning the sustainable development of natural resources is generally considered to comprise four elements: the need to preserve natural resources for the benefit of future generations; the aim of exploiting natural resources in a manner which is rational; the equitable use of natural resources, which means taking into consideration the needs of other States; and, finally, the need to ensure that environmental considerations are integrated in development plans or policies.

74 The issue of → *intergenerational equity* is considered to constitute a central element of the principal of sustainable development. In spite of the controversy as to the exact meaning of this aspect and its implications, it is evident that it embraces an element of solidarity, since intergenerational equity requests that the present generation must use natural resources in a manner which leaves to future generations equal conditions for living. It goes without saying that the other aspect, namely the obligation to use natural resources in a way that also reflects the needs of other States, implies the principle of solidarity among States.

75 Equally the principle of common but differentiated responsibility, a principle which, in particular, is at the roots of the international legal regimes concerning climate change, reflects or is built upon the principle of inter-State solidarity. The principle contains several clearly distinguishable elements, namely the responsibility concerning the world climate as a common one, which means all States have an obligation to co-operate in the preservation of the climate. A further aspect of the principle of common but differentiated responsibility is that the preservation of the world climate is not only for present benefit, but for the benefit of future generations. In that respect a certain element of intergenerational equity is applied. The third element refers to the fact that the obligations States face may differ. This means that different capabilities of a technological or economic nature may be taken into consideration when the obligations concerning the protection of the environment are specified and have to be implemented. States have to contribute their particular share to achieve the common objective. This clearly entails an element of solidarity. According to the fourth element of this principle, developed States Parties should provide new and additional financial resources to enable developing States Parties to meet the incremental costs of implementing their commitments. This obligation clearly reflects the underlying structural principle of solidarity. That these financial obligations are part of the general commitment of developed States Parties has been highlighted in other international environmental agreements, such as the Convention on Biological Diversity ([concluded 5 June 1992, entered into force 29 December 1993] 1760 UNTS 79).

(iv) Solidarity in the World Trade Law Regime

76 The Preamble WTO Agreement lists in its first consideration several overall and paramount objectives, namely raising the standards of living; ensuring full employment, a large and steadily growing volume of real income, and effective demand; and expanding the production of trade-goods and services. Over all, it addresses the 'optimal use of the world's resources in accordance with the objectives of sustainable development', and the aim 'both to protect and

preserve the environment and to enhance the means for doing so'. The objectives referred to in the Preamble WTO Agreement define a common value, namely the enhancement of economic development. Combined therewith is the second aspect of the principle of solidarity, namely the amelioration of existing deficiencies and the need to further promote the economic development of → *developing countries*.

- 77 Apart from that, the liberalization of world trade as the objective of a world trade order is pursued through individually negotiated steps on the basis of → *reciprocity*. This points in the direction of a law governed by co-operation which is, however, modified by several exceptions reflecting the principle of solidarity. First and foremost the reciprocally agreed → *concessions* are subject to most-favoured-nation treatment. This ensures that all States at a time participate offhand in the current state of development of the world trade system. Through this, the impact of differences in power amongst the Member States is reduced.
- 78 Under particular circumstances, the WTO legal system provides for exceptions from the principle of most-favoured-nation treatment through the so-called 'enabling clause', providing for the preferential treatment of developing countries.

(c) The Impact of the Principle of Solidarity on Implementation and Enforcement

- 79 The nature of the solidarity obligation is not that different from the obligation under the principle of co-operation that it will lead to different mechanisms for implementation and enforcement.

D. Universality

- 80 As indicated earlier, the deepening and consolidation of the values underlying the corpus of international law may raise a problem with respect to its universal application. Whereas during the late Middle Ages the prevailing approach was to embrace all entities, with the establishment of modern statehood there was a tendency to include in international society only the 'civilized nations' (Abi-Saab *Cours général de droit international public* [1987] 55). This restriction has been overcome by reference to peace loving nations as referred to in Art. 4 UN Charter.
- 81 However, since international law is based upon a value system of which human rights form a significant part, as well as upon the common understanding that the management of common spaces and community interests require common action, universality is more difficult to achieve and to maintain. This is a process which requires balancing respect for national and regional diversities with the community interests as accepted in a process open to all States and including societal groups.

E. The Question of Legitimacy of International Law

1. The Quest of Legitimacy

- 82 It has been argued that international law lacks legitimacy—at least if compared with the legitimacy of national democratic governance—and therefore less authoritative weight should be given to international law (Young 13; Glennon 84; Rabkin 69). Others argue that, due to global developments, it is necessary to establish organs which may exercise parliamentary and governmental functions which would provide the necessary—and so far not sufficiently existing—legitimacy of international law (Keohane and Nye). The objectives pursued by both schools of thought are diametrically opposed, since the former is concerned with the protection of the autonomy of democratically elected governments to act as required by State interests (at least as they perceive such interests), whereas the latter intends to replace or to supplement national governments by democratically legitimate world institutions. Nevertheless, they coincide on one point—both proceed from an assumption that international law lacks legitimacy. Another approach is not concerned with the establishment of new international institutions, but rather with adapting the traditional means of norm-developing and their content to the needs of a globalized world by, for example, strengthening the national parliamentary influence on the conduct of international relations, which is traditionally thought to be the domain of the executive. This approach is inspired by the consideration that international law has reached—at least in parts—a different quality, which may be referred to as international governance, and thus requires legitimacy.

1. Legitimization through Consent by States

- 83 The legitimacy in international treaties rests in the consent of the States Parties, expressed at the time of adoption of the instrument in question. Is this legitimacy put into question if some of the participating States are not democratically

structured (see Buchanan and Keohane)? This approach is hardly sustainable. The issue of legitimacy means to establish whether the exercise of authority is procedurally and/or substantially legitimate, as seen from the point of view of those addressed by such an exercise of authority. The implementation of an international agreement in a democratic country is based upon the consent of the democratically legitimized representatives of that country. It is this consent which provides for this possibility and not the vote of the representatives of other countries which may not be appropriately legitimized.

- 84 A further question is to be raised in this context, namely whether the consent is sufficient at the time the commitment is accepted or whether it has to be sustained over time. This depends upon the commitment concerned. Consent can have two different meanings; a specific and static one referring to a particular clearly defined obligation, and a more general or dynamic one referring to the establishment of a regime or a system of governance which—after having been set up by consent—develops a legal life of its own (Bodansky 604).
- 85 The consent of a State concerned will undoubtedly be sufficient as a mechanism to invoke the legitimacy of the respective measure if the obligation is a specific and static one and can be implemented by an isolated act or omission. The same is true even if the obligation is of a continuing nature but the commitment does not change over time as far as its substance and scope are concerned. International law proceeds from the assumption that the establishment of continuous obligations is possible by an original consent; apart from that, mechanisms re-establishing legitimacy exist through the possibility of renunciation or withdrawal from the respective obligation or having recourse to the *clausula rebus sic stantibus*. In particular the latter is meant, within some limits, to re-adjust continuing legal obligations to the equilibrium originally envisaged by the partners.
- 86 The situation is different if a form of international governance has been set up; although this is the exception rather than the rule under international law (see Weiler). If States have indeed agreed to establish regimes or systems of international governance endowed with quasi-legislative or adjudicative competences, this constitutes a challenge to the legitimizing effects of the original consent through which the regime or system has been set up.
- 87 In respect of these areas—and only these areas—it is appropriate to inquire into the legitimacy of the rules and decisions which are produced therefrom. Recourse to the legitimacy, as provided for by the original consent of the States concerned, does not seem to be sufficient for them. Consent seems to be too attenuated to provide an unproblematic basis of legitimacy. Such a gap in legitimacy can be filled either on the international or national level, or on both.
- 88 As far as the international level is concerned, one central element is the strengthening of the legal legitimacy of measures deriving from international governance; legal legitimacy being understood as the obligation to keep strictly within the frame of the original mandate. This means that the respective institution does not attempt to broaden its mandate and that it follows the procedures set out for decision-making. The logical consequence of enforcing legal legitimacy is to strengthen the possibility of judicial review. This would be a matter of consequence considering the functions international governance is assuming. If international institutions are taking over governance tasks equivalent to the ones of national institutions and—as one should add—to the detriment of the latter, they should come under the same restrictions as national governance in States, adhering to the principle of the → *rule of law*.
- 89 If the gap in the legitimacy chain is identified to be at the linkage between the international and the national level, efforts are called for to reinforce this linkage or—in other words—to make this linkage commensurate to the governmental authority exercised on the international level. Such need arises in all cases where legislative measures or individual acts are taken on the international level which replace otherwise possible equivalent legislative measures or decisions on the national level. The consent, including the consequential approval of the competent national institutions as the major source of legitimacy, is to be construed in a way that it covers the international commitment in its short-term, as well as long-term, consequences. In the long run, this will require strengthening the impact on and control of the legislature on the conduct of foreign relations, in particular its qualified impact in respect of the establishment of international organizations or fora likely to assume functions of international governance.

3. Legitimacy through the Established International Value System

- 90 However, it remains important to consider legitimacy in the context of international law as a whole. The corpus of international law has developed, and is based upon, its own value system. It has developed new forms of international governance which have their roots in the will of an international community united by such a system and which gains its legitimacy by conforming to such values. Accordingly there exists a second chain of legitimacy developed from within, rather than outside, international law.

F. Concluding Remarks

- 91 International law significantly developed over time as far as its basis, its substance, its structural principles, and its addressees are concerned. It mutated from a legal system reflecting the need to guide the co-existence of a few subjects of international law, to an embracing legal regime in which the international community participates. Besides the still existing co-ordinating function, international law by now has a governing function with a view to steering the actions of States, and to a more limited extent of juridical or natural persons. What, in particular, changed the character of international law is the recovery of values common to the international community, which is a counterweight against the reliance on the consent of States as the basis of international law.
- 92 It may be argued that the development of an international regime on the implementation of international law has not kept pace with the development of the normativity. Such criticism is only justified if one considers international law to be separate from the regional or the national level. These levels of exercise of public authorities interact, and may be seen as a unity. International law relies on being implemented and enforced mainly on the national or on the regional level.

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